No. 13-266

IN THE

Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
Petitioner,

v.

STATE OF OKLAHOMA EX REL. E. SCOTT PRUITT, ATTORNEY GENERAL OF OKLAHOMA, STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, AND STATE OF OKLAHOMA EX REL. OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1998, the State of Oklahoma, along with 45 other States, the District of Columbia, and five U.S. territories, entered into a "Master Settlement Agreement" with the nation's four largest tobacco companies. The Master Settlement Agreement, or "MSA," as it is commonly known, resolved numerous lawsuits seeking to recover billions of dollars in health-care costs for which the "big four" tobacco companies were allegedly responsible.

Under the MSA, the settling States were required to enact statutes imposing "escrow" obligations on "nonparticipating manufacturers" or "NPMs" — that is, cigarette manufacturers that refused to join the MSA. The acknowledged purpose of these interlocking "Qualifying" or "Escrow" statutes was to "effectively and fully neutralize[] the cost disadvantages that Participating Manufacturers experience vis-à-vis Non-participating Manufacturers within [each] Settling State as a result of [the MSA]." MSA § IX(d)(2)(E), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/. The model escrow statute appended to the MSA and ultimately enacted by all settling States (though later amended to address an issue not relevant here) was designed to accomplish this goal by requiring NPMs to deposit a sum into escrow for each cigarette the manufacturer sold in the State — directly or through indirect distribution channels — in a given year. The amount of an NPM's escrow obligation for each cigarette sold was calibrated to match or exceed the amount participating manufacturers would owe for comparable sales under the MSA.

This case raises important federal questions regarding the validity of Oklahoma's Escrow Statute. The questions presented are:

1. Whether this Court's precedents establish that the State of Oklahoma (along with 45 other States and various U.S. territories with similar statutes) can impose escrow obligations on certain cigarette manufacturers based partly on sales by Indian tribes to tribal members in Indian country.

2. Whether the Oklahoma Escrow Statute, as interpreted by the state courts in this case, violates federal law by imposing escrow obligations on certain cigarette manufacturers — including Indian-owned businesses operating on reservation lands —based partly on sales by Indian tribes to tribal members in Indian country.

LIST OF PARTIES

Petitioner Grand River Enterprises Six Nations, Ltd. is a Canadian company owned by members of the Six Nations (also known as the Iroquois or the *Haudenosaunee*). Grand River manufactures tobacco products — including Seneca brand cigarettes — which it sells to distributors exclusively on Six Nations territory in Canada. Grand River was a plaintiff and a defendant in the District Court of Oklahoma County and an appellant in the Court of Civil Appeals of Oklahoma.

Respondents were plaintiffs in the District Court (and defendants in a declaratory judgment action filed by Petitioner), and appellees in the Court of Civil Appeals.

Tobaccoville, USA, Inc. was a plaintiff in the District Court and an appellant in the Court of Civil Appeals and is being served as a respondent herein.

The State of Oklahoma *ex rel.* W.A. "Drew" Edmondson, Attorney General of Oklahoma, was a plaintiff in the District Court and an appellee in the Court of Civil Appeals. Oklahoma's current attorney general, E. Scott Pruitt, has been substituted for Mr. Edmondson in accordance with Supreme Court Rule 35.3.

CORPORATE DISCLOSURE STATEMENT

Petitioner Grand River has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Grand River seeks a writ of certiorari to review the opinion and judgment of the Court of Civil Appeals of Oklahoma.

OPINIONS BELOW

The unreported order of the Supreme Court of Oklahoma denying Grand River's petition for a writ of certiorari is attached as Appendix A.

The opinion of the Oklahoma Court of Civil Appeals affirming the entry of judgment in favor of the State is attached as Appendix B. Additionally, the opinion appears in unofficial reporters as follows: *State ex rel. Edmondson v. Grand River Enterprises Six Nations, Ltd.*, No. 109484, —- P.3d —-, 2013 WL 3389079, 2013 OK CIV APP 58 (Mar. 27, 2013).

The unreported order *nunc pro tunc* of findings of fact and conclusions of law of the District Court of Oklahoma County is attached as Appendix C. Additionally, the District Court's unreported order granting partial summary judgment to the Attorney General of Oklahoma is attached as Appendix D.

JURISDICTION

The Oklahoma Supreme Court denied Grand River's petition for a writ of certiorari on May 28, 2013, thereby leaving intact the opinion and judgment of the Oklahoma Court of Civil Appeals — the highest court of Oklahoma in which a decision could be had — filed on March

27, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the validity of Oklahoma's Escrow Statute is drawn in question as being repugnant to the U.S. Constitution and other provisions of federal law or, alternatively, because the State of Oklahoma, through its attorney general and other officials, has infringed Grand River's rights under federal law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

U.S. Const. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25 U.S.C. §§ 261 to 264
(Indian Trader Statutes)

See Appendix E.

37 Okla. Stat. §§ 600.21 to 600.23
(Oklahoma Escrow Statute)

See Appendix F.

68 Okla. Stat. § 349 (*repealed effective Jan. 1, 2010, and replaced in part by 68 Okla. Stat. 349.1)*

See Appendix G.

68 Okla. Stat. § 349.1

See Appendix H.

68 Okla. Stat. §§ 346 to 348, 350

See Appendix I.

STATEMENT OF THE CASE

Petitioner Grand River Enterprises Six Nations, Ltd. is a Canadian company owned by members of the Six Nations (also known as the Iroquois or the *Haudenosaunee*). Grand River manufactures tobacco products — including Seneca brand cigarettes — which it sells to distributors exclusively on Six Nations territory in Canada. Grand River has not joined the MSA — despite the settling States' well-documented attempts to compel Native-owned cigarette manufacturers and other independent tobacco companies to join or die. Accordingly, Oklahoma considers Grand River to be a "non-participating manufacturer" or "NPM" subject to the State's Escrow Statute.

In accordance with its obligations under the Master Settlement Agreement (hereafter, "MSA"),[1] Oklahoma enacted the model escrow statute in 1999. Under Oklahoma's Escrow Statute (codified at 37 Okla. Stat. §§ 600.21 to 600.23), NPMs are required to make escrow payments for each cigarette which the State determines

1. Counsel in an unrelated case (among them, former Judge Michael McConnell) concisely described the MSA as "an unprecedented multistate and multi-company agreement that restrains trade in and stifles competition for hundreds of billions of dollars of interstate commerce, extracts billions of dollars in supra-competitive profits from consumers, and perverts core federalism principles." Petition for Writ of Certiorari, at 14, *S&M Brands, Inc. v. Caldwell*, 131 S. Ct. 1601 (2011) (No. 10-622). However, the validity of the MSA in and of itself is not directly at issue here.

it sold in Oklahoma (directly or through distribution channels, no matter how attenuated) in a given year.[2]

The Statute specifies the amount NPMs must deposit in escrow "per unit sold." 37 Okla. Stat. § 600.23(A)(2). For example, from 2003 through 2006, the escrow obligation was $.0167539 per unit sold. *Id.* § 600.23(A)(2)(d). The Statute defines "units sold" as "the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer or similar intermediary or intermediaries, during the year in question, as measured by excise taxes collected by the state on packs . . . bearing the excise tax stamp of the state." *Id.* § 600.22(10) (emphasis added).

In theory, an NPM may recover its annual escrow deposit after 25 years, unless the deposited funds are used to satisfy a (potential) judgment or settlement in a suit by the State to recover health-care costs for which the NPM is allegedly responsible.

This case began in August 2006, when the Oklahoma Attorney General filed suit against Grand River in state court claiming, among other things, that Grand River's

2. The Oklahoma Escrow Statute imposes escrow obligations on all NPMs whose cigarettes are sold in the State, regardless of how the cigarettes wind up there. Thus, NPMs are subject to escrow obligations even when their cigarettes are purchased by wholesalers outside Oklahoma and brought into the State without the NPM's participation or knowledge. Grand River does not sell its tobacco products in Oklahoma, or, indeed, any other State. Rather, Grand River manufactures and sells its products exclusively on reservation land in Canada.

escrow deposit for 2005 was deficient. Grand River (along with former party Tobaccoville, USA, Inc.) then filed a separate suit against the Oklahoma Tax Commission and the Office of the Attorney General seeking to prevent the State from infringing Grand River's rights under federal and state law. These suits were consolidated and decided together by the state courts. In 2007, the Attorney General filed a supplemental petition claiming that Grand River's escrow deposit for 2006 was also deficient.

On September 12, 2008, the District Court of Oklahoma County granted partial summary judgment to the Attorney General. (App. 42a–44a.) The District Court rejected Grand River's challenge to the application of the Escrow Statute to on-reservation cigarette sales, holding instead that "packs of cigarettes manufactured by a Non-Participating Manufacturer which have a tax stamp issued by the State of Oklahoma affixed thereto and are sold in the State of Oklahoma by retailers owned, licensed, or operated by an Indian Tribe are 'units sold' upon which escrow is due." (App. 43a–44a.)

On May 5, 2009, following an evidentiary hearing, the District Court issued an order containing its findings of fact and conclusions of law. The District Court determined that Grand River's escrow deposits for 2005 and 2006 were deficient by approximately $3.4 million and $1.7 million, respectively. The District Court also imposed a civil penalty of approximately $500,000 (10% of the total escrow deficiency).

On April 20, 2011, following an abortive interlocutory appeal, the District Court issued an "order *nunc pro tunc* of findings of fact and conclusions of law." (App.

31a–41a.) In the order *nunc pro tunc*, the District Court reiterated its previous findings and conclusions, as well as its previous determinations concerning the amounts of Grand River's alleged escrow deficiency and the corresponding civil penalty. (App. 32a–40a.) This time, the District Court entered final judgment in favor of the Attorney General and Tax Commission and against Grand River and Tobaccoville, thereby disposing of all pending claims. (App. 41a.)

On March 27, 2013, the Oklahoma Court of Civil Appeals affirmed the District Court's order *nunc pro tunc* in its entirety. (App. 2a–30a.) Regarding the application of the Escrow Statute to on-reservation sales, the Court of Civil Appeals adopted the trial court's broad interpretation of the Statute, holding that "packs of cigarettes manufactured by GRE [i.e., Grand River] 'which have a tax stamp issued by the State of Oklahoma affixed thereto and are sold in the State of Oklahoma by retailers owned, licensed, or operated by an Indian Tribe are "units sold" upon which escrow is due.'" (App. 25a.)

Significantly, the Court of Civil Appeals noted that under 68 Okla. Stat. § 349, all cigarettes sold in tribal stores during the relevant period were "taxed" in an amount equaling 75% of the excise taxes on cigarettes sold by non-Indian retailers. (*See* App. 22a.) The Court of Civil Appeals also noted that all packs of cigarettes sold in tribal stores during the relevant period were required to bear a "payment-in-lieu-of-tax" stamp "without distinction between member and nonmember sales." (*Id.*, quoting 68 Okla. Stat. § 346(C)(2).) In other words, all cigarette packs sold in tribal stores were required to bear an identical "payment-in-lieu-of-tax" stamp which provided no basis

for distinguishing between packs sold to tribal members and packs sold to nontribal members.

Thus, under the state courts' broad interpretation, the Escrow Statute extends to all on-reservation sales of cigarette packs bearing a "payment-in-lieu-of-tax" stamp —including on-reservation sales by Indian tribes to tribal members. (*See* App. 22a, 25a.) In turn, Grand River's alleged escrow deficiency necessarily includes cigarettes in packs bearing a payment-in-lieu-of-tax stamp sold by Indian tribes to tribal members in Indian country.

On May 28, 2013, the Oklahoma Supreme Court denied Grand River's petition for a writ of certiorari (App. 1a), thereby leaving intact the erroneous decision of the Oklahoma Court of Civil Appeals.[3]

This case raises important federal questions regarding the validity of Oklahoma's Escrow Statute. The fundamental question is whether this Court's precedents allow Oklahoma — along with 45 other States and various territories with similar statutes — to impose escrow

3. The federal questions sought to be reviewed were raised in the state trial and appellate courts and presented to the Oklahoma Supreme Court in Grand River's petition for a writ of certiorari. As noted in the main text, the trial court rejected Grand River's federal law challenge, with minimal discussion, in its order granting partial summary judgment to the Attorney General (App. 43a–44a), and again in its order *nunc pro tunc* of findings of fact and conclusions of law (App. 32a, ¶ 3, 38a–39a,¶ 6, 41a, ¶ 12). The state appellate court rejected Grand River's federal law challenge in its opinion affirming the trial court's order (App. 20a–25a), and the Oklahoma Supreme Court denied Grand River's petition for a writ of certiorari (App. 1a).

obligations on NPMs such as Grand River based partly on cigarette sales by Indian tribes to tribal members in Indian country.[4]

4. As the Court of Civil Appeals noted, section 349 was repealed in 2010 and replaced, in part, by 68 Okla. Stat. § 349.1. (App. 22a, n.13.) It is undisputed, however, that section 349 was "the law in effect at all times relevant to this case (*i.e.*, 2005 and 2006)." (*Id.*) Moreover, the important federal questions set forth in this petition continue to exist under the amended version of the statutory regime, albeit in slightly different form. Specifically, under section 349.1, a limited number of cigarette packs sold by "noncompacting" Indian tribes (that is tribes that have not entered a cigarette tax compact with the State) may now bear a "tax-free" stamp rather than a "payment-in-lieu-of-tax" stamp." These tax exempt cigarettes — the distribution of which is strictly limited by the State — are, presumably, excluded from NPMs' yearly escrow obligations, even under the state courts' broad interpretation of the Escrow Statute. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1164 (10th Cir. 2012) (finding that "the Escrow Statute applies only to cigarettes bearing the Oklahoma excise tax stamp and not to cigarettes bearing tax-free stamps," but without addressing the "payment-in-lieu-of-tax" stamp category at issue in this case). However, even after the repeal of section 349, cigarette packs sold by "compacting" Indian tribes — that is, tribes that have entered a cigarette tax compact with the State — still must bear a "payment-in-lieu-of-tax" stamp under 68 Okla. Stat. § 346(C)(2). *See also* 68 Okla. Stat. §§ 321(3), 347. Accordingly, under the state courts' broad interpretation of the Escrow Statute, all on-reservation sales of cigarette packs bearing a "payment-in-lieu-of-tax" stamp — including on-reservation sales by compacting Indian tribes to tribal members — would, presumably, still be counted as "units sold" for the purpose of calculating NPMs' yearly escrow obligations.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because The State Courts Misinterpreted and Misapplied This Court's Decisions In *Moe, Colville,* And *Attea.*

Throughout this litigation, Grand River has challenged the State's assertion of unfettered power to impose escrow obligations based on cigarette sales to Indians and non-Indians alike — including, critically, on-reservation sales by Indian tribes to tribal members. On its face, the State's assertion of power over on-reservation cigarette sales by Indians to Indians contravenes this Court's precedents establishing that States generally lack authority to tax or otherwise regulate "on-reservation conduct involving only Indians," *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 180-81 (1973).[5] Yet the state trial and appellate courts rejected Grand River's federal law challenge, holding instead that "packs of cigarettes manufactured by [Grand River] 'which have a tax stamp issued by the State of Oklahoma affixed thereto and are sold in the State of Oklahoma by retailers owned, licensed, or operated by an Indian Tribe are 'units sold' upon which escrow is due." (App. 25a, 38a–39a (emphasis added).)

5. While the reasoning in these precedents is instructive as to the important federal questions raised in this case, Grand River submits that the State's imposition of escrow obligations on NPMs is best understood as an exercise of regulatory power — one designed to confiscate the assets of Native-owned cigarette manufacturers and other independent tobacco companies. Escrow payments are not a tax.

The state courts' interpretation of the Escrow Statute likewise contravenes this Court's precedents, for recall that under section 349, all cigarettes sold in tribal stores during the relevant period were "taxed" in an amount equaling 75% of the excise taxes on cigarettes sold by non-Indian retailers, and all packs of cigarettes sold in tribal stores during the relevant period were required to bear a "payment-in-lieu-of-tax" stamp — without any distinction between packs sold to tribal members and packs sold to nontribal members. (*See* App. 22a, citing 68 Okla. Stat. § 346(C)(2).) Thus, under the state courts' interpretation, the Escrow Statute extends to all on-reservation sales of cigarette packs bearing a "payment-in-lieu-of-tax" stamp — including, critically, on-reservation sales by Indian tribes to tribal members. (*See* App. 22a, 25a.) And, in turn, Grand River's alleged escrow deficiency necessarily includes cigarettes in packs bearing a payment-in-lieu-of-tax stamp sold by Indian tribes to tribal members in Indian country.

In reaching its decision, the Oklahoma Court of Civil Appeals purportedly relied on this Court's decisions in *Moe*, *Colville*, and *Attea*. (*See* App. 21a, 25a.) However, those decisions do not address — let alone authorize — a State's imposition of escrow obligations based on on-reservation cigarette sales by Indian tribes to tribal members. On the contrary, this Court has consistently held that States lack authority to tax on-reservation cigarette sales by Indians to Indians. *E.g.*, *Dep't of Tax. & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994); *Moe*, 425 U.S. at 480-81; *see also Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) ("'Absent cession of jurisdiction or other federal statutes permitting it,' we

have held, a State is without power to tax reservation lands and reservation Indians." (brackets omitted)) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

As this Court has observed, *Moe*, *Colville*, and *Attea* are "cases about state taxation of non-Indians." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 n.8 (1995) (emphasis added). *Moe* and *Colville* "stand for the proposition that the doctrine of tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 513 (1991) (emphasis added). In *Attea*, the Court upheld a regulatory scheme that imposed recordkeeping requirements and quantity limitations on cigarette wholesalers who sell tax-exempt cigarettes to reservation Indians. 512 U.S. 61. However, the *Attea* Court made clear that the regulatory scheme passed muster because the burdens on Indians and Indian traders were merely incidental, and the State's attempt "to staunch the illegal flow of tax-free cigarettes early in the distribution stream [was] a 'reasonably necessary' method of 'preventing fraudulent transactions'" — that is, transactions evading the State's "valid taxes" on "non-Indian consumers." *Id.* at 75 (emphasis added).

Moe, *Colville*, and *Attea* simply do not support the Court of Civil Appeals' conclusion that Oklahoma has unfettered power to impose escrow obligations based on cigarette sales to Indians and non-Indians alike — including on-reservation sales by Indian tribes to tribal members. The state appellate court compounded its error by failing to acknowledge or address this

Court's many precedents forbidding States from taxing or otherwise regulating the on-reservation conduct of Indians and Indian traders. *See generally, e.g.*, *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan*, 411 U.S. 164; *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005) ("We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test.").

The state courts' misinterpretation and misapplication of this Court's decisions in *Moe*, *Colville*, and *Attea* has important consequences not only for Grand River —which will be subject to an illegal confiscation of its property in violation of federal law, *see infra*, at p. 14 — but also for Indian tribes, tribal members, and Indian traders throughout Oklahoma. Indeed, now that Oklahoma's courts have blessed the State's unprecedented assertion of power over on-reservation conduct involving only Indians, further incursions into reservation life by State authorities are all but assured. Moreover, if history in this area is any guide, the 45 other States (and various territories) with escrow statutes will rush to follow Oklahoma's lead by asserting equally expansive power to regulate or tax on-reservation transactions between Indians. To forestall these pernicious effects, this Court must grant the instant petition in order to reaffirm and enforce the important federal limits on States' power over on-reservation conduct involving only Indians.

II. The Petition Should Be Granted Because The State Courts' Interpretation Of The Oklahoma Escrow Statute Imperils The Federal Law Rights Of NPMs, Indian Tribes, Tribal Members, And Indian Traders In Oklahoma And Numerous Other States And U.S. Territories.

The state trial and appellate courts gave short shrift to the important federal questions raised by the State authorities' unprecedented assertion of power over on-reservation conduct involving only Indians. The state courts' unbounded interpretation of the Oklahoma Escrow Statute imperils the federal law rights of NPMs such as Grand River as well as Indian tribes, tribal members, and Indian traders in Oklahoma and elsewhere. (*See supra*, at p. 13.)

In particular, the state courts' determination that the State may impose escrow obligations based on cigarette sales that the State has no power to tax or otherwise regulate infringes the Due Process Clause of the Fourteenth Amendment. *See generally Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954) ("It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simply confiscation and a denial of due process of law. 'No principle is better settled than that the power of a state, even its power of taxation, in respect of property, is limited to such as is within its jurisdiction.'") (quoting *N.Y., L.E. & W.R. Co. v. Pennsylvania*, 153 U.S. 628, 646 (1894)). Moreover, the state courts' refusal to acknowledge and enforce the federal limits on the State's assertion of power over on-reservation transactions between Indians all but guarantees further violations of

the federal law rights of Indian tribes, tribal members, and Indian traders in Oklahoma and the 45 other States (and various territories) with similar escrow statutes.

The state courts' grounds for rejecting Grand River's federal law challenge to the Escrow Statute, as applied to on-reservation sales, are plainly inadequate. Indeed, the trial court's orders consist of bare conclusions, unsupported by meaningful analysis. And while the Court of Civil Appeals' opinion includes a brief discussion of the relevant federal questions, the court's analysis is plagued by fundamental errors.

Specifically, in addition to misinterpreting and misapplying this Court's decisions in *Moe*, *Colville*, and *Attea* (*see supra*, at pp. 11–13), the Court of Civil Appeals mistakenly assumed (a) that Grand River's reliance on established federal limitations on the State's regulatory power was inherently suspect, and (b) that the State's asserted policy interests were somehow inviolable. According to the Court of Civil Appeals,

> A decision in favor of [Grand River] on this issue would allow it, by distributing its cigarettes to be sold only on tribal lands, to reduce its "units sold" to zero and thereby evade both its escrow obligation as an NPM, and "the public policy . . . of shifting the burden of tobacco-related health care costs from the State to the entities who profit from the smoking enterprise."

(App. 24a, quoting *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 27, 237 P.3d 199, 209.)

The assumptions embodied in the state court's decision are quite blatantly incompatible with the Supremacy Clause of the U.S. Constitution. Moreover, the state court's assumptions are fundamentally at odds with this Court's precedents in the important area of State-Indian relations.

As this Court has said, time and again, "(t)he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973); *see also, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) (explaining that the Court's jurisprudence regarding State-Indian relations "relies 'heavily on the doctrine of tribal sovereignty . . . which historically gave state law "no role to play" within a tribe's territorial boundaries'") (ellipsis in original) (quoting *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993)); *Morton v. Mancari*, 417 U.S. 535, 553 (1974) (noting that "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations."). Although the doctrine of Indian sovereignty has evolved in response to changed circumstances, *McClanahan*, 411 U.S. at 171, this Court has never departed from the principle that States generally lack authority to tax or otherwise regulate "on-reservation conduct involving only Indians," *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). On the contrary, the Court "has repeatedly emphasized that there is a significant geographic component to tribal sovereignty," which remains "highly relevant" to deciding whether a State's assertion of authority over conduct on tribal reservations is preempted by federal law. *Id.* at 151. "[T]hough the reservation boundary is not absolute,

it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *Id.*

Judged against this backdrop, there is nothing inherently suspect about Indians and Indian-owned businesses choosing to operate exclusively on reservation lands —where tribal authority is at its apex — and to deal exclusively with Indians and Indian traders. Nor is it inherently suspect for a party haled into court by the State to invoke the protections that federal law affords to on-reservation conduct involving only Indians. The state appellate court's contrary assumption was, simply, wrong.

Similarly, this Court has made clear that "[w]hen on-reservation conduct involving only Indians is at issue, . . . the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. Moreover, "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

Here, the State failed to identify <u>any</u> regulatory interest specifically linked to functions or services that it provided to tribal members on reservation lands. *See Mescalero*, 462 U.S. at 336. Likewise, the State failed to show that its putative interest in regulating on-reservation transactions between Indians is more than "minimal" — let alone that its interest outweighs the countervailing federal and tribal interests. *See Bracker*, 448 U.S. at

144. The Court of Civil Appeals simply assumed that Oklahoma's general policy interest in shifting the burden of (notional) tobacco-related health care costs from the State to NPMs justified the unprecedented exercise of State power over on-reservation conduct involving only Indians. But that is not the law.

Accordingly, for these additional reasons, the opinion and judgment of the Court of Civil Appeals must not stand as the final word on the important federal questions at issue here.

CONCLUSION

For all the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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