No. 04-624

In The Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents offer little other than the reasoning of the Ninth Circuit majority in opposing certiorari. They contend, for example, that "the court of appeals properly held that the substantive provisions of the state motor fuels tax, not the legislature's mere say-so, control the ultimate federal question of where the legal incidence falls." Opp'n 2. Respondents thus endorse the court's determination to discount the Idaho Legislature's 2002 amendments to the motor fuels tax statute, which removed any doubt over its intent with respect to which economic actor bears legal incidence. They adopt further the majority's description of the amendments as not "substantively alter[ing]" the tax (Opp'n 15) and its reasons for construing the law contrary to the legislature's explicit direction (*id.* 16-17). Respondents see no inconsistency between the Ninth Circuit's application of *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), and that of the South Dakota Supreme Court in *Pourier v. South Dakota*, 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 124 S. Ct. 2400 (2004), because the latter court, in their view, merely recognized "that an express pass-through provision is not required to place the legal incidence of a state tax on the consumer." Opp'n 18.

Respondents follow suit with the Ninth Circuit in summarily dismissing petitioners' reliance on *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), for the principle that the Indian canons of construction have no place in determining the geographical reach of section 10 of the Hayden-Cartwright Act, Act of June 16, 1936, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104). Opp'n 21. They do take a more restrictive

position than the court of appeals – which considered "the language, structure, and legislative history of the statute" in deeming the term "United State military or other reservations" ambiguous and therefore not an "unmistakably clear" consent to tax (Pet. App. 28) – by arguing that the "unmistakably clear" standard would be satisfied here only if Congress had referred specifically to Indians, Indian tribes, or Indian reservations. Opp'n 3, 24. Finally, they cite other recent Hayden-Cartwright Act litigation as indicative of the lack of unmistakable congressional intent with respect to subjecting tribes or their members to state fuel taxes. Opp'n 22.

Respondents, in short, ask this Court to deny review because the Ninth Circuit reached the right result for the right reasons. In so contending, they fail to address the significant issues identified by petitioners, 16 *amici curiae* States and the *amicus curiae* Multistate Tax Commission ("MTC"). Brief analysis of respondents' basic arguments highlights why certiorari should be granted.

I. RESPONDENTS, LIKE THE COURT OF APPEALS, READ *CHICKASAW NATION* IN A MANNER THAT NOT ONLY RUNS COUNTER TO WHAT THIS COURT STATED BUT ALSO WILL ENCOURAGE JUDICIAL SECOND-GUESSING OF LEGISLATIVE DETERMINATIONS IN A CORE AREA OF STATE AUTHORITY.

This Court in *Chickasaw Nation* found the Tenth Circuit Court of Appeal's ruling on the fuel tax's legal incidence to be "altogether reasonable" and accordingly upheld it. 515 U.S. at 461. Oklahoma had contended there that the incidence was borne by consumers, not retailers, because "the taxes are passed on to the consumer in the

retail price." *Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 31 F.3d 964, 971 (10th Cir. 1994), *aff'd in part and rev'd in part*, 515 U.S. 450 (1995). The court of appeals deemed the state position, which the district court had accepted, as "substitut[ing] economic assumptions for the language of the statute" and observed that "[t]he statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." *Id.* The Tenth Circuit instead placed heavy weight in determining legal incidence on the statute's requirement that the distributor "remit[]" the fuel tax "*on behalf of* a licensed retailer." *Id.* (citing Okla. Stat. Ann. § 505(C)) (emphasis supplied). It is nonetheless plain that, had the Oklahoma law included a mandatory pass-through provision but remained otherwise the same, the court of appeals would have accepted the State's construction.[1]

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[1] The Idaho Supreme Court also emphasized this aspect of the Oklahoma statute in determining that the Idaho statute was "strikingly similar." *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996, 1003 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002). However, the provision of Idaho law relied upon, Idaho Code § 63-2406(4), had been modified by the 2000 Idaho legislature to delete any reference to an obligation on the distributor's part "to collect" the fuels tax. *See* Pet. 5 n.1. Under the provision in effect since July 2000, distributors "required to pay the tax imposed under this chapter" are liable to the tax commission for the unremitted taxes, together with any applicable penalties and interest. Pet. App. 72. The court of appeals, perhaps relying on the Idaho court's analysis, cited to Idaho Code § 63-2406(4) for the notion that the motor fuels statute, even after the 2002 amendments, "still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State." Pet. App. 17. Section 63-2406(4), as presently codified, cannot be reconciled with that reading. Also unhelpful to respondents is the other provision relied upon by the

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This Court validated the Tenth Circuit's reasoning by holding that "[i]n the absence of such dispositive language" – *i.e.*, in the absence of an express legislative allocation of legal incidence or a mandatory pass-through provision – the question becomes "one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw Nation*, 515 U.S. at 461. Only the lack of certainty regarding the legislature's intent, in other words, mandated the textual analysis. *See* Br. *Amicus Curiae* of States of North Dakota *et al.* 7 (the Oklahoma statute's failure to allocate explicitly legal incidence "opened the door to judicial construction of the statute to identify the taxpayer"). Here, there is no disputing legislative intent and hence neither need nor license to go further. The Idaho Legislature unequivocally spoke to the issue in section 1 of 2002 Idaho Session Laws chapter 174 (56th Leg.), through providing that it "intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives . . . the fuel" and through including a statement of purpose that the act was "designed to change the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al. v. Idaho State Tax Commission[] by expressly imposing the legal incidence of motor fuel taxes upon the motor fuel distributor who first receives the fuel in Idaho." Pet. App. 133, 151.

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majority for this characterization of the Idaho law – Idaho Code § 63-2435 – which, as *amicus* MTC notes (Br. *Amicus Curiae* of MTC 7 n.9), is merely a security provision ensuring that the portion of a fuel sales equal to the tax due from the distributor for receipt of the fuel sold is held in trust for the State's benefit and does not become "subject to encumbrance, security interest, execution of seizure on account of any debt owed by the distributor . . . to any creditor other than the commission." Pet. App. 95.

Contrary to respondents' assertion (Opp'n 15), moreover, the legislature's specific allocation of legal incidence to distributors was manifested not solely by section 1 and the statement of purpose but also by the amendment to Idaho Code § 63-2402(1). Pet. App. 133. This amendment removed any doubt that the taxable event is the *receipt* of fuel by the distributor, not its sale to the retailer as the Idaho Supreme Court had held in *Goodman Oil*, and that the distributor is the economic actor being taxed by virtue of such receipt. *See Goodman Oil*, 28 P.3d at 1003 (finding the Oklahoma and Idaho taxes similar because, *inter alia*, " 'the tax imposed *when a distributor sells fuel to a reservation* applies whether or not the fuel is ever purchased by a consumer' ") (emphasis supplied). The amendment to Idaho Code § 63-2402(1), when read in conjunction with the coordinating amendment to Idaho Code § 63-2405 (Pet. App. 141), additionally made clear that the tax is being imposed on the distributor's act of receiving motor fuel and is not simply *measured* by the amount of fuel received.

Respondents, like the Ninth Circuit, thus mistake the federal judiciary's authority, under this Court's decisions, to overrule state court construction of state tax statutes when legal incidence allocation and federal rights are at stake with authority to ignore such allocation when the legislature has spoken precisely on the topic. *E.g.*, *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) ("[b]ecause the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax"); *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965) ("we give this finding [concerning a tax's operating incidence] great weight in determining the natural effect of a statute, and if it is consistent with the

statute's reasonable interpretation it will be deemed conclusive"); *see* Br. *Amicus Curiae* of MTC 11. This independent review power exists only to protect federal rights from infringement through unreasonable state court interpretation of state law, not to re-write what is being interpreted. *See Bush v. Gore*, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting) ("Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court"). Here, the Idaho legislature meticulously complied with federal law, as laid out in *Chickasaw Nation*, and left no ambiguity for judicial construction. Distributors bear legal incidence, and if respondents had a grievance with some specific provision of the motor fuel statute other than the tax imposed on their distributors – and they have never identified any – the appropriate course of action would have been to challenge that provision rather than the tax itself. *See* Pet. 21 n.7.

Last, respondents' argument that the South Dakota Supreme Court's application of *Chickasaw Nation* in *Pourier* does not conflict with the majority's reasoning below cannot be credited. The court there was faced with an explicit legislative allocation of legal incidence to the consumer and considered itself bound by *Chickasaw Nation* to honor that allocation "despite indications in the statute that it may be the marketer who is ultimately responsible to pay the tax" and despite its concern over "the wisdom of permitting a state to determine the entity who bears the legal incidence of a tax by merely making cosmetic changes to a statute." *Pourier*, 658 N.W.2d at 405. Under the Ninth Circuit's approach, however, the South

Dakota court would have been obligated to engage in a "fair interpretation of the taxing statute as written and applied" analysis notwithstanding the legislative determination. The state court correctly recognized its duty under *Chickasaw Nation*; the majority below did not. A palpable conflict exists.

II. RESPONDENTS' CONTENTION THAT THE TERM "RESERVATIONS" IN THE HAYDEN-CARTWRIGHT ACT DOES NOT ENCOMPASS INDIAN RESERVATIONS IN THE ABSENCE OF EXPLICIT REFERENCE TO INDIANS, INDIAN TRIBES, OR INDIAN RESERVATIONS NOT ONLY IS INCOMPATIBLE WITH *TUSCARORA* BUT ALSO IS PREDICATED ON THE ASSUMPTION THAT THE STATE MOTOR FUEL TAX'S LEGAL INCIDENCE ALWAYS WILL BE BORNE BY A TRIBE OR A TRIBAL MEMBER.

Respondents characterize as "novel" petitioners' reliance on *Tuscarora* for the principle that, as a "general Act of Congress," the Hayden-Cartwright Act applies to Indians and their tribes absent a contrary congressional direction. Opp'n 21. It is true that decisions in other litigation addressing the question whether the Act applies to Indian reservations did not discuss *Tuscarora*.[2] Nevertheless,

[2] Aside from *Goodman Oil* and *Pourier*, those decisions include *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291 (D. Kan. 2004); *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295 (D. Kan. 2003), *rev'd on other grounds*, 379 F.3d 979 (10th Cir. 2004); and *In re State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.D. 1978). The court of appeals additionally cited *Marty Indian School Board, Inc. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987), as standing for the proposition that the Hayden-Cartwright Act does not "reach[ ] Indian reservations" (Pet. App. 28), but the Eighth Circuit opinion did

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the relevance of the presumption applied in *Tuscarora* cannot be gainsaid to the extent the Ninth Circuit found the term "United States military or other reservations" ambiguous with respect to its applicability to one of the most obvious examples of a federal reservation. *Tuscarora* itself underscored this point by commenting on Congress' power to define the term "reservation" in an "artificial[]" manner so as to *exclude* Indian reservations. 362 U.S. at 111.

No less off-mark is respondents' contention that, notwithstanding the Hayden-Cartwright Act's status as nationwide legislation applicable to all "United States military or other reservations," the requisite specificity for application to Indian reservations is lacking because, as the Ninth Circuit reasoned, Congress must express its intent to permit state taxation of Indians or their tribes with unmistakable clarity. Opp'n 21. Two difficulties attend their argument. First, implicit in the *Tuscarora* presumption is the requisite congressional authorization; *i.e.*, the general nature of the Hayden-Cartwright Act itself embodies the mandated clarity.[3] Second, and without regard to the preceding point, the immediate issue here is whether the Act applies to motor fuel transactions within

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not consider the issue of whether the Act applies to Indian reservations. *Id.* at 688.

[3] In support of their position, respondents cite to this Court's statement in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), for the principle that "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" because "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak." *Id.* at 215 n.17; *see* Opp'n 21. Nothing in *Cabazon* intimates that canon of construction associated with this categorical rule is repugnant to giving effect to the *Tuscarora* presumption.

Indian *reservations*. *See* Pet. App. 40-41 (Kleinfeld, J., dissenting). Even were the "unmistakably clear" standard eventually found applicable to fuel taxes imposed on resident tribes or their members, it would have no effect as to fuel taxes imposed on nonmembers. The majority below conflated the issue of tribal immunity from state taxation with the issue of whether the Act applies to reservations at all. Pet. App. 27 ("we cannot hold that Congress has authorized state taxation of Indians *or Indian reservations* unless we determine that Congress has 'made its intention to do so unmistakably clear'") (emphasis added). Needless to say, economic actors are taxed under Idaho and other States' motor fuel laws, not particular locations. The court of appeals thus broke wholly new doctrinal ground in applying the "unmistakably clear" canon to determine what it characterized as "the preliminary point of statutory construction" of determining whether the term "reservations" encompasses Indian reservations. Pet. App. 31. Respondents offer nothing in the way of decisional authority or argument to justify this expansion of the canon.

Finally, respondents' emphasis for certiorari decision-making purposes on the fact that two state supreme courts and two Kansas federal district courts have reached the same conclusion as the Ninth Circuit and the district court below is misplaced. Opp'n 22-23. The *Prairie Band* and *Pourier* opinions' reasoning borrowed heavily from or paralleled closely *Goodman Oil*'s. *E.g.*, *Prairie Band*, 241 F. Supp. 2d at 1304 ("find[ing] the [Idaho] decisions persuasive"); *Pourier*, 658 N.W.2d at 399 ("[t]he language of the statute does not make Congress' intention to allow [motor fuel] taxation 'unmistakably clear'"). The *Winnebago* district court adopted the prior Kansas decision's

conclusion with no substantive discussion. 297 F. Supp. 2d at 1304. These decisions, in sum, do nothing to cure the shortcomings in the Ninth Circuit's analysis or the compelling need for determining whether the Hayden-Cartwright Act applies to Indian reservations.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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