No. 10-754

In the Supreme Court of the United States

NATIVE WHOLESALE SUPPLY, A CORPORATION CHARTERED BY THE SAC AND FOX TRIBE OF OKLAHOMA,
Petitioner,

v.

STATE OF OKLAHOMA EX REL. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition fails to confront the central issue raised in the Petition: the improper projection of state regulatory power beyond state borders and beyond constitutional limits. That issue is central both to the state's exercise of specific personal jurisdiction over out-of-state conduct by this foreign corporation, and to the state's attempt to prevent an Indian tribe from leaving the state to trade with other Indians.

I. THE OKLAHOMA COURT'S PERSONAL JURISDICTION DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEALS.

A. Respondent Ignores the Historic Development of This Court's Tort-Based Personal Jurisdiction Standard Which was Erroneously Applied by the Oklahoma Court.

Respondent concedes that purposeful availment is the appropriate standard. Br. in Opp'n 2, 15. Yet Respondent misinterprets the limitations of that standard and ignores its historic development. Contrary to Respondent's contention, the purposeful availment standard did not spring from *Asahi* like Athena from Zeus' head. Instead, the *Asahi* plurality discussed the historic development of "purposeful availment" as enunciated in *Hanson*.[1] *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 109

[1] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

(1987). The *Asahi* Court then adopted the less stringent *Calder* 'purposeful direction' standard applicable in tort cases.[2] *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part) ("I see no reason in this case for the plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts"). In other words, the Court in *Asahi* addressed a tort cause of action, and enunciated a tort jurisdiction standard that was more expansive than the limited purposeful availment standard outlined in *Hanson* (personal jurisdiction over trust and trustee) and *Burger King* (personal jurisdiction in contract action).[3]

In failing to understand the historic development of these alternative standards, Respondent experienced the same confusion that plagued the Oklahoma court. App. to Pet. Cert. ("App.") 13a-14a ("The *Asahi* decision has created significant confusion in lower courts over the constitutional standard for minimum contacts under the stream-of-commerce theory"). As a result of its confusion, the Oklahoma court improperly relied on the tort-based "stream-of-commerce" theory to find specific personal jurisdiction in this regulatory action. App. 18a (Petitioner "deliver[s] its products into the stream of commerce that brings it into Oklahoma"). Although simply placing a product in the "stream-of-commerce" may be sufficient in a tort action, something more is required for a state to regulate beyond its borders. *BMW of N. Am. v. Gore*,

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[2] *Calder v. Jones*, 465 U.S. 783, 790 (1984).

[3] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

517 U.S. 559, 572-73 (1996) ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"). If a state's extra-territorial regulatory power were coextensive with its power to bring a foreign tortfeasor before its courts, then the state with the most restrictive regulations would dictate national product standards, New Jersey would set standards for construction of recycling machines in Great Britain, and North Carolina would regulate manufacturing of tires in Turkey and sold in France.

The Oklahoma decision confused these two personal jurisdiction standards, resulting in conflict with this Court's decisions in *Hanson*, *Calder*, and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), not a single one of which was even cited by Respondent. The state court decision also conflicts with decisions of the Courts of Appeals [Pet. 12-15, ignored in Br. in Opp'n] which have applied this Court's distinction between "purposeful availment" and the less rigorous "purposeful direction" standard applicable in tort actions.

B. State Regulatory Jurisdiction Does Not Sound in Tort.

Contrary to Respondent's novel argument that all that is not contract is tort: "The state never can sue in tort in its political or governmental capacity." W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 2, at 7 (5th ed. 1984). Indeed, government systems of regulation differ significantly from tort law. Dan B. Dobbs, *The Law of Torts* § 5, at 9 (2000) ("Probably no practicing lawyers [sic] would think that tort law and regulatory law systems are alike"). The source of

regulatory power is not grounded in tort, and the "source of the injury" does not affect the scope of regulatory authority:

> It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.

United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942).

C. Respondent's General Jurisdiction Facts do not Support Exercise of Specific Jurisdiction.

Respondent's pleading in the trial court raised only one "Violation by Defendant," which Respondent set out in two paragraphs claiming that: 1. Seneca brand cigarettes "have not been approved for sale within the State of Oklahoma" [paragraph 30]; and 2. Petitioner has "sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale . . . Seneca brand cigarettes . . . to Muscogee Creek Nation Wholesale" [paragraph 31]. App. 61a, 62a. Respondent chose, for whatever reason, to limit its case to the out-of-state sale of a single brand of cigarettes to the Muscogee Creek Tribe, and sought specific personal jurisdiction over that single, limited claim. The only facts relevant to the issue of specific jurisdiction here are those out of which Respondent's single claim arises. *Platten v. HG Berm. Exempted Ltd*., 437 F.3d 118, 138 (1st Cir. 2006) ("In specific jurisdiction terms, plaintiffs have not shown a 'material connection' between their injuries and HG Limited's contacts in Massachusetts and therefore

cannot meet the relatedness requirement of the due process inquiry"); *Burger King,* 471 U.S. at 472 (for purposes of specific jurisdiction, injuries must "arise out of or relate to" alleged forum related activities).

Ignoring this basic requirement, the Brief in Opposition contains a lengthy recitation of alleged "facts" – only two of which apply to the relatedness requirement for specific jurisdiction. Those are number 4 on page 7 (same as 4 on page 9) (alleging Petitioner "arranged, paid for and directed the shipping of its cigarettes" to the Muscogee Tribe); and number 7 on page 10 (same as 6 on page 8) (alleging Petitioner's president and national sales manager "personally traveled to Oklahoma to market their product").[4] Yet only the alleged sales trip occurred in Oklahoma and it is insufficient to support specific personal jurisdiction. *E.g., Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1279 (8th Cir. 1991) (three trips to forum insufficient for specific jurisdiction).

Petitioner's out-of-state storage and shipping procedures are immaterial under basic principles of commercial law, as discussed in the Petition yet ignored in the Brief in Opposition. Oklahoma law confirms the sales at issue occurred either on the Seneca Nation when title passed to the Muscogee Creek Tribe, or in Nevada at the time and place of shipment. *Sesow v. Swearingen*, 552 P.2d 705, 707

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[4] The other alleged facts listed in the Brief in Opposition relate only to abandonment and disposal of cigarettes (which by definition could not have ended up in possession of the Muscogee Creek Tribe), non-Muscogee Creek smoke shops, census data and purchases by state agents from third parties.

(Okla. 1976).[5] These sales were initiated by the Tribe, and once title transferred shipment was conducted by a third party not involved in this case and acting as the agent of the Tribe. *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1264 (D. Ala. 2000). Petitioner's assistance in arranging transportation of product owned at shipment by the Tribe does not alter these basic commercial law concepts.

Respondent limited its claim to Petitioner's out-of-state sale of a single brand of cigarettes to the Tribe, and sought specific personal jurisdiction over that single, limited claim. Now, apparently unhappy with its pleading and the record it presented to the court below, Respondent inappropriately argues facts outside the record, and engages in vitriolic ad hominem attacks on Petitioner and its counsel.[6] If Respondent thinks people have lied under oath, it has a remedy. Peppering its Brief with false accusations simply confirms the inadequacy of its argument, and its record.

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[5] Oklahoma defines "sale" as the passing of title from the seller to the buyer for a price. Okla. Stat. tit. 12A, § 2-106(1). Oklahoma also recognizes that title to goods passes from the seller to the buyer at the time and place of shipment. Okla. Stat. tit. 12A, § 2-401(2)(a).

[6] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 n.16 (1970) ("the statement itself is not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

II. RESPONDENT CONFUSES CONSTITUTIONAL INDIAN COMMERCE CLAUSE ISSUES WITH TAXATION AND SOVEREIGN IMMUNITY ARGUMENTS.

A. Congressional Power is the Issue in this Case.

Oklahoma wants to reach outside its borders to regulate the kind and price of cigarettes purchased by an Indian tribe from an Indian vendor doing business in Indian Territory outside Oklahoma. The United States Constitution vests that regulatory authority exclusively in Congress. U.S. Const. art. I, § 8, cl. 3; *Seminole Tribe v. Florida.*, 517 U.S. 44, 62 (1996). The Indian commerce clause requires congressional permission before states can regulate the sale of liquor, apply state health and education laws, or regulate other commercial activities by Indians on reservations.[7] Congress has not granted such authority over the Indian commerce at issue here.

B. Respondent Concedes That This is Not a Tax Case.

The right to regulate is no greater than the right to tax. *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992) (Scalia, J. concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax"). Yet Respondent cannot tax the out-of-state purchase at issue in this case: "the [Oklahoma law at issue] does not impose a tax, or any type of financial obligation for

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[7] Pet. at 28 n.23.

that matter, on NWS." Br. in Opp'n 34. Tellingly, although Petitioner never paid a penny in taxes to Oklahoma, there is no "tax evasion" alleged by Respondent, an obvious concession that Oklahoma has no power over the Muscogee Creek Tribe's out-of-state purchases from Petitioner. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 994 (2010) ("New York City . . . cannot, consistent with the Commerce Clause, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax") (Ginsberg, J., concurring).

Respondent nevertheless cites a string of tax cases attempting to bootstrap its limited power to tax reservation *sales* to *non-members* into a general power to regulate the kind and price of cigarettes the Muscogee Creek Tribe can purchase from Indians outside Oklahoma. None of those tax cases support that extension of extraterritorial regulatory jurisdiction. The right to require a tribe to help collect state taxes on the *sale* of goods *to non-members* does not imbue the state with the power to regulate the kind and price of goods *a tribe* can buy from Indians out-of-state.[8]

C. Sovereign Immunity is Not at Issue.

Neither Petitioner nor its owner is a sovereign entity unbound by all state laws, and the Petition does not claim otherwise. Yet although tribal sovereignty plays a role in the analysis, it is not true that both sides of a transaction among Indians must be

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[8] *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976) (state vendor licensing fees on reservation Indians preempted).

sovereigns to implicate the Indian commerce clause. *United States v. Holliday*, 70 U.S. 407, 417 (1865) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes"); Cohen's Handbook of Federal Indian Law § 5.01[3], at 396 (Nell Jessup Newton ed., 2005) ("Although the [Indian commerce] clause speaks of commerce 'with the Indian Tribes,' it comprehends transactions with individual tribal Indians as well as with tribes, including transactions outside of Indian country").

It is not merely the Indian status of Petitioner or its owner that make the transactions at issue intertribal commerce. Rather, it is the Muscogee Creek Tribe's purchase of goods, FOB the Seneca Indian reservation, from an Indian corporation owned by an Indian tribal member that places this issue within the ambit of the Indian Commerce Clause. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876) (confirming holding "that the power to regulate commerce with the Indian tribes [is], in its nature, general, and not confined to any locality; that its existence necessarily implies the right to exercise it, whenever there was a subject to act upon, although within the limits of a State, and that it extend[s] to the regulation of commerce with the individual members of such tribes"). Respondent's attempt to minimize the import of Mr. Montour's tribal membership and Respondent's questioning of whether Petitioner's business is conducted on Seneca land ignore what it is that Respondent seeks to regulate: the brand of cigarettes an Indian tribe can purchase

from Indians outside Oklahoma. Such regulation is not permitted absent congressional consent. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

To the extent sovereign immunity is an issue, it is so only because Oklahoma knows its courts cannot enjoin the Muscogee Creek Tribe from purchasing goods from Indians out-of-state.[9] It therefore tries through the back door what it cannot achieve through the front: to stop a Tribe's purchase of goods by attacking the out-of-state Indian vendor who does not share the Tribe's sovereign immunity. Yet that is not permissible under federal law. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 690 (1965) ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders").

D. Cigarette Regulation has been Preempted by the Federal Government.

Even within its boundaries, Oklahoma's power to regulate cigarettes is limited: it cannot impose advertising requirements or prohibitions based on smoking and health [*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001)]; it cannot require those shipping cigarettes into Oklahoma to use delivery companies that provide recipient age verification [*Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 365

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[9] This Court has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

(2008)] and it cannot regulate the type of cigarettes bought by tribes, nor establish a minimum price [*Dep't of Taxation v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 75 (1994)]. Because selling cigarettes is not illegal in Oklahoma, and because the cigarettes bought by the Muscogee Creek Tribe comply with all federal requirements, Oklahoma has no authority to dictate which cigarettes the Tribe can purchase from out-of-state Indians. *Cabazon*, 480 U.S. at 207-10 (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); *Milhelm Attea & Bros.*, 512 U.S. at 75.

E. Respondent's "Indian Trader Statute" Analysis is Flawed.

1. Preemption analysis is not affected by whether Petitioner is a licensed Indian Trader.

Petitioner need not be licensed by the Commissioner of Indian Affairs to point out that the Indian Trader Statutes preempt state regulation of Indian commerce. 25 U.S.C. §§ 261, *et seq*. Indeed, as this Court has confirmed: "It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165 (1980). In other words, federal preemption through the Indian Trader Statute applies with equal strength even when the seller is not a federally licensed Indian trader.

2. Respondent misinterprets cases allowing taxation of *sales* to non-members to condone regulation of a tribe's *purchase* of goods out-of-state.

Respondent argues that projecting state regulation onto out-of-state Indians is proper because it "imposes no tax or financial obligation." In support of this contention, Respondent argues that the Indian Trader cases "merely recognize the general principle that a State tax imposed on Indian traders' [sic] 'on-reservation' transactions with a Tribe *may* be preempted by the Indian Trader Statutes if the tax's financial burden is ultimately passed on to the Tribe with which the trader was dealing." Br. in Opp'n 34 (emphasis in original). But the absence of a tax obligation does not validate an improper state restriction on the kind and price of cigarettes a tribe can buy from Indians out-of-state. *Milhelm Attea & Bros.*, 512 U.S. at 75 ("By imposing a quota on tax-free cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' *Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price*") (emphasis added).

3. Whether Oklahoma can label Petitioner's product illegal is the very issue requiring this Court's review.

Respondent argues that preemption does not apply because, according to Respondent, Petitioner's product is illegal. But the only thing that would make the product "illegal" is Respondent's decision to label it so. Respondent's argument begins with the premise that

state regulation is lawful, which of course is the very question requiring review by this Court. Put another way, Petitioner's product is legal because Oklahoma is preempted from regulating its out-of-state sale to the Muscogee Creek Tribe. *BMW*, 517 U.S. at 572-73 ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred").

CONCLUSION

This Court should grant the petition for a writ of certiorari and review the Oklahoma Supreme Court decision.

Respectfully Submitted,

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