No. 10-754 DEC 3-2010



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*

## PETITION FOR WRIT OF CERTIORARI

RANDOLPH H. BARNHOUSE
*Counsel of Record*
Luebben Johnson & Barnhouse LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (telephone)
(505) 842-6124 (facsimile)
dbarnhouse@luebbenlaw.com

*Counsel for Petitioner*

December 3, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

## QUESTIONS PRESENTED

1. Whether a contract entered into by an Indian Tribe and fully performed outside the exterior boundaries of the state in which the Tribe's reservation is located can constitutionally subject the out of state vendor to the personal jurisdiction of the state in which the Tribe's reservation is located.

2. Whether a state can prohibit an Indian Tribe located within its boundaries from purchasing goods from Indians on a reservation outside the state.

## PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

## RULE 29.6 STATEMENT

Petitioner Native Wholesale Supply has no parent company, and no public company owns ten percent or more of the company's stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**



**Statutes**

**Rules**

**Regulations**



**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

Native Wholesale Supply respectfully petitions for a writ of certiorari to review the opinion and judgment of the Oklahoma Supreme Court in this case.

## OPINIONS BELOW

The decision of the Oklahoma Supreme Court is reported at 2010 OK 58, 237 P.3d 199, and is reprinted in the Appendix (App. A, 1a-40a). The order of the District Court is not reported, and is reprinted in the Appendix (App. A, 41a-43a).

## JURISDICTION

The Oklahoma Supreme Court entered its decision on July 6, 2010. On September 27, 2010, Justice Sotomayor granted an extension of time, until December 3, 2010, in which to file this petition. App. A, 71a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed by the required deadline as extended by a Justice of the Supreme Court for a period not exceeding sixty days pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5. This Court has jurisdiction to review the judgment of the Oklahoma Supreme Court pursuant to 28 U.S.C. § 1257.

## 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. amend. XIV, § 1

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

### Oklahoma Stat. tit. 12 § 2004 (F) (2009)

"A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

## STATEMENT OF THE CASE

### I. BACKGROUND FACTS AND ISSUES.

#### A. Native Wholesale Supply.

Native Wholesale Supply is an Indian corporation that sells Native American manufactured products at wholesale to Indian Tribes and retailers owned by Native Americans and located on tribal land. 237 P.3d at 207-08, App., 13a-18a; 216-17, App., 36a-40a. Native Wholesale is a distributor, and does not manufacture the products it sells. 237 P.3d at 207. App. 13a Tobacco products sold by Native Wholesale are sold on an F.O.B (Freight On Board) Seneca Nation basis, with title and risk of loss transferring to

the buyer at the point of sale. Montour affidavit (Montour aff.) at ¶ 6, App., 67a; Okla. Stat. tit. 12A § 2-401(2)(a). Shipments occur at Foreign Trade Zones, one of which is located in Las Vegas, Nevada. 237 P.3d at 207, App., 13a, 216, App., 18a. No sales or shipments are made in Oklahoma. Montour aff. at ¶ 6, App., 67a. All sales are made from Native Wholesale's corporate headquarters located on the Seneca Cattaraugus Indian Territory, within the exterior boundaries of the State of New York. 237 P.3d at 215, App., 36a. Montour aff. at ¶¶ 5, 6, App., 67a. Native Wholesale has no other office. Montour aff. at ¶ 12, App., 66a.

Native Wholesale is a corporation chartered by the Sac and Fox Nation. 237 P.3d at 209, App., 20a. Its president and sole shareholder is a Native American enrolled in the Seneca Nation. 237 P.3d at 209, App., 20a, 211, App., 23a. Both the Sac and Fox Nation and the Seneca Nation are federally recognized Indian tribes. 75 Fed. Reg. 60812.

**B. The Muscogee Creek Tribe.**

The Muscogee Creek Tribe is a federally recognized Indian Tribe. 75 Fed. Reg. 60811. Its reservation is within the exterior boundaries of the State of Oklahoma. 237 P.3d at 208, App., 15a. Muscogee Creek Nation Wholesale is a tribal entity owned and operated by the Muscogee Creek Tribe. 237 P.3d at 216, App., 37a. ("The transactions at issue in this case are between a Sac and Fox chartered corporation operating on the tribal land of another tribe with a third tribe, the Muscogee Creek Nation"); *see also id.* at 208 n.38, App., 16a. Muscogee Creek Wholesale

went outside of Oklahoma to purchase cigarettes from Native Wholesale. 237 P.3d at 208; App., 16a.

### C. Cigarette Regulation.

The United States government has a comprehensive statutory and regulatory scheme governing the manufacture and sale of cigarettes. *E.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("In the [FCLAA's] pre-emption provision, Congress . . . precludes States or localities from imposing any requirements or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes")[1]; *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (states are without authority to require cigarette retail businesses to use delivery companies that provide recipient age verification); Prevent All Cigarette Trafficking Act of 2009, 15 U.S.C. §§ 375 *et seq.*; Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.*

The permissible scope of state regulation of cigarettes is limited. *See Lorillard, supra; Rowe, supra.*

### D. Oklahoma's Contract with the Major Tobacco Companies.

Cigarettes are legal in Oklahoma. *E.g.*, Okla. Stat. tit. 68 § 360.1 *et seq.* Indeed, Oklahoma has entered into a contract with major tobacco companies called the Master Settlement Agreement or MSA. 237 P.3d

---

[1] Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended; 15 U.S.C. §§ 1331 *et seq.*

at 203, App., 3a. The MSA allows companies who contract with Oklahoma to sell their cigarette brands in the State, but only if they pay Oklahoma a share of the profits from those cigarette sales. *Id.* These are profits paid pursuant to a contract; they are not a tax. 237 P.3d at 216, App., 38a. ("Neither the underlying MSA–imposed escrow obligation of the tobacco manufacturer nor the equitable relief sought against Native Wholesale Supply is a tax"). In return for its share of the profits, Oklahoma has agreed "diligently" to protect the market share of its cigarette company partners. MSA, § IX(d)(2)(B).[2] To do so, if a company does not contract with Oklahoma, the State prohibits the sale of the company's cigarette brands in Oklahoma. Okla. Stat. tit. 37, §§ 600.21-600.23; Okla. Stat. tit. 68, §§ 360.1 *et seq*. Under its contract, Oklahoma does not regulate cigarettes; instead it only regulates product brands – outlawing those brands produced by any company with which it does not have a contract. 237 P.3d at 216, App., 38a. (these laws are "a method adopted by the State to regulate the distribution and sale of Tobacco products in the Oklahoma market").

To further protect its cigarette partners, Oklahoma has passed a law applying only to them and that allows its partners to appeal judgments under special rules that limit required appeal bond amounts. Okla. Stat. tit. 12 § 990.4(B)(5).[3] There can be no doubt that

---

[2] Available at http://www.naag.org/backpages/naag/tobacco/mas/mas-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view (last visited December 1, 2010).

[3] Oklahoma also statutorily mandates protective cigarette prices, as confirmed by the United States Centers for Disease Control

these limits are to protect the State's cigarette profits, as the statute itself confirms that fact:

> In order to protect any monies payable to the Tobacco Settlement Fund as set forth in Section 50 of Title 62 of the Oklahoma Statutes, the bond in any action or litigation brought under any legal theory involving a signatory, successor of a signatory or an affiliate of a signatory to the Master Settlement Agreement . . . shall [be limited].

*Id.*

## II. THE CURRENT LITIGATION.

### A. The District Court Proceedings.

On May 29, 2008, the Oklahoma Attorney General filed a civil petition against Native Wholesale in the Oklahoma County District Court. App., 44a-48a. The State filed its petition pursuant to Oklahoma's laws that protect the market share of its contract partner cigarette companies, complaining only that Native Wholesale sold to the Muscogee Creek Nation cigarette brands that "have not been listed on the Oklahoma Attorney General's Directory and its products have not been approved for sale within the State of Oklahoma."

---

and Prevention. Morbidity and Mortality Weekly Report (MMWR), v. 59 no. 13, April 9, 2010, State Cigarette Minimum Price Laws – United States, 2009, at 389, 391, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm (last visited December 1, 2010).

App., 47a; Pet. ¶¶ 9-10 at 3: "Violation by Defendant."[4] *See* 237 P.3d at 204, App., 3a-7a.

The petition did not allege that Native Wholesale had failed to perform any duties as a manufacturer of cigarettes. Instead, it only challenged Native Wholesale's distribution (wholesale) activities. Oklahoma's petition sought disgorgement of gross proceeds from wholesale cigarette sales that occurred outside the State of Oklahoma, and injunctive relief preventing Native Wholesale from selling cigarettes to the Muscogee Creek Nation outside Oklahoma. District Court Order at 1, App. A, 41a.

Oklahoma's petition raised one straightforward issue: state enforcement of the "method adopted by the State [of Oklahoma] to regulate the distribution and sale of tobacco products in the Oklahoma market." 237 P.3d at 216, App., 38a. The petition did not raise tax issues.[5] Nor did it raise health issues: there are no allegations in the record or otherwise of any health or material product differences between the cigarettes manufactured by Oklahoma's contract partners and the cigarettes distributed by Native Wholesale. Instead, the Oklahoma Attorney General sought only to stop a federally recognized Indian Tribe located in the State from going outside the State to purchase from other Indians a product that is legal in Oklahoma.

---

[4] Alleging that "Native Wholesale Supply knowingly and unlawfully sold . . . Seneca brand cigarettes manufactured by GRE to Muscogee Creek Nation Wholesale."

[5] 237 P.3d at 216, App., 38a.

On November 5, 2008, Native Wholesale moved to dismiss the State's petition for lack of personal and subject matter jurisdiction. The Attorney General filed an amended petition on November 21, 2008, and a second amended petition on February 24, 2009. The amended petition and second amended petition added factual averments regarding Native Wholesale's operations, but contained no material changes to the specific claimed "Violations by Defendant." Compare Pet. ¶¶ 9-10 at 3 ("Violations by Defendant") (App., 47a) with Second Amended Pet. ¶¶ 30-31 at 11-12 ("Violations by Defendant") (App. A, 54a-55a).[6]

Native Wholesale moved to dismiss the second amended petition on March 11, 2009, again challenging the district court's personal and subject matter jurisdiction.

**B. The District Court's Decision.**

The district court entered its Journal Entry of Judgment on June 10, 2009, dismissing the petition with prejudice for lack of subject matter jurisdiction. App. A, 41a-43a. In doing so, the district court denied Native Wholesale's motion to dismiss based on lack of personal jurisdiction.

---

[6] Oklahoma nowhere claimed, and neither the district court nor the Oklahoma Supreme Court held, that general personal jurisdiction exists over Native Wholesale in Oklahoma, which it does not.

### C. The Oklahoma Supreme Court's Decision.

The Attorney General appealed the district court's decision dismissing the case for lack of subject matter jurisdiction on June 19, 2009. On July 28, 2009, Native Wholesale cross appealed on that portion of the district court's order denying its motion to dismiss for lack of personal jurisdiction. On July 6, 2010, the Oklahoma Supreme Court, applying specific personal jurisdiction analysis, affirmed the district court's order regarding personal jurisdiction, holding that Native Wholesale "deliver[s] its products into the stream of commerce that brings it into Oklahoma." 237 P.3d at 208, App., 18a. The court reversed that portion of the district court's order dismissing the case for lack of subject matter jurisdiction, holding: (1) that Native Wholesale "is not clothed with tribal immunity;"[7] and (2) "there is no blanket ban on state regulation of inter-tribal commerce even on a reservation" (without citation to any legal authority in support).[8]

## REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant a petition for writ of certiorari and review the Oklahoma Supreme Court's decision.

First, the Oklahoma Supreme Court's decision conflicts with relevant decisions of this Court and decisions of a number of the Courts of Appeals which limit the constitutionally permissible scope of a state's

---

[7] 237 P.3d at 210, App., 23a.

[8] 237 P.3d at 215-16, App., 36a.

personal jurisdiction. Specifically, the Oklahoma Supreme Court erroneously applied this Court's tort standard for exercise of specific personal jurisdiction (purposeful direction) in a contract case where this Court's standard is purposeful availment; the court's decision improperly extends the state's regulatory jurisdiction beyond the state's geographic boundaries; and the court ignored this Court's precedent confirming that neither out of state business activities nor a third party's in state activity can constitutionally subject a foreign corporation to a state's specific personal jurisdiction in contract based cases.

Second, the Oklahoma Supreme Court has decided an important question of federal law that has not been, but should be, decided by this Court: whether the Indian Commerce Clause protects Indian Tribes from state regulation of purely Indian commerce that occurs outside of the state's geographic boundaries – specifically, whether it allows a state to prohibit certain companies from trading with Indians outside the state.

## I. THE OKLAHOMA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

### A. The Oklahoma Supreme Court's Application of This Court's Tort Based "Purposeful Direction" Specific Jurisdiction Standard in a Contract Based Case Requiring "Purposeful Availment"

**Conflicts With This Court's Precedent and With Decisions of the Courts of Appeals.**

Beginning three decades ago, this Court decided a series of personal jurisdiction cases in which the Court clarified the standards lower courts are to apply when addressing personal jurisdiction issues.[9] In those decisions, when considering whether specific personal jurisdiction can constitutionally be exercised over an out of state defendant, the Court distinguished between contract and tort based claims, and identified a distinct test to be applied for each. For decades, the general test applied to personal jurisdiction challenges required a determination of whether an out of state defendant had "purposefully availed" itself of the laws and protections of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"). A quarter century later, this Court adopted a less stringent analysis applicable to tort based actions, only requiring that a foreign defendant purposefully "direct" its efforts towards residents of another state. *Calder*, 465 U.S. at 790.

Yet in this contract based action, the Oklahoma Supreme Court erroneously embraced and applied this Court's tort based standard. The Oklahoma Supreme

---

[9] *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 107 (1987).

Court cited this Court's decision in *World-Wide Volkswagen* as tacit approval for doing so, claiming this Court "has gradually relaxed the limits placed on state jurisdiction by the Due Process Clause." 237 P.3d at 206, App., 10a-11a.[10] Yet *World Wide Volkswagen* was a tort case in which the Court held specific personal jurisdiction did not exist. The distinction between this Court's tort and contract based tests - ignored by the Oklahoma Supreme Court - is crucial to personal jurisdiction jurisprudence, and has been recognized as such by a number of United States Courts of Appeals. Simply placing a product in the "stream of commerce" may be sufficient in a tort action, but in a contract action specific "minimum contacts" must exist to support specific personal jurisdiction. *Burger King*, 471 U.S. at 474.[11]

The instant Oklahoma Supreme Court decision, by confusing tort based and contract based specific personal jurisdiction standards, conflicts with this Court's decisions in *Hanson v. Denckla*, *Calder*, and

---

[10] In *World-Wide Volkswagen* this Court rejected, as not satisfying constitutional due process protections, the argument that one who sells a product in one forum is subject to jurisdiction in another forum, whose only connection with the seller is that a purchaser transported the product into the forum and suffered an injury there.

[11] The Oklahoma Court recognized its confusion over the applicable standard: "The *Asahi* decision has created significant confusion in lower courts over the constitutional standard for minimum contacts under the stream-of-commerce theory." 237 P.3d at 207, App., 13a-14a.

*Worldwide Volkswagen*.[12] It also conflicts with decisions of the Courts of Appeals that have applied this Court's distinction between "purposeful availment" in contract actions and a less rigorous "purposeful direction" standard in tort actions.

For example, the Ninth Circuit Court of Appeals specifically has recognized and relied upon the separate standards in a number of cases. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) ("we have typically analyzed cases that sound primarily in contract – as [the plaintiff's] case does -- under a 'purposeful availment' standard"); *Holland Am. Line, Inc. v. Wartsila N. Am. Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) (*Calder* test applies only to intentional torts and requires that the defendant individually and wrongfully target the plaintiff); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (the less rigorous purposeful direction of activities analysis only applies to "suits sounding in tort").

The Eleventh Circuit has made the same distinction. *Licciardello v. Lovelady*, 544 F.3d 1280, 1285-88 (11th Cir. 2008). In *Licciardello*, the court adopted somewhat different language, labeling the *Calder* tort based "purposeful direction" test "the 'effects' test;" and calling the *Hanson v. Denckla*

---

[12] *See also Asahi*, 480 U.S. at 107 (tort action applying purposeful direction analysis); *Burger King*, 471 U.S. at 464-68 (in contract based action specific jurisdiction was proper where defendants purposefully availed themselves of the privilege of conducting business in Florida when they sought out Burger King in Florida, trained in Florida, obtained proprietary information in Florida, purchased $165,000 worth of equipment from Burger King in Florida, and negotiated contract disputes in Florida).

contract based "purposeful availment" test the "minimum contacts" test. *Id.* at 1286.

The Tenth Circuit Court of Appeals also has distinguished between the need to demonstrate an out of state defendant "purposefully availed" itself of the forum's laws and protections in a contract case, while recognizing the existence of a less stringent test applicable to personal jurisdiction analysis in a tort action. *Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods. Inc.*, 16 Fed. Appx. 959 (10th Cir. 2001) (unpublished opinion). In analyzing whether personal jurisdiction existed based on the plaintiff's contract claims, the Tenth Circuit Court of Appeals noted:

> the exercise of jurisdiction depends on the *nature* of those contacts and whether they represent an effort by the defendant to purposefully avail itself of the privilege of conducting activities within the forum state.

*Id.* at 962 (internal quotations and citation omitted) (emphasis in original). Yet when analyzing whether personal jurisdiction existed based on the plaintiff's tort based claims, the court used a different test, stating:

> absent allegations of tortious activity in Colorado, exercise of personal jurisdiction under Colorado's long-arm statute is permitted only where 'the injury itself . . . occurred in Colorado.' Further, the injury in Colorado 'must be direct, not consequential and remote.' Thus, the fact that a Colorado resident sustains a loss of profits in Colorado as a result of a tort that occurred elsewhere is insufficient to sustain

> long-arm jurisdiction under the Colorado statute.

*Id.* at 963 (internal quotations and citations omitted).

Regardless of the labels used, the Courts of Appeals have recognized this Court's standards applicable to differing personal jurisdiction claims, and have applied a more stringent analysis to determine whether specific personal jurisdiction exists in contract based cases.

In this case, there are no allegations or facts in the record demonstrating that the product purchased by the Muscogee Creek Tribe from Native Wholesale was defective or misrepresented, nor any claim of fraud, deception or any personal injury that might implicate tort analysis.[13] Indeed, Oklahoma does not dispute that cigarettes are legal and sold by the millions every day in Oklahoma, nor can it dispute that it profits handsomely from those sales.[14]

---

[13] The petition contains no tort claims, and there are no claims or averments that Native Wholesale sold cigarettes that were more dangerous than cigarettes sold by Oklahoma's MSA contract partners, as it did not. Instead, the only activities that Oklahoma alleged as "Violations by Defendant" are that Native Wholesale sold Seneca brand cigarettes "to Muscogee Creek Nation Wholesale." Second Amended Petition at 12, ¶ 31; App., 62a.

[14] In the year it filed this petition, Oklahoma's profits (not taxes) from cigarette sales totaled $89 million, an increase in profits of over $26 million from the year before. Campaign for Tobacco Free Kids (Nov. 11, 2008) available at http://tobaccofreekids.org/research/factsheets/pdf/0286.pdf (last visited December 1, 2010). Of note, to address tobacco control issues in that same year, Oklahoma only spent an amount of federal and state funds equal

Instead, the State's claims are based entirely on contracts entered into on an Indian reservation in New York by a federally recognized Indian Tribe and fully performed outside Oklahoma. In holding that Oklahoma has specific personal jurisdiction to regulate these out of state contracts, the Oklahoma Supreme Court decided an important question of federal law in a way that conflicts with relevant decisions of this Court and Courts of Appeals confirming that in contract cases, a defendant must purposefully avail itself of a forum state's protections before it can be required to defend itself in that state.

This Court has not needed to address a significant personal jurisdiction question for nearly a quarter of a century. Instead, the Court's guidance on the separate personal jurisdiction standards applicable in contract and tort based actions has served as both important and pragmatic guidance to the lower courts. The Oklahoma Supreme Court's decision ignoring this Court's articulated standard applicable to contract based claims warrants granting a writ of certiorari in this case.

### B. The Oklahoma Supreme Court's Holding Decides an Important Question of Federal Law in a Way That Conflicts with Decisions of This Court and the Courts of

---

to 21 percent of its profits from cigarette sales. *Id.* *See also* Oklahoma Council of Public Affairs, Smoke and Mirrors, http://www.ocpathink.org/publications/perspective-archives/july-2000/?module=perspective&id=1109 (last visited December 1, 2010).

**Appeals Which Limit State Extra-Territorial Regulation.**

This Court specifically addressed the limits of state regulatory jurisdiction in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), stating:

> A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. . . . Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.

*Id.* at 407-08. *Accord, Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the

jurisdiction of state courts"); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) ("There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction").[15]

Finding that specific personal jurisdiction exists in the courts of Oklahoma based solely on Native Wholesale's business operations on the Seneca Nation in New York and at a Foreign Trade Zone in Nevada not only offends due process protections but also conflicts with this Court's precedent regarding expansion of regulatory authority beyond state boundaries. As this Court noted in *Healy v. Beer Inst.*, 491 U.S. 324 (1989):

> A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

*Id.* at 336 (citation omitted). In *Healy* the Court confirmed:

---

[15] *Accord Dean Foods Co. v. Brancel*, 187 F.3d 609, 614 (7th Cir. 1999) ("extraterritorial regulation is barred by the federal constitution"); *McCormick v. Statler Hotels Delware Corp.*, 195 N.E.2d 172, 174 (Ill. 1963) ("legislation is presumptively territorial only and confined to the limits over which the law-making power has jurisdiction").

> the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.

*Id.* (internal quotations and citation omitted). These constitutional concepts apply with equal force to both legislative and judicial exercise of jurisdiction. As noted by this Court in *BMW of N. Am. v. Gore*: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. 559, 572 n.17 (1996).

The Oklahoma Supreme Court recognized that the issue before it was "whether the state has a right to enforce Native Wholesale Supply's compliance with state [cigarette] law." 237 P.3d at 210, App., 21a. Yet even within its boundaries, Oklahoma's power to regulate cigarettes is limited at best. For example, it cannot impose any advertising requirements or prohibitions based on smoking and health. *Lorillard*, 533 U.S. at 542. Similarly, Oklahoma is without authority to require that those shipping cigarettes into the state use delivery companies which provide recipient age verification. *Rowe*, 552 U.S. at 365. Oklahoma cannot regulate the type of cigarettes bought by Tribes located in the state, nor establish a minimum price. *Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994) ("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 supplied)). Nor does Oklahoma have

tax jurisdiction over the sale at issue in this case. Tellingly, although Native Wholesale never paid a penny in taxes to Oklahoma, there is no "tax evasion" alleged in the petition, an obvious concession that Oklahoma has no jurisdiction over Native Wholesale's out-of-state sales to the Muscogee Creek Tribe. *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" *citing Quill Corp. v. N.D.*, 504 U.S. 298, 301 (1992) and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 758 (1967)) (Ginsberg, J., concurring).

It would be ironic indeed if Oklahoma, which allows cigarette sales in the state, but is jurisdictionally impotent to control cigarette advertising, to regulate tobacco delivery through age verification inside Oklahoma, or to tax these out of state sales, could nevertheless extend its personal jurisdiction to an Indian reservation in New York to prohibit entirely a Native American wholesale company from selling a legal product to an Indian Tribe over which the State of Oklahoma has no jurisdictional power. *Cf. Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (if state does not prohibit, but merely regulates conduct, Tribes may engage in the conduct free of state regulatory oversight). Yet that is exactly the result reached by the Oklahoma Supreme Court below. Because Oklahoma has no such jurisdiction, this Court should issue a writ of certiorari to the Oklahoma Supreme Court and review the lower court's decision which is in direct conflict with decisions of this Court.

### C. The Oklahoma Supreme Court's Decision Conflicts with this Court's Precedent Confirming That Out of State Business Activities Cannot Subject a Foreign Corporation to a State's Specific Personal Jurisdiction in Contract Based Cases.

It is a fundamental concept of due process that a state only has jurisdiction over non-residents to the extent of their activities within that state. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945); *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular"). As a result, activities of a non-resident defendant, legal where they occurred, and taking place outside a state seeking to exercise specific personal jurisdiction, are irrelevant and have no bearing on the existence *vel non* of the state's jurisdictional authority. *Accord 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"); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). A defendant's business activities outside a forum state simply cannot have any impact on the scope of the forum state's jurisdictional power. That is particularly true regarding specific personal jurisdiction analysis, based as it must be on the specific minimum contacts necessary to give a state the power to force a foreign defendant to appear and defend claims against it.

Native Wholesale's operations outside of Oklahoma, both on the Seneca Nation and at the Foreign Trade

Zone in Las Vegas, Nevada, were legal activities where they occurred, and Oklahoma makes no claim to the contrary in its three petitions or anywhere else in its pleadings. Therefore, those operations have no bearing on the question of specific personal jurisdiction in Oklahoma. As this Court has confirmed:

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

*New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The constitutional rights addressed by this Court in *International Shoe* apply with as much force today as they did at the time this Court rendered that decision, and those rights preclude forcing Native Wholesale to defend itself in a jurisdiction where it does not have the requisite minimum contacts.[16] *Accord Cote v. Wadel*, 796 F.2d 981, 984-85 (7th Cir. 1986) ("personal jurisdiction over nonresidents of a state is a quid for a quo that consists of the state's extending protection or

---

[16] *Int'l Shoe*, 326 U.S. at 316; *see Shaffer*, 433 U.S. at 212 ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny").

other services to the nonresident . . . [L]itigants and the public will benefit substantially in the long run from better compliance with the rules limiting personal jurisdiction"); *Froning & Deppe, Inc. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (allowing exercise of personal jurisdiction in Illinois "would positively *hinder* the underlying policies of the several states which favor the free flow of commerce") (emphasis in original).

Here, Oklahoma law confirms that all sales by Native Wholesale 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. Swearengen*, 552 P.2d 705, 707 (Okla. 1976).[17] *Accord Lindgregn v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131-32 (S.D. Iowa 2004) (holding no personal jurisdiction existed in Iowa where both Iowa and California Uniform Commercial Code confirmed title passed in California "when [defendant] delivered the items to FedEx for shipment"). These sales were initiated by the Muscogee Creek Tribe and not Native Wholesale; and once title transferred shipment was conducted by a third party not involved in this case and acting the entire time as the agent of the Muscogee Creek Tribe. *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1264 (Ala. 2000) (no personal jurisdiction where sale took place in the seller's state,

---

[17] Under Oklahoma law, a "sale" is defined as the passing of title from the seller to the buyer for a price. Okla. Stat. tit. 12A § 2-106(1). Oklahoma law also recognizes that, in transactions such as those upon which the State seeks to exercise specific personal jurisdiction over Native Wholesale here, title to the goods passes from the seller to the buyer at the time and place of shipment. Okla. Stat. tit. 12A §2-401(2)(a).

and was shipped by a third party carrier "acting, the entire time, as the agent" of the buyer). No sales took place in Oklahoma, and Native Wholesale has not otherwise purposefully availed itself of the privilege of doing business in Oklahoma.

It would be contrary to this Court's long standing personal jurisdiction jurisprudence to force Native Wholesale to defend its Seneca Nation operations in Oklahoma based on contracts entered on the Seneca Nation in New York and performed there and in Nevada. Indeed, as this Court noted in *Hanson v. Denckla*:

> [a state] does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [defendant]. As we have indicated, they are insufficient to sustain the jurisdiction.

*Hanson*, 357 U.S. at 254.

Similarly, constitutional due process protections do not permit Oklahoma to exercise personal jurisdiction over this out of state vendor simply because the Muscogee Creek Nation has, of its own accord, brought the product it purchased back to its reservation within the exterior boundaries of Oklahoma. This Court consistently has confirmed that these types of actions by a third party cannot expose an out of state defendant to personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("unilateral activity of another party or a

third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *accord Amsleep, Inc. v. Am. Mattress Ctrs., Inc.*, 2002 U.S. Dist. LEXIS 11665 (Ill. 2002) ("That a product sold in Defendant's Indiana location may someday be transported by an Illinois resident into Illinois does not convert Defendant's Indiana contacts into Illinois contacts").

Oklahoma wants to exercise its police powers to regulate an out of state sale made by an Indian to an Indian Tribe occurring on the Seneca Cattaraugus Indian Territory within the exterior boundaries of the State of New York. This Court's precedent confirms that Due Process protections prohibit it from doing so. The Oklahoma Supreme Court disagrees, requiring this Court's review of its decision on writ of certiorari.

## II. THE OKLAHOMA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

### A. Unable to Stop the Muscogee Creek Tribe From Buying Goods Directly, Oklahoma Seeks to Regulate Indian Commerce by Suing the Indian Company From Which the Tribe Buys Its Out of State Goods.

Regulating Trade "with the Indian Tribes" is the most fundamental power granted to the United States

Congress by the Indian Commerce Clause.[18] Allowing a state to usurp that exclusive congressional power through state regulation - and a state court injunction - controlling a Tribe's purchase of goods from Indians out of state not only ignores the plain meaning of the Indian Commerce Clause, it undermines comprehensive federal statutory schemes adopted by Congress under its Indian Commerce Clause powers,[19] and eviscerates centuries of this Court's jurisprudence

---

[18] "Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 692 n.18 (1965).

[19] *E.g.*, 19 Stat. 200, 25 U.S.C. § 261 ("The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." *See also* 4 Stat. 729, now 25 U.S.C. § 263 (empowering the President in the public interest to forbid introduction of any or all goods into the territory of a tribe, and to revoke and refuse all licenses to trade with that tribe); 4 Stat. 729, as amended, now 25 U.S.C. § 264 (establishing penalties for trading without a license and forbidding traders to hire white persons as clerks unless licensed to do so); 18 U.S.C. § 3113 (forbidding unlawful introduction of liquor into Indian country and providing for revocation of the license of any trader violating this prohibition).

on this very subject.[20] Yet that is exactly what the Oklahoma Supreme Court did in its decision below.

Oklahoma knows its courts cannot enjoin the Muscogee Creek Tribe from purchasing goods from other Indians out of state.[21] Indeed, not only is there no reported case allowing states to regulate an Indian tribe's purchases absent congressional authorization, just the opposite is true. *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"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of

---

[20] "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *see also United States v. Mazurie*, 419 U.S. 544, 554 (1975) ("This Court has repeatedly held that [the Indian Commerce] clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country").

[21] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("[state] laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply"); *Indian Country, U.S.A., Inc. v. Okla.*, 829 F.2d 967, 987 (10th Cir. 1987). ("[T]he treaties with the Creek Nation as well as traditional presumptions favor the exclusion of state law from Creek Nation lands").

Indians on a reservation").[22] As a result, congressional permission is required before states can regulate the sale of liquor, apply state health and education laws, or regulate similar activities by Indians on reservation.[23]

No doubt frustrated by its inability to regulate purchases of goods by a Tribe over which it has no police power, Oklahoma's Attorney General asked the Oklahoma state courts to enjoin the Tribe's out of state seller from doing business with the Muscogee Creek Tribe. In doing so, the Attorney General sought to accomplish through the back door what he could not accomplish through the front: prohibit the Muscogee Creek Tribe from purchasing a specific brand of an otherwise legal product by suing the Tribe's out of state Indian wholesale distributor, which operates on a reservation within the exterior boundaries of the State of New York. The Oklahoma district court

---

[22] This Court has recognized limited state jurisdiction over non Indians operating on reservation, but has never recognized any state power to regulate from whom Indian Tribes can purchase goods absent congressional enactment. *Mazurie*, 419 U.S. at 558 ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it").

[23] *E.g.*, 18 U.S.C. § 1161 (permitting application of state liquor law standards within an Indian reservation under certain conditions); 25 U.S.C. § 231 (permitting application of state health and education laws within a reservation under certain conditions); 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (respectively granting certain states criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations).

properly recognized that it had no subject matter jurisdiction to hear the Indian commerce claims asserted by the State's Attorney General, and granted Native Wholesale's motion to dismiss. In reversing that decision, the Oklahoma Supreme Court held: (1) that Native Wholesale "is not clothed with tribal immunity;"[24] and (2) "there is no blanket ban on state regulation of inter-tribal commerce even on a reservation" (without citation to any legal authority in support).[25]

It is on this second issue, application of the Indian Commerce Clause to on reservation intertribal commerce, that the Oklahoma Supreme Court misapplied the Indian Commerce Clause and misinterpreted this Court's decisions addressing the scope of that constitutional provision. In doing so, the Oklahoma Supreme Court relied upon this Court's decisions holding that states may require a tribe to collect taxes for the state on *sale* of goods to non tribal members.[26] The Oklahoma Supreme Court never addressed, and indeed ignored, Indian Commerce Clause protections enjoyed by a tribe *purchasing* goods, which was the case before it.

This second issue, whether a state can prohibit an Indian tribe located within its boundaries from leaving

---

[24] 237 P.3d at 210, App., 23a.

[25] 237 P.3d at 215-16, App., 36a.

[26] *E.g., citing Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 (1976) (tax on sale of cigarettes to non-tribal members), 237 P.3d at 212, 213, 214, App., 27a, 30a, 31a.

the state to purchase goods from Indians on a reservation outside the state, is an important question of federal law that has not, but should be, addressed by this Court on writ of certiorari to the Oklahoma Supreme Court. *Williams*, 358 U.S. at 218 ("Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari").

### B. The Power to Regulate Indian Commerce Between Tribes Lies Exclusively in Congress.

Oklahoma is jurisdictionally impotent to regulate commerce of any kind occurring completely outside of its boundaries. *E.g.*, *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"). This prohibition applies with greater force here, given that Oklahoma's attempt at extraterritorial regulation involves prohibiting purchases 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. In interpreting this Constitutional delegation of power exclusively to Congress, this Court has confirmed:

> [T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but the States

> have been divested of virtually all authority over Indian commerce and Indian tribes.

*Seminole Tribe v. Fla.*, 517 U.S. 44, 62 (1996). The divestiture of state authority accomplished by the Indian Commerce Clause is confirmed in its historical underpinnings.[27]

Under the Indian Commerce Clause, intertribal trade and commerce between Indian nations has long been encouraged by the federal government free from state regulation. Not only has Congress never passed legislation authorizing the incursion into Indian commerce Oklahoma seeks here, just the opposite is true: Congress repeatedly has recognized and encouraged trade between Indians free of state regulation. *See, e.g.,* Native American Business Development Act, 25 U.S.C. § 4301(b)(5). In early statutes regulating interactions with Indians and tribes, Congress recognized and encouraged trade between Indians, and specifically exempted Indians trading with other Indians from the scope of federal regulation. 25 U.S.C. §§ 261-264 (placing restrictions on "any person other than an Indian" attempting to engage in trade or commerce "with the Indians on any

---

[27] "The conduct of Indian affairs under the Articles of Confederation suffered because of conflicts between federal and state authority." Francis Paul Prucha, Documents of United States Indian Policy 10-11 (3d ed. 2000) p. 10. "[T]here was fundamental agreement that Indian affairs was one area that belonged to the central government." Francis Paul Prucha, American Indian Policy in the Formative Years (1962) p. 29. From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to disable the colonies or States from doing so. *(Ibid.)*

Indian reservation"). In addition, Congress recognized a tribe's authority to engage in tribal commerce when it passed the Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. §§ 4301 *et seq*. Congress passed that Act not only to recognize, but also "to encourage intertribal . . . trade and business development." 25 U.S.C. § 4301(b)(5).

Only Congress can regulate the right of tribes to engage in Indian commerce with other tribes. Here, the Oklahoma Supreme Court's decision sanctioning that State's lawsuit against Native Wholesale directly interferes with this congressional power, and unduly burdens Indian commerce, all in violation of the Indian Commerce Clause.

### C. Federal Law Preempts the State Regulations at Issue in This Case.

Federal preemption of state law as applied to Indian reservations is not controlled by the standards of preemption in other areas of law. Instead, the analysis requires a particularized examination of the relevant federal, state, and tribal interests, including the federal trust responsibility and the tribal interest in promoting economic development, self-sufficiency and strong tribal government. As this Court has confirmed:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. Relevant federal statutes and treaties must be examined in light of 'the broad

> policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.' As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.

*Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (citations omitted).

When on reservation conduct involving only Indians is at issue, state law cannot be enforced, for the state's interest is minimal and the federal interest in encouraging tribal self-government is at its strongest. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *Moe,* 425 U.S. at 480-83; *McClanahan*, 411 U.S. at 171-72. In *Moe*, this Court held that vendor licensing fees the state sought to impose upon reservation Indians were preempted. *Moe*, 425 U.S. at 480-81. Here, similar to the vendor licensing fees this Court rejected in *Moe*, the burden falls on Indians conducting on reservation business, and the state regulation cannot be enforced because the state is regulating the Muscogee Creek Tribe (not non-Indian consumers), and is doing so by dictating those businesses from which the Tribe can purchase goods outside Oklahoma. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995); *Central Machinery Co. v. Ariz. St. Tax Comm'n* 448 U.S. 160 (1980) (state law imposing burdens upon reservation traders cannot be enforced); *Bracker*, 448 U.S. at 144-45.

The state law here, seeking to dictate from whom the Muscogee Creek Tribe can purchase goods, is preempted. Indeed, because selling cigarettes is not illegal in Oklahoma, and because the cigarettes bought by the Muscogee Creek Tribe comply with federal regulatory requirements, Oklahoma has no authority to regulate the brands of 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); *accord 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)).

Oklahoma's decision not to prohibit cigarettes, but instead to regulate the kind and price, cannot be enforced to prohibit Native Wholesale from trading with the Muscogee Creek Tribe. The State's attempt to do so is preempted by federal law. *Milhelm Attea & Bros., supra.* In holding to the contrary, the Oklahoma Supreme Court ignored this Court's controlling decisions, and instead opined that the State of Oklahoma has the authority to regulate *the product brand* of an otherwise legal product that can be purchased by the Muscogee Creek Tribe from Indians in a transaction occurring entirely outside Oklahoma. The Oklahoma Supreme Court's decision incorrectly decided this important question of federal law that has not, but should be, addressed instead by this Court on writ of certiorari to the Oklahoma Supreme Court.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

RANDOLPH BARNHOUSE
*Counsel of Record*
Luebben Johnson & Barnhouse LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (telephone)
(505) 842-6124 (facsimile)
dbarnhouse@luebbenlaw.com

*Counsel for Petitioner*

Blank Page