No. 04-631

In The Supreme Court of the United States

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

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeal For The Tenth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA, IN SUPPORT OF PETITIONER, RICHARDS

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AMICI CURIAE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

This *amici curiae* brief is submitted on behalf of the National Association of Convenience Stores (NACS), the Petroleum Marketers Association of America (PMAA), and the Society of Independent Gasoline Marketers of America (SIGMA) in support of Petitioner, Stephen Richards, in his official capacity as Secretary, Kansas Department of Revenue (Kansas), seeking reversal of a ruling by the United States Court of Appeals for the Tenth Circuit. Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all the parties.[1]

INTEREST OF THE *AMICI CURIAE*

NACS is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. Its retail members operate more than 130,700 convenience stores worldwide. The majority of NACS retail members sell motor fuels (gasoline and diesel

[1] Copies of the consent letters have been filed with the Clerk of the Court with this brief. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

fuel); NACS member companies collectively sell approximately 220 billion dollars worth of motor fuels in the United States each year. Overall, more than 100,000 convenience stores in the United States sell motor fuels.

PMAA is a national federation of 45 State and regional trade associations representing 8,000 independent petroleum marketers. Most PMAA member marketers conduct business as both wholesalers and retailers. PMAA members sell or supply over 56 percent of the gasoline, 60 percent of the diesel fuel, and 80 percent of the heating oil consumed in the U.S. each year. Independent petroleum marketers are mostly small businesses, many of which are also family-owned businesses.

SIGMA is an association of more than 250 independent motor fuel marketers operating in all 50 States. Last year, SIGMA members sold more than 48 billion gallons of motor fuel, which represents more than 30 percent of all motor fuels sold in the United States in 2004. SIGMA members supply more than 28,000 retail outlets across the nation and employ more than 270,000 workers nationwide.

Every State imposes volume taxes on motor fuels (both gasoline and diesel fuel) and these State taxes constitute a large proportion of the price of motor fuel. On average, State taxes per gallon are greater than the per-gallon profits of retailers. The Tenth Circuit has held that a Tribe may enjoin these and any other tax that increases the price that a Tribe pays for motor fuel or that it charges to its purchasers if the Tribe's reservation includes some enticement to reservation travel other than tax exemptions on motor fuels. This holding would exempt Tribes from volume taxes and every tax imposed on every aspect relating to the discovery of crude oil, its production,

refinement to motor fuel, transportation, marketing, and sale.

The Tenth Circuit's decision would likely bankrupt many of *amici's* members. Consumer research demonstrates that price differentials of one to two cents per gallon are sufficient to cause consumers to shift where they purchase motor fuel. Energy Analysts International, *The Convenience Store Industry vs. Hypermarkets: Strategies for Competition*, 15-1 (2002). That is consistent with the price advantage the Prairie Band of the Potawatomi Nation has over its competitors due to its tax advantage in Kansas and is enough to cause significant competitive advantages for the Tribe. With 55.7 million acres of land in trust for the 562 federally recognized tribes, there are numerous options for tribes to competitively place motor fuel retail outlets and to drive *amici's* members out of business. A large percentage of *amici's* retail members' sales are of motor fuels,[2] and more than 75,000 of these retailers are single-store operators who will not be able to make up for lost sales by increasing sales at other locations. Many of them simply will not be able to compete. It is, therefore, critical to *amici* that the Tenth Circuit decision be reversed.

STATEMENT OF THE CASE

Kansas imposes a tax on the "first receipt" of motor fuel in Kansas by all wholesale distributors of that motor fuel and does not prohibit those distributors from passing some or all of that tax on to the purchasers of that motor

[2] That percentage is 62.4 for convenience stores in 2002.

fuel. The proceeds of this tax are used exclusively for construction and maintenance of roads in Kansas and its political subdivisions.

The Prairie Band of the Potawatomi Nation (the Tribe), like all other motor fuel retailers in Kansas, purchases motor fuel from these wholesale distributors for retail sale. This motor fuel is retailed primarily to non-tribal members, who bear the economic impact of the tax. The Tribe's motor fuel sale profits are used solely for construction and maintenance of reservation roads, including a one mile road from Highway 75, to a casino operated by the Tribe.[3] However, nearly all on-reservation motor fuel purchasers travel to the reservation on roads provided and maintained by Kansas.

While the location of the reservation, in Jackson County, Kansas, is technically rural, it is near several large urban centers, such as Kansas City (87 miles, metropolitan area population in Missouri and Kansas of nearly 1.8 million), Lawrence (50 miles, pop. 81,000), Topeka (20 miles, pop. 123,000), Manhattan (70 miles, pop. 45,000), and Wichita (168 miles, pop. 344,284).[4] Travel to and from these cities can be accomplished easily with one tank of gas. Moreover, there are many motor fuel stations between these points of origin and the reservation, including those adjacent thereto in Mayetta, Kansas.

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[3] Because the Tribe owns the motor fuel and the station that dispenses it, its claim that the profits from its sale of its motor fuel constitute tax revenue is disingenuous. The Tribe may not convert profit to tax revenue merely by purporting to tax itself.

[4] Population figures are from the 2000 Census; distances are from MapQuest.com.

Kansas constructed and maintains, using the proceeds of the wholesale distributor motor fuel tax, state Highway 75, a four lane highway that passes along the eastern edge of the Tribe's reservation, which the Tribe's one mile road to its casino joins. Highway 75 is the main access to the reservation from Topeka. The main access to Topeka, hence the casino, from Kansas City and Lawrence is the Kansas Turnpike, which is a high-speed, high-capacity highway, maintained partially using Kansas' wholesale distributor motor fuel tax. Interstate Highway 35, also maintained with Kansas' motor fuel tax revenues, connects Wichita to Topeka. Thus, the reservation is accessible to most urban centers in Kansas by high-speed, high-volume highways maintained by taxes imposed and collected by Kansas. Kansas also maintains other roads providing access to the reservation, including from Manhattan and smaller, less urban areas. Kansas provides snow removal, law enforcement, and courts in connection therewith.

SUMMARY OF THE ARGUMENT

Kansas is correct that a tax imposed on non-Indian, off-reservation economic activity is controlled by *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Kansas' first receipt tax on wholesale distributors of motor fuel is not pre-empted unless Congress expressly exempts it, which it has not done. *Amici* also support the reasoned argument of Kansas that, if *Jones* does not control the balancing test set out in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and its progeny, should be abandoned in favor of a *per se*, bright-line rule

that does not pre-empt state taxation unless Congress has stated unequivocally its intention to do so.

If the *Colville* balancing test must be applied, however, the Tenth Circuit failed to do so, and circumvented *Colville's* requirement to accommodate State interests in raising revenues with Tribal interests in raising revenues by inventing unprecedented new tests for: (1) determining the on- and off-reservation value of motor fuel and comparing governmental services provided by the Tribe and State to the producers of that value; (2) comparing the governmental services provided by the Tribe and State to the on-reservation purchasers of that motor fuel; and (3) balancing the results of these determinations and comparisons. *Colville*, 480 U.S. at 156-57. In postulating these imaginative tests, the Tenth Circuit ignored or misunderstood *Colville's* holding and its reasoning. It then compounded this error by relying instead on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which is entirely inapposite, to hold incorrectly that the Tribe's motor fuel station and its casino are one and the same for the purpose of determining the value added by the reservation to motor fuel sold on-reservation.

The Tenth Circuit, ignoring *Colville*, grounded its analysis in the surprising proposition that the off-reservation value of motor fuel created by discovering, producing, transporting, refining, marketing, and distributing it to off-reservation wholesalers and from them to the Tribe, is lost once delivered to the Tribe, acquiring solely on-reservation value when it is purchased by persons traveling to the reservation to attend some

reservation attraction.[5] The Tenth Circuit concluded, without any explanation or reference to the record, that any product, purchased off-reservation and sold on-reservation, becomes integral and essential to the reservation attraction and thereby is invested with reservation value. Thus, the Tenth Circuit concluded that, because the motor fuel station is part of the casino, motor fuel delivered there is divested of all off-reservation value and is invested instead with the on-reservation value of the casino. The Tenth Circuit exacerbated this error by failing to compare the governmental services provided by the Tribe and Kansas to the producers of motor fuel value. As a result, the Tenth Circuit's ruling repudiates *Colville's* first prong, which requires a finding that any value added to the motor fuel by the Tribe was *de minimis*; that Kansas provided nearly all the governmental services to the producers of motor fuel value; and that Kansas' interest in this respect is overwhelmingly paramount.

The Tenth Circuit also failed to address the second prong of the *Colville* test – a comparison of the services provided to purchasers of the motor fuel by the Tribe and State. Rather, the Tenth Circuit merely observed in passing that, because motor fuel purchasers did not leave immediately after purchasing motor fuel, but stayed for some time to gamble, the Tribe provided services to them. However, the Tenth Circuit neither discussed the amount of such services, their nature, and how the Tribe's motor

[5] In this case, a tribally owned and operated casino was the attraction. Under this view of reservation value, any feature of the reservation or activities thereon that provides a reason to travel to the reservation, including the reservation itself, imparts solely reservation value to the motor fuel.

fuel sale profits contributed thereto, nor addressed the extent and nature of the services provided by Kansas and the relation of its tax thereto. Had the Tenth Circuit made the comparison required by *Colville*, it would have found that Kansas provided a highly disproportionate amount of services to those purchasers, which was related directly to and supported by the tax in question.

The Tenth Circuit ignored the third prong of *Colville* altogether and did not balance the comparisons of the first and second prongs. Thereupon the Tenth Circuit erroneously concluded that Kansas' tax was pre-empted by federal law.

If upheld, the Tenth Circuit's decision would allow Indian Tribes to enjoin all taxes imposed at every stage of the production of value in crude oil from its discovery to its sale to the Indian Tribe, simply because the purchase price of motor fuel paid by the Tribe included some part of these taxes, thereby reducing the profit of the Tribe from motor fuel sales. This result would destroy competition from non-Indian competitors, such as *amici*, would disrupt State tax administration, would interfere with the States' ability to raise revenue, and would create commercial chaos. This Court must, therefore, reverse the Tenth Circuit and hold the Kansas tax valid and enforceable.

ARGUMENT

I. THE TENTH CIRCUIT INVENTED AND APPLIED A PRE-EMPTION JURISPRUDENCE PREVIOUSLY UNKNOWN, WITH FAR-REACHING AND DISASTROUS CONSEQUENCES.

Amici agree with Kansas that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), controls because Kansas' motor fuel tax has no on-reservation aspect except an indirect economic impact. Congress must unequivocally state that such a tax is pre-empted. It has not so stated. *Amici* further agree with Kansas that, if the categorical rule set out above does not apply, the balancing test previously developed by this Court is too unpredictable and unreliable, leading to capricious and unreliable rulings, such as that of the Tenth Circuit here. Accordingly, *amici* adopt the reasoned analysis of Kansas on this point, requesting this Court to adopt this bright-line, categorical rule: "There is no federal pre-emption unless Congress unequivocally so states."

If a balancing test were applied correctly in this case the Tenth Circuit's decision would not be sustained. The Tenth Circuit reached its result by inventing a new concept of product value and a new test to adjudicate conflicts between Tribal and State sovereignty interests in raising revenue for essential governmental services. In doing so, the Tenth Circuit sought, unsuccessfully, to distinguish *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). However, the Tenth Circuit was plagued by a fundamental misconception of the holding and the reasoning of *Colville*.

A. *Colville* Requires An Accommodation Of Kansas' Interest In Raising Revenues To Support Essential State Services, Which Is Achieved By Comparing And Balancing Those Interests With Those Of The Tribe.

In *Colville*, federally licensed Indian Traders engaged in the on-reservation sale, predominantly to non-tribal members, of cigarettes supplied by several Washington Tribes.[6] The Tribes imposed a tax on cigarette purchasers, though the tax was imposed on the Trader in one case. This tax provided vitally needed revenues for the Tribes, which were expended for essential governmental services.

The State of Washington also imposed a tax on cigarette purchasers. Because the low sale price was the only reason purchasers journeyed to the reservation, if the Washington tax were collected, on-reservation cigarette purchases by non-tribal members would end, along with the main source of Tribal revenues for essential governmental services. The Tribes argued that, while both the Tribe and the State had an interest in taxing to raise revenue for essential governmental services, federal law supporting tribal self-determination and economic development pre-empted the State's interest. This Court rejected both arguments.

1. The State may tax on-reservation economic activity of non-tribal members irrespective of the economic impact on the Tribe.

Here, because the legal incidence of Kansas' tax is off-reservation and the ultimate burden falls primarily on

[6] Indian Trader Statutes: 25 U.S.C. §§ 261-264.

non-Indian purchasers of goods, and not on the Tribe or its members, "the [Tribe's] primary argument is economic." *Colville*, 447 U.S. at 154. Therefore, the categorical exemption from direct state taxation of Tribes or their members for on-reservation economic activity, formulated in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), does not apply. Thus, "there is no automatic bar" to a Kansas tax of on-reservation economic activity of non-Indians. *Id.* at 151. Indeed, Kansas could tax on-reservation economic activity of non-Indians, "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians," because "Tribes have no vested right in a certain volume of sales to non-Indians, or indeed any such sales at all." *Id.* at 151 and n. 27. Because Kansas' wholesale distributors motor fuel tax is on the off-reservation economic activity of non-Indians, the Tribe's economic argument may not prevail under *Colville*.

2. The Court must balance the interests of Tribes and States in raising revenue and determine, in the case of conflict, which interest predominates.

Colville recognized that both the Tribes and States have a critical interest in raising revenues for essential governmental services. Therefore, when a State tax of on-reservation economic activity of non-Indians has the indirect effect of reducing Tribal revenue, "[t]he principle of tribal self government, grounded in notions of inherent sovereignty and in congressional policies, [requires] accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 156. This accommodation is

achieved by the use of this Court's sliding scale, which measures and balances these interests:

> The Tribe's . . . interest in raising revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State['s] . . . legitimate governmental interest in raising revenues . . . is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-57.

Thus, when State taxes indirectly impact the price Tribes pay for motor fuel or charge on-reservation purchasers for motor fuel, a court must engage in three comparisons. First, the court must determine the extent to which the motor fuel's value, that is, its market price, is derived from off-reservation economic activity and the extent to which the value is derived from on-reservation activity, and then compare the amount of governmental services provided these activities by the Tribe and the State. Second, the court must compare the services provided by the Tribe to the retail motor fuel purchasers on whom the economic impact of the tax falls with the services provided to those purchasers by the State. Finally, the court must balance the results of these two comparisons, determining whether, overall, the Tribe's interest in raising revenues outweighs that of the State.[7] *Colville* 447

[7] The severity of the economic impact on the Tribe or the State is not part of the calculus.

U.S. at 156-157. Here, the balance overwhelmingly favors Kansas on all points.

B. The Tenth Circuit Invented A New Concept Of Product Value Inconsistent With This Court's Precedent.

1. Product value in *Colville* consists of the activities of businesses that add to the marketable price of a product.

The common understanding of product value is set forth by Merriam-Webster OnLine[8] as "the monetary worth of something: marketable price." Thus, to determine "reservation value" in an off-reservation product, such as motor fuel, the court must compare the value added to the purchase price by on-reservation activities with the value added by off-reservation activities. "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." *Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358, 362 (1991). Thus, "a business adds value by handling or processing these goods with its labor force, machinery, buildings and capital." *Id.* "Value added is a measure of actual business activity. . . ." *Id.* "[T]he sales price of a product is the total of all value added by each step of the production process to that point."[9] *Id.* One particular tax, the value-added tax (VAT), taxes each business' addition to

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[8] http://www.webster.com.

[9] "The value added to a loaf of bread . . . includes the contribution of the farmer, miller, baker, wholesaler and retailer." *Id.*

the product value.[10] "The logic of the VAT rests squarely on the benefits received principle of taxation – government services are essential to the operation of any business enterprise . . . and a part of these public service costs should properly be included in the cost of doing business." *Id.* at 364.

Understanding how value is added to a product and that the producers of that value receive governmental services that enhance that value clarifies why *Colville* placed such importance on determining where and how marketable price was created; the government that provides the bulk of the services to those who create marketable value should be favored heavily in determining which government's interest predominates and, hence, prevails.

The value of motor fuel at the Tribe's retail pump is the result of extensive effort and cost off-reservation, where nearly all value is added. Undiscovered crude oil has little value. It must be discovered, drilled, extracted, transported for refinement, refined, marketed, and transported to wholesalers and again to retail outlets. This entails extensive capital and labor expenditures at every stage of the process and corresponding utilization of State services, including roads. These investments all add to the product value of crude oil, which eventually becomes motor fuel sold by the Tribe. On the other hand, the Tribe adds *de minimis* value to the crude oil by selling it at the Tribe's pumps. The product value comparison of *Colville* tremendously favors Kansas.

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[10] While this is primarily a tax of European application, its theory is instructive here.

2. The Tenth Circuit misunderstood product value and ignored where it was contributed, relying only on why the product was purchased.

The Tenth Circuit invented its own concept of reservation-added value, vainly attempting to distinguish *Colville*. The Tenth Circuit held that, if the Tribe provided any activity that attracted non-Indian consumers, who then purchased motor fuel, then all off-reservation value added to the crude oil is divested instantly and is invested in the reservation instead. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 984-985 (10th Cir. 2004). This is not only a *non sequitor*, it fundamentally distorts the holding and reasoning of *Colville*.

The Tenth Circuit wrote that, "in stark contrast to the smokeshops in *Colville*, the [Tribe] is not marketing an exemption from state taxes," a factor considered "critical" by the Tenth Circuit to *Colville*. *Richards*, 379 F.3d at 985. However, the sale price of the cigarettes sold in *Colville* was irrelevant to this Court's on- off-reservation value analysis. *Colville's* reference to the marketing of the tax exemption on cigarettes was used to illustrate only the lack of services provided by the Tribe to purchasers who immediately left the reservation after purchase, which relates to the second, not the first, prong of its balancing test. Had the cigarettes been sold at market price, the result would have been the same – nearly all value is off-reservation because few services were provided by the

Tribe.[11] Why the purchaser is on the reservation is not relevant to *Colville*.

The Tenth Circuit, by judicial fiat, divested motor fuel of all off-reservation value and conferred it on the reservation, intoning merely that the Court "must look beyond the physical motor fuel . . . and [] *view* the . . . motor fuel sales as an *integral* and *essential* part of the [Tribe's] on-reservation gaming enterprise." *Richards*, 379 F.3d at 984 (emphasis added). The Tenth Circuit provided no explanation or support in the record for why it believed it must adopt this particular "view" of product value, nor did it provide any support for its decision to "view" the motor fuel station as "integral and essential" to the casino. It "viewed" the motor fuel station and the casino as one and the same simply because it was expedient to the outcome it wished to achieve.

Colville focused on the reservation-added value of the product itself, not the reason the purchaser was there. "The Washington tax . . . concerns [only] transactions in personalty with no substantial connection to the reservation lands." *Colville*, 447 U.S. at 156. Likewise here, motor fuel has no substantial connection to reservation lands. The Tenth Circuit is simply wrong factually in "viewing" the motor fuel station as an "integral and essential part" of the casino. There is nothing in the record supporting this finding or demonstrating that the casino would be affected

[11] For example, if a convenience store were located on-reservation just off-highway, convenience might dictate the purchase of cigarettes or motor fuel there, but the purchaser would immediately leave. The Tenth Circuit would hold that because the buyer was attracted by the convenience of the reservation store, the cigarettes had only reservation value. *Colville* is, however, to the contrary.

adversely by even the total absence of the motor fuel station. The opposite is true. A round trip to the casino from any major urban centers in Kansas can be made on one tank of gas. There are motor fuel outlets in Mayetta, Kansas, at the juncture of the Tribal road to the casino and Highway 75, from which motor fuel could be purchased conveniently. There are motor fuel stations along the route from Kansas urban centers. Thus, the motor fuel and the station from which it is dispensed is unnecessary to the success of the casino.[12]

The Tenth Circuit relied heavily upon *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to support its supposition that the motor fuel station and casino are one. *Cabazon* is inapposite. It did not involve State taxation's indirect economic impact on the Tribe or on purchasers of a product the Tribe purchased off-reservation and sold on-reservation. Rather, it involved only the attempted State regulation of the Tribe's gambling activities at its high stakes bingo hall. There is no indication in that case that any product purchased off-reservation and

[12] Indeed, the only reason to purchase motor fuel on the reservation, rather than the city of origin of the casino patron, or in Mayetta, Hoyt, or Dennison, Kansas (all located conveniently close to the reservation), is the perpetual two cents below competition price at which it is marketed, made possible by an exemption from state taxation. Contrary to the Tenth Circuit's holding, it appears that the Tribe is marketing its exemption from State taxation by remaining two cents below the competition. Moreover, the Tribe is free at any time to sell below the so-called "market price" so that motor fuel purchasers are attracted to the reservation by the tax exemption. This would lead to the anomalous and ironic result that off-reservation value, destroyed and re-vested in the Tribe by selling at market price, is restored suddenly by dropping that price. This absurdity demonstrates the illogic of the Tenth Circuit analysis. Litigation would occur every time the Tribe lowered the price of its motor fuel.

sold on-reservation was involved. Indeed, *Cabazon* found critical that "the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians," as is the case here! *Cabazon*, 480 U.S. at 219 (emphasis added). The on-reservation value of the bingo hall and the gambling activities was unrelated to off-reservation product sales. Like the casino here, the bingo hall was the result of tribal construction, maintenance, operation, and upkeep and provided gambling-related on-premises amenities, which contributed to an "attractive facility," "well run games," and "increase[d] attendance." *Id.* at 219. The motor fuel station does none of these things for the casino, nor did the Tenth Circuit explain or support its conclusion that it did. Casino patrons would be there even if the motor fuel station were not nearby.

Important to *Cabazon* was that the bingo hall resembled a "resort complex, featuring hunting and fishing that the Mescalero Apache Tribe operates on its reservation through concerted and sustained management of reservation land and wildlife resources." *Id.* at 220. This was a reference to *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983), which held: "This case is far removed from . . . situations such as on reservation sales outlets which market to nonmembers goods not manufactured by the Tribe or its members, in which the tribal contribution is *de minimis*." The motor fuel station here bears no resemblance to the bingo hall in *Cabazon* or the hunting and fishing facilities in *Mescalero Apache*.

Thus, the existence of a facility invested with strong, or even exclusively, on-reservation value that attracts people to the reservation does not lend its on-reservation

value to a product purchased off-reservation for sale on the reservation.[13] All the motor fuel's value is off-reservation. Kansas provides all the essential governmental services required by the producers of that value, including Kansas' extensive system of roads and highways funded by the tax in question, while the Tribe provides none. Therefore, the balance of interests in this first *Colville* factor favors Kansas.

C. The Tenth Circuit Failed To Compare The Provision Of Governmental Services To The Purchasers Of Motor Fuel By The Tribe And By Kansas.

The Tenth Circuit ignored the second prong of *Colville*, and did not compare services provided purchasers of motor fuel by the Tribe and by the State. The Tenth Circuit only noted in passing that purchasers "spend extended amounts of time using the entertainment services offered [by the Tribe]." *Richards*, 379 U.S. at 985. The Tenth Circuit neither discussed the nature of these "entertainment services," the extent thereof, and the

[13] *Accord, Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995) (State tax on purchasers of off-reservation goods sold at shopping mall, Scottsdale Pavilions, constructed by Tribe on-reservation and leased to various off-reservation retailers); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (State privilege tax on sale of tickets and concessionary items imposed on non-Indian operators in connection with on-reservation sporting and cultural activities in venues constructed at substantial expense by and owned by the Tribe); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *certiorari denied*, 522 U.S. 1076 (1998) (State business transaction and privilege tax on sales of food and beverages by non-Indian operators of restaurant and hotel constructed and owned on-reservation by the Tribe).

relationship of the Tribal motor fuel profits thereto, nor addressed what services were provided by Kansas and the relation thereto of its tax.

To compound its error, the Tenth Circuit failed altogether to address the third and last prong of *Colville*, that is, balancing the governmental services provided to off-reservation producers of value with the governmental services provided to the purchasers of motor fuel by the Tribe and Kansas, respectively.

To be sure, the Tribe provides "entertainment services" to motor fuel purchasers while they are on the reservation. The Tribes' profits from motor fuel sales, however, are not used to fund these "entertainment services" but are used only for roads, principally the one mile of road connecting the casino to State Highway 75. The Tribe's "entertainment services" are funded by other sources, such as casino revenues, which are not taxed or regulated by Kansas.[14]

The Tenth Circuit ignored that motor fuel purchasers spend practically all their time living, working, and recreating off-reservation, where Kansas provides all the essential governmental services. The Kansas tax is utilized for construction and maintenance of roads that are extensive, providing the means of access to work, shops, and entertainment, and are the only means of access to

[14] This case does differ from *Colville* in one respect. In *Colville*, cigarette taxes on Indian Traders provided nearly all the Tribe's revenue for essential governmental services, and the Tribe derived no profit from cigarette sales. Here, the Tribal profits from its motor fuel sales remain, though some "tax" revenue is lost. The primary sources of revenue for governmental services remain. The economic impact on the Tribe here is miniscule compared with that in *Colville*.

the reservation casino.[15] Without these roads, there would no casino.

Thus, though the Tribe provides some undefined "entertainment services" for a few days a year, Kansas provides governmental services for the remainder thereof. *Colville's* second prong decidedly favors Kansas. Because both the first two *Colville* factors overwhelmingly favor Kansas, the last, and determinative factor, balancing the first two factors, which was not performed by the Tenth Circuit, leaves no doubt that Kansas' tax is not preempted and does not interfere with Tribal sovereignty.[16]

D. The Tenth Circuit Ignored That The Significant Geographic Component Of Sovereignty Favors Kansas.

"There is a significant geographical component to tribal sovereignty[, which is] . . . highly relevant to the

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[15] Importantly, Kansas has represented that this tax also assists Kansas in providing maintenance of over 40 percent of reservation roads, excepting the connection from Highway 75 to the casino.

[16] Importantly, there exists no comprehensive federal legislation regulating Tribal sales of products produced and manufactured off-reservation, which leave no room for any additional State regulation, unlike that found critical in *Bracker*, 448 U.S. 136 (1980) (on-reservation timber management, cutting and sale); *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160 (1980) (Indian Trader Statutes, though these were not determinative in *Colville*, which may have overruled implicitly *Central Machinery*); or *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (on-reservation construction of educational facilities and education of tribal members). Furthermore "a congressional intent to preempt state taxation [cannot] be found in the Indian Reorganization Act, . . . the Indian Financing Act of 1973, . . . or the Indian Self Determination and Education Assistance Act of 1975." *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 183 (1989).

preemption inquiry. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, n. 18 (1983) ("Tribal sovereignty contains a significant geographic component."). This explains why the extent of the State's governmental services provided to the off-reservation producers of the value of a product sold on-reservation and the extent of such services provided off-reservation to the on-reservation motor fuel purchasers are so important in the pre-emption analysis.

Kansas is taxing solely off-reservation economic activity, that is, the receipt of motor fuel. It does not tax on-reservation delivery, sale, or purchase of that fuel. Thus, the "geographic component of sovereignty" favors the State in whose jurisdiction the taxable event occurred and the taxable parties reside – Kansas. That this off-reservation taxable activity may affect the Tribe's wholesale purchase price for motor fuel is irrelevant. The Tenth Circuit ignored the geographic component of sovereignty, though Kansas argued it with vigor. The geographic component of sovereignty strongly favors Kansas.

E. There Is No Tradition Of Tribal Sovereignty Involved In Sales Of Motor Fuel Purchased Off-Reservation.

"The goal of any pre-emption analysis is to determine the Congressional plan." *Rice v. Rehner*, 463 U.S. 713, 718 (1983). Thus, determining "whether federal legislation has pre-empted state taxation . . . is primarily an exercise in examining congressional intent." *Cotton Petroleum*, 490 U.S. at 176. In so doing, this Court has "employed a preemption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them."

Rice, 463 U.S. at 718. *Accord*, *Cotton Petroleum*, 490 U.S. at 176. The "tradition of Indian sovereignty" is employed only "as a 'backdrop' against which the applicable treaties and federal statutes must be read. . . ." *Rice*, at 719. Thus, courts must determine whether "that tradition [of Indian sovereignty] has [historically] recognized a sovereign immunity in favor of the Indians in some respect." *Id.* When the court does "not find such a tradition . . . [its] preemption analysis may accord less weight to the 'backdrop' of tribal sovereignty." *Id.* at 720. Therefore, a court must "first determine the nature of the 'backdrop' of tribal sovereignty. . . ." *Id.* "In the area of [motor fuel retail sales]" there are "no congressional enactments demonstrating a firm federal policy of promoting tribal self sufficiency and economic development." *Id.* at 724. Therefore, the "backdrop" of Tribal sovereignty must be given less weight and State sovereignty more weight. The Tenth Circuit did the opposite through its tortured reasoning, giving Tribal sovereignty dispositive weight.

F. If Upheld, The Tenth Circuit's Ruling Will Lead To Unmanageable And Unpredictable State Taxation, Commercial Chaos, And Endless Litigation.

The Tenth Circuit held that any State tax impacting the cost of a product sold, regardless of the off- or on-reservation incidence of the tax, may be enjoined by an Indian Tribe, its lessees or licensees if: (1) the tax results in a higher price paid, or a higher price charged the ultimate purchaser; (2) the Tribe possesses some on-reservation attraction that induces non-tribal members to travel to the reservation; and (3) the Tribe provides some "entertainment services" to those non-tribal members

while they are on the reservation. This achieves absurd results.

The key for the Tenth Circuit is an on-reservation attraction that serves as an inducement to non-Indians to travel to a reservation.[17] When such an attraction exists, any off-reservation products sold on-reservation may not include in the price charged to the Tribe, or in the price charged by the Tribe to its purchasers, any State taxes.

The price of motor fuel includes some portion of all the taxes imposed on various aspects of its discovery, production, transportation, refinement, distribution, marketing, storage, and wholesale sale.[18] Thus, the imposition of all these taxes could be enjoined insofar as they impact the price charged to or by the Tribe. The Tenth Circuit's reasoning provides no basis to exclude taxes imposed by other States from Tribal injunction. Often, much of the economic activity that produces off-reservation value occurs in other States. Thus, the Tribe could proceed to enjoin Louisiana's severance tax, imposed on motor fuel that is purchased directly by the Tribe in Kansas, and to enjoin every other tax in multiple States that is imposed from exploratory drilling to arrival at the reservation. The administration of such a system is impossible.

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[17] This attraction could be the physical features or the history of the reservation; entertainment, historical or cultural activities conducted or provided by the Tribe; hunting or fishing; or, as here, a gambling facility.

[18] Such taxes may include but are not limited to severance taxes, vehicle licensing taxes, commercial vehicle taxes, road/mile taxes, excise taxes, use taxes, sales taxes, gross receipts taxes, income taxes, and business privilege taxes.

Under such circumstances, the Tribe could sell, not just motor fuel, but all manner of goods, all free from all State taxes that involve addition of value to the products. The Tribes' profit margins would be phenomenal. These goods could be priced at below market, as the Tribal motor fuel is. This would lead to continuing litigation over whether the discount prices were the draw for persons coming to the reservation. Consumer research has demonstrated that consumers will shift the outlet they use to purchase motor fuel based on price differentials of one to two cents per gallon. Energy Analysts International, *The Convenience Store Industry vs. Hypermarkets: Strategies for Competition*, 15-1 (2002). At best, this will put the courts in the position of determining the primary motivations for consumer behavior even when price differentials seem to be small.[19] At worst, this will be a prescription for institutionalizing permanent, determinative price advantages for on-reservation retailers. This is a grim prospect for *amici*, many of whose members have been impacted seriously or whose businesses have been closed by the non-uniform, discriminatory method of taxation that exempts Tribes and allows them to sell products below market price.

This is particularly problematic today. Tribes near urban centers, like the Prairie Band of the Potawatomi, have benefited from extensive commercial development on reservation lands, including casinos. Funds derived from these ventures are utilized often to acquire additional

[19] For example, what if the attraction and the product price each accounts for 50 percent of the inducement? How could one determine the facts without extensive scientific surveying of patrons? This demonstrates the irrationality of the Tenth Circuit's holding.

lands, put those lands into trust, and then engage in further commercial activities there. These activities are generally free from State taxation, giving Tribes tremendous competitive advantages. Many Tribes are becoming formidable commercial enterprises, largely because of the federal protections afforded them. The result has been the shrinking of local tax bases for States and their political subdivisions and unfair, often ruinous, competition. The need for the federal government's paternalistic protection and its concept of dependent sovereignty has changed considerably over the last 20 years. Under such circumstances, it is difficult to disagree with Justice Stevens that "the doctrine of sovereign immunity is founded upon an anachronistic fiction." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (Stevens, J. concurring).

This Court should reverse the Tenth Circuit's decision, which demonstrates a highly paternalistic and unsupportable view of Tribal sovereignty at the expense of, and without any consideration of, the sovereignty of the States of this Federal Republic.

CONCLUSION

The Tenth Circuit's ruling should be reversed and the Kansas tax declared valid and enforceable.

Respectfully submitted,

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