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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit, consistent with decisions of other courts, including this Court, properly applied *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the state fuel tax under review predominately relates to "on-reservation" activity.

2. Whether the well-established analytical framework of *White Mountain Apache*, which courts, including this Court, have consistently applied for over two decades, should be overruled.

3. Whether the Tenth Circuit's fact-specific application of the *White Mountain Apache* framework, which carefully assessed all relevant factors in light of the unique facts of this case, should be disturbed.

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BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied. The Tenth Circuit held that, pursuant to the well-established standards set forth by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), a Kansas fuel tax assessed on gas delivered to a single gas station operated by respondent Prairie Band Potawatomi Nation on its reservation is preempted. Assessing the "unique facts of this case," Pet. App. 7a, the Tenth Circuit relied principally on the "close nexus between the Nation's fuel sales and its gaming enterprise," *id.* at 8a and the fact that the Nation's fuel sales are "an integral and essential part of the Nation's on-reservation gaming enterprise," *id.* at 7a. In so ruling, the Tenth Circuit recognized a narrow sphere of preemption where, as here, a state tax is imposed on fuel delivered to a Tribe for sale at market prices on its reservation by an integral part of a tribal gaming enterprise that is regulated under federal law. The Tenth Circuit properly applied this Court's precedent to the specific and unique facts of this case, and the State's request for error correction should be denied.

The State attempts to manufacture a basis for this Court's review, claiming a conflict in the lower courts concerning whether *White Mountain Apache* or *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("*Mescalero*"), applies to "off-reservation" conduct. But even assuming such a conflict, it is not presented by this case. This case falls within the narrow range of cases in which the conduct that the State seeks to regulate has an off-reservation aspect, but at its core concerns on-reservation activity. In that situation, the courts of appeals and state supreme courts have uniformly determined that the *White Mountain Apache* analysis applies. Indeed, the Ninth Circuit – cited by petitioner as allegedly in

conflict with the decision below – *shares* the Tenth Circuit's judgment that certain activities are considered "on-reservation" for the purpose of triggering *White Mountain Apache*, even if some significant off-reservation conduct is involved. This Court as well has rejected the notion that the presence of even substantial off-reservation conduct inevitably precludes reliance on the balancing test set forth in *White Mountain Apache*. Thus, the Tenth Circuit's application of *White Mountain Apache* rather than *Mescalero* to a state tax that, although it has off-reservation components, principally involves and burdens on-reservation activity, is fully consistent with the decisions of this Court.

Lacking any true conflict concerning the applicability of *White Mountain Apache*, petitioner is left to make a meritless plea for overturning that decision on the ground that a bright line rather than a balancing test is most appropriate. But petitioner merely rehashes arguments that have been rejected by this Court on numerous occasions. Indeed, since *White Mountain Apache* and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"), were decided nearly 25 years ago, this Court (and the lower courts) have regularly applied a balancing analysis to States' evolving attempts to regulate activities affecting Indian tribes, recognizing that "particularized examination[s] of the relevant state, federal and tribal interests," rather than "'mechanical or absolute conceptions of state or tribal sovereignty'" are best suited to this area of the law. *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982) (quoting *White Mountain Apache*, 448 U.S. at 145); *see, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) ("*Chickasaw*") (describing the balancing inquiry applicable where "the legal incidence of the tax rests on non-Indians").

It is thus unsurprising that petitioner has completely failed to substantiate its claims of "chaos" allegedly caused by the *White Mountain Apache* framework. Pet. at 18. Indeed, if anything, it is the States' continually evolving efforts to avoid preemption – and not any inherent flaw in *White Mountain Apache* – that has generated litigation about the meaning of that framework. Because *White Mountain Apache* provides a well-established analytic structure to account for the varying state, federal, and tribal interests that are at stake in any particular preemption analysis, it is – and should remain – good law.

STATEMENT OF THE CASE

A. Factual Background

1. Respondent Prairie Band Potawatomi Nation ("Tribe" or "Nation") is a federally recognized Indian tribe whose sizeable 121-square-mile reservation is located in a remote and rural area of Jackson County, Kansas. On this reservation, the Nation constructed a casino complex, which it now owns and operates under the regulation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. The casino is linked to the state highway system by means of a two-mile access road that leads from United States Highway 75 (the main road leading to the reservation) to the Nation's casino. The Tribe has assumed exclusive responsibility for maintaining this access road, and Kansas does not contribute funds to cover these maintenance costs.

The tribally owned-and-operated gas station and convenience store ("Nation Station") at issue here is an integral part of the Tribe's casino enterprise. The Tribe financed and built the Nation Station on the access road on the reservation shortly after the casino was built, principally to service the influx of casino patrons who otherwise would

not travel to this remote and rural area, as well as other casino- and reservation-related traffic. The Nation Station sells its fuel at fair market prices and does not advertise an exemption from state fuel taxes. For this reason, it is undisputed that the Nation Station's existence is not based upon "'marketing a tax exemption.'" Pet. App. 4a.

Rather, as the undisputed testimony in the record confirmed, the Nation Station's "'value marketed'" derives from "'the business generated by the casino and from employees of the casino and [the Nation's] government and residents.'" Pet. App. 3a. Indeed, 73% of the Nation Station's fuel customers are casino patrons and employees, and another 11% otherwise live or work on the reservation. As the record makes clear, the Nation Station is a location-dependent business integral to the casino, without which "'there would not be enough traffic to support [it] in its current location.'" *Id.*

By the same token, the Nation Station is an integral part of the Tribe's governmental system of tribal taxation. The Tribe imposes a tribal tax on retailers of motor fuel of 16 cents per gallon for gasoline and 18 cents per gallon for diesel (increased in January 2003 to 20 cents for gasoline and 22 cents for diesel). Under the Nation's tax code, all of this revenue pays for the construction, maintenance, and improvement of roads, bridges, and rights-of-way on or near the reservation, including the casino access road. The Nation Station is the sole source of the Tribe's fuel tax revenue, which is roughly $300,000 per year. Since the casino was built, the Nation has committed substantial resources to the construction and maintenance of the roads to the casino. For example, in 1997 and 1998, the Nation spent approximately $1.2 million to improve and pave the casino access road and make improvements to the road's intersection with Highway

75, and the Nation has committed to funding further improvements to this access road and intersection. In contrast, Kansas does not contribute funds to cover the costs of maintaining this access road to the reservation and casino.

2. Prior to 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands, because Kansas law placed the legal incidence of the tax on fuel retailers (such as the Nation Station), and not on fuel distributors. Pet. App. 25a. In 1995, Kansas amended its Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997), in order to place the legal incidence of the tax on fuel distributors. *See* Kan. Stat. Ann. § 79-3408(b). Two aspects of the tax are particularly relevant.

First, the Kansas tax operates with substantial exemptions that condition liability upon the place and manner of ultimate use. For example, the statute exempts fuel distributed from Kansas "to any other state or territory or to any foreign country," under Kan. Stat. Ann. § 79-3408(d)(1), it exempts fuel sold from one distributor to another under Kan. Stat. Ann. § 79-3408(d)(5), and it exempts fuel sold or delivered to the United States, its agencies, and its contractors under Kan. Stat. Ann. § 79-3408(d)(2), (3). Thus, whether the tax is owed and collected by the State depends entirely on where and to whom the fuel is distributed for retail sale. For instance, if it is distributed to a retailer in neighboring Oklahoma, then no tax is due.

Second, the amended statute acknowledges that distributors inevitably will pass on the cost of the tax in their wholesale price to the retailer – here, the Nation Station. *See* Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment *shall be entitled* to charge and collect an amount, including the cost of doing business

that could include such tax on motor-vehicle fuels . . . sold or delivered by such distributor, as a part of the selling price.") (emphasis added); *Sac and Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 579 (10th Cir. 2000) ("*Sac and Fox*").

3. The adverse impact of the Kansas tax on the Tribe and its government is undeniable. It is undisputed that it is impossible for the Nation to impose its tax on the Nation Station in addition to the state tax. Indeed, the combination of the state and tribal fuel taxes would result in an extraordinarily high tax burden twice that of the Nation Station's competitors for a product with a highly elastic demand curve. As the Nation's expert explained, in testimony accepted by the courts below, "'the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero.'" Pet. App. 12a. Thus, the state tax would deprive the Nation of virtually all of its tribal fuel tax revenues used by its government to fund road projects necessary for its casino and reservation. In contrast, Kansas' potential fuel tax revenues from the Nation Station represent only 0.09% of the state motor fuel taxes collected in 1999, and only a trivial portion of the State's overall tax revenues. Brief for Appellee at 16 (10th Cir. filed Oct. 22, 2003).

B. The District Court Proceedings

The Nation brought suit in the United States District Court for the District of Kansas, seeking to enjoin the State from collecting motor fuel tax for fuel delivered to the Nation Station. The Nation claimed principally that the state tax was prohibited both because it was preempted by federal law and because it infringed upon the Tribe's right to self-

government. Petitioner moved for summary judgment, disputing these contentions.[1]

The district court granted summary judgment to petitioner. With respect to the issues presented here, the district court's analysis proceeded from the assumption that the Kansas tax implicated "transactions occurring *on reservation land*." Pet. App. 44a (emphasis added). As the court properly recognized, in such circumstances, under *White Mountain Apache*, two separate but distinct doctrines can pose a barrier to the assertion of state taxation: "federal preemption and tribal rights to self-government." *Id.* The court then analyzed the Nation's challenge under both doctrines and upheld the validity of the state tax.

C. The Tenth Circuit's Decision

The Tenth Circuit reversed. Applying the balancing test set forth in *White Mountain Apache*, the court of appeals concluded that "under these particular facts," the Kansas tax "interferes with and is incompatible with strong tribal and federal interests against taxation." Pet. App. 14a.

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[1] The State also asserted (among other things) that the Hayden-Cartwright Act, 4 U.S.C. § 104, explicitly authorizes the State's taxation of fuel distributed to on-reservation Indians. The district court rejected that contention. Pet. App. 43a-44a. The State neither appealed that determination, nor raised it in its petition before this Court. The Hayden-Cartwright issue is presented by another petition currently under review by the Court. *See Hammond v. Coeur d'Alene Tribe of Idaho*, No. 04-624 (U.S. filed Nov. 5, 2004). Because there is no longer a Hayden-Cartwright issue in the instant case, and because the only other issue in *Hammond* – legal incidence of a fuel tax – is not disputed here, the resolution of *Hammond* has no bearing on the instant petition.

Driving the Tenth Circuit's analysis was that the tax, although nominally involving off-reservation "distribution," was intimately connected with *on-reservation* tribal activity. Thus, it was appropriate on "the unique facts of this case" to "view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 7a. Indeed, the Tenth Circuit deemed "critical" to its analysis the "close nexus between the Nation's fuel sales and its gaming enterprise," explaining that "the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides." *Id.* at 8a.

The Tenth Circuit thus viewed the Nation's interests in avoiding the tax to be "particularly strong," a conclusion that flowed from this Court's decision in *Colville*, which held that a Tribe's interest is the strongest for revenues "'derived from value generated on the reservation by activities involving the Tribes.'" Pet. App. 7a (quoting *Colville*, 447 U.S. at 156-57).[2] The Tenth Circuit was careful to distinguish the "unique" situation before it from the situation involving a stand-alone gas station deriving business from marketing a state tax exemption. For those stations, the court of appeals made clear that it "would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians." Pet. App. 8a. Indeed, in *Sac and Fox*, a case involving the application of this exact Kansas tax to other Kansas Tribes, the Tenth Circuit found insufficient

[2] Notably, petitioner has conceded that under *Colville*, "State taxes generally may not be imposed on non-Indians where revenues burdened by the tax are derived from 'value generated on the reservation by activities' in which [Indians] have a significant interest." Brief for Appellee at 48 (10th Cir. filed Oct. 22, 2003).

evidence that the state tax burdened commerce derived from value generated on Indian lands. *Sac and Fox*, 213 F.3d at 583-85.[3]

The Tenth Circuit also emphasized that, unlike the situation in *Sac and Fox* and *Colville*, the Nation's "fuel market does not exist because of a claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities." Pet. App. 8a-9a. Indeed, the Nation Station sells fuel at fair market prices and 73% of its customers are casino patrons and employees. *Id.* at 3a-4a. Thus, just as in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ("*Cabazon*"), these customers "spend extended amounts of time using the entertainment services offered by the Nation," and are not simply lured to the reservation by low prices. Pet. App. 11a.

The Tenth Circuit also correctly recognized that the Nation's interests are further strengthened because the Nation Station represents the Nation's only source of fuel tax revenue, which is used to maintain the reservation's roads and infrastructure, including "to provide better access from the main federal highway to its casino." Pet. App. 11a-12a. The record reflects the Nation's documented use of the fuel revenue to improve the roads surrounding the casino area, whereas "Kansas does not contribute funds to cover the costs of maintaining this access road." *Id.* at 12a. Furthermore, the Court stressed that it was undisputed that it would not be "economically feasible" for both the Nation and the State to impose taxes with respect to the Nation Station's fuel, and thus, if the State's tax were permitted, the Nation would

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[3] The Tenth Circuit ordered a narrow remand in *Sac and Fox*, and the case was thereafter voluntarily dismissed, preserving the application of the Kansas fuel tax at issue there.

unequivocally lose its fuel tax revenue used to fund tribal government services for the casino operation and its customers. *Id.*

Finally, the Tenth Circuit determined that the Nation's interests are directly aligned with the "strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal government," as embodied in the specific federal statutes under which the casino is federally regulated, as well as numerous other legislative, executive and judicial sources. Pet. App. 12a-13a. In contrast, the Tenth Circuit recognized that the State's generalized interest in raising revenue is particularly weak where, as here, the tax is directed at value generated on the reservation and the State does not provide financial assistance to the Nation for the upkeep of the surrounding roads. Accordingly, the court of appeals ruled the Kansas tax invalid "as it applies to the Nation's fuel." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's consideration. Petitioner's principal contention is that the decision below creates a split of authority as to whether taxation of "off-reservation" conduct of non-Indians is properly evaluated under the framework articulated in *White Mountain Apache*, which requires courts to balance federal, state, and tribal interests to determine whether state regulations affecting Indians are preempted by federal law, or the framework articulated in *Mescalero*, which held that States may generally regulate off-reservation conduct of Indians, absent express preemption by Congress. According to petitioner, the Tenth Circuit mistakenly applies the *White Mountain Apache* analysis to taxation of off-reservation

activities of non-Indians, in alleged conflict with decisions of other circuits.

Whatever the merits of petitioner's contentions as an abstract matter, the dispositive fact here is that the issue petitioner raises is not presented by this case, because this is not a case involving entirely off-reservation conduct. To the contrary, although the non-Indian conduct at issue (distribution of fuel) has an off-reservation aspect (the location of the fuel distributor), it overwhelmingly concerns on-reservation activity, in at least three important senses.

First, the motor fuel tax at issue principally concerns the on-reservation delivery and use of fuel, and the passing on of the fuel tax burden to the on-reservation Nation Station from the distributor, *see* Kan. Stat. Ann. § 79-3409. Indeed, under the Kansas fuel tax statute, whether the state fuel tax is ultimately imposed on a distributor is completely dependant upon the location and identity of the retailer to whom the fuel is sold. *See* Kan. Stat. Ann. § 79-3408(d). Thus, it is not until the fuel is delivered to the Indian retailer in Kansas that the distributor's tax liability is finally determined, because it is only then that the distributor can be sure that none of the statutory exceptions apply. *See id.* This statutory structure, which exempts categories of fuel less likely to be used for travel on state roads, reflects the unique nature of motor fuel taxes, which generally are designed not for general revenue collection, but rather for funding the upkeep of state roads – an interest of less importance to the state where, as here, the fuel is delivered on-reservation for sale there.[4]

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[4] As Kansas and other states previously have stated to this Court: "State motor fuel taxation is unusual for at least one important

Second, the fuel's ultimate use is for on-reservation sales – largely to patrons and employees of the Tribe's gaming enterprise (and to other reservation residents) – and the tribal tax revenues from the Nation Station flow directly to the reservation roads that serve the casino and its customers. As the Tenth Circuit found, the Nation Station's fuel sales are thus "an integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 7a.

Third (and related), the Tribe is *not* marketing a tax exemption, but is instead selling the gas at market prices. It is thus the on-reservation value of the casino enterprise, and not any tax exemption, that is generating the value provided by the Nation Station's fuel sales.

Thus, the Tenth Circuit did not, as petitioner claims, apply *White Mountain Apache* to off-reservation conduct.

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reason: The resulting revenue typically is devoted to expenditure for the construction, maintenance, and repair of highways, roads, other transportation-related infrastructure, and associated administrative responsibilities. The exaction thus facilitates the very activity to which the tax relates, namely the operation of motor vehicles." Brief *Amicus Curiae* of the States of Idaho *et al.*, *South Dakota Dep't of Revenue v. Pourier*, (U.S. filed May 10, 2004) (No. 03-1401), *cert. denied* 124 S. Ct. 2400 (2004). The Kansas motor fuel tax statute makes clear the tax's narrow purpose "of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways, including the payment of bonds heretofore issued for highways included in the state system of the state, and the cost and expenses of the director of taxation and the director's agents and employees incurred in administration and enforcement of this act and for no other purpose whatever." Kan. Stat. Ann. § 79-3402.

Rather, despite the presence of some off-reservation activity, the motor fuel tax as applied to the Nation Station involved principally *on-reservation* activity. Pet. App. 44a. In such a situation, this Court has repeatedly held that the balancing analysis of *White Mountain Apache* applies. *Infra* at 17-18.

The core of petitioner's challenge is thus the Tenth Circuit's fact-bound conclusion that this case is properly viewed as an "on-reservation" case. As noted, however, in light of the peculiarities of the motor fuel tax at issue, the unique relationship between the Nation Station and the casino, and the absence of any marketing of a tax exemption, the facts presented provide no basis to disturb the determination of the courts below that this case is properly an on-reservation case to which *White Mountain Apache* applies. In any event, such a request for error correction is not an issue worthy of this Court's review.[5]

2. The absence of any issue worthy of review is further made plain by the fact that other courts – including those cited by petitioner as allegedly creating a conflict here – have similarly applied *White Mountain Apache* to on-reservation activities that nevertheless have a significant off-

[5] Not only do the statute's numerous tax exemptions based on identity of the retailer justify treating this case as an "on-reservation" case for the purpose of *White Mountain Apache*, but these same exemptions demonstrate the discriminatory nature of the statute. Because the Kansas tax discriminates against the Nation, as compared to other similarly situated entities, it must be struck down, even if the *Mescalero* "off-reservation" analysis applies. *See Mescalero*, 411 U.S. at 148-49. Because the courts below concluded that the tax at issue is "on-reservation," they have not ruled on this discrimination issue, and most certainly have not, as petitioner states, Pet. at 5, concluded that the tax is nondiscriminatory.

reservation aspect. For example, petitioner claims that the Tenth Circuit's opinion directly conflicts with *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994) (per curiam). There, the Indian tribe filed suit in an off-reservation company's bankruptcy proceedings, claiming that the tribe's entitlement to certain timber proceeds derived from the company's on-reservation logging operation was superior to an entitlement to the same proceeds claimed by an off-reservation bank. *Id.* at 1139-40. The Ninth Circuit recognized that the case "implicates an off-reservation relationship between two non-Indian actors (Blue Lake and the bank)." *Id.* at 1141. Nevertheless, the Ninth Circuit "deem[ed] it an on-reservation case for purposes of preemption" because "the essential conduct at issue occurred on the reservation: the severance of timber and its removal without proper compensation." *Id.* As the Ninth Circuit explained, in reasoning directly applicable to the instant case: "the Indian enterprise at the heart of this dispute – the timbering lands – is located on, not off, the reservation." *Id.* (contrasting *Mescalero*). Consistent with the Tenth Circuit's decision here, the Ninth Circuit thus applied the *White Mountain Apache* balancing test.[6]

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[6] In the other Ninth Circuit case cited by petitioner, *Blunk v. Arizona Department of Transportation*, 177 F.3d 879 (9th Cir. 1999), the Court concluded that the *White Mountain Apache* analysis did not apply, because the Indian billboards that the State sought to regulate were located completely outside of Indian country. *Id.* at 882-84. The dispute in *Blunk* concerned whether the land at issue constituted Indian country, and no argument was made that – assuming the billboards were off-reservation – the core of the conduct regulated was, as here, on-reservation. Rather, because the billboards were located entirely outside of Indian country, they were identical to the completely off-reservation ski

Like the Ninth and Tenth Circuits, other courts have reached similar conclusions regarding state attempts to regulate core on-reservation conduct even when it has a significant off-reservation aspect. In *People v. McCovey*, 685 P.2d 687 (Cal. 1984) (en banc), for example, the California Supreme Court applied *White Mountain Apache* and concluded that California was preempted from regulating the *off-reservation* sale of fish by Indians. *See id.* at 697. The Court distinguished *Mescalero*, because "the Indian activity in [*Mescalero*] occurred entirely off the reservation, while this case involves on-reservation fishing followed by an off-reservation sale." *Id.*; *cf. Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662, 667-69 (Utah 1995) (applying *White Mountain Apache* and distinguishing *Mescalero*, in concluding that Utah was preempted from taxing the income of a tribal member providing on-reservation mental health services, notwithstanding that the tribal member "participates in administrative and training activities off the Reservation").

The other cases cited by petitioner similarly create no conflict. *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), for example, has nothing to do with the issues presented here. That case concerned whether certain property constituted Indian country, so as to exempt it from the State's zoning regulations. Although the First Circuit noted, as an introduction to its Indian country analysis, that the "Indian country label bears real significance" with respect to the State's authority to regulate, the case did not involve a preemption analysis, and the Court cited neither *White*

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resort in *Mescalero*. The Tenth Circuit's decision below is thus entirely consistent with *Blunk*.

Mountain Apache nor *Mescalero* in its brief discussion of the significance of Indian country. *Id.* at 914-15. Accordingly, the Court had no occasion to – and did not – address the question presented by petitioner concerning the scope of *White Mountain Apache*'s applicability.

Similarly, the Supreme Court of New Mexico case cited by petitioner, *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation & Revenue*, 759 P.2d 186 (N.M. 1988), creates no conflict with the Tenth Circuit. In that case, the Supreme Court of New Mexico made the uncontroversial observation that the *White Mountain Apache* analysis "does not apply to activities of non-Indians occurring off Indian reservations," in the course of determining that the State was not preempted from taxing an attorney's off-reservation legal services. *Id.* at 187. However, it was undisputed that all of the conduct at issue took place off-reservation, *see id.* at 188, and thus the court had no occasion to assess whether *White Mountain Apache* applies where the core conduct occurs on the reservation, notwithstanding important off-reservation aspects.[7]

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[7] Although there is no conflict with the New Mexico Supreme Court's decision in *Rodey*, the New Mexico *Court of Appeals* subsequently applied *Rodey* in a manner that seems inconsistent with the Tenth Circuit's decision in this case. *See Ramah Navajo School Board, Inc. v. New Mexico Taxation & Revenue Department*, 977 P.2d 1021, 1029 (N.M. Ct. App. 1999). The *Ramah* decision provides no basis for a grant of certiorari, however, as it is not a decision of a "state court of last resort." S. Ct. R. 10. Moreover, even in *Ramah*, the court of appeals *invalidated* the fuel tax at issue, applying a broad reading of express preemption and invalidating the tax in large part because of its connection to on-reservation projects. 977 P.2d at 1032-34. Thus, although purporting to apply the stricter *Mescalero* standard,

3. The Tenth Circuit's approach (like that of the Ninth Circuit and other courts discussed above) also conforms with this Court's precedent. Even after *Mescalero*, this Court has not required express preemption in all cases that have off-reservation aspects. For example, in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), the Court rejected the State's claim that the case be treated as an off-reservation case, simply because the non-Indian trader whom the State sought to tax "did not maintain a permanent place of business on the reservation." *Id.* at 165. Rather, despite the off-reservation nature of the trader's business, the Court treated the case as on-reservation, because the core conduct at issue was the trader's sale of goods to on-reservation Indians. *Id.*

Similarly, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), the Court applied the *White Mountain Apache* analysis to a gross receipts tax imposed on a non-Indian that did business throughout the State, recognizing that a balancing test was appropriate at least insofar as the tax applied to construction projects on the reservation. *Id.* at 837-39. Indeed, the Court did so despite the express contention that the case was distinguishable from *White Mountain Apache* because the contractor in *White Mountain Apache* "conducted no off-reservation activities whatsoever," while "[t]he contractor in this case is a general building contractor doing business throughout the State of New Mexico, and enjoying state services to the same extent as any other commercial enterprise in New Mexico." *Id.* at 852 n.3 (Rehnquist, then-

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the New Mexico Court of Appeals reached the same result as the Tenth Circuit did here, relying on many of the same factors that the Tenth Circuit found relevant.

J., dissenting). In short, the Court's precedent simply does not support the extreme rule suggested by petitioner – that some off-reservation activity, regardless of otherwise substantial on-reservation activity – precludes application of *White Mountain Apache*. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) (treating challenge to state motor vehicle tax as on-reservation case, despite the fact that tribal members living on allotments "likely use their cars more frequently on state land and less frequently within Indian country than tribal members who live on established reservations").

Like the Tenth Circuit, this Court has recognized the need for careful analysis where state regulation impacts tribes' long-recognized right to self-government and federal policies encouraging Indian economic development. *See, e.g.*, *Cabazon*, 480 U.S. at 215 n.17 (1987) ("We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak"). In particular, this Court has disallowed States from avoiding preemption by labeling as off-reservation activity what is truly on-reservation activity. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac and Fox*, 508 U.S. at 127-28 ("Oklahoma may not avoid our precedent by avoiding the name 'personal property tax' here any more than Washington could in *Colville*"); *Central Machinery*, 448 U.S. at 164 n.3 (explaining that "regardless of the label placed on this tax, its imposition as to on-reservation sales to Indians could" undermine federal policy). Accordingly, applying *White Mountain Apache* in this case is entirely consistent with this Court's precedent.

4. Petitioners' remaining efforts to manufacture a relevant split of authority fare no better. Petitioner suggests, for example, that the Tenth Circuit has effectively held that

whenever a tax imposes an "indirect economic effect" on a Tribe it is "void," Pet. at 14-15, and that the imposition of a "transient economic burden" on a Tribe is "sufficient to preempt the State tax," *id.* at 17. To the contrary, that is the precise position that the Tenth Circuit *rejected*. Citing its previous decision in *Sac and Fox*, the Tenth Circuit stated that it "would *not* invalidate a tax solely on the ground that it would decrease tribal sales to non-Indians." Pet. App. 8a (emphasis added). Indeed, *Sac and Fox* makes that crystal clear, because there, the Tenth Circuit *rejected* the Tribes' argument that the reduction in tribal revenues from the imposition of the tax was sufficient to overcome the State's interests. *See* 213 F.3d at 584-85.

Petitioner and its *amicus* also fire off an array of policy arguments for why the Tenth Circuit was wrong to "expand[] *White Mountain Apache* to the present context." Pet. at 8-9. As explained above, however, the Tenth Circuit's decision and decisions like it are not an expansion of *White Mountain Apache*, but an application of that case and other precedent of this Court. Indeed, petitioner's policy arguments have nothing to do with this particular case, but rather are part of petitioner's meritless broadside on *White Mountain Apache*. *Infra* at 22-24.

Contrary to petitioner's speculation, there is simply no reason to believe that courts will begin applying *White Mountain Apache* to any and all upstream suppliers of products to Indians. Rather it is only where the particular tax is effectively consummated upon reservation delivery and is integrally related to and burdens on-reservation Tribal activity that the *White Mountain Apache* analysis applies. Indeed, the motor fuel tax at issue here is *unlike* most taxes on upstream suppliers. *First*, state motor fuel taxes are unique because they are generally collected for the sole

purpose of maintaining the roads and not for raising general revenue, *see* Kan. Stat. Ann. § 79-3402, and thus where, as here, the fuel is distributed on-reservation for on-reservation sale, the asserted state interest in taxation is weaker. The same may not be true, of course, of a tax that raises general fund revenues. *Second*, and related, under the Kansas statute at issue, whether the distributor must pay the motor fuel tax depends entirely on the ultimate destination of the fuel. *See* Kan. Stat. Ann. § 79-3408(d). Accordingly, the on-reservation destination of the fuel in this case is critical to determining whether the tax applies. Indeed, the tax design at issue here – which reflects that motor fuel taxes are generally targeted toward in-state consumption – is distinguishable from other taxes that apply to off-reservation upstream suppliers.

If anything, policy arguments based on the facts of this case counsel strongly in favor of the Tenth Circuit's decision. A basic purpose of the "Indian preemption" jurisprudence is to protect value generated on Indian reservations from undue infringement by States.[8] Here, as found by the courts below, Kansas seeks to tax commerce in "fuel which, under the particular circumstances of this case, is derived primarily from value generated on the

[8] *See, e.g.*, *Cabazon*, 480 U.S. at 219 ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) (preempting a state law where the state regulation "would also threaten Congress' overriding objective of encouraging tribal self-government and economic development," by interfering with activities "generat[ing] funds for essential tribal services and provid[ing] employment for members who reside on the reservation").

reservation." Pet. App. 13a. Further, the Nation uses the fuel tax from the Nation Station – "the Nation's only source of fuel revenue" – exclusively for the upkeep of reservation roads for which "Kansas does not provide any financial assistance." *Id.* Nonetheless, Kansas has gone out of its way to attempt to evade preemption by shifting its tax to the fuel distributors, knowing that this tax would be passed on to the Nation, burden its on-reservation enterprise, and preclude the Nation from obtaining vital fuel tax revenues. What Kansas seeks to do is directly analogous to the Indian conduct *disallowed* in *Colville*, in which the Court prohibited the tribe from "marketing" its tax exemption – that is, collecting taxes that otherwise would have been collected by the State, without providing any Indian-generated value. *Colville*, 447 U.S. at 155. Similarly here, Kansas seeks to burden revenues from what is principally on-reservation activity without providing any corresponding value to the burdened activity. Pet. App. 13a-14a.[9]

[9] The State is wrong to suggest that the Tenth Circuit's decision deprives the State of money that it is due for maintaining the roads. Pet. at 8-9. Although some Nation Station customers consume fuel off-reservation, many casino patrons and others who use reservation roads buy no fuel at the Nation Station and pay no tribal fuel taxes. Moreover, purchases at the Nation Station for off-reservation use are clearly not disproportional to those for on-reservation use because its customers are not drawn to the Station to buy cheap gas. Indeed, it is likely that the state's fuel tax revenues have increased independent of the Nation Station because of the market created by the Tribe's casino, which has generated more fuel purchases by Kansas residents who would otherwise stay home and out-of-state residents who would otherwise not travel to Kansas.

Accordingly, Kansas' plea to resolve the "conflict" allegedly implicated by the decision below is meritless.

5. Petitioner's fallback ground for *certiorari* is a request that this Court overrule *White Mountain Apache* in *all* situations, eliminating the balancing test in order to give States "predictability" in the implementation of their tax statutes. Pet. at 10-20. There is, however, no justification for granting petitioner's radical request.

Petitioner and its *amicus*, of course, do not allege a conflict among lower courts on this question. They rely instead on exaggerated and unsubstantiated claims about the practical consequences of *White Mountain Apache*. For instance, petitioner suggests that state fiscs are jeopardized – indeed, thrown into "chaos," Pet. at 18 – by the allegedly unpredictable applications of *White Mountain Apache*. Rhetoric aside, there is simply no basis for these claims. The fuel tax revenues that the State seeks to collect here on deliveries to the Nation Station – the *sole* source of the Tribe's tribal fuel tax revenue – constituted a scant 0.09% of the motor fuel taxes collected by Kansas in 1999, and an even more trivial percentage of the State's overall tax revenues. Brief for Appellant at 16 (10th Cir. filed Sept. 22, 2003). There is no reason to believe that the future of Kansas' revenue collection – or that of other States – is jeopardized by the existence of *White Mountain Apache*. Rather, where (as here) the tribal revenue is dedicated to tribal government services for the reservation, the State obtains *benefits* by having these needs met by the Tribe.

As for predictability, courts – including this Court – have refined the *White Mountain Apache* framework and applied it to specific factual situations without a problem. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32,

36-37 (1999) (summarizing this Court's use of the *White Mountain Apache* framework); *Chickasaw*, 515 U.S. at 459 (endorsing and describing the balancing inquiry); *Ramah*, 458 U.S. at 846 (refusing to discard *White Mountain Apache* and explaining that "our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts"). If anything, it is because States continually devise new mechanisms for imposing taxes that affect Indians to avoid preemption – and not because of any feature of *White Mountain Apache* – that there has been litigation about that case's meaning. *Supra* at 21. Challenges by taxpayers are a inevitable part of any tax system, and the State offers no reason to think that challenges by Indians raise particular concerns.

Moreover, to the extent that practical concerns are truly at issue, it is noteworthy that other States have entered into compacts with Tribes to resolve issues of taxation like those presented here. *See, e.g.*, Richard J. Ansson, Jr., *State Taxation of Non-Indians [Who] Do Business With Indian Tribes*, 78 Or. L. Rev. 501, 545-49 (1999); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 927 nn.36, 37 (1999). States also have enacted state tax credits for tribal taxes. *See, e.g.*, N.M. Stat. Ann. § 7-13-4.4 (New Mexico state tax credit for tribal fuel taxes); Nev. Rev. Stat. § 370.503 (Nevada state tax credit for tribal cigarette taxes); Ariz. Rev. Stat. § 42-3302 (Arizona state tax credit for tribal cigarette taxes). Where, as here, a State refuses to avail itself of such measures to coordinate its tax collection efforts with those of Indian tribes, but rather seeks to find creative ways that burden tribal value, any resulting uncertainty is no basis for reworking existing law.

Practical considerations aside, petitioner's proposal is fundamentally misguided. The balancing test articulated in *White Mountain Apache* was not created out of whole cloth. That test is merely an expression of how courts should account for all of the federal, state, and tribal interests, including the Indian interests – and sovereignty – long recognized by this Court as relevant to Indian preemption analysis. *White Mountain Apache*, 448 U.S. at 141 (articulating and discussing the "several basic principles with respect to boundaries between state regulatory authority and tribal self-government" established by the Court's precedent from the Nineteenth Century forward); *id.* at 144-45 (citing cases exemplifying the Court's historical practice of case-specific assessment of Indian preemption claims); *see also, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (endorsing *White Mountain Apache* as embodying "a flexible pre-emption analysis sensitive to the particular facts and legislation involved"); *Ramah*, 458 U.S. at 846 (balancing "allow[s] for more flexible consideration of the federal, state, and tribal interests at issue"). In contrast, a rule limiting Indian tax immunity to cases of express preemption gives no outlet for consideration of those interests. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("*New Mexico v. Mescalero*") (explaining that the Court has expressly "rejected a narrow focus on congressional intent to preempt State law as the sole touchstone," based on the "'unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination" (quoting *White Mountain Apache*, 448 U.S. at 143)). Thus, the Court should decline petitioner's request to abandon the context-sensitive analysis that is so clearly appropriate in this area.[10]

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[10] Petitioner cites cases in support of the undeniable proposition

6. Finally, petitioner asks this Court to review the Tenth Circuit's case-specific assessment under *White Mountain Apache*. Pet. at 20-24. This plea for error correction is plainly an insufficient basis for this Court's review.[11]

Moreover, there is no reason for this Court to disturb the Tenth Circuit's reasonable application of *White Mountain Apache*, *Colville*, and related precedent to the facts of this case. The Tenth Circuit carefully explained, for example, why this case is unlike *Colville*, in which this Court permitted state taxation of smokeshops on tribal land that sold cigarettes free of state taxes at below-market prices, and that thus drew state residents who would otherwise shop elsewhere. *Colville*, 447 U.S. at 155. In contrast, the Nation Station sells fuel at market prices and thus undisputedly does not "market" a state tax exemption, as in *Colville*. Pet. App. 4a. Rather, the Nation Station's customers are generated by the casino and other on-reservation values. Thus, there is simply no worry – as there was in *Colville* – that state residents will venture to the Tribe's rural and remote reservation only to make purchases that they would otherwise make in Kansas.

The Tenth Circuit also properly noted that the "unique facts" here were similar to those in *Cabazon*, where this

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that in a particular case, a number of different factors may properly affect the balance. *See* Pet. at 11-14. But it is precisely that context-specific approach that allows courts to accommodate all of the various interests at stake. Such accommodation of all relevant interests is, as this Court has explained, not a vice but a virtue.

[11] Although petitioner claims that the Tenth Circuit's balancing was "in sharp contrast to decisions from other circuits," Pet. at 20, petitioner does not substantiate this claim, *see id.* at 20-24.

Court preempted certain state regulations that impermissibly sought to regulate value generated on the reservation. Pet. App. 7a. The Court emphasized that the Tribes had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." *Cabazon*, 480 U.S. at 219. As the Tenth Circuit explained, the Nation Station functions as a vital part of the Tribe's self-generated casino operation, Pet. App. 8a-9a, and "[a]s in *Cabazon*, the Nation built a modern casino and ancillary services, like the Nation Station, in order to offer its patrons an attractive entertainment opportunity," *id.* at 10a-11a.

The Tenth Circuit also carefully explained why the Tribe's interests predominate here. The Tribe's sole source of fuel tax revenue is the Nation Station, and it is bound to use – and has in fact used – that revenue to build, improve, and maintain on-reservation roads, including those leading to the casino. Pet. App. 11a-13a. In contrast, the State does not help maintain critical on-reservation roads, but rather claims an interest in taxing the Nation Station based on its maintenance of off-reservation roads. *Id.* at 13a-14a. *See New Mexico v. Mescalero*, 462 U.S. at 336 ("[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity")

Moreover, the balancing required by this Court's cases takes place against the backdrop of Congress' "'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216. The Nation Station is an integral part of the Tribe's federally regulated

casino enterprise, which Congress has endorsed "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see id.* § 2701(4) (stating that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"). As in *Cabazon*, the casino and resulting Nation Station provide "revenues for the operation of the tribal governments and the provision of tribal services," and are a "major sourc[e] of employment on the reservatio[n]." 480 U.S. at 218-19. "Self-determination and economic development are not within reach if the Tribe[] cannot raise revenues and provide employment for [its] members." *Id.* at 219.

Nor, finally, is there any reason to believe that the Tenth Circuit systematically undervalues the interests of the State. Except in the "unique" case (like this one) in which the State is burdening tribally generated on-reservation value, the Tenth Circuit has *preserved* the Kansas motor fuel tax, even as applied to fuel distributed to tribal retailers. *Compare Sac and Fox*, 213 F.3d at 584-85 (no preemption where it appeared that "the revenues resulting from the Tribes' retail fuel sales to non-Indian customers traveling from outside Indian lands is not derived from value 'generated on the reservations'" (quoting *Colville*, 447 U.S. at 155)), *with* Pet. App. 8a-9a (explaining that "unlike in *Sac and Fox*, the Nation's fuel market does not exist because of a claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities"). There is simply no reason to believe that the Tenth Circuit routinely applies *White Mountain Apache* too generously. The Tenth Circuit's fact-bound application of the *White Mountain Apache* balancing test thus does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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