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 Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, CONNECTICUT, IDAHO, IOWA, MASSACHUSETTS, MISSOURI, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The much litigated rule of *White Mountain Apache Tribe v. Bracker* provides for a nuanced weighing of state, federal, and tribal interests. *Bracker* has been heretofore applied by this Court to determine whether state authority over non-Indians acting within Indian country has been preempted; this Court has not applied that rule beyond Indian country. State authority over non-Indians beyond Indian country has been found to be preempted only by an express congressional direction.

Should the rule of *Bracker* be applied to preempt a state tax on the receipt off reservation of fuel by a non-Indian distributor merely because the non-Indian distributor later, and still off reservation, sells the fuel to an Indian tribe for use on reservation?

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INTEREST OF *AMICI CURIAE*

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137 (1980), this Court considered the "extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." This Court held that state authority over non-Indians on a reservation might be preempted dependent upon the result of a "particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . ." *Id.* at 145. The inquiry included investigation into the language of treaties and statutes, both in terms of the "broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. *Bracker* was specifically limited to questions regarding state authority *on* the reservation. *Bracker* specifically distinguished questions relating to state authority off reservation, finding that Indians (and necessarily non-Indians) were generally subject to "'nondiscriminatory state law'" off the reservation "in the absence of 'express federal law to the contrary.'" *Id.* at 144 n.11.

The effect of the decision below with regard to off reservation transactions was to replace the per se rule of no preemption absent "express federal law to the contrary" with the complex and nuanced rule of *Bracker*. The *amici* states have three discrete points of interest in this case.

Two of the interests of the states have been cogently expressed by the Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioners, at 3-4. First, the states, and we submit, the tribes, have a joint interest in the establishment and maintenance of bright line rules of jurisdiction. *Id.* at 3. Such bright lines effectively deter divisive jurisdictional battles. Second, the states have a

compelling interest in maintaining their ability to tax. State governments provide services to Indians and non-Indians alike, and cannot sacrifice their taxing authority without legitimate cause. *Id.* at 4.

Third, and beyond the scope of interests identified by the Multistate Tax Commission, the states have a strong interest in maintaining their authority to *regulate* Indians and non-Indians off reservation. The court below applied the *Bracker* test in the context of an off reservation *tax* controversy. *Bracker*, however, is a test of general application on the reservation to the activities of non-Indians; it applies to both tax *and non-tax matters*. *See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001). The decision below logically could require the balancing of state, federal, and tribal interests with regard to *any* activity of a non-Indian off reservation, whether related to taxation or not. It affects all states, not simply those with Indian lands. States have never been subjected to divestment of their regulatory authority off reservation through the *Bracker* test, and resist such an extension as unfounded and illegitimate.

SUMMARY OF ARGUMENT

This Court has established a bright line rule for determining when state authority over non-Indians acting beyond Indian country can be found to be preempted – when, and only when, federal law expressly provides. The Court below ignored that basic precept of this Court's cases, and instead applied the complex interest balancing test of *White Mountain Apache Tribe v. Bracker* to find

preemption of a state law imposing a tax on a non-Indian fuel distributor who received fuel off reservation.

The bright line rule of the cases with regard to off reservation transactions should be adhered to because it is the clear precedent of the cases, because it is logical, and because it simplifies relations between the states and the tribes, and so works to avoid divisive litigation.

ARGUMENT

I.

THE APPLICATION OF *WHITE MOUNTAIN APACHE TRIBE V. BRACKER* TO AN OFF RESERVATION TRANSACTION BETWEEN A NON-INDIAN AND A TRIBE IS CONTRARY TO THIS COURT'S PRECEDENT.

This Court has found that the interest balancing test set out in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), should be confined to transactions occurring on reservation or within Indian country. In *Bracker* itself, the Court found that "'Indians going beyond reservation boundaries'" are subject to "'nondiscriminatory state law'" in the absence of "'express federal law to the contrary.'" *Bracker*, 448 U.S. at 144 n.11 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). This Court, moreover, has regularly applied this rule. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464-465 (1995); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18

(1983). Given the force and history of the Court's pronouncements in this regard, it is remarkable that the Court of Appeals for the Tenth Circuit did not even pause to consider the point. In any event, the attempt of the Tenth Circuit to apply the *Bracker* rule off reservation is directly contrary to the repeated statements and holdings of this Court, and itself merits the grant of certiorari.

II.

THE *BRACKER* BALANCE OF INTEREST TEST HAS NO DOCTRINAL "FIT" OFF RESERVATION OR BEYOND THE LIMITS OF "INDIAN COUNTRY."

It is no surprise that this Court has not applied the *Bracker* interest balancing test off reservation. The very words used in pronouncing and explaining the test preclude its use off reservation.

In explaining the doctrinal basis for the test, this Court stated that the "tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 448 U.S. at 143. In articulating the test itself, the Court required examination of the language of "federal treaties and statutes" in addition to the "notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. The test is directed at the intersection of tribal and state sovereignty; it would be doctrinal folly to transport the doctrine off reservation because there is no "tradition of Indian sovereignty" off reservation.

Moreover, it is not only historically true that the exercise of tribal sovereignty has been confined to Indian

reservations, it is virtually demanded in the American system. This is because tribes have license to act beyond the confines of the United States Constitution and the Bill of Rights. *Duro v. Reina*, 495 U.S. 676, 693 (1990). Indeed, to recognize a historical sovereignty of tribes beyond the boundaries of Indian country and Indian reservations would raise serious and profound questions with regard to invasion of the rights of American citizens entitled to the protections of the Constitution and the Bill of Rights.

III.

THIS COURT HAS WARNED AGAINST EXPANDING THE APPLICABILITY OF THE *BRACKER* BALANCING TEST.

Not only has this Court consistently found that the *Bracker* test does not apply off reservation, it has restricted its application even *on* reservation. In *Arizona Dep't of Revenue v. Blaze Construction Co., Inc.*, 526 U.S. 32 (1999), this Court considered whether a non-Indian who contracted with the Bureau of Indian Affairs for a highway improvement project on a reservation was subject to the *Bracker* balance of interest test in a tax context. The Court implied that the "'particularized examination'" of the cases, including *Bracker*, had been called for with regard to "on-reservation activity" when the "legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members." 526 U.S. at 37.

This Court, however, refused to extend the balancing test to a case in which a "State seeks to tax a transaction between the Federal Government and its non-Indian private contractor" even though the contractor was dealing with

the Bureau of Indian Affairs with regard to a contract on the reservation. *Id.* at 37. The Court declared that "[i]nterest balancing . . . would only cloud the clear rule established by our decision in [*United States v.*] *New Mexico* [455 U.S. 720 (1982)]." *Id.* The Court identified certain of the same interests which have motivated the states in the filing of this *Amicus*, finding that the "need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard. . . ." 526 U.S. at 37. The Court concluded that the political processes of the states and the federal government were appropriate for determining whether to exempt the non-Indian contractor from state taxation. *Id.* at 38.*

IV.

THE PRESENT CASE, ALONG WITH THE CASE OF *HAMMOND V. COEUR D'ALENE TRIBE*, TOGETHER PRESENT THIS COURT WITH AN OPPORTUNITY TO CLARIFY BASIC MISCONCEPTIONS OF COURTS OF APPEALS WITH REGARD TO INDIAN TAXATION MATTERS.

Amici respectfully suggests that not only would it be appropriate for the Court to accept certiorari in this case, but that it would also be appropriate for this Court to accept certiorari in *Hammond v. Coeur d'Alene Tribe of Idaho*, No. 04-624. The latter case raises the question of whether a federal court may, despite an express allocation

* Indeed, many states do exempt tribes from various taxes imposed both on and off reservation. *See* SDCL 10-45-10. Other taxes, however, remain payable by an entity with whom the tribe deals. Taxes such as the contractor's excise tax would fall into this category in South Dakota.

by the state legislature of the legal incidence of the motor fuels tax to a distributor, nonetheless deemed the incidence of the tax to be borne by the retailers. The *Hammond* case raises the related issue of whether the Hayden-Cartwright Act, which uses the term "United States military or other reservations," provides "express congressional authorization" for fuel taxation on an Indian reservation. *Hammond*, together with the present case, present the Court with an opportunity to address serious misconceptions which continue to undermine effective tax administration and to encourage needless and divisive litigation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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