No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON, IN HER 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 Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NCAI, CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION, PUEBLOS OF ISLETA, SANDIA AND ZIA, SISSETON WAHPETON SIOUX TRIBE, SKULL VALLEY BAND OF GOSHUTE INDIANS, TULALIP TRIBES, AND WINNEBAGO TRIBE OF NEBRASKA

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages, including *amici* Confederated Tribes of the Warm Springs Reservation, Pueblos of Isleta, Sandia, and Zia, Sisseton Wahepeton Sioux Tribe, Skull Valley Band of Goshute Indians, Tulalip Tribes, and Winnebago Tribe of Nebraska. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. This case calls for the straightforward application of longstanding principles regarding federal preemption of state taxes that substantially infringe tribal sovereignty. Kansas, however, urges this Court to embark on a wholesale revision of these principles and advocates a rule of law that would thwart federal and tribal interests in tribal sovereignty and economic self-sufficiency. *Amici* have a strong interest in opposing the abandonment of time-honored principles of Indian law and in preventing the infringement of tribal sovereignty Kansas seeks to work in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1995, Kansas imposed an excise tax on motor fuel sold or delivered in the State. Pursuant to an agreement with the Prairie Band Potawatomi Nation ("Tribe"), Kansas did not tax the motor fuel sold or delivered to the Tribe for the station on its reservation. In 1995, however, Kansas amended its Motor Fuel Tax Act to place the legal incidence of the tax on distributors, and now seeks to enforce that tax on motor fuel sold or delivered to the Tribe's on-reservation gas station.

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[1] No persons or entities other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

Imposition of the tax on fuel sold to the Tribe would deprive the tribal government of all fuel tax revenues currently used by the tribal government to fund and maintain reservation roads. Although reservation roads are essential to reservation economies, educational systems, health care and virtually all aspects of reservation life, these roads are generally in miserable condition, resulting in a far greater number of automobile accidents and fatalities than occur in comparable areas outside of Indian country. The federal government has a comprehensive regulatory structure addressing reservation roads, but federal funding is woefully inadequate. The states, moreover, who receive federal funding for their own roads that fall within reservations, frequently shirk their obligation to improve or maintain these roads and instead siphon off the funds for use elsewhere. The Tribe's fuel tax, whose revenues are exclusively dedicated to reservation roads, seeks to address the glaring need to improve the Tribe's transportation infrastructure – an important governmental function that federal reservation-roads regulations specifically envision the tribes will discharge.

The tribal government's ability to act as a responsible sovereign vis-à-vis reservation roads would be wholly abrogated by enforcement of the Kansas tax on fuel delivered to the Tribe. If both state and tribal taxes were imposed, the high tax burden would price the Tribe's fuel out of the market. Pet. App. 12. Moreover, the Tribe is not marketing a tax exemption (its tax is roughly equivalent to the state tax), see JA 134. Its station sells motor fuel primarily to the customers and employees of the Tribe's casino, and thus is an "integral and essential part of the Nation's on-reservation gaming enterprise." Pet. App. 8, 3. Equally to the point, pursuant to tribal law, all tribal motor fuel tax revenues are expended to improve roads in Kansas. The sole consequence of the tribal taxing authority, accordingly, is a more equitable distribution of revenues for road maintenance in Kansas.

In sum, the Kansas tax on fuel sold to the Tribe would annul the Tribe's taxing authority and its ability to fulfill its sovereign responsibility to fund and maintain reservation roads. It is, accordingly, preempted.

Kansas contends that none of this matters. Kansas first claims that no matter what its effect on the Tribe, the tax is lawful unless Congress expressly preempts it. In addition, Kansas asserts – again no matter what its effect on the Tribe – that the tax is lawful because its formal incidence falls off-reservation. Finally, Kansas argues that even if this Court's established balancing test is applied, see *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the State always wins the balancing game if its tax serves a valid state purpose and is imposed off-reservation. But, Commerce Clause jurisprudence generally, including Indian Commerce Clause jurisprudence specifically, has always focused on the real interests at stake for *all* sovereigns involved.

Indeed, every error in Kansas's analysis can be traced to its failure to understand or appreciate the constitutional and historic origins of this Court's Indian Commerce Clause jurisprudence, and hence the origins of the balancing test. If this Court were to adopt either of the two bright-line tests that Kansas endorses (express preemption and formal incidence) or Kansas's application of *Bracker* balancing, Indian preemption law would become wholly divorced from its historic and constitutional roots, interests and purposes. Our constitutional structure and history recognize the overlapping interests of three different sovereigns in Indian preemption cases. In such cases, any legal test applied to determine the validity of state regulation must respect those interests; and that respect, not an ahistoric simplicity, is the hallmark of proper legal analysis in this setting.

Part I.A. sets forth the origins and the evolution of this Court's test balancing the interest of all three sovereigns in determining whether a state tax is preempted. By adopting the Constitution, Kansas, like other States, delegated to

Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. From the earliest days of the Republic, the Indian Commerce Clause, in conjunction with the United States' trust responsibility to the tribes, has been interpreted to give the federal government broad power over tribal Indians, tribal land, and tribes. F. Cohen, *Handbook of Federal Indian Law* 212-16 (1982 ed.). But the Indian Commerce Clause and the United States' trust responsibility do not merely authorize the United States to exercise authority over the Indian Tribes. They incorporate into our constitutional structure a recognition of both the tribes' sovereignty and the United States' unique obligation to the tribes.

As a result of these constitutional and historic roots, federal preemption of state regulations or taxes infringing tribal sovereignty and burdening tribal commerce has two aspects: First, federal law may preempt the state regulation at issue, either expressly or because federal and tribal interests outweigh the relevant state interests. Second, state law that unduly infringes tribal sovereignty is prohibited. These tests recognize that an Indian tribe, like a state or foreign state, possesses sovereign authority – an authority that inherently limits other sovereigns' ability to impose burdens on or infringe a tribe's authority. The limits are not identical to those arising from the sovereignty of a state or foreign state, but are the distinctive consequences of the tribes' status as domestic dependent nations subject to the United States' authority and under the United States' protection.

Part I.B. relies on the fundamental principles underlying Indian preemption to demonstrate that the legal rules proposed by Kansas are utterly inconsistent with the constitutional and historic foundations of Indian Commerce Clause preemption law. Kansas's first request – that the Court jettison the balancing test for express preemption – wholly ignores that a tribe is not merely a market participant,

but a sovereign whose inherent authority to tax in order to fulfill its sovereign responsibilities with respect to reservation roads is entitled to respect and protection. Forcing a tribe to run to Congress for protection from every state regulation that infringes upon its sovereignty – no matter how severe the infringement – is entirely inconsistent with the tribes' status in our constitutional system, in addition to being wholly unworkable. The test for federal preclusion of state regulation affecting the tribes must take legitimate tribal interests into account, which an express preemption test fails to do.

Second, Kansas's claim that the balancing test should not apply because the legal incidence of its tax falls on off-reservation conduct both mischaracterizes the Kansas tax, which in truth attaches to the on-reservation delivery of fuel, and misunderstands the relevant constitutional inquiry. The pertinent question is not the formal incidence or geography of the transaction taxed, but the effect of the regulation on the interests of federal, tribal and state sovereigns. The state regulation cannot stand if it substantially infringes tribal sovereignty (here, the sovereign power to tax value generated on the reservation to fund and maintain reservation roads). The State's manipulation of legal incidence – without changing the tax's forbidden impact – treats state taxation of tribes in Indian country as a game in which the label is dispositive and the effect of the tax on tribal self-government is irrelevant. That has never been the law under any of the Commerce Clauses; instead, this Court's legal tests protect the sovereign interests implicated by overlapping jurisdiction.

Finally, Kansas's version of the Court's balancing test would make balancing a meaningless exercise because federally-protected tribal sovereignty, and concomitant federal and tribal interests, would be accorded no weight. The State erroneously contrasts its interests as arising from its status as sovereign with the Tribe's interests as supposedly arising only from a desire to increase profits. But, the state

tax would nullify tribal taxing authority and significantly obstruct the federal interest in tribal self-determination with respect to taxes, governmental functions (here the funding and maintenance of a safe and viable transportation infrastructure), and other economic activities. It should be dispositive here – under both the balancing test and the infringement test – that enforcement of the state tax would wholly preclude the Tribe from exercising its sovereign authority to tax sales of motor fuel at its on-reservation station, and thereby to fund the very reservation roads that only the Tribe has demonstrated a commitment to maintain.

This is not a case, finally, where the impact of the state tax is speculative or remote: The state tax is passed through to the Tribe in its entirety; and the impact of the lost revenues is substantial for the Tribe (but would be trivial to the State if its tax were invalidated). The federal and tribal interests at stake overwhelm the State's interest in collecting the tax on distributions to the Tribe.

ARGUMENT

THE ORIGINS AND EVOLUTION OF INDIAN PREEMPTION DEMONSTRATE THAT KANSAS MAY NOT IMPOSE ITS TAX ON FUEL SOLD TO A TRIBE.

A. The Principles Underlying Federal Preclusion Of State Taxes Infringing Tribal Sovereignty And Burdening On-Reservation Commerce.

This Court has recognized the Indian Commerce Clause, in conjunction with the federal treaty power, as the source of plenary federal power over Indian affairs. See, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978). The Indian Commerce Clause, however, is not simply a constitutional supplier of federal power over the tribes. The Framers intended it to serve as a barrier to state authority that infringes upon tribal sovereignty on the reservation.

During the colonial period, the tribes were recognized as sovereigns, governing their own territories. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). Under international law, however, the British Crown's "discovery" of the tribes and tribal land gave the Crown power over the tribes' external relations. *Id.* at 543-44. When the United States declared independence, the Crown's rights were passed to the colonies. The Articles of Confederation, however, were wholly unclear about whether, and the extent to which, the *states* or *the United States* had succeeded to the Crown's discovery rights. See R. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1097-98 (1995) (legal history of federal-state conflict during this period). Several colonies took the position that they had inherited the powers of the British Crown with respect to tribes within their boundaries.

Experience under the Articles demonstrated to the Constitutional Convention of 1787 that exclusive federal control over Indian policy was necessary. Separate states' actions routinely created serious conflicts and threats of war with powerful tribes. See 33 J. Cont. Cong. 453-63 (Aug. 3, 1787). With little debate, accordingly, the Constitution gave the federal government exclusive power over Indian affairs. See J. Madison, *Journal of the Federal Convention* 654-56 (E. Scott ed. 1898); *The Federalist No. 42*, at 268 (Madison) (C. Rossiter ed., 1961) ("[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory"). Once the Constitution was enacted, states ceased to have jurisdiction vis-à-vis tribes and tribal lands except as provided by Congress. See Cohen, *supra*, at 388; *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

Federal exclusivity (and the corollary of state exclusion from Indian policy) was reflected in the early decisions of this Court. In *Worcester*, for example, Chief Justice Marshall addressed the constitutionality of a Georgia law requiring

non-Indians to obtain a state license to visit or work in the Cherokee Nation. The Court invalidated the law on several grounds, including its inconsistency with the Indian Commerce Clause, which this Court held excluded states from the regulation of Indian affairs. The opinion described the "discontents and confusion" resulting from the divided federal-state authority over Indian affairs under the Articles of Confederation, and explained that the Constitution threw off "[t]he shackles imposed on [federal] power, in the confederation." 31 U.S. (6 Pet.) at 559. The Georgia law was thus invalidated because it "interfere[d] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed *exclusively to the government of the union*." *Id.* at 561 (emphasis supplied). See also *id.* at 580-81 ("the regulation of commerce among the Indian tribes . . . . must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations") (M'Lean, J., concurring).

"A clearer and more forceful assertion of the dormant Indian Commerce Clause is hard to imagine." R. Clinton, *supra*, at 1173. See also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831) (describing the Indian Commerce Clause as the source of the exclusivity of federal power over Indian affairs). As the Court's early cases reflect, the Constitution's exclusive grant of Indian commerce power to Congress prevented states from exercising authority over Indian affairs, including over non-Indians who dealt with tribes. Federal statutory enactments, accordingly, were not necessary to preclude state regulation.

In the years that followed, the Court regularly rejected state claims of inherent authority over Indian affairs. For example, when Kansas sought to tax the tribal lands of the Shawnee, this Court held that the United States' continuing recognition of the Shawnee as a tribe necessarily excluded Kansas's exercise of taxing authority over the tribal lands so "long as

the United States recognizes [the tribe's] national character." *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1866). See also *United States* v. *Kagama*, 118 U.S. 375 (1886) (sustaining Congress's authority under the federal trust obligation to enact the Major Crimes Act punishing Indians who committed serious offenses in Indian country, and explaining why states lacked any concomitant authority).

It is critical to note, however, that the Indian Commerce Clause completely excluded state regulatory authority without assessment of countervailing state interests only where tribes were involved in or directly and concretely affected by the transactions that the state sought to regulate. Thus, in *United States* v. *McBratney*, 104 U.S. 621 (1881), the Court sustained Colorado's authority to prosecute a non-Indian for the murder of another non-Indian even though the murder occurred on the Ute reservation. And, in *Utah & Northern Railway* v. *Fisher*, 116 U.S. 28 (1885), the Court upheld a territorial tax on a railway's right-of-way through an Indian reservation, explaining that "[t]he authority of the Territory may rightfully extend to all matters not interfering with [federal provisions for the tribe's] protection." *Id*. at 31. See also *Thomas* v. *Gay*, 169 U.S. 264 (1898) (upholding Oklahoma tax on cattle owned by non-Indians but grazed in part on Indian land, because the tax was not imposed on the tribe's rental income or contract, but only on the cattle; thus its effect was too remote to interfere with Indian commerce).

As matters stood by the mid-20th century, then, states were empowered to exercise general regulatory authority, including taxing authority, over transactions not involving, or only remotely affecting, tribes, even if those transactions took place in, or had some connection with, Indian country. But, federal authority was exclusive with respect to transactions directly or concretely affecting tribes in Indian country. See *Rice* v. *Olsen*, 324 U.S. 786, 789 (1945) ("[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court gave voice to one of the modern tests for assessing assertions of state jurisdiction in light of these principles. There, the Court announced that the Arizona courts lacked jurisdiction over a non-Indian's claim against a Navajo seeking to collect for goods sold on the reservation. The Court relied on the United States' treaty with the Navajo, but also relied on *Worcester*, and thus on the Indian Commerce Clause and the federal trust obligation, for the proposition that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 219-20. In essence, this Court read the Constitution and its precedent to protect the exclusivity of federal authority over Indian affairs *and* tribal sovereignty from state infringement.

From the inception of our Republic, Congress has regularly exercised its broad authority over Indian affairs, altering the content of federal Indian policy in ways that have dramatically affected the scope of tribal sovereignty. Throughout that journey from isolation, to allotment, to assimilation, to self-determination and economic self-sufficiency, however, the tribes have retained their status as sovereigns, exercising those inherent powers of sovereignty consistent with the Congress's Indian policy of the time. See, *e.g.*, Cohen, *supra*, at 239-40.

Critically here, in the past three decades, federal Indian policy has led to increasing interaction among tribes and non-Indians, with the result that federal, tribal and state interests are implicated in more and more areas subject to regulation. The increasing overlap in sovereign interests has required the Court to consider and accommodate all three sovereigns' interests in an increasing number of cases. In order to do so, the Court has synthesized the various strands in its analysis of the validity of state regulation that affected tribal Indians in Indian country – the enforcement of preemptive federal power, the protection of tribal sovereignty from infringement,

and the recognition that states have certain valid interests affected by activities in Indian country.

The Court has continued, of course, to enforce federal law with express preemptive effect. See, *e.g.*, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 165 (1973); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 (1987). And, the Court has continued, in the vein of *Williams*, to flatly forbid state regulation that frustrates tribal self-government. *McClanahan*, 411 U.S. at 170. See *id.* at 173 (Indian tribes are "'regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided'"). But, in addition to assessing whether state regulations that are not expressly preempted frustrate tribal self-government, the Court's increasing need to accommodate tribal sovereignty, its federal protection, and state interests has given rise to the current balancing approach for assessing the validity of state regulation, including taxation, affecting Indian country.

Under this approach, direct state taxation of tribal Indians and tribes for on-reservation activities is flatly forbidden absent express congressional authorization, because in that setting, federal and tribal interests *always* outweigh the contravening state interest. See *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458 (1995). Importantly, however, in analyzing the validity of state taxes on *non-Indians*, the Court, separate and apart from the *Williams* infringement test, balances the legitimate interests of the affected sovereigns (the United States, the tribe and the state) to determine whether the tax has an unlawful effect in Indian country. Through this test, the Court gives continuing effect to the Indian Commerce Clause and its historic purpose to

protect the legitimate sovereign interests of the tribes and their federal protector.

Bracker states the modern test for determining whether state regulation of non-Indians should be invalidated and the principles supporting that test:

> [C]ongressional authority [under the Indian Commerce Clause] and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. [448 U.S. at 142-43 (citations omitted).]

The Court has thus "rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required." *Id.* at 143. See also *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982) ("federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity").

The Court has also determined that a state law's validity is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty, but [. . .] call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. See also *Washington* v. *Confederated Tribes of the Colville Indian Res.*, 447 U.S. 134, 154-157 (1980); *New Mexico* v. *Mescalero Apache*

Tribe, 462 U.S. 324 (1983) (preempting state wildlife regulation and licensing fees on non-Indians on reservation). This inquiry is required to ensure that competing sovereign interests are all given due respect.

In sum, in addition to being the constitutional source of the broad federal power over Indian tribes, the Indian Commerce Clause is a reservation of areas of exclusive federal authority from which state regulation is excluded to serve the federal interests in protecting tribal sovereignty and fulfilling the federal trust obligation. The Court has limited the area of exclusivity, allowing state regulation (including taxation) that does not substantially infringe federal interests and tribal sovereignty. But, in light of the constitutional origins of this Court's jurisprudence, it would be a revolutionary change in the law, not warranted by any showing of need, to eliminate either the *Williams* infringement or the *Bracker* balancing test – tests which take federally-protected tribal interests into account to give content to the Indian Commerce Clause and the trust obligation embodied in our constitutional plan.

B. Kansas's Tax Is Invalid.

1. Kansas's Claim That State Taxes Infringing Tribal Sovereignty Are Valid Unless Expressly Preempted Ignores History And The Actual Interests At Stake Here.

Kansas contends that *Bracker* balancing is administratively unworkable and must be replaced with a bright-line test of express preemption. This Court has already rejected the argument. In any event, an express preemption test would sever all ties between the constitutional origins and principles of Indian preemption and modern jurisprudence in this area.

First, Kansas's quest to subject Indian commerce to plenary state control absent express preemption is not new. Twenty-five years ago, an effort to achieve Kansas's goal was emphatically rejected by this Court. In *Colville*, several Indian tribes challenged the legality of Washington's taxes on

cigarette sales by Indian retailers and on motor vehicle use in Indian country, asserting that these taxes violated the Indian Commerce Clause and the Supremacy Clause. 447 U.S. at 139-41. The United States argued that the tribes' Commerce Claims were "insubstantial," because the Court had previously decided that the Indian Commerce Clause was "'without force in situations like the present.'" *Id.* at 148.

Colville rejected the United States' position. This Court held that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an 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. In balancing those legitimate concerns, the Court explained that although "the Indian Commerce Clause, of its own force, [does not] automatically bar[] all state taxation of matters significantly touching the political and economic interests of the Tribes," the Clause nonetheless has a continuing "role to play in *preventing undue discrimination against, or burdens on, Indian commerce*." *Id.* at 157 (emphasis supplied).

Colville, thus, explicitly refused to adopt the express-preemption test advocated by Kansas and instead reaffirmed that balancing of federal, tribal and state interests is required to determine whether state regulation infringing tribal sovereignty is valid under the Indian Commerce Clause. See also *Ramah*, 458 U.S. at 843 (the state's argument that "imposition of the state tax is not pre-empted because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. . . is clearly foreclosed by our precedents") (citing cases). The Court recently utilized the balancing test to address the validity of a state tax on a non-Indian, see, *e.g.*, *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 73-75 (1994). Kansas has not come close to producing a "compelling justification" for departing from *stare decisis* in this area, where the Court's decisions are subject to

congressional revision. See *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Second, Kansas's proposed rule is divorced from the historic underpinnings of the Indian Commerce Clause. The Clause did not simply grant authority to the federal government. As Part A makes clear, the Indian Commerce Clause addressed the problems created by the dual authority over Indian affairs under the Articles of Confederation by reserving an area of exclusive federal authority and excluding state regulation from that area. Federal exclusivity was deemed necessary to serve the federal interests in protecting tribal sovereignty and fulfilling the federal trust obligation. From this inception until today, the Court has always recognized the constitutional basis for the protection of tribal sovereignty and the necessary accommodation of federal, state and tribal interests. Indian law preemption respects "'[t]he unique historical origins of tribal sovereignty, and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero*, 462 U.S. at 334.

Acceptance of Kansas's crabbed express-preemption test would entirely exclude tribal-sovereignty interests from the Indian Commerce Clause analysis, and thus turn a blind eye to the Court's precedent and the Framers' intent. States could enact taxes that would devastate tribal governments and enterprises, and the tribes would be forced to lobby Congress for an express exemption each time such a tax was enacted in any state. That – and not the *Bracker* balancing test – is wholly unworkable. At a bare minimum, the Indian Commerce Clause and the federal trust obligation require that tribal interests be recognized and respected; an express preemption test fulfills neither requirement.

There is a third textual and historical reason that the Court should not adopt an express preemption rule. The Indian Commerce Clause is one of three Commerce Clauses, granting the federal government broad authority to regulate commerce among the states and with foreign states and Indian

tribes. The interstate and foreign Commerce Clauses both have "dormant" aspects that forbid states from burdening commerce despite the absence of any express congressional prohibition. With regard to state taxes, those that burden interstate commerce are analyzed under a four-part test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which requires a substantial nexus between the state and the item taxed, a fair relationship between the state and the services provided by the state, fair apportionment of the tax, and the absence of discrimination against foreign goods. *Id.* at 279. State taxes that burden international commerce are judged under a rigorous test set forth in *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434 (1979), which includes the four-part *Complete Auto* test, with additional consideration of the risk of multiple taxation and the interest in federal uniformity.

Significantly here, this Court does *not* require an express congressional statement of preemption to invalidate a state tax that burdens interstate or foreign commerce. Indeed, the development of the test for determining when a state tax violates the interstate Commerce Clause is analogous to the Court's movement from the exclusivity of federal regulation to the *Bracker* balancing inquiry. In *Complete Auto*, this Court rejected the longstanding *Spector* rule that a state tax on the "privilege of doing business" is per se unconstitutional when applied to interstate commerce as excessively formalistic and divorced from the true interests served by the interstate Commerce Clause. See 430 U.S. at 278 (citing *Spector Motor Serv.* v. *O'Connor*, 340 U.S. 602 (1951)). But, in doing so, the Court has emphasized that express preemption is not required and that a state's interest in raising revenue must always be balanced against the federal interest in preventing undue burdens and discrimination in interstate commerce:

> it long has been "accepted constitutional doctrine that the commerce clause, *without the aid of Congressional legislation* . . . affords some protection from state

> legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [*Japan Line*, 441 U.S. at 454 (emphasis supplied).]

In the text of the Constitution, the Indian Commerce Clause parallels the interstate and foreign Commerce Clauses in a grammatical sense. This parallel phrasing reveals that the Framers contemplated that the national government would have bilateral relations with the Indian tribes as distinct sovereign entities, just as it would with foreign nations and the several States. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982). There are historic reasons to give the Indian Commerce Clause stronger preclusive effect than the interstate or foreign Commerce Clauses. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 62 (1996) ("[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause"). But, at the very least, the structure of the Commerce Clause as a whole and the history and purpose of the Indian Commerce Clause militate strongly against Kansas's argument that an express preemption test – which excludes any consideration of the interests of the tribal sovereign – should be adopted in place of a balancing test that respects all relevant sovereigns' interests.

This point – that the individual Commerce Clauses are parallel and that there is no basis in the text or history of the provisions to require express preemption under the Indian Commerce Clause – is not undermined by *Cotton Petroleum Corp.* v. *New Mexico*'s discussion of the differences between the interstate and Indian Commerce Clauses. 490 U.S. 163, 192 (1989). The Court made these observations in explaining that Indian tribes are not states for purposes of determining whether New Mexico's taxation of the mineral production

had to be apportioned in light of the tribal tax. Nothing in that explanation undermines the point that a balancing test is appropriate to determine whether a state tax is invalid under the Commerce Clause generally and the Indian Commerce Clause specifically. Indeed, *Cotton Petroleum* cites and applies the *Bracker* test. See *id*. at 183-86. In Kansas's view, the tribes are no better off than private citizens, protected from state regulation only by express preemption; but, this Court has often made clear that tribes are sovereigns and, for that reason, entitled to have their unique status and interests taken into account where state and tribal interests are both implicated.

At the end of the day, the sole basis Kansas offers for its ahistorical argument that state regulations that infringe Indian sovereignty and burden on-reservation commerce are lawful unless expressly preempted is that interest-balancing is messy. This argument applies to the majority of legal standards because most issues do not lend themselves to inflexible absolutes. Complexity is certainly endemic to cases arising under the interstate and foreign Commerce Clauses. In this area, the Constitution recognizes that the competing interests of sovereigns are at issue; those interests cannot be ignored because the accommodation process is sometimes difficult. (Indeed, it is precisely for this reason that states and tribes often address these potential issues of multiple taxation by negotiated agreement. See Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922 (1999).) The Court's precedents "provide sufficient guidance," *Ramah*, 458 U.S. at 846. Kansas's express-preemption test should be rejected.

2. Kansas's Claim That Its Tax Is Valid Because It Is Formally Imposed On An Off-Reservation Act Is Wrong.

In the alternative, Kansas claims that its fuel tax falls on off-reservation conduct and thus is per se valid, even if it

infringes tribal sovereignty and unduly burdens on-reservation commerce. Preliminarily, as the Tribe's brief shows, Kansas's characterization of its fuel tax as a tax on off-reservation conduct ignores the structure of the statutory scheme at issue: The activity taxed is the use, sale or delivery of motor fuel in Kansas, here the on-reservation sale and delivery of fuel to the Tribe. In any event, as *Amici* show, the State's attempted recharacterization of its tax cannot insulate that tax from a proper Indian Commerce Clause analysis.[2] The issue is not where the tax falls, but whether the tax has a forbidden effect. If a state tax imposed on an off-reservation act significantly burdens on-reservation interests, the balancing inquiry must be conducted.

Like its express preemption test, Kansas's per se legal incidence test reflects the State's indifference to the actual interests at stake here, and its desire to replace an interest-based analysis with a label. The dispositive question here is not the geographic location of the activity taxed, but whether the state tax has an unlawful effect *on tribal sovereignty*. Put differently, it is the location and nature of the *effect*, not the location of the tax, that determines whether that tax may be imposed under the Indian Commerce Clause. To determine whether the tax has an unlawful effect, the interests of all relevant sovereigns must be carefully weighed.

As set forth in Part A, *supra*, the primary purpose and function of the Indian Commerce Clause is *the protection of Indian sovereignty and commerce in Indian country from undue state infringement.* Thus, where, as here, the Court is analyzing whether a state tax on a non-Indian unduly infringes tribal sovereignty and commerce *on the reservation*, the Court is fulfilling the Indian Commerce Clause's core protective purpose. And, the question whether the activity

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[2] Legal incidence is, of course, a question of federal law, as its determination is necessary to protect a federal right. *See Carpenter* v. *Shaw*, 280 U.S. 363, 367-68 (1930).

taxed is on or off the reservation is relevant only insofar as the location exacerbates or ameliorates the burden that the tax imposes on tribal sovereignty on the reservation.

Thus, the question whether a particular tax on a non-Indian has an unlawful effect on the reservation cannot be answered by invocation of a presumption based on the location of the activity taxed. Such a "formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. The Indian Commerce Clause test cannot protect the interests that it is intended to serve if those interests are not even considered. That is why this Court has always conducted a particularized balancing inquiry to determine whether a state tax on non-Indians has an unlawful effect on the reservation, without regard to whether the tax has off-reservation components. See *Bracker*, 448 U.S. at 143-44, 150-51; *Ramah*, 458 U.S. at 843-44 (moving the incidence of a tax upstream or off-reservation to avoid taxing a tribe directly does not save a state tax "whose ultimate burden falls on the tribal organization"); *Milhelm Attea*, 512 U.S. at 73 (applying balancing test to validity of state regulation of off-reservation wholesalers). Cf. *Chickasaw Nation*, 515 U.S. at 459 (where "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax"; the "Indian preemption" test requires the Court to analyze "the balance of federal, state, and tribal interests").

In *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980), this Court invalidated a state gross receipts tax on a non-Indian who did not have a place of business on the reservation, but who sold tractors to tribal Indians on the reservation. The state defended its tax, pointing out that the incidence of the tax fell on the non-Indian whose business was not on the reservation. Rejecting that argument, this Court explained:

> Nor may [the state] distinguish the present case from *Warren Trading Post* [where a state tax on a non-

> Indian's sales of goods to a tribal Indian was invalidated] by contending that the tax at issue in this case falls upon the [non-Indian] seller of goods and not the [Indian] buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. . . . . *[R]egardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission."* [*Id.* at 163 n.3 (citations omitted) (emphasis supplied)].

This Court's concern with state taxation that affects tribal Indians is not merely symbolic – it is substantive. It arises from the Indian Commerce Clause and the historic principles of tribal sovereignty embedded in our constitutional structure, which Kansas embraced when it joined the United States. The Court's jurisprudence is designed to protect those substantive interests, not to enforce a formal rule about the incidence of taxation that would simply facilitate circumvention of the constitutional and historic protections afforded the tribes.

For example, with substantial federal promotion and support, the tribes are now engaged in a multitude of commercial activities from professional services to product development and manufacturing, to natural resource exploitation. See *infra* at 25-26. If states are empowered to capture the full market value generated on Indian reservations simply by shifting the incidence of the tax off the reservation, these important federal and tribal interests will be severely undermined. No bright line test based on the incidence of taxation can fairly accommodate the federal, tribe and state interests that are implicated by state taxation regimes.

It is noteworthy that the Court has rejected analogous requests to adopt formal incidence tests under the parallel provisions of the interstate Commerce Clause. In *Complete Auto*, for example, the Court explained that, in analyzing state

taxes that affect interstate commerce, the Court "has moved toward a standard of permissibility of state taxation *based upon its actual effect rather than its legal terminology*." 430 U.S. at 281 (emphasis supplied). Like the *Bracker* test, *Complete Auto*'s functional analysis "seek[s] to avoid formalism and to rel[y] upon a 'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax.'" *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991) (third alteration in original) (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980)).

It is undisputed that enforcement of the Kansas tax precludes imposition of the tribal tax. And, the statutory pass-through mechanism makes clear that this is *not* a case where a tax on a non-Indian simply increases the non-Indian's costs and has the indirect and speculative effect of making tribal economic activity more expensive or less profitable (*e.g.*, *Thomas*, *Cotton Petroleum*). There is nothing speculative about the burden of Kansas's tax – by statute, it is directly and in its entirety passed through to the Tribe, and imposes an impenetrable barrier to tribal taxation. With this effect, the state tax cannot stand.

3. Kansas's Balancing Derogates The Federal And Tribal Interests At Stake.

Kansas's final argument is that its tax is valid even if the *Bracker* balancing of federal, tribal and state interests is conducted. Kansas's version of this Court's balancing test, however, illustrates what happens when *no* weight is given to the tribal sovereignty interests protected by our constitutional structure and Indian preemption law, and *dispositive* weight is given to the most minimal state interest. The State contends that its interest in collecting $300,000 in fuel tax revenue to fund Kansas roads outweighs the Tribe's sovereign interest in exercising *any* power to tax fuel sold at its on-reservation station as part of its casino complex in order to fund reservation roads, also in Kansas, and recognized by the

federal government as critical to tribal welfare and self-sufficiency. The Tribe is not marketing a tax exemption, assisting tax evaders or engaged in any other illegitimate activity; instead, the Tribe is taxing an on-reservation service to generate revenue to fulfill a governmental function. Moreover, transactions with the Tribe alone among sovereigns are fully taxed. Kansas's version of balancing makes a mockery of tribal sovereignty.

A tribe's "power to tax is an essential attribute of [its] sovereignty because it is a necessary instrument of self-government and territorial management," allowing the tribe "to raise revenues for its essential services." *Jicarilla Apache Tribe*, 455 U.S. at 137. Indeed, a "necessary implication of th[e] broad federal commitment" to tribal self-sufficiency in all its forms is that the tribes have "the power . . . to defray the cost of governmental services by levying taxes." *Mescalero*, 462 U.S. at 335-36. In addition, like any government, a tribe has an important sovereign interest in the construction and maintenance of an infrastructure of roads and bridges on its reservation. Here, under applicable law – and as a result of inadequate federal and state funding for numerous years – the Tribe has assumed financial responsibility "for the majority of the roads and bridges on and near its reservation." Pet. App. 11. The Tribe receives no funding from the State for this purpose. See JA 79. The Tribe's principal economic asset and revenue source is its casino, with associated services such as the tribal gas station. Thus, the Tribe exercised its taxing power to fund its roads programs by imposing a fuel tax on sales at its on-reservation station whose proceeds are used exclusively for this purpose. *Id.* at 48-50 (PBP Code §§ 10-6-1 to -2).

Nothing less than the Tribe's practical ability to exercise one of the most fundamental attributes of sovereignty in order to fulfill a traditional, critical government function is at stake here. Although the State has not passed a law forbidding the Tribe to tax retail sales of motor fuel at its reservation station,

it has constructively done so. "[T]he Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Tribe's] fuel business to virtually zero." Pet App. 12.

If "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status," *Colville*, 447 U.S. at 152, the State cannot impose such a tax. Tribes do not have a theoretical interest in taxing economic activity on the reservation; the tribal interest in taxation (like that of the United States and the states) is a practical interest in the ability to raise essential funds for public purposes, here the building and maintenance of roads. Where state regulation constructively eliminates a tribe's ability to exercise its sovereign power, the tribal interest in precluding such regulation should be dispositive. Tribal sovereignty would be "hollow," indeed, if "[t]he Tribe could thus exercise its authority over the reservation only at the sufferance of the State." *Mescalero*, 462 U.S. at 338.[3]

Moreover, under the circumstances, the Tribe bears the full economic burden of the Kansas motor fuel tax. Although the Court will not strike down a tax on a non-Indian simply because the tribe bears the economic burden of the tax, that fact is important in assessing the relative importance of the Indian interest. Compare *Bracker*, 448 U.S. at 151-52; *Ramah*, 458 U.S. at 844 n.8 (finding "it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company") with *Cotton Petroleum*,

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[3] *Compare Cotton Petroleum*, 490 U.S. at 185 (permitting state severance tax on non-Indian's leased oil and gas production where the state tax imposed "'no economic burden . . . on the tribe'" because "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development") (alteration omitted).

490 U.S. at 185 ("'no economic burden [fell] on the tribe by virtue of the state taxes'") (alteration omitted). And, it is particularly important where, as here, the fact and extent of the economic harm to the Tribe is *certain*; the tax is passed on to the Tribe in its entirety.[4]

In addition, this is not a case like *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976), or *Colville*, 447 U.S. at 155, where the tribes had no legitimate interest in exercising their sovereign power to assist state tax evaders or in marketing an exemption from state tax law, respectively. Here, the Tribe "sells fuel at fair market prices," JA 133-134, 40, 86, 69-70; and "'"the value marketed" by [the Tribe's] Station results from the business generated by the casino and from employees of the casino and [Tribal] government and residents.'" Pet. App. 3. A tribe has a substantial, legitimate interest in an on-reservation market when it generates sales that "would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the [product]," *even* "*if credit [for the tribal tax] were given.*" *Colville*, 447 U.S. at 158 (emphasis supplied).

In fact, a tribe's interest in raising revenue is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes." *Colville*, 447 U.S. at 156-57; *Milhelm Attea*, 512 U.S. at 73 (same). See also *Cabazon Band*, 480 U.S. at 219. As noted above, with strong federal backing and pursuant to federal statutes and

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[4] The Court has upheld state property taxes on railroad rights-of-way and non-Indian livestock grazed on reservation lands. *See Maricopa & Phoenix R.R.* v. *Territory of Ariz.*, 156 U.S. 347 (1895); *Wagoner* v. *Evans*, 170 U.S. 588 (1898); *Thomas* v. *Gay*, 169 U.S. 264 (1898). In these cases, the only Indian interest asserted was the Indians' potential ability to obtain marginally more money from the rights-of-way or leases if the taxes were preempted – interests the Court considered too remote and speculative to invalidate state regulation. *See Thomas*, 169 U.S. at 273-74.

regulatory programs,[5] Indian tribes today are engaged in a broad array of economic activities on reservations, including commercial exploitation of natural resources, basic manufacturing, professional services, product development and cultural and entertainment activities. See, *e.g.*, *Cabazon Band of Mission Indians* v. *Wilson*, 37 F.3d 430 (9th Cir. 1994) (tribal investment in off-track wagering facility); *Hoopa Valley Tribe* v. *Nevins*, 881 F.2d 657 (9th Cir. 1989) (tribal investment in timber operation). A state tax *that entirely precludes tribal taxation* by capturing all tax revenues available on such activities and products – as the Kansas tax does – both infringes tribal sovereignty and undermines the federal interest in promoting tribal enterprises that generate economic value on reservations.

The substantial infringement of tribal sovereignty worked by the Kansas tax alone should result in its invalidation. It does not stand alone, however. The Tribe's brief fully details Congress's comprehensive scheme regulating the funding, construction and maintenance of roads on reservations – a scheme responsive to the dismal and dangerous condition of reservation roads and the urgent need for improvement of this vital infrastructure to further the paramount federal goals of tribal sovereignty and economic self-sufficiency. *Amici* endorse and adopt the Tribe's delineation of the substantial federal interests obstructed by Kansas's tax. Specifically, federal laws governing the Indian Reservation Road ("IRR") system recognize the tribes' interest qua sovereigns in road

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[5] Congress has routinely acknowledged and sought generally to encourage tribal sovereignty and economic self-sufficiency. That purpose and policy is embodied in federal statutes such as the Indian Reorganization Act, 25 U.S.C. §§ 461-479, the Indian Self-Determination and Education Act, 25 U.S.C. § 450f *et seq.*, and IGRA. *See also, e.g.*, *Cabazon Band*, 480 U.S. at 216 ("[t]he inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development").

planning, regulation, and construction, and identify a "[t]ribal fuel tax" as a vital source of funds for IRR projects. 25 C.F.R. § 170.932(d). See 23 U.S.C. § 135(d)(2), (e)(2)(C), (f)(1)(B)(iii) (mandating state consultation with the tribes on roads issues related to Indian country). Viewed through the proper lens, the Kansas tax obstructs full implementation of the specific federal purposes of improving tribal roads and supporting tribal efforts to act as responsible sovereigns and to raise revenue to do so. Where, as here, a state tax precludes tribal taxation of an on-reservation activity, it undermines these important federal interests.

State interests such as those at stake here are not "sufficient to justify the assertion of State authority." *Mescalero*, 462 U.S. at 334. Like tribes, states always have a significant sovereign interest in enforcing a tax to obtain funds for roads and other government projects, but the state tax here effectively eliminates any tribal taxing power and thus significantly impinges on the Tribe's on-reservation sovereignty, while the loss of the tax revenues from transactions with the Tribe has a very small impact on the State's fuel tax revenues. Of the roughly $429 million Kansas annually collects from its motor fuel tax, approximately $300,000 would be laid upon fuel distributed to the Tribe. See *id.* at 343 (limiting state interest in tax because "[t]he loss of revenue to the State is likely to be insubstantial"). However substantial state interests in their taxing authority are, tribes have an analogous interest. Thus where, as here, the tribal power to tax is obliterated by a state tax, the tribe's interest necessarily outweighs the state interest.

In addition, the State's interest in revenues related to a particular transaction should be reduced when the tribal tax produces revenues devoted to a legitimate governmental purpose. For example, like all Kansas citizens, tribal members benefit from Kansas's network of roads; but tribal members and non-members also benefit from reservation

roads. Kansas law requires the State to remit a significant percentage of its fuel tax funds to cities and counties, *but not to Indian tribes*, for road projects. Kan. Stat. Ann. § 79-34, 142. And, the Tribe is using its fuel tax proceeds exclusively for roads projects within the reservation. Put differently, the Tribe's tax does not deprive the State road system of revenue; it simply results in the use of less than one-tenth of one percent of the motor fuel tax proceeds for on-reservation road projects in the State. Cf. *Ramah*, 458 U.S. at 844 n.9 ("the state tax revenues derived from [the non-Indian contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides to [that contractor]"). Kansas fails to recognize either its omission or the Tribe's beneficial use of the funds in its "balancing" of the relevant interests.

In this connection, it is difficult to discern the legitimacy in Kansas's determination that it may nullify the Tribe's taxing authority by collecting all motor fuel tax revenues resulting in the Tribe's inability to collect any. A state is not required strictly to adhere to proportional taxation when its taxes overlap with those of a tribe with concurrent jurisdiction. But a state should not be permitted to act in complete derogation of the tribes' sovereign taxing power and responsibilities, and this is precisely what Kansas's version of balancing would allow. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. at 114, 124-25 (1993).

Finally, a state's interest in enforcing a tax must be diminished if its tax scheme is discriminatory. Kansas does not tax distributors' transactions with the United States or its contractors. When the State taxes distributors' transactions with Kansas, it simply moves the money from one "pocket" to another. Even local governments receive a mandated rebate of almost half of *all* fuel taxes for their roads projects, counterbalancing any taxes they pay on distributors' transactions with them. See Kan. Stat. Ann. §§ 79-3402,

-34,142 (formula). The Tribe is the only sovereign neither exempted from the tax nor entitled to share in its revenues.

Kansas cannot see any derogation of the Tribe's interest here because it does not view the Tribe as retaining inherent sovereign powers or responsibilities on the reservation. And, indeed, Indian tribes have not generally prospered under the balancing test of *Bracker* and its progeny. In its application, federal courts have tended to favor familiar state interests over tribal interests which are less well known. As a result, state taxation often drains reservation economies, while states make little or no contribution to reservation infrastructure.

Kansas's application of *Bracker* balancing, however, would go even further in this direction, placing a thumb permanently on the states' side of the scale in the balancing process. This is a case where any reasonable analysis demonstrates that the tax substantially infringes federally-protected interests and the Tribe's right to self-government, nullifying any tribal ability to levy a fuel tax and fulfill its sovereign responsibilities vis-à-vis reservation roads, and the State interest is transferring $300,000 in fuel tax revenues from one set of Kansas roads to reservation roads also in Kansas. Yet Kansas urges the Court to scrap any balancing or infringement test, or to apply a balancing test in ways entirely divorced from its constitutional origins. The Tribe is a responsible government that is not marketing a tax exemption but instead exercising its taxing authority to build reservation roads and fulfill important governmental functions. Its authority should be upheld. Kansas's fuel tax is unconstitutional.

CONCLUSION

The decision of the Tenth Circuit should be affirmed.

Respectfully submitted,

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