No. 04-1740

IN THE

Supreme Court of the United States

JOAN WAGNON, in her official capacity as Secretary, Kansas Department of Revenue, *ET AL.*,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

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

BRIEF IN OPPOSITION

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August 26, 2005

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QUESTION PRESENTED

Whether the Tenth Circuit properly ruled that federal law bars Kansas from refusing to permit the use of motor vehicle registrations and titles duly issued by an Indian Tribe located within the State, when Kansas permits the use of registrations and titles duly issued by other States, foreign countries, and even out-of-state Indian Tribes, and when the Kansas policy would effectively foreclose the Tribe's vehicle registration program.

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The State of Kansas generally permits the use of motor vehicle registrations and titles issued by other States, territories and possessions of the United States, foreign countries, states and provinces of other countries, and even out-of-state Indian Tribes, but refuses to permit the use of motor vehicle registrations and titles issued by Respondent Prairie Band Potawatomi Nation (the "Nation"), an Indian Tribe located in Kansas. In the decision of the United States Court of Appeals for the Tenth Circuit below, all three panel members agreed that the State's selective refusal to recognize registrations issued by the Nation cannot stand. *See* Pet. App. 19a; *id.* at 31a (McConnell, J., concurring).

The State's sole contention here is that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), rather than *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), controls this case. According to the State, the Tenth Circuit majority's application of *Bracker* to what the State describes as a "nondiscriminatory State law imposed off-reservation," Pet. 4, "creates a palpable conflict between authority from this Court and the Ninth Circuit" that merits this Court's review, *id.* at 11.

Even assuming *arguendo* that *Bracker* and *Jones* represent competing analytical frameworks, this case does not present the issue pressed by the State. All three panel members below concluded, contrary to the central premise of the State's petition, that the Kansas law is not "nondiscriminatory." *See* Pet. App. 11a (describing the "discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe"); *id.* at 30a (explaining that Kansas' application of the statute is "a form of discrimination"). The State's refusal to permit the use of tribally issued registrations thus fails regardless of whether

the reasoning in *Bracker* or *Jones* is applied. Indeed, Judge McConnell's concurring opinion – which the State's petition inexplicably fails even to mention – applied *Jones* in the precise way the State urges here and concluded that the State's actions cannot be sustained.

Neither is there a "schism," Pet. 4, among the Circuits. Both the panel majority and Judge McConnell recognized that the conclusion that the State's actions are discriminatory and cannot survive is wholly consistent with the Ninth Circuit's decision in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) ("*Cabazon IV*"). *See* Pet. App. 11a ("[T]he *Cabazon IV* analysis regarding the discriminatory effect of the State's motor vehicle code is sound."); *id.* at 31a ("This analysis comports with the Ninth Circuit's approach in [*Cabazon IV*].").

Because the discriminatory Kansas policy is unlawful regardless of whether *Bracker* or *Jones* is the focus of analysis, and because there is no conflict on that issue with the Ninth Circuit (or any other Circuit), this case presents nothing more than an academic debate about the line (if any) between *Bracker* and *Jones*. Accordingly, the State's petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

The Nation is a federally recognized Indian Tribe that was evicted from its ancestral home in the Great Lakes region and eventually resettled in present-day Kansas. *See Tiller's Guide to Indian Country* 554 (Veronica E. Velarde Tiller ed., 2005 ed.). Today the Nation resides on a 121-square-mile reservation in a remote and rural area of Jackson County, Kansas. The reservation's roads have become more

heavily traveled since the Nation constructed a modern casino complex, which it owns and operates pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

Exercising its inherent sovereign authority, the Nation in 1999 enacted the Prairie Band Motor Vehicle Code, Potawatomi Law and Order Code title 17 ("PBMVC"). The PBMVC is a comprehensive motor code, the basic purpose of which is to "implement reasonable rules, regulations, and penalties essential to maintaining a safe and efficient transportation system" on the reservation. PBMVC § 17-1; *see* Pet. App. 2a. As explained in the code itself, the PBMVC's detailed regulations were necessary because of the "increasing number of tribal members . . . seeking to reside on the Reservation," the "increasing number of motor vehicles . . . being used by Indian and non-Indian persons to enter the Reservation territory in order to engage in gaming and other activities with Tribal enterprises or members," and the "significant increase in the amount of motor vehicle traffic on the Reservation." PBMVC § 17-1; *see id.* § 17-10-1; Pet. App. 35a.

Among other things, the PBMVC requires tribal vehicle registrations and titles for all vehicles owned by tribal members who reside on the reservation and for all tribal government vehicles. Pet. App. 35a. To obtain a tribal registration under the PBMVC, an individual must surrender any title certificate issued by another jurisdiction. *Id.* at 35a-36a. The tribal title certificates resemble titles of other jurisdictions, and the tribal license plates conform to national standards for visibility, design, and size. *Id.* at 36a. In addition, before a tribal registration is issued, the Nation inspects vehicles in accord with generally accepted practices. The Nation delivers pertinent information for all tribal registrations and titles to the State of Kansas and local law

enforcement agencies, although the State has refused to include that information in the State's computer database. *Id.* at 39a-40a. It is anticipated that 300-400 tribal registrations will be in use if the tribal system is permitted to proceed. *Id.* at 36a. The PBMVC exempts from its registration requirement any vehicle duly registered in another jurisdiction, so long as that jurisdiction provides reciprocal recognition to the Nation.

Kansas also has a registration and titling requirement. Under the Kansas motor vehicle code, all vehicles that operate in Kansas must be registered and titled by the State. *See* Kan. Stat. Ann. § 8-142. However, nonresidents who operate vehicles in Kansas are exempt from these requirements if they are "duly licensed in the state of residence," so long as the nonresident "state" provides reciprocal recognition to Kansas drivers. *Id.* § 8-138a. For purposes of the registration requirement, the term "state" includes any "'state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country and a state or province of the foreign country.'" Pet. App. 38a (quoting K.S.A. § 74-4305). Under these provisions, Kansas recognizes registrations issued by other States, Canada, Mexico, and even out-of-state Tribes. *See Kansas v. Wakole*, 959 P.2d 882 (Kan. 1998); Pet. App. 18a; *id.* at 38a & n.19. Kansas also exempts certain in-state local vehicle registrations of cities, counties, and school districts. Kansas has nevertheless refused to recognize registrations issued by the Nation.

Tribal members must frequently leave the reservation in their vehicles – for example, to obtain auto repairs, to seek certain medical services, or simply to shop for products that are not available on the reservation. Pet. App. 36a. In addition, tribal government-owned vehicles at times must

leave the reservation to perform government functions such as storm spotting and meeting with state officials. *Id.* Because the State refuses to recognize tribal registrations and titles, however, these tribally registered vehicles are subject to seizure, citation, and penalty when they drive on off-reservation Kansas roads without a Kansas registration. So far, Kansas has issued three citations involving tribally registered vehicles.

It is undisputed that the Nation's government and members cannot practicably comply with both tribal and Kansas registration and titling requirements, and that Kansas' policy effectively forecloses the tribal registration scheme. *See, e.g.*, Pet. App. 16a (noting that the State's failure to recognize tribal registrations would render the tribal system "'effectively defunct'") (quoting Pet. App. 68a); *id.* at 74a-75a ("[I]f the State does not recognize tribal registrations and titles, there will be no tribal registrations and titles and the Nation will be unable to effectively pursue the goal of self-government."); *id.* at 59a (absent an injunction, the Nation's registration and titling program "would be defeated").

B. The District Court Proceedings

The Nation brought suit in the United States District Court for the District of Kansas to enjoin Kansas from enforcing its registration and title requirements against vehicles duly registered under the PBMVC. The Nation argued that the State's policy impermissibly infringed the Nation's right to self-government, was preempted by federal law, and illegally discriminated against the Nation. The district court granted the Nation's request for a preliminary injunction, *see Prairie Band of Potawatomi Indians v.*

Pierce, 64 F. Supp. 2d 1113 (D. Kan. 1999), and the Tenth Circuit affirmed, 253 F.3d 1234 (10th Cir. 2001).

The district court then granted summary judgment for the Nation.[1] Applying this Court's analysis in *Bracker*, the district court concluded that the Kansas law could not be enforced against vehicles registered under the PBMVC. *See* Pet. App. 61a-78a. With respect to federal and tribal interests, the district court determined that "[m]otor vehicle registration and titling is a traditional government function," and that "the state's interference with the Nation's pursuit in this regard is considered interference with or infringement on tribal-self government." *Id.* at 64a. The district court explained that even off-reservation state action may impermissibly infringe tribal sovereignty, particularly when the State's action effectively forecloses the exercise of important aspects of "tribal self-government," *id.* at 66a, the "heart" of which occur on-reservation, *id.* at 72a, such as the enactment of a comprehensive tribal motor vehicle code. In contrast, the district court concluded that the State's articulated interests in sovereignty and public safety were minimally threatened, because the Nation provides the State with pertinent information for its vehicle database used by law enforcement officers, *id.* at 72a-74a, and because "Kansas is already recognizing out-of-state tribally issued registrations pursuant to its reciprocity statute," *id.* at 78a.

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[1] The district court also denied the State's motion for summary judgment and its motion to dismiss, rejecting its arguments that the Nation's suit was barred by the Tenth and Eleventh Amendments to the United States Constitution. These arguments were subsequently rejected by the Tenth Circuit as well.

C. The Tenth Circuit's Decision

The Tenth Circuit affirmed. The panel majority first rejected the State's argument that the *Bracker* balancing test should not be applied. Pet. App. 9a. The Tenth Circuit concluded that *Bracker* and *Jones* are not inconsistent in that, under *Jones*, "'if the tribal activity is off reservation that fact *generally* tips the balancing in favor of the state.'" *Id.* at 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9). The Tenth Circuit also concluded that the balancing test is not inapplicable simply because some off-reservation conduct is at issue. Further, unlike the ski resort at issue in *Jones*, the tribal activity that is burdened – the "licensing and titling of vehicles" – "takes place on the reservation" and involves a traditional government function. *Id.* at 14a.

Applying the *Bracker* balancing test, the panel majority determined that "vehicle registration involves a traditional government function," and that the Nation "has a significant interest in regulating motor vehicles on its reservation through the comprehensive PBMVC and through the issuance of tribal registrations and titles." Pet. App. 16a.[2] As the majority explained, if Kansas continues to enforce its registration and title requirements against tribal members, the similar requirements of the PBMVC "'will be effectively defunct.'" *Id.* (quoting Pet. App. 68a). The majority found these tribal interests "linked with strong federal interests in promoting strong tribal economic development, self-sufficiency, and self-governance." *Id.* at 17a. In contrast,

[2] The State has not contended in this case that the Nation lacks the power to enact a tribal registration and titling program, or that the State's criminal laws prohibit such a program on the Nation's reservation. It is thus undisputed that the Nation's enactment of its motor vehicle code is a valid exercise of its sovereign powers.

there was no evidence that the articulated state interests – public safety and sovereignty – were jeopardized by exempting drivers with tribal registrations. Indeed, "Kansas recognizes license plates from other states, Canada, and Mexico, and tribally issued tags from other jurisdictions, including Minnesota and Oklahoma, without any record-supported safety concerns." *Id.* at 18a. Thus, "[b]alanced against the amorphous and unsupported safety concerns asserted by the State, the Tribe's interest in self-governance by enacting and enforcing its own vehicle registration and titling laws must prevail." *Id.* at 19a.

The panel majority also placed substantial reliance on the discriminatory nature of the Kansas policy, concluding that "[c]ertainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.

Judge McConnell concurred. Pet. App. 25a-31a. In his view, a discrimination analysis under *Jones* rather than the balancing test of *Bracker* was applicable. He concluded, however, that the State could not survive the discrimination analysis because the State's registration and titling policy was *not* "non-discriminatory." *Id.* at 29a. Judge McConnell emphasized that under the Kansas registration policy, "residents of Missouri, Newfoundland, or Singapore can drive on Kansas roads without being forced to register," as can members of "Indian tribes from outside of Kansas." *Id.* at 29a. Indeed, "out of the universe of non-Kansas vehicles that appear on Kansas highways," the only non-exempt group is "Kansas-based Indian tribes." *Id.* at 29a-30a. Judge McConnell rejected the State's purported public safety justification for this discrimination because Kansas had not taken any steps – by amending its titling statute or otherwise

– to address safety concerns with respect to any other jurisdiction. Judge McConnell also noted in this regard that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*]," which had invalidated California's refusal to permit tribal law enforcement vehicles to display emergency lights when law enforcement vehicles from other jurisdictions were permitted to do so. *Id.* at 31a. Judge McConnell thus concluded that the Kansas policy was "a discriminatory application of state law that violates the [*Jones*] standard." *Id.*[3]

REASONS FOR DENYING THE PETITION

1. Petitioners' principal contention is that the decision below creates a split of authority as to whether "off-reservation" enforcement of "nondiscriminatory" state motor vehicle codes is properly evaluated under the *Bracker* framework – which requires courts to balance federal, state, and tribal interests to determine whether state regulations affecting Indians are preempted by federal law or unduly infringe upon tribal sovereignty.[4] According to the State, the

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[3] As Judge McConnell noted, the State expressly disclaimed any interest in generating revenue as a basis for imposing registration requirements on the Nation, choosing to rely exclusively on public safety and sovereignty as justifications for its discrimination. *See* Pet. App. 30a n.2.

[4] On October 3, 2005, the Court will hear oral argument in *Wagnon v. Prairie Band Potawatomi Nation*, No. 04-631, which involves a challenge to Kansas' motor fuel tax, as applied to fuel sold and delivered to an on-reservation tribal gas station. Although that case involves the applicability and application of *Bracker*, its resolution is unlikely to affect this case, because, among other things, the Kansas vehicle registration policy at issue here is discriminatory and thus invalid regardless of whether

Bracker framework is limited to situations involving purely on-reservation conduct, and because the Kansas law at issue here involves off-reservation roads, the applicable law is described in *Jones*, in which the Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to *nondiscriminatory* state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added).

As discussed below, even if presented, the *Bracker* issue raised by the State is neither the subject of a meaningful split of authority nor otherwise worthy of this Court's review. *See infra* pp. 13-23. But the State's plea for review fails for a more basic reason. As the Tenth Circuit held, the Kansas law at issue is *discriminatory*, and it thus may not be enforced regardless of which analysis the Court applies. The issue pressed by the State – whether "nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in [*Bracker*]," Pet. 4 – is simply not presented.

All three judges below concluded that the Kansas policy is discriminatory. Kansas law requires all vehicles driving on Kansas roads to be registered and tilted by the State of Kansas. *See* Kan. Stat. Ann. § 8-142. However, any individual whose vehicle is duly registered and titled by another "state" is exempt from the Kansas requirements, so long as the other "state" extends reciprocal privileges to Kansas drivers. *See id.* § 8-138a. This exemption applies not only to individuals properly registered in other States of the United States, but also to those registered by foreign countries and out-of-state Indian Tribes. *See* Pet. App. 18a.

Bracker applies. Accordingly, there is no basis to hold this case pending resolution of 04-631.

Thus, as Judge McConnell reasoned in his concurrence, the State's interpretation singles out in-state Tribes such as the Nation for impermissibly discriminatory treatment. *See, e.g.*, Pet. App. 31a ("This is a discriminatory application of state law . . . ."). As Judge McConnell explained, the State's purported safety and sovereignty rationales – the only rationales invoked by the State, *see supra* n.3 – fail to justify the State's discriminatory policy, because "Kansas recognizes [other] foreign vehicles without reference to any safety standards," and thus imposes "on residents of Kansas-based reservations a requirement that it does not impose on residents of any other jurisdiction." Pet. App. 30a-31a.

The panel majority similarly recognized the discriminatory nature of State's registration and title policy, concluding that "the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a. Although it did not expressly adopt the discrimination analysis used by Judge McConnell, the majority did "not disagree with the concurrence's discrimination analysis," which "may very well be an additional appropriate analysis in the instant case." *Id.* at 20a.[5]

[5] As Judge McConnell observed, the State "strenuously argued in [the Tenth Circuit] that the [*Jones*] discrimination test, rather than the *Bracker* balancing test, applies to this case," although it "failed to offer a persuasive argument why [the State] should *prevail* under the [*Jones*] test" – as the Nation argued below. Pet. App. 27a n.1. Thus, although the Tenth Circuit applied the *Bracker* balancing analysis, the discrimination issue was also properly presented and considered.

The State nevertheless pretends as if that analysis never happened. Indeed, the State's petition repeatedly describes its policy as "nondiscriminatory," Pet. 4, 5, 6, 10, 12, 13, 16, and even raises the specter of the Tenth Circuit's ruling being used to strike down "an otherwise lawful, nondiscriminatory State law imposed off-reservation," *id.* at 4, apparently oblivious to the Tenth Circuit's discrimination-based reasoning and Judge McConnell's concurrence. But as all members of the Tenth Circuit panel recognized, the State's insistence that the Kansas policy is "nondiscriminatory" does not make it so. Regardless of whether *Jones* or *Bracker* controls (assuming such a dichotomy), the State's discriminatory registration policy is unenforceable against tribal registrations. The State's petition is thus not an appropriate vehicle for delineating the line, if any, between these two cases.

Nor is the question whether the Kansas policy is discriminatory independently worthy of review. That question turns on a fact-specific analysis of the Kansas policy, making it an inappropriate candidate for certiorari. Moreover, there is no conflict among the lower courts on this issue. Indeed, the only other court facing an analogous situation concluded that the state policy there at issue was discriminatory. In *Cabazon IV*, the Ninth Circuit considered the validity of a provision of California's vehicle code that prohibited the Cabazon tribal police vehicles from displaying emergency light bars, while permitting the display of such bars by California local law enforcement vehicles, as well as law enforcement vehicles of the federal government, bordering States, and even private security companies. *See* 388 F.3d at 698-99. The Ninth Circuit concluded that the State's enforcement of its light bar provisions against the Cabazon's law enforcement vehicles was discriminatory

under *Jones* and was therefore preempted by federal law. *See id.* at 701 (noting that California "discriminates against the Tribe").

Both the panel majority and Judge McConnell's concurrence cited the Ninth Circuit's discrimination analysis with approval. Indeed, the panel praised as "sound" the Ninth Circuit's "analysis regarding the discriminatory effect of the State's motor vehicle code" in *Cabazon IV*. Pet. App. 11a. And Judge McConnell noted that his "analysis comports with the Ninth Circuit's approach in [*Cabazon IV*.]." *Id.* at 31a. The discrimination at the core of this case thus undermines the State's plea for review.

2. The State's petition should also be denied because this case does not, as the State claims, present the question whether *Bracker* "applies" to off-reservation state regulations. This is so, because, as the panel majority ruled, this is not an "off-reservation" case. Rather, this case – although complicated by "the transitory nature of motor vehicles," Pet. App. 9a – ultimately concerns a state policy that nullifies the tribal "licensing and titling of vehicles," which "takes place on the reservation," *id.* at 14a. Thus, "[e]ven though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the reservation for various reasons," the majority "'deem[ed] it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'" *Id.* (quoting *In re Blue Lake Forest Prods., Inc.*, 30 F.3d 1138, 1141 (9th Cir. 1994) (classifying a case as "on-reservation," even though it "implicates an off-reservation relationship between the two non-Indian actors," where "the Indian enterprise at the heart of this dispute – the timbering lands – is located on, not off, the reservation")).

Thus, the panel majority did not purport to apply *Bracker* to exclusively off-reservation activity – notwithstanding the State's repeated claims to the contrary. *See* Pet. 4-11. Indeed, the majority even stated that it did "not necessarily disagree with [the State's] statement that the '[*Bracker*] balancing of interests test [is inapplicable] when the activity sought to be regulated by the State takes place off reservation land.'" Pet. App. 13a-14a (quoting the State's appellate brief; second and third brackets in original). The core of the State's challenge is thus that the majority erred in its fact-bound conclusion that this case is properly viewed as an "on-reservation" case. Such error correction is not a proper basis for this Court's review.

Moreover, the majority got it right. The record evidence is undisputed that if the State enforces its registration requirements against tribal vehicles, the Nation's "'motor vehicle code will be effectively defunct.'" Pet. App. 16a (quoting district court); *see, e.g., id.* at 59a, 74a-75a (district court findings). In light of the devastating on-reservation consequences of the State's refusal to permit the use of tribal registrations off-reservation – the effective nullification of the Nation's sovereign power to enact a motor vehicle code and regulate its government and members – there is no reason to question the panel majority's sound determination that this is at base an "on-reservation" case.

3. Review by the Court is unwarranted even were this case to involve a nondiscriminatory state policy applied to "off-reservation" conduct because the application of *Bracker* to such a policy is not – as the State contends – "directly contrary to the repeated statements and holdings of this Court." Pet. 5. Indeed, far from endorsing the State's approach, the Court has repeatedly *rejected* arguments that the *Bracker* analysis does not apply when the specific

conduct regulated by a State occurs off the reservation. For example, in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court contemplated the application of the *Bracker* balance-of-interests analysis where the legal incidence of a state tax is placed on the off-reservation "wholesalers who sell to the Tribe." *Id.* at 459. That approach is consistent with the Court's rejection a decade earlier of a "'legal incidence'" test in place of applying *Bracker* in the tax context, "under which legal incidence and not the actual burden of the tax would control the pre-emption inquiry." *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 n.8 (1982); *see, e.g., Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74 (1994) (applying balancing analysis to obligations imposed on off-reservation wholesalers).

Indeed, at least a century of precedent endorses the common-sense notion that off-reservation state regulation can impermissibly infringe on-reservation tribal sovereign interests. In *Winters v. United States*, 207 U.S. 564 (1908), for example, the United States successfully sued to prevent the building of off-reservation dams and reservoirs that would have limited water flows to the reservation. *Id.* at 576; *see Arizona v. California*, 373 U.S. 546, 598-601 (1963). The same principle is reflected in the fishing cases. In *United States v. Winans*, 198 U.S. 371, 379 (1905), for example, the Court enjoined the use of a "fishing wheel" on private property off the reservation when that wheel unduly restricted the ability of the Tribe to fish at its "usual and accustomed places." And in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court held that neither the Tribe nor the State could "rely on the State's regulatory powers or on

property law concepts to defeat the other's right to a 'fairly apportioned' share" of the fish. *Id.* at 682; *see id.* at 679-85 (discussing cases).[6]

The State would use the reservation border to immunize off-reservation state regulations from preemption, no matter how devastating the effect on tribal-self government. For example, as here, the State could effectively nullify a tribal motor vehicle code – enacted pursuant to the Nation's sovereign right to control its members and territory – by refusing to recognize tribal registrations off-reservation, thus forcing tribal members to eschew tribal registration if they intend any off-reservation travel. This Court, however, has repeatedly rejected such an approach, which would allow Tribes to exercise sovereign authority "only at the sufferance of the State." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). Rather, in situations where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," this Court "resolve[s] th[e] conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973).

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[6] The State places great weight on *Nevada v. Hicks*, 533 U.S. 353 (2001), for its claim that states have *carte blanche* to regulate the off-reservation activities of Indians. Pet. 7-9. However, as the Tenth Circuit explained, *see* Pet. App. 11a-15a, the principles announced in *Hicks* concern the limits of *tribal* power to reach out and regulate the conduct of nonmembers, whereas the question here concerns the scope of *federal* power to limit state interference with a Tribe's exercise of its sovereign powers. *Hicks* is thus fully consistent with (and did not purport to affect) the *Bracker* framework in a situation like this. Unsurprisingly, the State does not even try to allege a split on this issue.

That the threat to the Nation's sovereign powers is a central feature of this case also shows why *Jones* does not establish a categorical rule against preemption for any off-reservation activity, as the State claims. *Jones* involved state taxation of Indians who ventured off the reservation to build a ski resort. In that case, there could be no claim that the tribal sovereign power to regulate on the reservation was effectively nullified by the off-reservation state tax. As the Tenth Circuit recognized, the Court in *Jones* simply had no occasion to consider a context – such as the one presented here – in which an ostensibly off-reservation state regulation effectively nullifies a core aspect of on-reservation tribal self-government.[7]

The State's approach is similarly at odds with the protections afforded Tribes by the Indian Commerce Clause. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (acknowledging the Clause's "role to play in preventing undue discrimination against, or burdens on, Indian commerce"). The contours of the constitutional protection are determined by the extent of the burden on Indian commerce and the importance of the tribal, state, and federal interests at stake – not by "where" the State imposes the

[7] The Court in *Jones* stated that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have *generally* been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 (emphasis added). The Tenth Circuit harmonized this passage from *Jones* with *Bracker* and its progeny to mean that "'if the tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state.'" Pet. App. 10a n.6 (quoting *Prairie Band I*, 253 F.3d at 1255 n.9).

burden.[8] The State's approach, in which federal and tribal interests become *entirely irrelevant* so long as the State enforces its offending regulation "off-reservation," cannot be reconciled with the careful balancing of interests that the Clause requires.

Finally, the State exaggerates the consequences of a refusal to restrict the balancing inquiry to purely on-reservation conduct, suggesting that "any off-reservation state regulatory activity is vulnerable." Pet. 11. But that is hardly the case, for it is only where, as here, ostensibly "off-reservation" state regulations devastate the federal and tribal interests in tribal self-government but forward no discernible state interest that the balance will weigh in favor of preemption. The State exaggerates further still in claiming that recognizing tribal registrations will "expose[] the States' system of highway safety and management and regulation of the thousands upon thousands of vehicles on the State's highways to unwarranted vulnerability as a practical matter." *Id.* But Kansas itself recognizes tribal registrations from other states, such as Minnesota and Oklahoma, without any reported negative effects. *See* Pet. App. 18a. Likewise, there are no reports of chaos from the many jurisdictions that choose to recognize in-state tribal registrations without the need for lengthy court battles. *See, e.g.*, S.D. Codified Laws

[8] Similarly, in the context of the Interstate Commerce Clause, the focus of the inquiry is the effect of the burden on interstate commerce regardless where such burden arises. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616 (1981) ("State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of the Commerce Clause inquiry.").

§ 32-5-42; Wash. Rev. Code Ann. §§ 46.16.020, 46.16.022; Wis. Stat. Ann. § 341.409.

4. Not only is the Tenth Circuit's approach fully consistent with this Court's precedent, but there is no split of authority among lower courts warranting review.

To support its claim of a "schism," Pet. 4, the State cites only *one* other court of appeals decision – a Ninth Circuit opinion that the State concedes has been *withdrawn*. *See* Pet. 9 (citing *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001) ("*Cabazon II*"), *vacated*, 271 F.3d 910 (9th Cir. 2001)). *Cabazon II* was an earlier iteration of the challenge to the discriminatory California law that prohibited the display of "light bars" by in-state tribal law enforcement vehicles. Over a dissent, the *Cabazon II* panel, in a wide-ranging opinion, found *Bracker* inapplicable and would have sustained California's policy under *Jones*. *See* 249 F.3d 1110. The Ninth Circuit's *Cabazon II* opinion – "sound" or not, Pet. 9 n.3 – was later withdrawn, and superseded by *Cabazon IV*, which concluded that the California policy was discriminatory and could not be sustained under *Jones*. *See Cabazon IV*, 388 F.3d at 701.

The State's narrow focus on *Cabazon II* and studied failure to discuss *Cabazon IV* or the discrimination analysis in the Tenth Circuit's opinion is telling. For *Cabazon IV* creates no "palpable conflict," Pet. 11, with the Tenth Circuit's decision here. Indeed, the Ninth Circuit's reasoning and result in *Cabazon IV* largely track the Tenth Circuit's decision at issue here. To begin with, both decisions reach the same conclusion – that States may not enforce discriminatory provisions of their motor vehicle codes against in-state Tribes where tribal sovereignty is jeopardized. Furthermore, although the two courts purport to

apply different analytical frameworks (*Jones* and *Bracker*), in reality each court relies on *both* cases to reach its decision. For example, although the Ninth Circuit grounded its *Cabazon IV* decision in the "discrimination" language in *Jones*, it also weighed federal and tribal interests in determining that the California policy was invalid. As the Ninth Circuit explained, the state policy both "discriminates against the Tribe *and* unduly burdens its ability to effectively perform its on-reservation law enforcement functions, thus frustrating the federal policy supporting tribal self-government." 388 F.3d at 701 (emphasis added). A pure "discrimination" framework would not be concerned with such reasoning. Similarly, the Tenth Circuit's interest-balancing in this case relied on the discriminatory nature of the exemptions from the Kansas registration requirement: "Certainly, the discriminatory effect of Kansas' motor vehicle registration and titling laws as applied to the Tribe strengthens the Tribe's claim that the *Bracker* balancing of interests inquiry favors them." Pet. App. 11a.[9]

In sum, what is more noteworthy than the reconcilable differences in doctrinal approach between the Ninth and Tenth Circuits is that *both* courts agree that state motor vehicle codes cannot be enforced against Tribes in a discriminatory manner or as to jeopardize the core exercise of tribal sovereignty. Indeed, both courts weigh similar

[9] Notably, the State's petition does not challenge the Tenth Circuit's *application* of the *Bracker* framework – and for good reason. Under *Bracker*, and for reasons similar to those articulated by the Ninth Circuit in *Cabazon IV*, the State may not refuse to permit the use of vehicle registrations issued by the Nation. Because the decision below and *Cabazon IV* reach essentially the same result, there is certainly no conflict in the lower courts about the invalidity of discriminatory laws such as the one at issue here.

factors – namely, the relevant state, federal, and tribal interests – in reaching that conclusion. There is simply no "palpable conflict," Pet. 11, warranting this Court's review.

5. The State's fallback ground for certiorari is a request that this Court overrule the preemption analysis articulated in *Bracker* for *all* situations – both on- and off-reservation – for the sake of clarity. *See* Pet. 12-18. There is, of course, no conflict among lower courts on this question. There is no justification for granting the State's radical request.

For 30 years, this Court has consistently applied *Bracker*'s synthesis of 200 years of Indian law, including in three recent unanimous opinions. *See, e.g.*, *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999); *Chickasaw*, 515 U.S. at 458 (unanimous on this issue); *Milhelm Attea*, 512 U.S. at 73. In these circumstances, this Court demands a "compelling justification" before "depart[ing] from the doctrine of *stare decisis*." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

There is simply no reason to reconsider this controlling law. The status of Tribes remains "anomalous" and "complex." *Bracker*, 448 U.S. at 142. Challenges to state regulations that affect both Tribes and non-members on the reservation still present the "difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah*, 458 U.S. at 836-37 (internal quotation marks omitted). And Indian law still operates against the backdrop of "'tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination." *Mescalero*, 462 U.S. at 334. It is for these reasons that the Court has long eschewed "standards of pre-emption that have developed in other areas of the law" –

namely, an express preemption standard – instead endorsing *Bracker*'s "flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

The State's main argument for discarding *Bracker*'s preemption framework is its claim that the balancing test "is simply unworkable." Pet. 12. But this Court has had little trouble with its application. *See, e.g.*, *Milhelm Attea*, 512 U.S. 61 (unanimous opinion); *see also Ramah*, 458 U.S. at 846 (noting that this Court's "precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance"). And the State completely fails to substantiate its bald assertion that the *Bracker* framework "has created uncertainty and confusion in the lower courts." Pet. 18. Indeed, despite its rhetoric, the State cites only one Ninth Circuit tax case that it deems confusing. Pet. 13-16.

Moreover, this Court has long recognized that, given the unique history and complicated interests at stake, ease of application is not the dominant consideration in Indian law. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (noting that "sovereign immunity bars the State from pursuing the most efficient remedy"). The State's cries for "clear guidance, clear lines of demarcation and clear, readily applicable results," and its exaltation of categorical rules thus ring hollow, Pet. 18, for "[o]nly rarely does the talismanic invocation" of "rigid conceptions of state and tribal sovereignty shed light on difficult problems." *Colville*, 447 U.S. at 168 (Brennan, J., concurring); *see also Ramah*, 458 U.S. at 846 (rejecting categorical rule in favor of nuanced balancing of interests).

Eliminating balancing as the State urges would have devastating consequences, spurring state regulation that would threaten tribal enterprises and even entire tribal regulatory schemes, such as those approved by the Court in *Bracker* and its progeny. It also would overturn significant precedent from this Court, including the Court's several cases applying *Bracker*. There is simply no need – or reason – to eviscerate the policy of promoting and protecting the interest in tribal self-government that Congress has long embraced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 26, 2005

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