No. 04-1740 JUN 23 2005

In The

Supreme Court of the United States

JOAN WAGNON, Secretary, Kansas Department of Revenue, SHEILA WALKER, Director of Vehicles, State of Kansas, and WILLIAM SECK, Superintendent, Kansas Highway Patrol, State of Kansas, in their official capacities,

Petitioners,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) should be applied to preempt a State's off-reservation enforcement of its motor vehicle code.

2) Should the Court abandon the *White Mountain Apache* interest-balancing test in favor of a preemption analysis based on the principle that Indian immunities are dependant upon congressional intent?

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The March 25, 2005, decision of the United States Court of Appeals for the Tenth Circuit is reported at 402 F.3d 1015 (10th Cir. 2005), and is included in the petition appendix. The decision of the District Court is reported at 276 F.Supp.2d 1168 (D. Kan. 2003) This decision is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision in this case on March 25, 2005. This petition has been filed within ninety (90) days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 provides that

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

18 U.S.C. § 3243 in pertinent part provides that

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over

offenses committed elsewhere within the State in accordance with the laws of the State.

Kan. Stat. Ann. § 8-142 (2001) provides that

> It shall be unlawful for any person to commit any of the following acts and except as otherwise provided, violation is subject to penalties provided in K.S.A. 8-149, and amendments thereto:
>
> *First:* To operate, or for the owner thereof knowingly to permit the operation, upon a highway of any vehicle, as defined in K.S.A. 8-126, and amendments thereto, which is not registered, or for which a certificate of title has not been issued or which does not have attached thereto and displayed thereon the license plate or plates assigned thereto by the division for the current registration year, including any registration decal required to be affixed to any such license plate pursuant to K.S.A. 8-134, and amendments thereto, subject to the exemptions allowed in K.S.A. 8-135, 8-198[,] and 8-1751a, and amendments thereto.
>
> *Second:* To display or cause or permit to be displayed, or to have in possession, any registration receipt, certificate of title, registration license plate, registration decal, accessible parking placard or accessible parking identification card knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

STATEMENT

1. *Nature of the Suit.* Prairie Band Potawatomi Nation (hereinafter, "Respondent"), filed suit against various Kansas State officials seeking declaratory and injunctive relief against the State to prohibit the State from enforcing its motor vehicle registration and titling laws off-reservation against any person who owned or operated a vehicle registered and licensed under tribal laws driven beyond the boundaries of Respondent's reservation.

2. *The District Court Proceedings.* Citing the balance-of-interests test articulated in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), the district court determined that the federal and tribal interests preempted the State's interests and permanently enjoined and restrained the State of Kansas from further application and enforcement of its motor vehicle registration or titling laws against Respondent, its members and any persons who operates or owns a vehicle properly registered and titled under Respondent's motor vehicle code. Pet. App. 79. The order applied to vehicles driven both on and off of Respondent's reservation. Pet. App. 79.

3. *The Court of Appeals' Decision.* The Court of Appeals, reviewing the District Court's decision affirmed the district court's Order. Pet. App. 25. The Court of Appeals concluded that the *White Mountain Apache* balance-of-interests test is appropriate to analyze, and ultimately strike, the off-reservation enforcement by the State of Kansas motor vehicle laws against Respondent and its members. Pet. App. 17-19.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts with Precedent from This Court Concerning Applicability of the *White Mountain Apache* Balancing Test, and Creates a Schism Between Federal Circuit Courts of Appeal.

The Court of Appeals determined that nondiscriminatory state motor vehicle laws, enforced off-reservation, are preempted under the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As a practical matter, the Court of Appeals has now invoked preemption-by-implication as an appropriate standard to reach beyond a tribe's geographical reservation boundary and strike an otherwise lawful, nondiscriminatory State law imposed off-reservation. This was error.[1]

White Mountain Apache only involved the on-reservation activity of a non-Indian company. This Court addressed only the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis that embodies the balance-of-interests test. This Court thus cited the settled rule three years later in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,'" *id.* at 335 n.18, and, as a result, held that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the

[1] Whether the *White Mountain Apache* balancing test is appropriate in the context of off-reservation taxation by a State is the subject of a case currently pending before this Court. *Richards v. Prairie Band of Potawatomi Nation*, Case No. 04-631.

contrary,'" *id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148-49 (1973)).

Given *White Mountain Apache's* express recognition of that rule, states have operated on the assumption that, at a *minimum*, they are free to apply their nondiscriminatory laws off-reservation, even against tribes or their members without reference to an *ad hoc* and amorphous test used to resolve only the validity of on-reservation state regulation of nonmembers doing business with tribal entities. *See Mescalero Apache Tribe*, 411 U.S. at 148-49 ("State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent 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.").

This Court has regularly endorsed this principle. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 468 (1995); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Given the force and history of the Court's pronouncements in this regard, it is remarkable that the Court of Appeals did not even pause to consider the point. In any event, the attempt of the Court of Appeals to apply the *White Mountain Apache* rule to off-reservation regulation by the State is directly contrary to the repeated statements and holdings of this Court, and itself merits the grant of certiorari.

In explaining the doctrinal basis for the *White Mountain Apache* test, this Court stated that the "tradition of

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

The Court of Appeals' decision constitutes a marked departure from the path-marking *Mescalero Apache Tribe* and its progeny. The decision below leaves substantial doubt concerning a State's ability to regulate Indians off-reservation through nondiscriminatory state laws. The Court of Appeals' decision dramatically departs from controlling authority from this Court, and sharply contrasts with the Ninth Circuit that the balance-of-interests test does not apply to off-reservation state regulation and enforcement of state law against Indians.

Long ago this Court held that in the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland,* 235 U.S. 610, 622 (1915). A state may require registration and licensing of such vehicles and charge reasonable fees. *Id.*

Moreover, this Court has held that a state is not automatically barred from applying its laws even if they

may significantly touch the political and economic interests of tribes. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 157 (1980) (discussing Indian commerce clause).

The Court of Appeals' decision ignored or swept aside the principles laid down in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) that have been followed up through and including *Nevada v. Hicks*, 533 U.S. 353 (2001), that states may regulate the activities of Indians off-reservation. The corollary to this principle is that tribal activity simply cannot extend beyond the bounds of a tribe's reservation to preempt off-reservation state law.

Most telling on this point is *Nevada v. Hicks*, 533 U.S. 353 (2001). Justice Scalia, writing for the majority, found constitutionally unembarrassed the on-reservation execution of a state court-issued search warrant against a tribal member in connection with an off-reservation violation of state game law. This Court observed, citing *Mescalero Apache* as authority, that "[i]t is . . . well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation." *Id.* at 362.[2] The Court then held that such "authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes" (*id.* at 363) because

[2] Kansas too has criminal jurisdiction over reservation Indians. 18 U.S.C. § 3243 provides that: "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."

"tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them[]'" (*id.* at 364).

Hicks, of course, presented a significantly different factual situation, since no on-reservation regulation by Kansas is at play instantly. *Hicks*, nevertheless, negates any suggestion that the *Mescalero Apache* standard is altered by virtue of subsequent, collateral on-reservation effects. As in *Hicks*, any *on-reservation* state conduct attendant to those effects conceivably may raise a preemption issue controlled by special Indian law principles, but the existence of state regulatory authority over the predicate off-reservation conduct remains intact. The Supreme Court's decision in *Hicks* affirmed the vitality of the rule of law expressed in *Mescalero* and *Colville*.

In contrast, the Court of Appeals' decision in this case is contrary to the holding and analysis in *Mescalero, Colville* and *Hicks*. Indeed, it seems as though the underlying principles embodied in these cases have largely been misapprehended by the Court of Appeals. The Court of Appeals distinguished this case from *Hicks* by holding that *Hicks* is limited to a case addressing "tribal interference with legitimate state law enforcement activity on reservation." Pet. App. 13. To shore up its decision, the Court of Appeals determined that "the activity at issue in this case, licensing and titling of vehicles, takes place on the reservation." Pet. App. 14, and "when state interests are secondarily affected, *Bracker* must be applied to ascertain and balance all parties' interests." Pet. App. 15. Yet, the overarching philosophy supporting the conclusion in *Hicks* in no way negates off-reservation state law enforcement. One

is given pause to ask, if *Hicks* stands for the proposition that notions of tribal sovereignty cannot oust on-reservation enforcement by a state of off-reservation state authority, how then can a tribe's sovereignty extend beyond its reservation to oust both state regulation and enforcement off-reservation?

The Court of Appeals got around that question by holding that the activity at issue was the tribe's titling and licensing of tribal member vehicles. Pet. App. 14. Yet, the activity at issue, indeed what precipitated this case, was the off-reservation operation of a vehicle in violation of Kan. Stat. Ann. § 8-142 (2001) by Respondent's tribal members. Pet. App. 5. There is no evidence in the record that the State attempted in any manner to regulate or prohibit the tribal activity of issuing tribal plates and titles.

Further, in *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001), *vacated*, 271 F.3d 910 (9th Cir. 2001) (hereinafter, *Cabazon II*), the County's regulation of the Tribe's use of emergency light bars occurred entirely off reservation and, the Ninth Circuit concluded that *White Mountain Apache's* balancing test was inapplicable.[3] Instead, the Ninth Circuit applied the standard articulated in *Mescalero Apache Tribe*. The Ninth Circuit concluded that under *Mescalero*, a nondiscriminatory state law applied to Indian activities outside a tribe's

[3] On July 18, 2001, while the Tribe's petition for rehearing in *Cabazon II* was pending, the Tribe and the BIA Office of Law Enforcement Services entered into a Deputation Agreement. In light of the Deputation Agreement, the *Cabazon II* panel withdrew its opinion and remanded for the district court to consider the Deputation Agreement's impact on the issues in this case. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 696 (9th Cir.2004). Though withdrawn, the Ninth Circuit's original reasoning in *Cabazon II* is still sound.

reservation boundaries is federally preempted only where the state law is contrary to "express federal law." *Id.* at 148-49. Finding no express law to the contrary, and concluding that it was "undisputed that California's Vehicle Code is nondiscriminatory state law," the *Cabazon II* Court held that the Vehicle Code's limitation on the use and display of emergency light bars to "authorized emergency vehicles," applied to the Tribe's police vehicles traveling on public highways. 249 F.3d at 1105. Similarly here, there is no express federal law contrary to Kan. Stat. Ann. § 8-142 (2001), nor is there any evidence that this Kansas Statute is discriminatory.

The Court of Appeals below noted the conflict between the circuits, stating it was in disagreement with the Ninth Circuit's conclusion that, under *Mescalero Apache Tribe,* balancing of interests is improper when a State regulates and administers its laws off-reservation, even against Indians and even if Indian interests may be implicated. Pet. App. 10. The Court of Appeals' repudiation of the rule of *Mescalero Apache Tribe* requiring "express federal law" as a prerequisite to off-reservation preemption is startling.

States have a strong interest in maintaining their authority to regulate both Indians and non-Indians off reservation. *White Mountain Apache* is a test of general application on the reservation to the activities of non-Indians; it applies to both tax *and non-tax matters. See generally Nevada v. Hicks*, 533 U.S. 353, 362 (2001). The decision below logically could be read to require the balancing of state, federal, and tribal interests with regard to *any* activity of an Indian off-reservation. States have never been subjected to divestment of their regulatory authority off-reservation through the *White Mountain*

Apache test, and such an extension as unfounded and illegitimate.

In sum, the Tenth Circuit's decision creates a palpable conflict between authority from this Court and the Ninth Circuit for purposes of S. Ct. R. 10(a).

Finally, the pernicious effect of the Court of Appeals' reasoning on the States' administration of their motor vehicle laws must be emphasized. The Court of Appeals' decision erroneously exposes 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. Indeed, under the Court of Appeals' rationale, any off-reservation state regulatory activity is vulnerable. For example, if a tribe decides to issue a license to its members for any manner of activities (*e.g.*, drivers licenses, hunting or fishing licenses, licenses to transport hazardous materials, etc.), the rationale of the decision below would operate as a *per se* preemption of state law, even off-reservation. Further, if a tribe places a business operation (*e.g.*, a hotel, restaurant and bar complex) off-reservation and "licenses" it under tribal code, then, under the rationale of the decision below, state statutes regulating health, safety, liquor sales, etc. would be preempted. In any suit brought by a tribe involving off-reservation state regulation, tribes will presumably be able to bring all manner of claims alleging that state action off-reservation against Indians or non-Indians has an adverse economic or political effect on the tribe which, *inter alia*, "harms" the tribe, and thus preempts the state's sovereign, off-reservation authority. This too is untenable under our system of federalism.

Thus, reversing the Court of Appeals' error in this case is not just a nicety of legal reasoning, but a practical necessity. Kansas respectfully requests that the Court reverse the Court of Appeals' erroneous holding on this issue.

II. The Perpetual Uncertainty in Lines of Demarcation and Lack of Meaningful, Clear Guidance That Is Critical to States, Dictates That the *White Mountain Apache* Balancing Test Be Replaced with a Preemption Analysis Based on the Principle that Indian Immunities Are Dependant Upon Congressional Intent.

In order to properly administer their highway programs, provide for the integrity of vehicle titles, and promote public safety on its highways for their citizens, States need clarity in jurisdictional limitations, certainty in rules of application and consistency of results. The balance-of-interests test is seriously deficient on all counts.

It has become abundantly clear that the *White Mountain Apache* interest-balancing test laid down almost 25 years ago is simply unworkable. Justice (now Chief Justice) Rehnquist's dissent in *Colville* was prescient in this regard. The judiciary has become log-jammed with protracted litigation in which neither side can, nor will, acknowledge that the balance of interests favors the other. This flight to litigation is encouraged by the balance-of-interests test itself, which has devolved into a case-by-case, highly subjective test whose results are plainly unpredictable. As previously noted, no circuit or state supreme court has used the *White Mountain Apache* balance-of-interests test to strike a lawful, nondiscriminatory State law imposed off-reservation. In light of *Mescalero*

Apache, which allows States to impose nondiscriminatory laws off-reservation even against Indians, the decision by the Court below to use the *White Mountain Apache* balance-of-interests test to strike a State law administered off-reservation can only be characterized as dramatically unpredictable as well as unprecedented.

More to the point, the fact that States must now ascertain whether their off-reservation regulation may have an effect on a tribe is plainly impracticable. For example, the test requires States to make determinations of off-reservation activity prior to the activity even occurring on facts that a State cannot possibly know and whose potential effects are unknown. This simply exceeds the capability of any official or institution. The only way that a State will be able to "know" about transactions or activities occurring off-reservation and the effects on tribes is when a tribe sues the State alleging harm. Thus, the real world result of the balance-of-interests test has become a nearly one hundred precent guarantee of protracted litigation. A test should be designed to mitigate conflict, not be the catalyst for litigation. This concern was rightly noted by Chief Justice Rhenquist in *Colville*, and has become all the more urgent today.

By way of example, a paradigm of the multi-layered complexity attendant to the *White Mountain Apache* analysis in a taxation context is *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). There, a majority of a Ninth Circuit three-judge panel upheld application of an Arizona business transaction tax imposed on-reservation on the lessee of a tribally-owned hotel and gaming facility. In so holding, the majority listed the factors that it considered as militating for and against preemption:

In our case the following facts favor preemption:

1. The fee is held by the United States in trust for the Tribe.

2. The Tribe has furnished the site for the Hotel.

3. The Tribe has ownership of the Hotel, its facilities, and all improvements.

4. The Tribe has a residual interest in the assignment of the lease.

5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.

7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.

8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The

manager of the Hotel was not aware of any employee from the Tribe.

2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.

3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.

4. The Tribe receives only a guaranteed 1-1/4 percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."

5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

   (a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement.

   (b) The law governing liens . . . and other security instruments such as the mortgages by which the Hotel is financed.

   (c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

Id. at 1111-12 (citations omitted). A dissenting judge reasoned, similarly to the Tenth Circuit here, that the state tax was preempted because of (1) the tribe's "'active

role in *generating activities of value* on its reservation[;]'" (2) the federal interest reflected in the leasing of tribal trust lands, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and a Housing and Urban Development grant that financed the hotel's construction; and (3) the conclusion that "the state does not provide the overwhelming 'majority' of services and does not provide services 'critical' to the Hotel's success." *Id.* at 1114-16 (Pregerson, J., dissenting).

While *Yavapai-Prescott* is a tax-related case, it clearly illustrates the conundrum facing states. The permutations of facts and circumstances in any given situation are legion, indeed, incalculable. Any variation of fact or circumstance, no matter how slight, could, in some court's mind, tip the "balance" in the opposite direction. It cannot be disputed that such *ad hoc* "interest balancing" is a recipe for unguided judicial picking-and-choosing which leaves state legislatures and administrators with no real guidance in attempting to conform their actions with applicable federal common law.

States simply cannot administer their statutes effectively when one party can change circumstances or create novel theories that ostensibly "shift" the balance against the State. States need a clear, bright-line test. *Chickasaw Nation*, 515 U.S. 450, 460 (1995). Balancing simply does not provide it. The appropriate approach is instead to follow a straightforward standard similar to the one approved in *United States v. New Mexico*, 455 U.S. 720, 733 (1983), permitting States to impose otherwise nondiscriminatory taxes on entities that do business with the Federal Government even though the economic burden of the tax may ultimately be borne by the Government. *See*

Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37-38 (1999).

The standard imposed by the Court of Appeals upon States now is that because the United States has a generalized interest in tribal viability, State regulation, even if imposed off-reservation, that may have an effect on tribes, is void. The Court of Appeals cites the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2000); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2000); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2000); *see also* Presidential Proclamation 7500, 66 Fed.Reg. 57641 (Nov. 12, 2001); and, Exec. Order 13175, 65 Fed.Reg. 67249 (Nov. 6, 2000). Pet. App. 17. Such a categorical bar to State taxation has been rejected by this Court. *Colville*, 447 U.S. 134, 154-56 (1980).

Moreover, nowhere within these statutes, proclamations or executive orders has off-reservation state authority been preempted, nor has Congress provided "supersovereign" status to tribes to preempt off-reservation state law by issuing their own license plates and vehicle titles. Where is the congressional intent to preempt state authority in this area? Where are the federal interests articulated in the statute that when a tribe issues its own license plates, off-reservation state law is preempted? None exist. Not only do none of these statutes, proclamations or executive orders address, even remotely, motor vehicles, titles or license plates, none of them purport to preempt State authority off-reservation or to extend tribal authority beyond its reservation boundaries.

The Court of Appeals could only reach its conclusion by contorting these generalized federal interests to make the circumstances here fit the balance-of-interests test as applying to off-reservation State regulation and enforcement, because there is no controlling authority to support the Court of Appeals' leap in logic. The balance-of-interests test itself has predestined this outcome because it provides no discernible limitation on lower courts to avoid such judicial legislation.. The test itself has created uncertainty and confusion in the lower courts resulting in conflicting decisions emanating from facts that at their core are not so vastly different. This is not the purpose of a precedent that is supposed to bring clarity and applicability to future, analogous cases. *Chickasaw Nation*, 515 U.S. at 459-60. While there are many words that could be used to describe the balance-of-interests test, predictability is not one of them.

Kansas asks this Court to abandon the balance-of-interests test in favor of a straight, federal preemption standard based on congressional intent similar to the standard recognized in *United States v. New Mexico*. Such an approach provides clear guidance, clear lines of demarcation and clear, readily applicable results.

Adoption of a federal preemption based on congressional intent such as expressed in *New Mexico* will recognize the States' compelling interest in a predictable sphere of authority. This approach, lastly, comports in rationale and result with *Hicks* and its predecessors.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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