No. 14-351

In the Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE, and MARSHALL STRANBURG, as Interim Executive Director and Deputy Executive Director,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

PAMELA JO BONDI
Attorney General of Florida

ALLEN WINSOR
Solicitor General
Counsel of Record

RACHEL NORDBY
OSVALDO VAZQUEZ
Deputy Solicitors General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Allen.Winsor@myfloridalegal.com
(850) 414-3600

Counsel for Respondents

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Petitioner Seminole Tribe of Florida (the "Tribe") views this case as one involving the complex balance of "the sovereignty and self-determination of American Indian tribes, the supremacy of federal law, and the sovereign immunity of the states." Pet. 2. But the case actually involves only a straightforward application of settled Eleventh Amendment principles. The Tribe sued two defendants, a state agency and its executive director. The Eleventh Amendment plainly barred claims against the state agency, and the Tribe has abandoned those claims here. The Eleventh Amendment likewise barred claims against the executive director under the *Ex parte Young* doctrine,[1] because the "injunctive" relief the Tribe sought was an order requiring the State to pay money. This Court has long held that such claims do not fit within the narrow *Ex parte Young* exception.

Regardless, even if the Tribe could overcome the Eleventh Amendment, it cannot ultimately succeed with its claim that imposition of the tax in question is unconstitutional. The Tribe has already litigated and lost that issue in state court. A second try—if allowed—would yield the same result because the tax is constitutional. The Eleventh Circuit's judgment could be affirmed on these or other bases, even putting aside the Eleventh Amendment. For these reasons and more, this is not an appropriate case for this Court's review.

---

[1] *See Ex parte Young*, 209 U.S. 123 (1908).

STATEMENT OF THE CASE

Florida has a fuel tax, the "legal incidence" of which is "on the ultimate consumer." Fla. Stat. § 206.41(4)(a) (2014). The tax is on the fuel's "use," but "use" for these purposes means "the placing of [the] fuel into any receptacle on a motor vehicle," *id.* § 206.01(24), meaning fuel is deemed "used" at the time of sale.[2]

For administrative convenience, the State precollects the tax from fuel suppliers, who then pass the cost along to retail consumers. Pet. App. 3a. Florida law exempts particular categories of retail end users from the tax, including some agricultural and municipal consumers. *Id.* at 3a-4a. But because the tax is precollected up the supply chain, exempt purchasers still pay the cost of the tax in the first instance; they later receive tax refunds from the Florida Department of Revenue. The Tribe's off-reservation purchases are not exempt, so the Tribe is not eligible for these refunds. *Id.* at 2a-3a, 12a.

---

[2] As the state court explained, there is logic in defining "use" as depositing in the tank:

> [I]t would be impossible to track the use of the fuel on and off the tribal lands. The Tribe reaps the benefit of untaxed fuel when it is purchased on tribal lands even if the fuel is used off of tribal lands. Common sense suggests that the tax should correspondingly be imposed if the fuel is purchased off the reservation regardless of where it is consumed.

Fla. Dep't of Revenue v. Seminole Tribe of Fla., 65 So. 3d 1094, 1097 (Fla. Dist. Ct. App. 2011) (note omitted).

In this case and earlier, the Tribe asserted that it should be exempt from taxes for fuel it consumes on the reservation, even when purchased off the reservation. According to the Tribe, the Indian Commerce Clause (Article I, Section 8 of the United States Constitution) precludes Florida from taxing any activity conducted on reservations—including consuming fuel—unless Congress has specifically authorized it. (Doc. 1 (Complaint) ¶¶ 30, 37.) The Tribe essentially argues that it "uses" the fuel *on* its reservation, even though state law defines "use" as putting the fuel in the vehicle's tank, which, all agree, happens *off* the reservation.

Years before this case, the Tribe raised the same claim in Florida state court, seeking both refunds for taxes already paid and a declaration that the Tribe was exempt from future taxes. *See Fla. Dep't of Revenue*, 65 So. 3d at 1095. The Florida appellate court framed the dispute about "[t]axability of gasoline purchased outside of Indian lands":

> The [Department] argues that the United States Supreme Court has consistently held that off-reservation sales are taxable and that [Florida law] defines "use" as the placing of fuel in the tank. The Tribe responds that the State's limited ability to tax tribal members is based on the Indian Commerce Clause of the United States Constitution. The Tribe contends that State taxation on the use or consumption of property by tribal members on the reservation is prohibited . . . .

Id. at 1095, 1096 (note and citation omitted). The court ruled for the State, explaining that "while the legal incidence of the tax falls on the purchaser—the Tribe—the tax is levied on off-reservation purchases." *Id.* at 1097. Relying on this Court's precedent, the court held that "[o]ff-reservation transactions, even by tribal members, are susceptible of taxation without running afoul of the Indian Commerce Clause." *Id.* (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).[3]

The Florida Supreme Court declined the Tribe's request for discretionary review, *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 86 So. 3d 1114 (Fla. 2012) (table decision), and the Tribe did not petition this Court for a writ of certiorari.

Shortly after the Florida Supreme Court denied review in the state-court case, the Tribe sued in federal court, again asserting that the Indian Commerce Clause required Florida to refund taxes the Tribe paid. Naming the State of Florida's Department of Revenue and its executive director as defendants, the Tribe sought an injunction against the defendants' "continued and prospective refusal to refund the Fuel Tax on the fuel that the Tribe uses." (Doc. 1 p. 14.) The Tribe acknowledged its earlier unsuccessful state-court suit, (Doc. 1 ¶¶ 19-24), but alleged that it "was deprived of the opportunity to litigate [certain] issues

---

[3] In this case, the Tribe also contended that Florida's taxing system violated the Equal Protection Clause. (Doc. 1 ¶¶ 39-52.) It elected not to present that claim in the state litigation.

of Federal law in the State courts" and that the suits were otherwise different in scope and relief sought, (Doc. 1 ¶ 22).

The defendants (Respondents here) moved to dismiss the complaint, arguing that: (i) the Eleventh Amendment barred the Tribe's claims; (ii) the state-court judgment precluded the Tribe's claims under the *Rooker-Feldman* doctrine and principles of res judicata; (iii) the Tax Injunction Act barred the Tribe's claims; and (iv) the Tribe failed to state a claim for relief because the State may constitutionally impose the tax at issue. (Doc. 11.)

The district court dismissed based on *Rooker-Feldman* and, alternatively, the Tax Injunction Act. Pet. App. 2a. It did not reach the other defenses.

The Eleventh Circuit affirmed, but on different grounds. It concluded the Eleventh Amendment barred the claims and it therefore had no need to "decide the correctness of [the district court's] rulings." Pet. App. 2a. It found the Department of Revenue was an arm of the state and immune from suit under the Eleventh Amendment, a conclusion the Tribe does not challenge here. It also found the department's executive director immune from suit notwithstanding the *Ex parte Young* exception, because the relief sought "would be tantamount to a judgment that Florida must pay the Tribe cash from state coffers." *Id.* at 12a; *see also id.* at 10a ("[T]he Tribe cannot wiggle into this exception through creative pleading."). One judge disagreed and dissented in part, *id.* at 20a, but no judge sought a poll on the Tribe's rehearing en banc petition, which the court denied, *id.* at 46a.

The Tribe then filed its Petition.

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION CORRECTLY APPLIED WELL-ESTABLISHED *EX PARTE YOUNG* PRINCIPLES.

The Eleventh Amendment confirms "the presupposition of our constitutional structure . . . that the States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). The Amendment protects this sovereignty by ensuring that an unconsenting State will not be haled into court, thereby "plac[ing] in jeopardy" the "dignity and respect" that immunity is designed to protect. *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997).

The *Ex parte Young* doctrine provides an important, but "narrowly construed," exception to these principles. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). Under the *Ex parte Young* "fiction," "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Thus, when *Ex parte Young* applies, an injunction against a state official does not violate the Eleventh Amendment because, through the fiction, the State is not the real party in interest. *Id.*

A.

Two points are essentially undisputed here. First, the Eleventh Amendment principles apply to the Tribe, just as they apply to non-Indian plaintiffs. *See Coeur d'Alene Tribe*, 521 U.S. at 268 ("Under well-established principles, the [Tribe and its members] are subject to the Eleventh Amendment.").[4] Second, if the *Ex parte Young* exception does not apply, the Eleventh Amendment would bar the Tribe's suit.[5]

B.

Because the *Ex parte Young* exception hangs on the fiction that certain suits against state officials are not suits against the State, it does not apply when the suit is, in reality, against the State. *Stewart*, 131 S. Ct. at 1639. And whether the suit is, in reality, against the State "is to be determined by the essential nature and effect of the proceeding." *Ford Motor Co. v.*

---

[4] In a single paragraph late in the Petition, the Tribe arguably hints otherwise, citing 28 U.S.C. § 1362 and claiming the Eleventh Circuit's decision "is contrary to congressional intent." Pet. 28. But this Court has rejected the argument that Section 1362 abrogated State's sovereign immunity. *Blatchford*, 501 U.S. at 788. At any rate, the Tribe never actually argues that it can prevail without the *Ex parte Young* exception, *cf.* Question Presented, an exception that would be irrelevant if the Eleventh Amendment did not apply.

[5] Although the Tribe sued the Department of Revenue—an arm of the State—and argued below that the court need not reach *Ex parte Young* because the Tribe *could* sue the State itself, (C.A. Reply Br. at 19), the Tribe has abandoned that argument here, asking this Court to review only the Eleventh Circuit's *Ex parte Young* application.

Dep't of Treasury of State of Ind., 323 U.S. 459, 464 (1945). For example, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest." *Id.*; *accord Stewart,* 131 S. Ct. at 1639 (*Ex parte Young* cannot be used if the suit seeks "an injunction requiring the payment of funds from the State's treasury"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."). Allowing such injunctions is an "indignity against which sovereign immunity protects." *Stewart,* 131 S. Ct. at 1640.

According to the Tribe, the Eleventh Circuit read too much into these cases and held that any time an injunction might involve expenditure of state dollars, *Ex parte Young* cannot apply. Pet. 15-19. But the Eleventh Circuit made no such holding. Instead, it correctly recognized that "some prospective relief against individual officers allowed by *Ex parte Young* *may* cost states money, but we must ask whether the expenditure of state funds is a necessary result of compliance with an injunction or a declaratory judgment or whether the expenditure is instead the 'goal in itself.'" Pet. App. 15a (quoting *Luckey v. Harris*, 860 F.2d 1012, 1014-15 (11th Cir. 1988)). This is consistent with *Edelman*, which recognized that the Eleventh Amendment allows courts to order injunctive relief that costs States money, but only where "the fiscal consequences to state treasuries . . . [a]re the necessary result of compliance with decrees which by their terms [are] prospective in nature." 415 U.S. at 667-68.

The Eleventh Circuit distinguished the Tribe's case, which seeks refunds *as the relief*, from the cases on which the Tribe relies, where the expenditure of funds was *incidental to* the relief. For example, the court recognized that in *Milliken v. Bradley*, 433 U.S. 267 (1977), this Court held that an injunction requiring state officials to institute programs to eliminate the vestiges of racial segregation did not violate the Eleventh Amendment even though "those programs would cost the state money." Pet. App. 15a-16a. Here, unlike in *Milliken* or the other cases the Tribe cites, "the expenditure of state funds is the goal in itself." *Id.* at 16a; *accord Green v. Mansour*, 474 U.S. 64, 71 (1985); *Kelley v. Metro. Cnty. Bd. of Educ.*, 836 F.2d 986, 992 (6th Cir. 1987) ("The order to pay is ancillary only to itself, in other words, and therefore it goes beyond *Milliken*."). Because "[t]he right to an exemption is the right to a refund under Florida law," the relief sought "is compensatory in nature," and "Florida is the real, substantial party in interest." Pet. App. 13a.[6]

C.

The dissent below, and to a lesser extent the Tribe here, suggested that the State could comply with an injunction without granting refunds. Pet.

---

[6] The Tribe, in challenging this conclusion, misreads *Edelman, Milliken,* and *Papasan v. Allain*, 478 U.S. 265 (1986), arguing that *any* claim can proceed so long as only "future payments" are involved. Pet. 23-24. But every case the Tribe relies on stresses that monetary relief is available only if it is "*ancillary*" to some other relief. *Papasan*, 478 U.S. at 278; *Milliken*, 433 U.S. at 289; *Edelman*, 415 U.S. at 668; *see also generally Stewart*, 131 S. Ct. at 1639. The Tribe's approach disregards this limitation.

App. 26a-27a; Pet. 21. This argument conflicts with this Court's precedent and ignores the tremendous intrusion into state affairs it would present. And because the Tribe never sought such relief below, the argument was not preserved.

First, the argument disregards the fact that the Eleventh Amendment bars injunctive or declaratory relief that would have the same *effect* as an impermissible category of relief. *Green*, 474 U.S. at 73 ("[A] declaratory judgment is not available when the result would be a partial 'end run' around our decision in [*Edelman*]."); *see also Ford*, 323 U.S. at 464; *Stewart*, 131 S. Ct. at 1639. By suggesting that the State has the "choice" to issue refunds to avoid alternatives the majority found "overly broad and impractical," Pet. App. 18a, the dissent advocates an end run around this Court's precedent, *see* Pet. App. 26a-27a.

Second, the Tribe's argument that Florida could simply rework its tax collection system ignores the substantial intrusion on sovereignty that this represents. As this Court has stressed, "[w]hile state sovereign immunity serves the important function of shielding state treasuries . . . , the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002) (quoting *Alden v. Maine*, 527 U.S. 706, 750-51 (1999)); *see also infra* Part III.D. A crucial plank of that respect is the avoidance of "judicial interference in the vital field of financial administration." *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). An order of the type the Tribe now suggests would present a unique type of in-

terference, imposing on the State entirely new tax-collection regimes.

Finally, even if this "state choice" argument were generally available, it is not available to the Tribe, which never developed it below. The Tribe's complaint requested injunctive relief against defendants' "continued and prospective refusal to refund" the tax. (Doc. 1 p. 14.) While two of the declaratory judgment counts were more general, the Tribe never argued below that it was entitled to have Florida rework its tax collection system in its favor. *See* Pet. App. 14a ("The Tribe points to no other way around the alleged constitutional violation other than a recurring refund paid to the Tribe from the Department after it precollects the tax from the fuel suppliers."). This, despite the fact that Respondents raised the Eleventh Amendment issue at the outset.

II. THE ELEVENTH CIRCUIT'S DECISION DID NOT CREATE A CIRCUIT SPLIT.

The Tribe offers two separate theories to establish a circuit split. First, it contends that there is a split over whether the particular manner in which a state tax is collected determines the viability of an *Ex parte Young* claim. Pet. 13. And second, it contends there is a split over whether the Eleventh Amendment bars claims that require future payments from the state. Pet. 15. While the Tribe cites a number of cases, in neither category can the Tribe cite a single case that conflicts with the court below on the issue it actually decided. There is no circuit split.

A.

For the first purported split, the Tribe argues that other circuits "routinely hear tribal suits, brought under *Ex parte Young*, seeking prospective injunctions against the continued enforcement of unconstitutional state tax schemes." Pet at. 13. But nothing in the Eleventh Circuit's decision suggests any disagreement with the general proposition that *Ex parte Young* allows actions to enjoin unlawful tax collections. Instead, the Eleventh Circuit expressly recognized the difference between enjoining tax *collection* and ordering tax *refunds*. "When a Tribe challenges the assessment of a tax by a tax collector, the Tribe might sue to enjoin the tax collector from collecting the illegally assessed tax." Pet. App. 14a. Unlike this case, "[t]hat suit asks only that the tax collector not come upon the Tribe's land to collect the tax, and everyone's money stays in everyone's pockets." *Id.*; *see also id.* at 10a ("To be sure, a federal court has jurisdiction to entertain suits against individual officers of a state who threaten . . . to enforce an unconstitutional act, violating the Federal Constitution. But the Tribe cannot wiggle into this exception . . . .") (marks and citation omitted). Indeed, it was not that the Eleventh Circuit disagreed with the authorities the Tribe cited; it was that "none of those decisions involved a precollected tax that the State would have to refund." *Id.* at 17a.

It is therefore beside the point for the Tribe to argue that other courts "focus on whether the federal Constitution forbids the tax in question—not on how the state administers it," or that other courts allow injunction actions without worrying about "how the tax

was structured." Pet. 13, 14. A court reviewing an injunction against collection of an unlawful tax may well not concern itself with the precise details of how the official goes about collecting the tax when it is clear—unlike here—that the relief does not require a raid on the state treasury. Regardless, the Tribe identifies no Circuit decision applying the Eleventh Amendment to relief like that sought here, in the context of a tax structured like this one—where the tax is precollected and exempt consumers recover payments through state refunds. In other words, none of the Tribe's cases conflict with the Eleventh Circuit's holding, because none addressed the same issue.[7] In fact, several cases the Tribe cites do not even mention the Eleventh Amendment or *Ex parte Young*—much less hold that it allows a suit like the Tribe brings here. *See Fond du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849 (8th Cir. 2011); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011); *Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881 (6th Cir. 2007); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). And the cases that *do* mention the Eleventh Amendment mostly do not address the nature of the taxing framework, much less hold that a suit seeking to compel the payment of refunds can proceed. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167-68 (10th Cir. 2012). These cases do not present a split with the Eleventh Circuit.

---

[7] The Tribe makes much of the dissenting judge's claim that the majority had created a circuit split, *see* Pet. 4, 11, 12, 15, 19, but the cases the dissent cited (also cited in the Petition) likewise did not address the issue, *see* Pet. App. 23a-25a.

CSX Transportation, the sole case the Tribe identifies that addresses the impact of tax refunds on the Eleventh Amendment, does not present any split either. There, a railroad contested the validity of its tax assessment. It paid the portion it agreed it owed, and it sued to enjoin collection of the balance. *See CSX Transp., Inc. v. Bd. of Pub. Works of W. Va.*, 138 F.3d 537, 542-43 (4th Cir. 1998). Unlike the Tribe, the railroad did *not* claim that the court could compel the state to issue a refund in the future after the tax was collected; instead, "the money allegedly illegally assessed [was] still safely in their pockets." *Id.* at 542. This is entirely consistent with the Eleventh Circuit's acknowledgement (even citing *CSX Transportation*) that *Ex parte Young* would allow an injunction prohibiting unlawful collection of uncollected taxes. Pet. App. 14a.

B.

Nor is there a split over whether the Eleventh Amendment bars claims seeking only future payments directly from the state treasury.

The Tribe first turns to *Ameritech Corporation v. McCann*, 297 F.3d 582 (7th Cir. 2002). Pet. 16. *Ameritech* held that a district attorney who sought electronic records from a telecommunications provider under a federal statute had to comply with the statute's requirement that he pay for the records. *Id.* at 584. Unlike the case here, "nothing in the relief sought by Ameritech [would] impermissibly 'insert[]' the federal courts into 'management of the state's fiscal affairs.'" *Id.* at 587-88 (quoting *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 295 (7th Cir. 1993)). Rather,

Ameritech merely recognized that if a state official chooses to obtain a service, he will have to comply with associated conditions. *See also McDonough Assocs., Inc. v. Grunlough*, 722 F.3d 1043, 1051 n.5 (7th Cir. 2013) (noting that where states participate in federal programs, such as grant and aid programs, they retain a choice to participate and "[s]tate sovereign immunity and federal oversight are thus compatible").[8]

Ameritech did not hold that any claim for prospective monetary relief could proceed despite the Eleventh Amendment. Indeed, the Seventh Circuit later recognized that the Eleventh Amendment barred claims requiring state officials to make *future* payments to employees unconnected to any programmatic condition because the payments were not ancillary relief. *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 883-84 (7th Cir. 2012). Interference with a state's tax framework is similarly unmoored from any program requirement and, if anything, represents an even greater intrusion on sovereignty. *See infra* Part III.D.

The Tribe also relies on *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367 (2d Cir. 2005), another factually distinct case. In *Dairy Mart*, a debtor corporation sought an injunction requiring a state

---

[8] The cases the Tribe identifies from the First, Fourth, and D.C. Circuits, *see* Pet. 17-18, merely apply this principle. The remaining cases, from the Second and Ninth Circuits, address cases ordering employee reinstatement, *see id.*; the payment of employee salaries is clearly ancillary to the principal goal of such suits.

environmental fund to accept a claim request as timely, after the fund disputed the timeliness. *Id.* at 370. The Second Circuit found *Ex parte Young* inapplicable, but only after recognizing that "the injunction does not directly lead to the payment of state funds from the treasury because the Fund will still make the final decision determining whether Dairy Mart meets the numerous other filing requirements imposed by Kentucky law." *Id.* at 376. Indeed, "whether or not [the claimant] will receive retroactive benefits rests entirely with the State, . . . not with the federal court." *Id.* (quoting *Quern v. Jordan*, 440 U.S. 332, 348 (1979) (alterations in *Dairy Mart*)). Unlike the case at hand, in which the Tribe seeks nothing but funds from the state treasury, any "eventual payment" resulting from the *Dairy Mart* injunction was "a permissible ancillary effect of *Ex parte Young*." *Id.* at 375.

The Tribe has identified no court that has addressed an injunction with a primary goal of requiring future payment of refunds from the state treasury, let alone one that has upheld such an order. There is no circuit split.[9]

---

[9] *CSX Transportation*, which the Tribe cites regarding its other asserted split, *see supra* Part II.A, *does* address prospective tax refunds and supports the Eleventh Circuit's decision. As explained above, *CSX Transportation* sought an injunction against collection of a disputed portion of a tax assessment. 138 F.3d at 543. In distinguishing between permissible prospective relief against unlawful collection and impermissible retrospective relief in the form of tax refunds, the Court used an example of a $10.00 tax assessment where the lawful amount was only $8.00 and the taxpayer had already paid $5.00. *Id.* The Court noted it

III. THERE ARE SEVERAL ALTERNATIVE BASES ON WHICH TO AFFIRM THE ELEVENTH CIRCUIT'S JUDGMENT.

Finally, even if the Eleventh Circuit's resolution of the Eleventh Amendment issue were incorrect, there are several alternative grounds on which the judgment could be affirmed.

A. Res Judicata Bars the Tribe's Claims.

Florida's state courts have ruled against the Tribe on the very same issue the Tribe raised in this suit, and that fact precludes the suit here.

In considering whether to give res judicata effect to an earlier state court judgment, federal courts apply "the law of the state whose decision is set up as a bar to further litigation." *Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006) (quoting *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1985)). Under Florida law, res judicata applies where there is "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality or capacity of the persons for or against whom the claim is made; and (5) the original claim was disposed on the merits."[10] *Lozman v. City of*

---

could enjoin collection of the $2.00 portion, allowing collection only of the remaining $3.00. "Were we to fashion an injunction ordering the Railroads to pay only an additional $4.00 . . . and also ordering the state to refund $1.00 from the first half-payment, that refund would be retrospective relief." *Id.*

[10] Under Florida law, the term res judicata "can refer specifically to claim preclusion or it can refer generally to the preclusive effect of earlier litigation." *Brown v. R.J. Reynolds To-*

Riviera Beach, 713 F.3d 1066, 1074 (11th Cir. 2013) (quoting *Andela v. Univ. of Miami*, 692 F. Supp. 2d 1356, 1371 (S.D. Fla. 2010)) (marks omitted). When these elements are satisfied, res judicata prohibits not only relitigation of claims actually raised but also the litigation of claims that could have been raised in the prior action. *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001).

Here, the 2011 decision of Florida's Fourth District Court of Appeal shows that the issues raised in this case were (or at the very least could have been) litigated to final judgment and addressed on appeal. *Fla. Dep't of Revenue*, 65 So. 3d at 1095 ("The Department of Revenue appeals a final summary judgment for the Seminole Tribe of Florida, declaring motor fuel taxes imposed on the Tribe for purchases of fuel off the reservations and trust lands, but used on tribal lands, invalid and directing the State to refund those taxes."). Rejecting the Tribe's federal claims, the court held that "the off-reservation purchase is taxable notwithstanding that the legal incidence of the tax falls on a tribal purchaser." *Id.* at 1097. The Tribe cannot relitigate that issue.

B. The Tribe's Claims Fail on the Merits.

Even without res judicata or the Eleventh Amendment, the Tribe cannot ultimately prevail. This Court's precedent establishes that States can tax the Tribe's off-reservation use of fuel, which is all Florida does.

---

bacco Co., 611 F.3d 1324, 1331 (11th Cir. 2010) (citing *Wacaster v. Wacaster*, 220 So. 2d 914, 915 (Fla. Dist. Ct. App. 1969)).

In "Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). If the legal incidence of a state tax falls "on a tribe or on tribal members" for an event occurring "inside Indian country," the tax is improper absent congressional authorization. *Id.* at 102. If the legal incidence falls on "non-Indians engaging in activity on [a] reservation," the validity of the tax depends on the outcome of an interest-balancing test. *Id.* at 110. But if the legal incidence falls on a tribe or tribal members for activities occurring *off* reservations, courts uphold the taxes "without applying the interest-balancing test." *Id.* at 112-13; *accord id.* at 113 ("[A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the State." (internal marks and citations omitted)).

Because Indian immunity from state taxation "does not operate outside Indian country," *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464 (1995), this Court has consistently upheld taxes whose legal incidence occurs off of tribal lands, *see, e.g.*, *Wagnon*, 546 U.S. at 99 (state's fuel tax permissible when assessed against non-Indian distributors who delivered fuel *to* reservation gas stations, because it taxed off-reservation transactions); *Okla. Tax Comm'n*, 515 U.S. at 464 (state may tax income of tribe members residing off reservation even for income earned on reservation); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (state may tax tribe's ski resort located off reservation) (citing multiple cases).

Here, as the state court has held, the taxable event takes place off reservation. The tax is on the "use" of motor fuel, and the law expressly defines "use" as "the placing of motor or diesel fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof." Fla. Stat. § 206.01(24). No party disputes that "the placing of" fuel at issue in this case takes place off reservation. The tax is therefore permissible.[11]

C. The District Court Provided Additional Bases for Affirming.

The district court dismissed without addressing the merits, the Eleventh Amendment, or res judicata. It dismissed based on the *Rooker-Feldman* doctrine and the Tax Injunction Act, offering still additional bases for affirming. *See* Pet. App. 36a-37a.

D. The Judgment Is Consistent with Principles of Comity.

Next, the principles of comity support the Eleventh Circuit's judgment:

---

[11] The Tribe's equal protection claims are easily dispatched. This Court has recognized that States have broad latitude in establishing classifications in tax statutes. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). The classifications are valid so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)) (internal marks omitted). The claims that the State must tax the Tribe the same way it taxes municipal or county governments, those operating off-road vehicles, or heavier users of the roadways, (Doc. 1 ¶¶ 39-52), cannot survive this deferential review.

> Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104 n.13 (1984) (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (internal marks omitted)); *see also Coeur D'Alene Tribe*, 521 U.S. at 277 (opinion of Kennedy, J.) ("The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences. The *Young* exception may not be applicable if the suit would 'upset the balance of federal and state interests that it embodies.'" (quoting *Papasan*, 478 U.S. at 277)).

Recently, in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), this Court held that comity may require dismissal of suits challenging state taxes, given the importance of states' taxing powers. Recognizing that "the modes adopted to enforce the taxes levied should be interfered with as little as possible," the Court held that a suit seeking to enjoin state officials' future enforcement of tax exemptions was properly dismissed. *Id.* at 422 (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)); *accord Read*, 322 U.S. at 54 (recognizing the need to minimize "judicial interference in the vital field of financial administration"); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298-99 (1943); *see also Levin*,

560 U.S. at 417 (noting that the comity doctrine is more embracive than the Tax Injunction Act).

An injunction ordering state officials merely to refrain from collecting a tax is different in kind from one requiring officials either to pay money from the treasury to private parties or to rework their tax structure. *See Levin*, 560 U.S. at 429 ("A more ambitious solution would reshape the relevant provisions of Ohio's tax code. Were a federal court to essay such relief, however, the court would engage in the very interference in state taxation the comity doctrine aims to avoid."); *id.* (noting that if the state's taxation scheme were unconstitutional, state courts would be better positioned to determine the proper remedy). Rather than exhibiting a "special delicacy" to the balance between federal equitable power and state administration, the relief the Tribe has sought would require federal courts to ignore the state's interests. The Eleventh Circuit did not err in refusing to do so.

IV. This Case Does Not Otherwise Warrant This Court's Review.

Finally, even if the judgment below were incorrect, and even if it could not be affirmed on any alternative basis, this case is nonetheless of insufficient importance to warrant this Court's review. The Tribe has other avenues to pursue its underlying claims and, assuming for purposes of argument that the current tax provisions are invalid, the Legislature could revise them to address the constitutional issue while leaving the Tribe in essentially the same position it is in now.

A. Florida's State Courts Have Afforded the Tribe an Avenue to Pursue Its Claims.

The Eleventh Amendment does not bar the Tribe's claims altogether. The Tribe was free to pursue—and indeed did pursue—its claims in state court. *See supra* Part III.A. Indeed, that is where the Tribe elected to first assert its challenge, perhaps recognizing the Eleventh Amendment obstacle to a federal court suit. Only after the Tribe lost on the merits in state court did it seek a do-over in federal court.

Florida's state court provided a sufficient forum to resolve the Tribe's claims. State courts "have the solemn responsibility equally with the federal courts to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974)) (marks omitted); *cf. also Coeur d'Alene Tribe*, 521 U.S. at 276 (opinion of Kennedy, J.) ("It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case."); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.").

Because this Court has jurisdiction to review state court determinations based on federal law, *Oregon v. Guzek*, 546 U.S. 517, 521 (2006), the Tribe could have pursued relief here after losing in the state appellate court. Indeed, while the Tribe complains

that the Eleventh Circuit's decision will deny it federal court review of its claims, it could have sought this Court's review of its earlier state-court loss. For reasons of its own, it did not.[12]

B. The Decision Does Not Give States Improper Incentives to Restructure Taxes.

To the Tribe, the Eleventh Circuit's decision is "an extraordinarily large loophole" that "will create strong incentives for states to reconfigure their tax schemes" to undermine the Tribe's (and others') rights. Pet. 28. But if Florida wished to restructure its fuel tax laws to avoid Indian sovereignty claims, it needs no incentive from this case: this Court's precedent already allows it.

Essential to the Tribe's claim is Florida's decision to impose the legal incidence of the fuel tax on the consumer, as opposed to the retailer, distributor, or others. But "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." *Okla. Tax Comm'n,* 515 U.S. at 460. Therefore, any victory the Tribe could hope to achieve in this case could easily be undone by the Legislature's shifting the legal incidence of the tax to, say, retailers. Similarly, because it is clear that Florida could tax off-reservation sales, it could simply place the legal incidence of the tax on the *sale*, rather than the "use," which Florida defines as the depositing into the vehicle.

---

[12] It still could pursue relief in state court—if it were correct that the earlier judgment has no preclusive effect.

The Tribe's fear of widespread consequences from this decision are, to say the least, overblown. It is difficult to imagine states' clamoring to invent new precollection regimes to avoid federal court review, particularly when the Tax Injunction Act already precludes the vast majority of pre-enforcement tax suits in federal court. Florida's precollection system has been on the books for years, and there has been no sign of the problems the Tribe suggests.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida

ALLEN WINSOR
Solicitor General
Counsel of Record

RACHEL NORDBY
OSVALDO VAZQUEZ
Deputy Solicitors General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
Allen.Winsor@myfloridalegal.com
(850) 414-3600

Counsel for Respondents

November 24, 2014

BLANK PAGE