No. _____

In The Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA, PETITIONER,

v.

MARSHALL STRANBURG, INTERIM EXECUTIVE DIRECTOR AND DEPUTY EXECUTIVE DIRECTOR.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida imposes a tax on gross receipts from utility services that are delivered to retail customers. Under express statutory authority, utility providers may separately itemize this utility tax on a customer's bill and add it to the total charge for utility services. If the utility provider does so, the customer is legally required to remit the tax to the utility provider, which then transfers the payment to the State. Here, petitioner is a federally recognized Indian tribe that has purchased utility services delivered to tribal reservations. Petitioner's utility providers have exercised their statutory right to separately itemize the utility tax when billing the Tribe for such services.

The question presented is:

When a utility provider exercises a state-law right to expressly pass on a utility tax to a federally recognized Indian tribe for utility services delivered to the tribe's reservations and the tribe is therefore legally obligated to pay the tax, is the tax an impermissible direct tax on the tribe?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The parties to the proceeding are listed in the caption.

Petitioner Seminole Tribe of Florida is a federally recognized American Indian tribe. It is not a corporation; it does not issue any stock; and it has no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seminole Tribe of Florida ("Tribe") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-68a) is reported at 799 F.3d 1324. The opinion of the district court (App., *infra*, 69a-96a) is reported at 49 F. Supp. 3d 1095.

JURISDICTION

The court of appeals entered judgment on August 26, 2015. Petitioner's timely petition for rehearing was denied on October 27, 2015 (App., *infra*, 97a-100a). On January 11, 2016, Justice Thomas extended the time for the Tribe to file a petition for a writ of certiorari to and including March 25, 2016. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fla. Stat. §§ 203.01, 203.0111, 203.012, 203.02, 203.03, 203.04, 203.06, 203.07 and Fla. Admin Code r. 12B-6.0015 and 12B-6.005 are set forth in an appendix to the petition. App., *infra*, 101a-133a.

INTRODUCTION

This case concerns Florida's attempt to tax utility services sold and delivered to the Tribe on its reservations. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes * * *, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Indeed, unless Congress has permitted it, a State is categorically "without power to tax reservation lands and reservation Indians." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992). In applying this rule, the key question is where the legal incidence of the tax lies: a state tax is "unenforceable" if its "legal incidence rest[s] on a tribe or on tribal members inside Indian country." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

At issue here is a Florida tax on utility companies' gross receipts from utility services delivered to retail consumers. *See* Fla. Stat. § 203.01 ("Utility Tax"). Florida law expressly authorizes utility companies to itemize the Utility Tax on their customers' bills, as a line item separate from the charges for the utility services. When the company does so, the customers become legally obligated to remit the tax to the company, which in turn transmits that payment to the State.

Virtually every utility provider in Florida exercises its right to espressly pass the tax along to customers. Indeed, a state tax official testified that he knows of no utility provider that does *not* separately charge the Utility Tax on its customers' bills. The Tribe's utility providers are no different; they have always passed the Utility Tax on to the Tribe, making the Tribe legally obligated to pay it.

The district court agreed with the Tribe that the legal incidence of the Utility Tax rests on the Tribe, and that the tax is therefore unenforceable as to the Tribe. But the court of appeals reversed, holding that even when a utility company passes along the tax in a separate line item on the Tribe's bill, the legal incidence of the tax remains with the utility—on the ground that the utility company was not *required* to pass the tax through.

In so ruling, the Eleventh Circuit deepened a conflict in the courts of appeals over the effect of a permissive, rather than mandatory, pass-through provision on the legality of a state tax as applied to Indian tribes. The Tenth and now the Eleventh Circuits hold that where the taxing scheme does not require a seller to pass a tax along to a purchaser, the legal incidence of the tax necessarily remains with the seller. The Sixth and Ninth Circuits, by contrast, have held that the legal incidence of a tax can fall on a purchaser despite the absence of a mandatory pass-through provision. This Court's intervention is needed to resolve the disagreement among the circuits.

The Eleventh Circuit's decision is also contrary to this Court's precedents. This Court has expressly rejected the notion that an explicit statutory pass-through provision is required to find that the legal incidence of a tax falls on the consumer. Under this Court's decisions, while the *presence* of a mandatory pass-through provision may be dispositive, the *absence* of such a provision is not. In the absence of a mandatory pass-through requirement, a tax's legal incidence rests on the consumer if the entire tax scheme indicates that the state legislature intended the consumer to pay the tax.

Here, several elements of the statutory scheme demonstrate that the Florida legislature intended consumers to pay the Utility Tax. Most significantly, when a utility provider passes the Utility Tax on to its customer, the customer becomes legally obligated to pay the tax, and the provider acts only as a transmittal agent for that payment.

The question presented here is important to Indian tribes, States, and the federal government. By permitting state taxation of activities on Indian reservations, the court of appeals' ruling undermines tribes' core sovereign interests. The decision may also threaten the sovereign and fiscal interests of the United States because the same "legal incidence" inquiry at issue here also determines whether a state tax can apply to activities occurring on federal land. Indeed, the court of appeals' decision provides a road-map for States wishing to extend taxes to Indian reservations and federal facilities: structure the tax

in a way that makes it virtually inevitable that a tribal or federal customer will be legally obligated to pay it pursuant to a pass-through, without making that pass-through formally mandatory. This Court should grant the petition and reverse.

STATEMENT

A. Statutory Background

Florida imposes a 2.5% Utility Tax "on gross receipts from utility services that are delivered to a retail consumer in this state." Fla. Stat. § 203.01(1)(a)1, (b)1. A "[u]tility service" is defined as "electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas." *Id.* § 203.012(3).

While the Utility Tax states that it taxes "the privilege of conducting" the business of providing utility services, *id.* § 203.01(5), it is levied only on particular sales by utility companies: sales to "retail consumer[s]," *id.* § 203.01(1)(a)1, (c)1. The tax therefore does not apply to wholesale sales to other utilities. *Id.* § 203.01(3)(a)-(c).

Florida law expressly authorizes a utility company to pass the Utility Tax on to its customers, who then become liable for it. Specifically, the law provides that "at the option of the person supplying the taxable services," *i.e.*, the utility company, the tax "may be separately stated as Florida gross receipts

tax on the total amount of any bill * * * and may be added as a component part of the total charge." *Id.* § 203.01(4). If the utility company elects to separately state the Utility Tax on the retail consumer's bill, the retail consumer "shall remit the tax to the person who provides such taxable services as a part of the total bill." *Ibid.* The tax becomes "a component part of the debt of the purchaser to the person who provides such taxable services until paid and, if unpaid, is recoverable at law in the same manner as any other part of the charge for such taxable services." *Ibid.*

Florida exempts some sales of utility services, depending on how the retail consumer uses them. For example, Florida does not impose the Utility Tax on natural-gas sales to certain industrial customers that use the gas "as an energy source or a raw material." *Id.* § 203.01(3)(d). The statute treats those retail customers as the entities exempt from the tax: when such a customer provides the utility with a written certification "certifying the purchaser's entitlement to the exclusion permitted by this paragraph," the utility provider is relieved "from the responsibility of remitting tax on the nontaxable amounts." *Ibid.* If it later turns out "that the purchaser was not entitled to the exclusion," the Department of Revenue "shall look solely to the purchaser," *i.e.*, not to the utility, "for recovery of such tax." *Ibid.*

B. Factual Background

The Seminole Tribe of Florida is a federally recognized Indian tribe with reservations throughout Florida. App., *infra*, 2a. The Tribe uses utility services in connection with substantially all of the Tribe's activities on Indian Land. C.A. Supp. App., Tab 58, Ex. A at 4. The Tribe's utility providers always pass through the Utility Tax to the Tribe, as the retail consumer, on all the utility services the Tribe purchases. *Ibid.*; App., *infra*, 5a. Accordingly, the Tribe alone pays the Utility Tax on the utility services delivered on its reservations. C.A. Supp. App., Tab 58, Ex. A at 4.

The Tribe applied to the Florida Department of Revenue for a refund of the $181,209 in Utility Tax it paid from August 1, 2008, to July 31, 2011. App., *infra*, 5a; C.A. App., D.E. 1 at 7. The Department denied the Tribe's request. App., *infra*, 5a. The Tribe continues to pay the Utility Tax on all utility services provided to the Tribe on Indian Land. C.A. Supp. App., Tab 58, Ex. A at 4.

C. Proceedings Below

1. Proceedings before the district court

After the Tribe's refund request was denied, the Tribe sued respondent, the Executive Director of the Florida Department of Revenue, in the United States

District Court for the Southern District of Florida.[1] The Tribe sought a declaration that the tax could not be lawfully applied to it and an injunction against collection of the tax. App., *infra*, 5a-6a.[2]

The district court granted summary judgment to the Tribe. The court noted that a "state may not directly tax an Indian Tribe on an Indian reservation unless a federal statute expressly permits the tax." App., *infra*, 83a-84a (citing *Chickasaw Nation*, 515 U.S. at 458). Accordingly, "'[i]f the legal incidence of an excise tax rests on a tribe * * * for sales made inside Indian country, the tax cannot be enforced.'" App., *infra*, 84a (quoting *Chickasaw Nation*, 515 U.S. at 459); *see ibid.* (noting that the Utility Tax is an excise tax). The court thus explained that "the dispositive question on this issue is whether the legal incidence of Florida's Utility Tax falls upon the Seminole Tribe or upon the utility company." *Ibid.* Because Florida law does not expressly state who bears the legal incidence of the tax, the district court explained that it "must make a 'fair interpretation of the taxing statute as written and applied.'" App.,

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[1] The Tribe also sued the State of Florida, but the district court dismissed the claims against the State on Eleventh Amendment immunity grounds.

[2] In addition, the Tribe challenged a separate tax on the Tribe's leases on tribal land. The district court granted summary judgment for the Tribe on that claim (App., *infra*, 71a-83a), and the court of appeals affirmed (App., *infra*, 8a-43a). That portion of the court of appeals' judgment is not at issue here.

infra, 86a (quoting *Chickasaw Nation*, 515 U.S. at 461).

Applying this test, the district court held that the legal incidence of the Utility Tax "falls upon the consumer," *i.e.*, the Tribe, and "not the utility company." *Ibid*. The court observed that when the Utility Tax is separately stated on the retail consumer's bill, the consumer "is required to 'remit the tax' to the utility company," and the "utility company then pays the taxes to the Florida Department of Revenue." *Ibid.* (quoting Fla. Stat. § 203.01(4)).

The district court rejected respondent's argument "that the utility company is ultimately 'fully and completely liable for the tax,' and thus the legal incidence falls upon the utility company." App., *infra*, 87a (citation omitted). The court explained that if the utility provider has itemized the tax on the consumer's bill, then "in reality, the utility company is only liable for the tax if and when the consumer remits the tax to the utility company as a part of the consumer's utility bill." *Ibid.*

In support of that conclusion, the district court cited the deposition testimony of Peter Steffens, the head of the Florida Department of Revenue's field-audit program. App., *infra*, 91a. Steffens explained that because the tax applies only to amounts actually paid, no tax is owed if a customer does not pay its bill. D. Ct. ECF No. 63-1 at 44. And if a customer pays only part of its bill, the payment is allocated proportionally as (1) a partial payment of the utility services

and (2) the Utility Tax owed on that partial payment. *Id.* at 30-31, 38-44; *see id*. at 39 ("The statute presumes that every dollar they collect contains two-and-a-half cents of gross receipts tax[.]"); *see* App., *infra*, 91a. He thus confirmed that a utility provider could never be responsible for paying any part of the Utility Tax that the customer does not remit to the utility company. D. Ct. ECF No. 63-1 at 38.

Accordingly, the district court concluded that "[i]f the consumer does not remit the tax to the utility company, then the utility company is not required to pay the tax over to the State." App., *infra*, 86a. Thus, "the utility company is no more than a transmittal agent for the tax imposed on the consumer." App., *infra*, 87a.

The court cited several other features of Florida law in support of its conclusion that the legal incidence of the Utility Tax falls on customers. *See, e.g.*, App., *infra*, 87a-88a (exemptions "based on the identity of the consumer"); App., *infra*, 89a (application only to consumer sales, not sales to other utility companies).

The district court thus concluded that "the fairest reading of Florida's utility-tax scheme as a whole is that the legal incidence of the tax falls upon the consumer" and that the tax is therefore "an impermissible direct tax upon the Seminole Tribe on its reservation." App., *infra*, 95a. The court accordingly awarded the Tribe a declaratory judgment that utility services provided to the Tribe on its reservation are

not subject to the Utility Tax and enjoined respondent from imposing or collecting the tax on those services. D. Ct. ECF No. 85.

2. Proceedings before the court of appeals

The Eleventh Circuit reversed the district court's judgment with respect to the Utility Tax. *See* App., *infra*, 48a-67a. The court of appeals, like the district court, focused its analysis on whether Florida law places the "legal incidence" of its Utility Tax on the utility provider or the retail consumer. App., *infra*, 48a-49a. The court stated that "both parties' positions" on legal incidence "have some merit" and acknowledged that the Utility Tax "does bear some hallmarks" of state taxes that this Court has barred. App., *infra*, 49a, 64a. But the court of appeals nonetheless concluded that "the legal incidence of the tax falls on the non-Indian utility company." App., *infra*, 48a-49a.

The court of appeals read this Court's decision in *Chickasaw Nation* as holding that the legal incidence of a tax does not rest on the consumer unless the seller is *required* to pass on the tax to the consumer: "To shift the legal incidence to a consumer, *Chickasaw Nation* insists that any pass-through be mandatory." App., *infra*, 58a. In ruling that the legal incidence of the Utility Tax is on the utility provider, the court therefore repeatedly emphasized that although utility providers *may* pass on the Utility Tax to consumers as a separate charge on their bills, utility providers are not *required* to do so. The court reasoned: "Although an itemized amount of the Utility

Tax becomes a component of the consumer's bill that is, in a sense, transmitted by the utility to the state once collected, it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax." App., *infra*, 54a. In the court of appeals' view, the absence of such a requirement was fatal to the Tribe's challenge: "there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters." *Ibid.*; *see also* App., *infra*, 60a ("But *Chickasaw Nation* insists on mandatory legal requirements over economic realities, no matter how 'automatic' those realities may be."); App., *infra*, 61a ("But it must be a *requirement* nonetheless."); *ibid.* ("[A]t the end of the day, there is simply nothing in the Florida scheme requiring a utility to pass the tax along to its customers.").

The court of appeals discounted reliance on the fact that certain natural-gas consumers can claim a consumer-based exemption from the Utility Tax, as well as the fact that if such a consumer's claimed exemption is improper, the Department of Revenue can collect the tax only from the consumer, not the utility provider. App., *infra*, 57a-58a. The court disagreed with the "notion that consumer-based exemptions illustrate that the legislature implicitly intended the tax to fall on consumers because the exemptions necessarily recognize that the tax can be passed through to consumers." App., *infra*, 58a. Instead, the court reasoned, "recognition that a tax may, or even likely will be passed through to a

consumer is not the same as *mandating* that the tax be passed through." *Ibid.*[3]

REASONS THE PETITION SHOULD BE GRANTED

The court of appeals' decision permits Florida to tax activities on a federally recognized Indian tribe's reservations. That represents a grave encroachment on tribal sovereignty. The court reached that result by adopting and applying a bright-line rule that the legal incidence of the tax falls on the non-tribal utility company, rather than the Tribe, because the statute does not *require* the company to pass the tax on to its customers. Both this Court's decisions and those from other courts of appeals squarely reject that rule. Where, as here, (1) a utility company is expressly authorized to pass through to customers a tax on receipts from retail sales, (2) it actually does so by including a separate line-item on the customers' bills, and (3) the customer then becomes legally obligated to pay it, the legal incidence of that tax falls on customers. Here, the customer in question is a sovereign

[3] The court of appeals also held that, on the present record, the Utility Tax is not categorically preempted by federal law under the balancing approach of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). App., *infra*, 65a-66a. The court held that the *Bracker* analysis requires a particularized inquiry into the "specific" tribal "activit[ies]" involved, and it remanded to the district court for such an inquiry. App., *infra*, 66a-67a & n.22. The district court has granted the parties' joint request for a stay of proceedings pending this Court's consideration of this petition for a writ of certiorari. D. Ct. ECF No. 100.

Indian tribe, so the tax cannot lawfully be applied. This Court's review is warranted.

A. The Circuits Are Divided Over How To Determine The Legal Incidence Of A Tax When The Taxing Scheme Contains A Permissive Pass-Through Provision

The Eleventh Circuit's decision in this case deepens a divide among the courts of appeals concerning how to determine the legal incidence of a state tax. That is the "initial and frequently dispositive question" in determining whether a tax is valid as applied to Indian tribes (or federal facilities). *Chickasaw Nation*, 515 U.S. at 458; *see United States v. Cty. of Fresno*, 429 U.S. 452, 459 (1977). Yet "identifying whether the tribe or a tribal member bears the tax's legal incidence" has proven to be the "most nettlesome element" of the analysis into the permissibility of a state tax on on-reservation tribal activity. Conference of Western Attorneys General, American Indian Law Deskbook § 11:3 (2015). That is problematic because, as this Court has recognized, there is a "need for substantial certainty as to the permissible scope of state taxation authority" vis-à-vis Indian tribes. *Chickasaw Nation*, 515 U.S. at 460 (internal quotation marks and citation omitted).

As particularly relevant here, the circuits are divided on where the legal incidence of a tax falls when the seller must remit the tax to the taxing authority but the seller is permitted, although not required, to add the tax as an item to the customer's bill. This question of a tax's legal incidence has

arisen in several scenarios. An Indian tribe may be the seller of a product, the sale of which is taxed, and the tribe may challenge the tax on the ground that the state is unlawfully taxing its on-reservation sales. Alternatively, as here, the Indian tribe may be the consumer in a transaction occurring on a reservation, and the tribe may assert that it cannot be taxed in connection with that sale. Likewise, the federal government may be the consumer, asserting that a tax on the government's purchase is an unlawful state tax on the federal government. In all of those scenarios, the question is the same. Courts must decide whether the "legal incidence" of the tax falls on the seller or the purchaser in order to decide whether it can lawfully be applied. *Id.* at 458-59; *Fresno*, 429 U.S. at 459 & n.7 (collecting cases).

As explained below, the circuits have taken different approaches to answering that question when the taxing scheme contains a permissive pass-through provision allowing the seller to add the tax to the customer's bill. On one side of the divide, the Sixth and Ninth Circuits have (correctly) held that where the pass-through is permissive rather than mandatory, the legal incidence of an excise tax may still fall on the consumer due to the tax scheme's other features. By contrast, the Eleventh Circuit in this case joined the Tenth Circuit in (erroneously) holding that the permissive nature of a pass-through provision automatically means that the legal incidence of the excise tax remains with the seller.

1. The Sixth and Ninth Circuits have held that the legal incidence of a tax falls on the consumer despite a permissive pass-through provision

a. In *Keweenaw Bay Indian Community v. Rising*, the Sixth Circuit held that the legal incidence of Michigan's excise tax on the sale of tobacco products fell on the retail consumer even though the statute expressly allowed, but did not require, the retailer to pass the tax on to the consumer. 477 F.3d 881, 886-90 (6th Cir. 2007). In that case, the Keweenaw Bay Community was the retailer, and it challenged the application of the tax to the Community's on-reservation sales to non-tribal members, arguing that the legal incidence of the tax fell on the Community retailers. *Id.* at 886-87. The statute required the retailer to initially pay the tax to obtain tobacco products for sale, but it allowed the retailer the option of passing the tax on to the consumer. *Id.* at 887. Specifically, the statute provided that "[a] person liable for the tax may reimburse itself by adding to the price of the tobacco products an amount equal to the tax levied under this act." *Ibid.* (alteration in original) (quoting Mich. Comp. Laws §§ 205.427, 205.427a).

The Community argued that the incidence of the tax fell on the retailer because of, *inter alia*, "the permissive, rather than mandatory pass-through provision." *Id.* at 889. The Sixth Circuit rejected that contention, concluding that "[a]lthough a mandatory pass-through provision strongly supports finding that

the legal incidence falls on the consumer," such a provision "is not an absolute prerequisite." *Ibid.*; *see id.* at 887, 889 (observing that this Court "has found legal incidences to be on consumers under statutes without mandatory pass-through provisions" and that the Sixth Circuit was unaware of any case where a court concluded that "a permissive pass-through suggests the incidence lies with the retailer").

Far from concluding that the permissive pass-through provision meant that the legal incidence of the tax remained with the seller, the Sixth Circuit instead found that the presence of that provision supported the conclusion that the legal incidence fell on the consumer. *Id.* at 889. "The critical inquiry," the court noted, "is whether the retailer is *encouraged* to pass on the cost of the tax to non-tribal consumers—whether or not the pass-through is described by the statutory language as mandatory does not appear to be determinative of the legal incidence." *Ibid.* The court found that the statute did encourage pass-through and that the legal incidence of the tax accordingly fell on customers rather than the retailer. *Id.* at 889-90.

b. In *United States v. California State Board of Equalization*, the Ninth Circuit held that the legal incidence of a gross-receipts tax fell on consumers even though the statute contained only a permissive pass-through provision. 650 F.2d 1127, 1130-32 (9th Cir. 1981), *summarily aff'd*, 456 U.S. 901 (1982). The tax at issue—which applied to, among other things, equipment leases—was nominally "imposed upon all

retailers" and lessors "[f]or the privilege of selling" or leasing "tangible personal property." *Id.* at 1130 n.4 (quoting Cal. Rev. & Tax. Code § 6051 (West Supp. 1980)); *see id.* at 1128 n.2. The lessor was required to remit the tax to the State, and the statute was "facially neutral" as to whether the lessor could pass the tax on to lessees, providing that the permissibility of such pass-through "depends solely upon the terms" of the lease agreement. *Id.* at 1131 (quoting Cal. Civil Code § 1656.1(a) (West Supp. 1980)).

The United States contended that California's imposition of the tax on the United States' equipment leases "infringed on the United States' constitutional immunity from state taxation because the legal incidence of the tax fell on the United States[ ]" as lessee. *Id.* at 1128; *see infra* pp. 33-34 (noting that the same legal incidence test for determining whether a state tax can be applied to Indian tribes applies for determining whether state tax can be applied to the federal government). Notwithstanding the absence of any requirement that lessors pass the tax to the United States or other lessees, the Ninth Circuit found it invalid as applied to the United States' leases. The court deemed dispositive that the tax scheme "manifests a legislative intent" that the lessee pay the tax. *Id.* at 1132. On that basis, it held the legal incidence of the tax was on the lessee. *Ibid.* The court reasoned that "[d]espite the facial neutrality" of the statute concerning whether the tax would be passed through, the statute creates a "strong

economic incentive" that "all but compels the lessor to collect the tax from the lessee." *Ibid.*

More recently, the Ninth Circuit has continued to adhere to its view that a permissive pass-through provision does not preclude the legal incidence of a tax from falling on the consumer. In *Confederated Tribes & Bands of Yakama Indian Nation v. Gregoire*, the court confirmed that the lack of a mandatory pass-through is "not outcome determinative" and concluded that the legal incidence of a cigarette tax fell on consumers "despite the absence of a statutory pass through." 658 F.3d 1078, 1087, 1089 (9th Cir. 2011).

2. The Tenth and Eleventh Circuits have held that a permissive pass-through provision precludes the legal incidence of a tax from falling on the consumer

a. In contrast to those courts, the Tenth Circuit takes a different approach. In *Sac & Fox Nation of Missouri v. Pierce*, that court held that the legal incidence of a motor-fuel tax fell on the wholesale fuel distributor rather than the tribe that purchased the fuel to sell it at retail, owing to the permissive nature of a statutory pass-through provision. 213 F.3d 566, 577-80 (10th Cir. 2000). The tax scheme expressly allowed fuel distributors to pass along the tax to purchasers; indeed, the court acknowledged that the law "presumes distributors will include the cost of the tax in their wholesale price to the Tribes." *Id.* at 579. But the court thought it "[s]ignificant[ ]" that

the pass-through provision "is permissive rather than mandatory." *Ibid.* In ruling that the legal incidence of the tax remained with the distributor, the court emphasized that the law "does *not* require distributors to pass the cost of the motor fuel tax to retailers; it simply permits them to do so." *Ibid.* The court explained: "Certainly, if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes. But the law does not require distributors to charge retailers the cost of the tax." *Id.* at 580 (citation and footnote omitted).

b. The Eleventh Circuit in the decision below deepened the conflict by adopting a categorical approach based on the permissive nature of the pass-through provision in the Utility Tax. The court began by acknowledging this Court's instruction that in the absence of a mandatory "pass through" provision "'the question is one of fair interpretation of the taxing statute as written and applied.'" App., *infra*, 51a (quoting *Chickasaw Nation*, 515 U.S. at 461). But the court then immediately proceeded to create a rule that the absence of a mandatory "pass through" provision is outcome determinative.

In determining that the legal incidence of the Utility Tax falls on the utility companies, the Eleventh Circuit repeatedly emphasized and relied upon the permissive nature of the pass-through provision. The court thought that "[t]o shift the legal incidence to a consumer, *Chickasaw Nation* insists that any

pass-through be mandatory." App., *infra*, 58a. The court explained that "it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax." App., *infra*, 54a. The court stressed that "there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters." *Ibid.*; *see also* App., *infra*, 58a ("[R]ecognition that a tax may, or even likely will be passed through to a consumer is not the same as *mandating* that the tax be passed through."); App., *infra*, 60a ("But *Chickasaw Nation* insists on mandatory legal requirements over economic realities, no matter how 'automatic' those realities may be."); App., *infra*, 61a ("But it must be a *requirement* nonetheless."); *ibid.* ("[A]t the end of the day, there is simply nothing in the Florida scheme requiring a utility to pass the tax along to its customers.").

While that approach is consistent with that of the Tenth Circuit, it is irreconcilable with the approaches taken by at least the Sixth and Ninth Circuits. Only this Court can resolve these intractable differences.

B. The Court Of Appeals Erroneously Concluded That The Legal Incidence Of The Utility Tax Is On The Utility Company Rather Than On The Tribe

The court of appeals' decision not only conflicts with those of other circuits, it is also contrary to this Court's precedents.

1. This Court's precedents do not require a mandatory pass-through provision for the legal incidence of a tax to fall on the consumer

This Court has never required the presence of a mandatory pass-through provision before concluding that the legal incidence of a tax falls on the consumer. To the contrary, this Court has expressly rejected that proposition. As this Court has explained, "[n]one of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary" to conclude that the incidence of the tax falls on the purchaser. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam). "Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express 'pass on and collect' provision." *Ibid.*; *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 142 & n.9 (1980) (concluding that legal incidence of tax falls on consumer despite lack of mandatory pass-through provision).

Rather, in the absence of a mandatory pass-through requirement, the legal incidence of a tax rests on the consumer if the entire tax scheme indicates that the legislature intended the consumer to pay the tax. As this Court has explained, the question is one of "a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection

requirements be 'explicitly stated.'" *Chemehuevi Tribe*, 474 U.S. at 11.

In concluding to the contrary, the court of appeals misconstrued this Court's precedents. For example, the court of appeals quoted this Court's observation in *Chickasaw Nation* that the tax at issue there did not "'contain a "pass through" provision, *requiring* distributors and retailers to pass on the tax's cost to consumers.'" App., *infra*, 54a (emphasis in decision below) (quoting *Chickasaw Nation*, 515 U.S. at 461). But the court of appeals disregarded the very next sentence of *Chickasaw Nation*, which made clear that while the *presence* of a mandatory pass-through provision may be "dispositive," the *absence* of such a provision is not. 515 U.S. at 461 ("In the absence of such dispositive language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" (quoting *Chemehuevi Tribe*, 474 U.S. at 11)). Indeed, the Court in *Chickasaw Nation* went on to hold that the legal incidence of the motor fuels tax at issue there fell on the Indian retailers, not the non-Indian distributors, even though the distributors were not required to pass the tax through. *Id.* at 461-62. This Court's holding in *Chickasaw Nation* is therefore fundamentally irreconcilable with the court of appeals' holding in this case.

Similarly, the court of appeals quoted this Court's statement that "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the

purchaser." App., *infra*, 54a (alteration and emphasis omitted) (quoting *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 608 (1975)). But, again, that statement was limited to the effect of the *presence* of a mandatory pass-through provision. The court of appeals erred by holding that the *absence* of such a provision is also dispositive. Under this Court's decisions, it is not. *See, e.g.*, *Chickasaw Nation*, 515 U.S. at 461-62; *Chemehuevi Tribe*, 474 U.S. at 11.

2. The legal incidence of the Utility Tax falls on the Tribe

The legal incidence of a tax rests on the party that, in light of a fair interpretation of the taxing statute as written and applied, is expected to be responsible for paying the tax. *See Chickasaw Nation*, 515 U.S. at 461-62. Here, the legal incidence of the Utility Tax plainly falls on purchasers of utility services who are legally obligated to pay the tax that is stated as a separate line item on their bills.

a. In determining which party bears the legal incidence of a tax, this Court has differentiated "legal incidence" from two other concepts, neither of which is determinative: "economic incidence" and "legal liability." The economic incidence of a tax focuses on the party who in fact ends up bearing all or part of the economic burden of the tax as a practical matter. *See id.* at 460; App., *infra*, 84a-85a. All taxes on those selling services can be expected to have some impact on the prices they charge. This Court has held, however, that such price impacts are not relevant

because a test based on them would be inadministrable. "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product." *Chickasaw Nation*, 515 U.S. at 460; *see also Washington v. United States*, 460 U.S. 536, 540 (1983); *United States v. New Mexico*, 455 U.S. 720, 734 (1982).

At the same time, the Court has declined to make dispositive the placement of legal liability for the tax. To the contrary, this Court has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *Miss. Tax Comm'n*, 421 U.S. at 607; *see First Agric. Nat'l Bank of Berkshire Cty. v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). Instead, courts must look "beyond the bare face of the taxing statute to consider all relevant circumstances." *United States v. City of Detroit*, 355 U.S. 466, 469 (1957). For example, even if a seller is legally liable for paying the tax, the legal incidence falls on the purchaser where the seller functionally acts merely as a collection and transmittal agent for the tax. *Chickasaw Nation*, 515 U.S. at 461-62.

b. Instead of looking to economic incidence or legal liability, the Court has analyzed "legal incidence," meaning "the 'who' and the 'where' of the challenged tax." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). Here, the statutory scheme provides every indication that the Florida

legislature intended consumers to pay the Utility Tax. At a minimum, where, as here, the utility distributor actually exercises its statutory right to pass through the tax to a consumer—making the consumer legally responsible for paying it—the legal incidence of the tax is shifted onto that consumer.

This conclusion is supported by several aspects of the statute. Most importantly, Florida law expressly allows utility companies to add the Utility Tax to their customers' utility bills and label it as such: the tax "may be separately stated as Florida gross receipts tax on the total amount of any bill * * * and may be added as a component part of the total charge." Fla. Stat. § 203.01(4). If the utility company exercises this option, the consumer becomes legally obligated to pay the full amount of the tax: the consumer "shall remit the tax to the person who provides such taxable services as a part of the total bill," and any unpaid tax is "recoverable at law." *Ibid.* When a tax appears on a consumer's bill and state law makes the consumer legally obligated to pay it, the legal incidence of that tax plainly falls on the consumer.

This conclusion is confirmed by the fact that the utility provider is not responsible for paying the Utility Tax unless and until the consumer remits the tax to the utility provider. *Cf. Chickasaw Nation*, 515 U.S. at 461 (legal incidence was on seller where seller could take a credit for tax it was unable to collect from the purchaser). If the customer does not pay its bill at all, there is no Utility Tax owed because there is no taxable gross receipt. App., *infra*, 56a; D. Ct.

ECF No. 63-1 at 44. The court of appeals appeared to believe, however, that a customer could choose to pay the utility services portion of a utility bill but not the Utility Tax portion, thus leaving the utility company on the hook for the unpaid Utility Tax. App., *infra*, 56a n.18. But as the head of Florida's field-audit program testified, that is incorrect. If a customer pays only part of the bill, the payment is allocated proportionately as a partial payment toward the utility services and a 2.5% tax on that partial payment. D. Ct. ECF No. 63-1 at 30-31, 38-44; *see* App., *infra*, 91a; *see also* D. Ct. ECF No. 63-1 at 39 ("The statute presumes that every dollar they collect contains two-and-a-half cents of gross receipts tax[.]"). The only Utility Tax that the utility provider pays the State is the portion of the customer's payment that was allocated toward the Utility Tax. Thus, as the district court recognized, "[t]here could never be a situation where the utility company could be responsible to the State for the Utility Tax unless it collected the tax from the consumer." App., *infra*, 91a.

By contrast, in certain circumstances, the *consumer* may be directly liable for paying the tax to the State if the utility provider does not collect it. As the district court explained, the statute makes "certain consumers * * * exempt from paying the Utility Tax when purchasing natural gas." App., *infra*, 87a-88a (citing Fla. Stat. § 203.01(3)(d)). "If it turns out that the consumer was not entitled to the exemption," however, "the Department of Revenue will look to collect the tax *directly from the consumer*, not the utility company." App., *infra*, 88a (emphasis added);

see Fla. Stat. § 203.01(3)(d) (the Department of Revenue "shall look solely to the purchaser for recovery of such tax"). Likewise, when a consumer imports electricity or natural gas into Florida for its own use, that consumer must pay the Utility Tax directly to the State. Fla. Stat. § 203.01(1)(f).

The court of appeals gave great weight to the fact that the utility distributor is generally the party that is legally required to remit the Utility Tax to the Department of Revenue. App., *infra*, 52a-53a. Reasoning that it "points strongly toward a legislative intent to impose the tax on utility companies," the court quoted with emphasis the statutory provision that "'each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.'" App., *infra*, 52a-53a (emphasis omitted) (quoting Fla. Stat. § 203.01(5)). As just noted, the court of appeals' premise does not always hold, as the statute envisions consumers directly paying the tax to the State in certain circumstances.

Even putting that aside, however, the provision invoked by the court of appeals simply makes clear which party is legally responsible for remitting the tax to the State, not which party is responsible for actually paying it. On the latter point, Florida law expressly provides that customers are legally obligated to pay the Utility Tax when it appears on their bill. *See* Fla. Stat. § 203.01(4). The utility company is therefore a mere "transmittal agent for the taxes imposed on" its customers. *Chickasaw Nation*, 515

U.S. at 461-62 (international quotation marks omitted). And, as discussed above, legal liability for merely transmitting tax money to the State is not the standard. *Miss. Tax Comm'n*, 421 U.S. at 607.

Additional features of the Utility Tax support the conclusion that its legal incidence rests with customers. For example, the Utility Tax applies only to sales to retail customers and not to wholesale sales to other utilities. Fla. Stat. § 203.01(3)(a)-(c). In *Chickasaw Nation*, this Court concluded that the "inference that the tax obligation" at issue there was "legally the retailer's, not the distributor's [was] supported by the prescriptions that sales between distributors [were] exempt from taxation, but sales from a distributor to a retailer [were] subject to taxation." 515 U.S. at 461 (citations omitted). The same inference holds here.

Moreover, the Florida statute provides that the amount of Utility Tax "shall be reduced by the amount of any like tax [from another jurisdiction] lawfully imposed on and paid by the person from whom the retail consumer purchased the electricity." Fla. Stat. § 203.01(1)(d)4. The Utility Tax mandates that such "reduction in tax shall be available to the *retail consumer* as a refund" and "does not inure to the benefit of" the utility provider. *Ibid.* (emphasis added); *see id.* § 203.01(1)(e)4 (same for natural gas). If the scheme did not assume payment of the Utility Tax by consumers, there would be no basis for providing Utility Tax refunds directly to consumers.

c. In ruling that the legal incidence of the Utility Tax falls on the Tribe, the court of appeals repeatedly cited *Wagnon*, but that reliance was misplaced. App., *infra*, 54a, 60a-61a. *Wagnon* held that the legal incidence of a Kansas motor-fuel tax fell on fuel distributors, not their customers. 546 U.S. at 102-10. The tax was imposed on fuel distributors' receipt of motor fuel from their upstream suppliers. *Id.* at 99-100. Kansas law provided that distributors were "'entitled' to pass along the cost of the tax to downstream purchasers" but were "not required to do so." *Id.* at 103 (quoting Kan. Stat. Ann. § 79-3409 (2003 Cum. Supp.)).

But there are critical differences between *Wagnon* and this case. Most importantly, Kansas law expressly provided that "the incidence of [the motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel"—language that this Court referred to as "dispositive." *Id.* at 102 (citations omitted, alteration in *Wagnon*). Florida's Utility Tax contains no such provision.

Additionally, as the district court here observed (App., *infra*, 90a), the motor-fuel tax in *Wagnon* was imposed well before—and even in the absence of—sale to downstream customers. The "event that generate[d] a distributor's tax liability [was] its receipt of fuel" from its upstream fuel supplier, *not* its sale of fuel to its downstream customer. *Wagnon*, 546 U.S. at 108 n.3; *see id.* at 106 ("[I]t is the distributor's off-reservation receipt of the motor fuel, and not any subsequent event, that establishes tax liability.").

Significantly, the distributor had to "pay tax on that fuel even if it [was] not subsequently delivered or sold" to an Indian tribe or any other customer. *Id.* at 108 n.3; *see id.* at 109 n.4 ("And a distributor must pay the tax even if the fuel is *never* delivered."). Here, by contrast, no tax is imposed unless and until a customer purchases and pays for utility services. Fla. Stat. § 203.01(1)(a)1. As the district court explained, "[t]he fact that the Utility Tax is not owed unless and until it is actually delivered to a consumer, supports [the] conclusion that the legal incidence of the Utility Tax is on the consumer (not the utility company)." App., *infra*, 90a.

C. Review Is Warranted Because The Question Presented Implicates Important Tribal and Federal Sovereignty Interests

The issue presented in this case is of tremendous importance to Indian tribes because it goes directly to the core of tribes' ability to govern themselves on their own lands. The Constitution vests the federal government with exclusive authority over relations with tribes. U.S. Const. art. I, § 8, cl. 3; *see Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 670 (1974). Thus, from the earliest days of this Nation, this Court has adhered to the principle that federally recognized Indian communities are sovereigns distinct from States and that, absent congressional approval, States cannot regulate the activities of tribes and tribal members on their own lands. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). As the Court explained in *The Kansas Indians*, if a tribe is

"recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." 72 U.S. (5 Wall.) 737, 755 (1867); *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("'[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945))).

The principle of tribal immunity from state taxation is a "corollary" that flows directly from the tribe's sovereignty. *Blackfeet Tribe*, 471 U.S. at 764. Thus, in *The New York Indians*, the Court characterized a State's attempt to tax Indian reservation land as "illegal" and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." 72 U.S. (5 Wall.) 761, 770-71 (1867). This Court has "never wavered" from these principles. *Blackfeet Tribe*, 741 U.S. at 765.

This case, therefore, is not simply about taxation. It is about Florida's unlawful attempt to tax another sovereign's activities on that sovereign's own land. After all, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). This Court's intervention is warranted to stop Florida's unlawful encroachment and to preserve the "unique trust relationship between the United States and the Indians." *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

There is also a compelling need for this Court to decide the question presented because permissive pass-through provisions like the one at issue here are common features of state tax laws.[4] As noted above, courts of appeals are divided on the impact of such provisions on the legal incidence of a tax. States and tribes would benefit from guidance on whether States may tax transactions involving Indian tribes when the tax does not contain mandatory pass-through language. Only this Court can resolve the circuit split and provide that guidance.

Finally, the implications of the decision below go beyond Indian sovereignty and extend to the sovereign and fiscal interests of the federal government. The same "legal incidence" test at issue when assessing whether a state tax can apply to an Indian tribe also determines whether a State can tax a

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[4] *See, e.g.*, Ariz. Rev. Stat. Ann. § 42-5002.A.1. ("A person who imposes an added charge to cover the tax levied by this article or which is identified as being imposed to cover transaction privilege tax shall not remit less than the amount so collected to the department."); Mich. Comp. Laws § 205.73(1) ("This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act."); Mo. Rev. Stat. § 144.285.5 ("Amounts which a vendor charges to and receives from the purchaser in accordance with this section shall not be includable in his gross receipts if the amounts are separately charged or stated."); S.C. Code Ann. § 12-36-940 ("Each retailer may add to the sales price as a result of the five percent sales tax * * * ."); Wis. Stat. § 77.52(3) ("The taxes imposed by this section may be collected from the consumer or user.").

transaction or property involving the federal government. *See, e.g.*, *Fresno*, 429 U.S. at 459 ("States may not * * * impose taxes the legal incidence of which falls on the Federal Government."); *see also Chickasaw Nation*, 515 U.S. at 460 n.9 ("Support for focusing on legal incidence [in cases involving Indian tribes] is also indicated in cases arising in the analogous context of the Federal Government's immunity from state taxation.").

The decision below therefore has serious implications for the federal government's activities and land in the State of Florida. Under the decision below, the Florida Utility Tax could seemingly be applied, for example, to the federal government's purchase of electricity for military bases and federal buildings throughout Florida. *See, e.g.*, *United States v. Delaware*, 958 F.2d 555 (3d Cir. 1992) (involving Delaware's attempt to tax a public utility company's sale of electricity to the federal government for the Dover Air Force Base). Utility companies could simply add the Utility Tax as a line item on the government's utility bills, and (absent congressional intervention) the federal government would be legally required under Florida law to pay this state tax on federal activities. *See* Fla. Stat. § 203.01(4) (consumer's legal obligation to pay the tax applies even if the consumer is a "governmental unit[ ]"). For this reason as well, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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