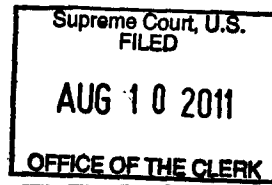


11-183

No. _____



In the
Supreme Court of the United States

SENECA TELEPHONE COMPANY,
Petitioner,

v.

MIAMI TRIBE OF OKLAHOMA, d/b/a
WHITE LOON CONSTRUCTION COMPANY,
Respondent.

*On Petition for Writ of Certiorari to the
Supreme Court of the State of Oklahoma*

PETITION FOR WRIT OF CERTIORARI

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August 10, 2011

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QUESTIONS PRESENTED**I**

Under federal preemption principles invoked in *Rice v. Rehner*, 463 U.S. 713 (1983), and specifically, the principles determinative on the applicability of the doctrine of tribal sovereign immunity in a regulatory context, did the Oklahoma Supreme Court err and issue a conflicting ruling with this Court's decision in *Rice* when it failed to apply the preemption principles to the present cases?

II

Under the preemption principles invoked in *Rice*, as applied to the present cases, does the Communications Act of 1934 (47 U.S.C. §§ 151 *et. seq.*) delegate to the States the authority to exercise jurisdiction over tribal entities when Congress confers to the States the power to exercise jurisdiction over all intrastate communications?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Oklahoma Supreme Court:

The petitioner here and plaintiff/appellee below is Seneca Telephone Company, a non-tribal company licensed to operate communication facilities in Oklahoma (“Petitioner”).

The respondent here and defendant/appellant below is the Miami Tribe of Oklahoma, d/b/a White Loon Construction Company, a federally recognized Indian Tribe (“Respondent”).

RULE 29.6 STATEMENT

Petitioner has no parent corporation and does not issue stock.

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PETITION FOR WRIT OF CERTIORARI**OPINIONS BELOW**

The opinion of the Oklahoma Supreme Court, App. 1a, appears at 253 P.3d 53 (Okla. 2011). The opinion of the Civil Court of Appeals, Division I, App. 11a, is not reported. The opinions of the Ottawa County District Court Small Claims Division on the merits of the cases, App. 76a, 79a, 82a, 85a., were not reported. The opinion of the Ottawa County District Court Small Claims Division on Respondent's motion to dismiss for lack of subject matter jurisdiction, App. 88a, was not reported.

JURISDICTION

The Oklahoma Supreme Court entered its judgment in these cases on March 8, 2011. App. 1a. Petition for Rehearing was denied on May 12, 2011 App. 104a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Communications Act of 1934 codified at 47 U.S.C. §§ 151 *et seq.* (the "Act") is the pivotal statute for purposes of this Petition. The relevant provisions of the Act are reprinted in the appendix to this petition. App. 107a-110a.

STATEMENT OF THE CASE

Introduction

This matter comes before this Court from four separate small claims cases filed in the Ottawa County District Court of Oklahoma. While the original venue for these cases was minute, the magnitude and historical effect of this Court's decision will be vast and far reaching. At the core, these cases challenge the principle of tribal sovereign immunity, a doctrine courts have expanded exponentially from its inception. This doctrine continues to cause injury and harm to unsuspecting individuals through tortious conduct of tribal entities acting with impunity. The Oklahoma Supreme Court decision from which this Petition derives denies Petitioner access to all state courts when seeking redress for Respondent's tortious wrongs. In essence, the Oklahoma Supreme Court's decision deprives Petitioner of any remedy and simultaneously grants the Respondent an unfettered license to damage property without recourse. This Petition for Writ of Certiorari is Petitioner's last avenue for obtaining justice. Further, these cases present the Court with a fleeting opportunity to protect this Country's citizens from reckless tribal entities carrying the doctrine of sovereign immunity as a sword for private inurement instead of as a shield from actions that threaten Indian tribes' rights as dependent sovereign nations.

Background

Petitioner is licensed by the Oklahoma Corporation Commission to operate communication facilities in Oklahoma. Appellee's Answer Brief at 2, *Seneca*

Telephone Co. v. Miami Tribe, Ottawa County District Court of Oklahoma (No. 107431). Respondent, a federally recognized Indian tribe, performs excavation services in the private sector through a construction company incorporated under tribal law bearing the trade name, White Loon Construction Company. App. 89a.

In 2007, the Eastern Shawnee tribe of Oklahoma (“Shawnee”)¹ hired Respondent to perform excavation activities on Shawnee land designated for gaming facilities and residential housing. The Shawnees also contracted with Petitioner to provide communication services for the gaming facilities and residential housing. Between December 4, 2007, and February 3, 2009, Respondent, while on Shawnee land, committed four negligent excavation acts resulting in damage to Petitioner’s underground telecommunication facilities in Oklahoma. Respondent’s egregious behavior toward Petitioner’s property is evinced by the severing of Communication Line 115-03B on three separate occasions within two years. Respondent displayed similar indifference to Communication Line 115-03. While excavating, Respondent uncovered, but did not damage, Line 115-03. Respondent contacted and requested Petitioner to identify the line onsite. Instead of ceasing operations until Petitioner arrived, and while Petitioner was traveling to the site, Respondent continued excavation and severed Line 115-03. App. 3a, 12a-13a, 76a-103a.

¹The Shawnee is a tribe completely distinct and separate from the Respondent and as such Respondent was acting as a private business enterprise vying for a construction contract.

On November 3, 2008, Petitioner filed three separate lawsuits in the Ottawa County District Court Small Claims Division (“District Court”) as a result of Respondent’s negligent excavation activities.² Subsequently, Respondent filed a motion to dismiss for lack of subject matter jurisdiction alleging that tribal sovereign immunity barred the District Court from proceeding further. Respondent argued that there had been no express waiver of immunity either by Respondent or from Congress.

Petitioner responded to the motion to dismiss by relying on preemption principles invoked in *Rice v. Rehner*, 463 U.S. 713 (1983), and asserting: (1) there was no tradition of tribal sovereign immunity governing the matters giving rise to the lawsuit; and (2) that Congress authorized suit and express abrogation was extraneous due to the application of relevant preemption principles.

Decisions Below

On February 10, 2009, the District Court heard oral argument on Respondent’s motion to dismiss. App. 88a. Respondent principally relied on *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* when arguing that tribal entities are “subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” 523 U.S. 751, 754 (1998).

² The November 2008 lawsuits alleged *two* separate incidents of damage to Line 115-03B, however, as stated above, Respondent damaged Line 115-03B on *three* separate occasions. The third damage event occurred in February of 2009, while the original three actions were pending. Petitioner filed the fourth small claims action on March 17, 2009.

Respondent contended that there was no Congressional authorization for suit and that it did not waive its immunity. Relying on federal preemption principles relevant to tribal immunity, Petitioner argued that tribal entities never enjoyed a tradition of tribal sovereignty or immunity in the area of telecommunications regulation. Petitioner further argued that Congress authorized suit against the Respondent by enacting the Act, *i.e.* 47 U.S.C. § 152(b), which delegated to the States the authority to regulate all intrastate telecommunications. Petitioner argued that the Oklahoma legislature created the Underground Facilities Damage Prevention Act (“UFDPA”) in furtherance of the Act to ensure telecommunication facilities were protected for public safety and welfare. Lastly, Petitioner urged that the District Court’s application of the UFDPA to Respondent should not be preempted by federal or tribal law. App. 88a-103a.

On March 3, 2008, the District Court entered an order denying Respondent’s motion to dismiss. App. 88a. The District Court relied on decisions of this Court (including, but not limited to, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Rice*, 463 U.S. 713; and *Montana v. United States*, 450 U.S. 544 (1981)) in conjunction with the Act, Oklahoma case and statutory law, and the South Dakota Supreme Court case of *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission*, 595 N.W.2d 604 (S.D. 1999) (“*Cheyenne*”),³ when ruling on the motion to dismiss.

³ *Cheyenne* is on “all fours” and is applicable to this Petition because it is the only reported decision, with the exception of the Oklahoma Supreme Court’s decision in these cases, involving the

In summary, the District Court found “that the Tribe has no traditional tribal self-government interest in the regulation of communications” and that the Act confers on the States the ability to regulate intrastate communications. App. 18a, 76a, 79a, 82a, and 85a. Moreover, the District Court ruled that “the State of Oklahoma has dual if not exclusive jurisdiction over intrastate underground communications facilities within the state, regardless of location on Indian trust or fee lands or on non-Indian lands.” App. 103a. The District Court considered Oklahoma’s state law interests as well, and specifically, the citizens’ right to access the judicial system. App. 94a. The District Court indicated that Oklahoma’s interest in protecting telecommunication facilities was evinced through the passage of the UFDPA. App. 102a. The UFDPA supported the ruling that federal law did not preempt state law in these matters. App. 88a-103a. Ultimately, the District Court ruled “[t]hat the Tribe’s sovereign interests are not implicated and the doctrine of sovereign immunity is not applicable.” App. 76a-103a.

At the trial on the merits, the Respondent was found liable for negligently and willfully damaging Petitioner’s property. App. 76a-87a. On August 17, 2009, Respondent filed a Petition in Error with the Oklahoma Supreme Court (the “OK Supreme Court”) and these cases were transferred to the Oklahoma Court of Civil Appeals, Division I (“Appeals Court”).

Act in the context of Congressional abrogation of a tribe’s sovereign immunity in the area of telecommunications. As discussed in Section II hereof, the decision in *Cheyenne* provides a compelling reason for granting this Petition.

The four small claims cases were consolidated for purposes of appellate review (hereinafter Petitioner will refer to the four actions as a single case). The Respondent's primary basis for review was the doctrine of tribal sovereign immunity. App. 11a-14a.

On September 24, 2010, the Appeals Court unanimously affirmed the District Court's ruling. App. 11a-17a. Generally, the Appeals Court opined "[w]e affirm, holding Oklahoma district courts have jurisdiction over tribes for violation of the Oklahoma UFDPA because there is no tradition of tribal sovereign immunity in the area of telecommunications regulation and Congress has authorized states to regulate intrastate telecommunication facilities." App. 12a-13a. Specifically, the Appeals Court distinguished Respondent's primary authority of *Kiowa* from Petitioner's *tort* case stating that "[t]he underlying action in *Kiowa* was based on contract, and the Court limited its holding to suits on contracts." App. 14a. The Appeals Court further found that the federal preemption principles in *Rice* were controlling in the instant case, including the required analysis regarding traditional tribal sovereignty. Finding tradition lacking, the Appeals Court considered the Congressional intent behind the Act and determined that Congress' delegation to the States to regulate intrastate telecommunications was an implied authorization for suit in these matters. App. 15a-16a. Lastly, the Appeals Court asserted that the adoption of the UFDPA was in furtherance of the Act's intention to protect underground telecommunications facilities from the type of damage caused by Respondent and enforcement of the UFDPA through adjudication was in furtherance of Oklahoma's telecommunication regulatory power. App. 15a-16a.

Respondent's Petition for Rehearing was denied. On November 12, 2010, Respondent filed a Petition for Certiorari with the Supreme Court. On January 11, 2011, the OK Supreme Court granted Respondent's Petition for Certiorari.

On March 8, 2011, the OK Supreme Court reversed the decision of the District Court and the Appeals Court and remanded the case with instructions to dismiss all four small claims cases. The OK Supreme Court, quoting *Kiowa*, stated that

[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. This immunity applies to the tribe's commercial as well as governmental activities. . . The Court in [*Kiowa*] went further, stating that it would not limit tribal immunity to reservations or noncommercial activities and deferred this limiting role to Congress. App. 4a-5a.

The OK Supreme Court continued by discussing contracts between tribal entities and non-Indian businesses and stated "parties must act at their own peril when dealing with the tribe." App. 5a.

The OK Supreme Court also relied on *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (2008), to conclude that "tribal corporations, acting as an arm of the tribe, enjoy the same sovereign immunity granted

to a tribe itself.” App. 6a. Further, the OK Supreme Court relied on *Cook* as a case grounded in tort.⁴

After detailed discussion regarding Indian law decisions applicable solely to contract cases, the OK Supreme Court finally recognized the Petitioner as an innocent tort victim who “did not have the opportunity to negotiate a waiver of the sovereign immunity with the negligent party.” App. 6a. The OK Supreme Court further acknowledged that “this result leaves Seneca without a remedy against the Tribe for their damages under our law, even when the assertions of negligence by the tribal enterprise are correct (Subject of course to filing within the tribal court system of the Miami Tribe of Oklahoma).” App. 6a-7a.⁵

The OK Supreme Court then minimally addressed the Act and its jurisdictional effects in the context of this case. Unfortunately, the decision only quoted §152 of the Act and dismissed its applicability by stating: “[r]eviewing this statute, it is apparent that the United States Congress has not authorized suit

⁴ The OK Supreme Court’s reliance on *Cook* was misplaced because *Cook* did not address a Congressional regulatory scheme delegating to the States the ability to exercise jurisdiction in any particular realm. Further, *Cook* did not address the issue of preemption.

⁵ The OK Supreme Court provides in a footnote to its decision that the Court of Indian Offenses or the Respondent’s Tribal Court would be the proper venue to resolve the present case. App. 7a. However, the OK Supreme Court failed to acknowledge the Respondent’s statement to the District Court that it would invoke the immunity doctrine in such venues as well. App. 97a. The OK Supreme Court truly left the Petitioner with no means to seek a remedy.

against the Tribe in this matter. There is no mention of Indian tribes in the statute and no express waiver of sovereign immunity in Indian Country.” App. 9a. The opinion contains not one scintilla of discussion regarding the Act’s mandate delegating state authority over intrastate communications and does not discuss Congressional intent for adoption of the Act. App. 1a-10a.

The OK Supreme Court proceeded to dismiss the lower courts’ reliance on *Rice* with one sentence. *Rice* was inapplicable because this case “is not like the fact patterns in *Rice v. Rehner*. . . where tribes are not allowed to regulate alcoholic beverages and must comply with the ‘laws of the State’ under the federal statute.” App. 9a. The OK Supreme Court constrained *Rice* to only cases involving liquor issues. App. 9a. Accordingly, the opinion failed to address the relevant preemption principles in the context of this case and, as a result, did not address any of Petitioner’s contentions or authority relating thereto.

The OK Supreme Court decision in the present case instructed the District Court to dismiss the four small claims cases. This left the Petitioner without any venue within which to seek relief for damages sustained to its telecommunication facilities from the Respondent’s numerous and continuous tortious excavation activities. The Supreme Court issued a license to tribal nations operating in the open economy to act recklessly and in complete disregard for the property of non-Indian entities and individuals without consequence.

COMPELLING REASONS FOR GRANTING THE PETITION

I. The Preemption Principles Invoked in *Rice* are Applicable to the Present Case.

This Court's review of the instant case is necessary and the reasons for review under this Section are compelling pursuant to Supreme Court Rule 10(c):

a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In its March 8, 2011, decision, the OK Supreme Court incorrectly determined that the preemption principles invoked in *Rice* were not applicable to the present case. In fact, the OK Supreme Court inferred that said principles were relevant only to matters involving liquor regulation. App. 3a-9a. Failure to employ the preemption principles to cases involving communications regulation not only deprived the Petitioner of a remedy, but also resulted in a ruling on federal questions (*i.e.*, tribal sovereign immunity and the Congressional intent of the Act) directly conflicting with the decision of this Court in *Rice* and in other decisions.⁶ It is apparent from a review of Indian law jurisprudence that the application of preemption

⁶ *Rice* is the subject decision discussed throughout this Petition, and is perfectly in line with this Court's decisions in numerous pivotal Indian law cases, including, but not limited to, *Montana*, 450 U.S. 544, discussed *infra* to support this assertion.

principles in the tribal sovereign immunity context requires clarification by this Court.

A. The Preemption Principles Invoked by this Court in *Rice*.

For the sake of background, a review of the preemption principles involved in *Rice* is prudent. The critical issue in *Rice* was whether the State of California could require a federally licensed Indian trader operating a general store on an Indian reservation to obtain a state license to sell liquor for off-premises consumption. 463 U.S. at 713. This Court answered in the affirmative and permitted California's licensing requirement. *Id.*

The Indian trader, Rehner, argued twofold that state licensing requirements infringed upon tribal sovereignty and that Title 18 U.S.C. § 1161 preempted state regulation of Indian liquor transactions. *Id.* at 725, 731. This Court began its opinion by addressing Rehner's contention that inherent tribal sovereignty was an absolute bar to state jurisdiction. Justice O'Connor, writing for the majority, noted that recent decisions of this Court trend "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . We have instead employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them." *Id.* at 718 (discussing *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973)). Relying on the recent trend, the Court employed a preemption analysis and set forth the principles of preemption to be considered.

The goal of preemption analysis is to determine the Congressional plan for enacting a relevant federal statute. *Id.* at 718. The analysis balances federal and tribal interests against state interests in a particular area of regulation. *See generally id.* The analysis begins with a determination of whether “tradition has recognized a sovereign immunity in favor of the Indians in some respect.” *Id.* at 719. If a tradition exists, then this Court is “reluctant to *infer* that Congress has authorized the assertion of state authority in that respect ‘except where Congress has expressly provided that State laws shall apply.’” *Id.* at 719-20 (quoting *McClanahan*, 411 U.S. at 171) (emphasis added). Moreover, if there is no tradition, or if this Court determines “that the balance of state, federal, and tribal interests so requires,” the preemption analysis “may accord less weight to the ‘backdrop’ of tribal sovereignty.” *Id.* at 720. As to the amount of weight to be accorded the stated “backdrop,” *Rice* contemplated the ability to afford absolutely no weight in certain situations. *Id.* at 725. The most significant rule of law relating to the tradition prong of the analysis is this Court’s finding that when a tradition of sovereignty is lacking, it is not necessary that Congress expressly indicate States’ rights to regulatory jurisdiction over tribal entities in a particular arena, but rather, that Congress can *implicitly* confer said jurisdiction on the States. *Id.* at 731.

Following a determination regarding the existence of a tradition of tribal sovereignty, the preemption analysis proceeds to balance federal, tribal, and state interests to determine if federal law preempts state law. *Id.* at 718. The federal interests to be balanced derive, in part, from Congress’ plenary power to

abrogate tribal sovereignty and tribal immunity arising therefrom. *Id.* The federal interests are embodied in the relevant federal statute as well as in the intent behind enacting the same. *See id.* at 730-34. The *Rice* Court also considered said federal interests in the context of historical regulatory jurisdiction exercised over tribal entities in a particular area. *See generally id.* Moreover, the Court has relied heavily on the legislative history of the relevant federal statute to determine intent and certain canons of construction when interpreting the statute. *Id.* at 723-30.

At its core, the preemption analysis is informed by the important state interest existing in the inherent concept of dual sovereignty and concurrent state and federal jurisdiction. *Id.* at 724. With regard to state interests to be balanced in preemption, the Court stated “[w]e do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized that “‘any applicable regulatory interest of the State must be given weight’ and ‘automatic exemptions “as a matter of constitutional law” are unusual.’” *Id.* at 719 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)) (emphasis added). As to the significance of certain state interests, “[a] State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.” *Id.* at 724 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983)).

The preemption analysis requires a consideration of tribal interests as well. *See generally Rice*, 463 U.S. 713. As stated *supra*, even where no tradition of immunity exists, tribal interests regarding sovereignty

may inform the preemption analysis, but such interests are not afforded much weight, if any. These interests, in part, take the form of the federal policy promoting tribal self-sufficiency and economic development. *Id.* at 724. In certain situations, as in the case of taxation, Indians were viewed to “‘possess the usual accoutrements of tribal self-government’ ” and thus, great weight was provided to tribal sovereign interests in such context. *Id.* at 724 (quoting *McClanahan*, 411 U.S. at 167-68). However, “[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress,” which results in the tribes’ status as “dependent” nations. *Id.* at 719 (quoting *Bracker*, 448 U.S. at 143).

Ultimately, the Court ruled in *Rice* that the relevant federal statute did not preempt state law and that California could exercise jurisdiction over the Indian trader because Congress, being already aware of the States’ concurrent jurisdiction, intended to delegate authority to the States in that matter. *Id.* at 733-35. The Court reasoned there was no tradition of tribal sovereignty/immunity in the area of liquor and as such afforded little, if any, weight to the tribal interests. *Id.* at 725, 733-35. Further, without a tradition of tribal immunity, Congress was not required to explicitly indicate that a State can exercise regulatory jurisdiction over tribal entities in contexts involving liquor transactions in Indian Country. *Id.* at 733-35. Finally, the Court determined that California’s interest in regulating liquor transactions was great because of the substantial effect that those transactions could have outside of Indian Country. *Id.* at 724-25.

B. General Applicability of the Preemption Principles Invoked in *Rice*.

The principles invoked in *Rice*, are applicable to the instant case. Unfortunately, the OK Supreme Court failed to apply them when reaching its decision in the present matter. The OK Supreme Court ruling answered federal preemption questions in direct conflict with opinions of this Court and as such provides a compelling reason to grant this Petition. *See id*; *see generally Montana*, 450 U.S. 544. Moreover, the applicability of the relevant preemption principles to cases involving communications regulation raises a question of first impression requiring resolution by this Court. In support of its applicability argument, Petitioner respectfully directs this Court's attention to *Rice* (specifically opinion sections II and II(B) at 718-35), and other Court decisions that have either employed the preemption analysis or inform the same such as *Montana*. 450 U.S. 544.

In Section II of *Rice*, this Court began its analysis by discussing the application of a preemption analysis in a *general sense*. 463 U.S. at 718. This Court acknowledged that it had trended “away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . We have instead employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them.” *Id.* The Court further recognized that “Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.” Moreover, this Court stated that “the goal of *any* preemption inquiry is to determine the congressional plan.” *Id.* (emphasis

added). Likewise, support for the general applicability of the analysis lies in the assertion that “[w]hen we determine that tradition has recognized a sovereign immunity in favor of the Indians in *some respect*, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in *that respect* . . .” *Id.* at 710 (emphasis added). Most important when discussing preemption applicability in the context of state authority was the recognition that “*any applicable regulatory interest of the State must be given weight.*” *Id.* at 719 (quoting *Bracker*, 448 U.S. at 144 (1980) (quoting *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976))) (emphasis added). Further, the general applicability of the preemption principles to the present cases agrees with the inherent principle that “the right of tribal self-government is ultimately dependent on and subject to the *broad power of Congress.*” *Id.* at 718 (quoting *Bracker*, 448 U.S. at 143) (emphasis added). The phrase “broad power of Congress” supports the notion that preemption should be considered in any matter wherein Congress has enacted legislation delegating to the States the ability to exercise jurisdiction in a particular regulatory area.

Section II(B) of *Rice* provides further support for general applicability. The Court discussed the use of canons of construction to interpret a federal statute in preemption matters. *Id.* at 725-34. The specific canon of construction at issue provided “ ‘State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.’” *Id.* at 731 (quoting *McClanahan*, 411 U.S. at 170-71 (quoting Felix Cohen, *Handbook of Federal Indian Law* 845 (1982 ed.))). The Court stated that we have *consistently* refused to apply such a canon of

construction when application would be tantamount to a formalistic disregard of congressional intent.” *Id.* at 732. (emphasis added). The use of “consistently” bolsters the notion that the preemption analysis has been applied on a regular and customary basis by this Court and not solely for the issues raised in *Rice*.

The fundamental case of *Montana* is also instructive when considering this first question presented and general applicability of preemption principles. Petitioner acknowledges that *Montana* involved a dispute between the United States as fiduciary on behalf of the Crow Tribe of Indians (collectively the U.S. and Crow Tribe of Indians shall be referred to as the “Crow”) and the State of Montana regarding ownership of the bed of the Big Horn River and the Crow’s ability to prohibit non-tribal members from hunting and fishing on its reservation. See *Montana*, 450 U.S. 544. However, *Montana* was instrumental in providing interpretation of federal delegation and the effect of the same on jurisdictional issues involving Indian tribes and states, which is at the core of the preemption principles invoked in *Rice*.

This Court, in *Montana*, considered whether the Crow could prohibit non-members from fishing on reservation lands owned in fee by non-members. *Id.* at 557. The State of Montana asserted that it had the authority to regulate hunting and fishing by non-Indians within the reservation. *Id.* at 549. The Crow argued that it had exclusive jurisdiction to regulate all hunting and fishing on the reservation. *Id.* As support for its argument, the Crow urged that it owned the bed of the Big Horn River passing through the reservation. *Id.* at 547. To further bolster that position, the Crow directed the Court’s attention to a federal trespassing

statute mandating a fine for any entity trespassing on Indian land for the purposes of hunting and fishing. *Id.* at 561.

The Court began its analysis of the regulatory question presented by addressing the principle that the federal government holds title to navigable waters in trust for future States and that upon entering the Union said title passes to those States. *Id.* at 551. Further, that nothing in the relevant treaties affecting the Crow stated that said principle would be abandoned in favor of the Crow with regard to the Big Horn River. *Id.* at 553. Thus, title to the river passed to Montana upon statehood. Next, the Court reviewed the federal trespassing statute including the legislative history of the same and found that Congress had excluded fee-patented lands under the statute. *Id.* at 562-63. Moreover, the statute was limited to Indian owned land only. *Id.* at 561-62.

The Court concluded its analysis of the case by addressing issues raised regarding inherent tribal sovereignty. The Court recognized the concept of tribal sovereignty but stated that “ ‘inherent sovereignty’ is not so broad as to support the application of Resolution No. 74-05 [the Crow’s resolution prohibiting fishing and hunting on the reservation by non-members] to non-Indian lands.” *Id.* at 563. When considering the Crow’s regulatory authority the Court stated that “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566. The Court’s application of the law to the facts

revealed that “nothing in this case suggests that such non-Indian hunting and fishing so threatens the Tribe’s political or economic security as to justify tribal regulation.” *Id.* Ultimately, the Court concluded that Montana could regulate the hunting and fishing of non-Indians on reservation land owned in fee by said non-members. *Id.* at 566-67.

Montana supports the concept of employing a preemption analysis in cases where the interplay between federal law, tribal sovereignty, and the breadth of state regulation requires clarification. Petitioner acknowledges that *Montana* involved the question of tribal authority to regulate non-members, which is inverse to the present matters. However, *Montana* supports the evolution and trend of employing the relevant preemption principles generally in matters such as the instant case before this Court.

Examination of this Court’s opinions in *Rice*, and to an extent in *Montana*, prove that the OK Supreme Court has issued an opinion deciding federal preemption questions regarding tribal sovereign immunity and the jurisdictional effect of the Act in contravention to federal precedent. The OK Supreme Court ignored this Court’s precedent when it failed to implement or even discuss the Court’s prescribed preemption principles to be used in matters involving questions of tribal sovereign immunity and the abrogation of the same by federal statute. This is evinced further by the OK Supreme Court’s constraint placed on the relevant preemption analysis in *Rice* to liquor regulation. App. 9a It is apparent that this Court discussed the subject preemption analysis in *Rice* in a general, if not universal, sense. There was

nothing in *Rice* supporting the OK Supreme Court's finding that the preemption analysis was not applicable or should be ignored. Petitioner prays that this Court grant this Petition to resolve the compelling conflict and to answer a question of first impression regarding the applicability of the preemption principles to matters involving the defense of tribal sovereign immunity and the Act's delegation of intrastate communications regulation to the States.

II. Application of the Preemption Principles Invoked in *Rice*, to the Present Case Results in Properly Exercised Jurisdiction over Respondent.

This Court's review of the instant cases is necessary and the reasons for review under this Section are compelling pursuant to Supreme Court Rules 10(b) and 10(c):

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort;

(c) a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Pursuant to Supreme Court Rule 10(b), the OK Supreme Court opinion provides the Court with a compelling reason to grant certiorari because it answered certain federal questions (tribal sovereign immunity and jurisdictional effect of the Act) in direct

conflict with the South Dakota Supreme Court's decision in *Cheyenne*, which resolved substantially identical federal questions differently.

In addition to the compelling reason for granting this Petition provided in Section I regarding the OK Supreme Court's conflicting decision limiting the *Rice* preemption principles to liquor cases, this Section provides stronger cause under Supreme Court Rule 10(c) as Petitioner's second question presented is one of first impression and is deserving of resolution. Petitioner's issue inquires as to whether the Act delegates to the States the authority to exercise jurisdiction over tribal entities. The Court's resolution of this question presented is of dire importance, because absent a proper determination of the relationship between the Act and the doctrine of sovereign immunity, Petitioner is without a remedy for the damage caused by Respondent's negligent conduct. Petitioner urges this Court to grant certiorari to protect its livelihood from tribal entities' tortious actions.

A. Conflicting Decisions of State Courts of Last Resort Resolving Important Federal Questions.

i. Oklahoma Supreme Court Decision in *Seneca Telephone Company v. Miami Tribe of Oklahoma d/b/a White Loon Construction*.

As discussed *supra*, the instant matters arose from damage sustained to Petitioner's telecommunication facilities caused by Respondent's tortious excavation actions while performing services in the private sector.

To defeat Respondent's jurisdictional defense of tribal immunity, Petitioner argued that Oklahoma state courts have jurisdiction to adjudicate its claims, in part, because tribes do not enjoy a tradition of immunity in matters involving telecommunications, and the Act delegated to Oklahoma the regulatory authority over all intrastate communications. Petitioner relied on the South Dakota Supreme Court's decision in *Cheyenne* to support its argument regarding tradition and Congressional delegation. App. 90a-91a, 93a, 100a, 101a, and 102a. Adhering to pronounced Oklahoma law, Petitioner argued that the state courts were authorized to adjudicate the instant matter because the judicial system is the enforcement mechanism used to ensure that the state's legislative scheme is obeyed. App. 15a, 99a-102a. The Petitioner urged that the UFDPA, which Respondent violated, was a state statute adopted by the legislature to protect underground telecommunication facilities. App. 100a.

The OK Supreme Court ruled that the state court did not have jurisdiction to hear the cases because the Act did not expressly abrogate tribal immunity and failed to mention Indians or Indian Country. The OK Supreme Court also dismissed *Rice* as inapplicable. App. 9a. This ruling decided federal questions in direct contravention to the decision in *Cheyenne*. Notably, the Oklahoma Supreme Court failed to cite or mention *Cheyenne* in the opinion.

**ii. South Dakota Supreme Court
Decision in *Cheyenne*.**

Cheyenne is directly on point with the instant case because it discusses tribal sovereignty in relation to

the Act. In said case, a Colorado telephone corporation (“Corporation”) desired to sell telephone exchanges located on Indian land to the Cheyenne River Sioux Tribe Telephone Authority, a wholly owned tribal subsidiary of the Cheyenne River Sioux Tribe (“Sioux”). *Cheyenne*, at 606-07. The Public Utilities Commission of South Dakota (“PUC”), the agency authorized to regulate telecommunications in South Dakota, intervened and disapproved the proposed sale. *Id.* at 606. The SD Court affirmed the intervention by invoking the relevant preemption principles. *See generally id.*

The Corporation and Sioux argued that PUC’s intervention in the sale was an illegal infringement on tribal self-government, that PUC’s action was preempted by the Federal Communications Commission (“FCC”), and that PUC lacked jurisdiction over the sale. *Id.* at 610-11. The SD Court disagreed and began its analysis by discussing principles of tribal sovereignty. The SD Court stated that “[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and Federal Government, on the one hand, and those of the State, on the other.” *Id.* at 608-09 (quoting *Washington v. Confederated Tribes*, 477 U.S. 134, 156 (1980)). Further:

exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct

threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id.* at 609 (quoting *Montana*, 450 U.S. at 564).

The SD Court did not recognize the Sioux's inherent sovereign powers, or tradition of sovereignty, as it related to the regulation of telecommunications in South Dakota or to the proposed sale between the Corporation and the Sioux. *Id.* at 609-11. The SD Court proceeded to employ a preemption analysis related to the Act and afforded little or no weight to tribal sovereignty when conducting the analysis. *See generally id.*

The court found that the “regulatory scheme of telecommunications services specifically grants PUC authority and jurisdiction over intrastate facilities. . . . The authority of PUC is extensive and crucial to the overall regulatory scheme.” *Id.* at 609. Further, the SD court asserted that the purpose of the federal and state scheme was to provide “a rapid efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” *Id.* at 610 (citing the Act at 47 U.S.C. § 151). The SD Court relied on the Act when asserting that “the FCC is deprived of regulatory power over telephone service[s] which, in their nature, are separable from and do not substantially affect the conduct or development of interstate communications.” *Id.* at 610. Further, “[w]hen determining whether a state may exercise jurisdiction, the question to be addressed is whether assumption of jurisdiction would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress.” *Id.* The SD court determined that Congress’ primary goal in telecommunications regulation was to:

protect telecommunications’ consumers. Consumers are ensured, through this regulation, of adequate facilities and reasonable rates. This protection applies to all consumers, whether they reside on or off an Indian reservation. Such regulation is an important government function, and PUC’s regulatory authority furthers its objectives and purposes; it does not interfere with them. *Id.* at 611.

The SD Court ruled in favor of the PUC finding federal law did not work to preempt state law because such power was “a significant, as well as authorized, part of the overall regulatory scheme. *Id.* (quoting *Rice*, 463 U.S. at 726).

The OK Supreme Court’s decision directly conflicts with *Cheyenne*. *Cheyenne* is the principal authority to be followed in the present case, because it properly implemented the preemption principles invoked in *Rice*. *Cheyenne* evinces the need to consider the overall telecommunications scheme embodied in the Act and to consider tribal tradition of sovereignty in that particular area. The OK Supreme Court failed to do so, and thus, Petitioner prays that this Court grant certiorari to resolve the pressing conflict between these two supreme courts.

B. Application of the Preemption Principles to the Present Matter.

As discussed supra, the Oklahoma Supreme Court and the South Dakota Supreme Court both decided the

federal questions regarding tribal sovereign immunity and the effect of the Act on States' ability to exercise jurisdiction over tribes in the arena of intrastate communications. However, this Court has yet to make a determination regarding said questions. Pursuant to Supreme Court Rule 10(c), these first impression issues provide a compelling reason for this Court to resolve the important federal questions. To support that compulsion, Petitioner applies the relevant preemption principles to the specific facts of this case to illustrate the OK Supreme Court's error when issuing its opinion and the long lasting peril that such decision will cause Petitioner and entities conducting business within the state.

The first part of the preemption analysis requires a determination as to whether tradition has recognized a sovereign immunity in favor of tribes in a particular regulatory area. *See generally Rice*, 463 U.S. 713. In *Rice*, this Court approached the aspect of tradition by reviewing the historical background of liquor regulation in the context of Indian tribes beginning in the early nineteenth century. *Id.* at 726-34. This background research resulted in a finding that tribes have long been divested of self-government in the area of liquor. *Id.* at 731 n.15. The divestment began long ago when tribes sought assistance from the Federal Government to control Indian access to liquor. *Id.* at 726-27. The Court stated that "[i]n many respects, the concerns about liquor expressed by the tribes were responsible for the development of the dependent status of the tribes. When the substance to be regulated is that primarily responsible for 'dependent' status, it makes no sense to say that the historical position of Indians as federal 'wards' militates in favor

of giving exclusive control over licensing and distribution to the tribes.” *Id.* at 731 n.15.

In the present case, telecommunications regulation is the relevant spectrum requiring analysis of such tradition. Undoubtedly, this nation’s communications infrastructure is and always has been exclusively developed, maintained, and regulated by the state and federal governments. Historically, there exists no instance where tribal nations independently developed, constructed, or implemented a comprehensive telecommunications system without the assistance of federal or state government. *Cheyenne* is the most instructive case for tradition of tribal sovereignty analysis in this context. In that case, the Sioux’s inherent sovereign interests were not implicated in the context of intrastate telecommunications regulation.⁷

Analogous to this Court’s holding in *Rice* stating that tribes have long been divested of self-government not only by Congressional mandate but by the “ ‘necessary implication of their dependent status,’ ” so to have Indian tribes been divested of any inherent right to self-government over intrastate communications. *Rice*, 463 U.S. at 722, 726 (quoting *Confederated Tribes*, 447 U.S. at 152); *see also* *Cheyenne*, 595 N.W.2d 604. The dependent status of Indian tribes in this respect reveals a nonexistent

⁷ In the instant case, the Shawnee’s use of Petitioner’s facilities for its gaming operation and residential housing is strong evidence of Indian tribes’ dependency on non-federal entities to procure access to telecommunications. Moreover, some of those telecommunication facilities were damaged by Respondent which gave rise to Petitioner’s present action.

tradition of tribal sovereignty in the area of telecommunications regulation. Accordingly, under the present application, little and, arguably, zero weight would be afforded to tribal sovereignty in resolving the preemption inquires in the instant matter.

According little if no weight to tribal sovereignty or immunity, preemption analysis proceeds to determine whether federal law preempts state law. The analysis requires federal and state interests to be balanced. *See generally Rice*, 463 U.S. 713. Federal interests are analyzed in the context of the relevant federal statute, which requires examination of congressional intent. In *Rice*, the Court determined that the relevant statute and its legislative history revealed Congressional intent to delegate jurisdiction to the States to regulate liquor transactions involving Indians on Indian land. *Id.* The Court further addressed the canon of construction that “State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.” *Id.* at 731. Said canon was dismissed as inapplicable because of the lack of sovereign tradition in the relevant regulatory authority. Further, the Court stated that in situations where tradition is lacking “*it is not necessary that Congress indicate expressly* that the State has jurisdiction to regulate the licensing and distribution of alcohol.” *Id.* (emphasis added).

According little weight to tribal sovereignty tradition in the present matter, the preemption analysis must proceed to consider federal interests. § 151 of the Act states that the FCC shall regulate interstate and foreign commerce in communication by

wire and radio for the purpose of promoting the safety of life and property. Congress also delegated regulatory jurisdiction to the States under § 152(b) of the Act:

(b) Exceptions to Federal Communication Commission *jurisdiction*

. . . nothing in this chapter shall be construed to apply or to give the [FCC] *jurisdiction* with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier . . . (emphasis added).

§ 221(a) of the Act further defines the statutory plan:

. . . nothing in this chapter shall be construed to apply or to give the [FCC] *jurisdiction*, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . telephone exchange service, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by State commission or by local governmental authority. (emphasis added).

The main federal interest under the Act is to promote the safety of life and property through an efficient communications system. *See* 47 U.S.C. § 151. It is clear that the Act delegates to the States the ability to regulate *all* intrastate communications within their borders to further those federal interests. 47 U.S.C. §§ 151, 152. A review of the Act's legislative

history further supports breadth of the States' authority. The Congressional Record of the House from June 9, 1934, acknowledged the Federal Government's retained power to regulate interstate communications and what was to be excluded from the same: "The Senate Bill excludes wire communication between points within the same State which passes through another State or a foreign country, when such communication is regulated by a State Commission." 78 CONG. REC. 10,986 (1934). The House's version of the Bill was the same in all respects except for the clause regarding foreign countries. *Id.* The State's ability to regulate intrastate communications is evident from its legislative history and is broader than what "intrastate" may indicate, especially where state commissions govern those intrastate communications.

Further, case law discussing the statutory scheme of the Act stands for the proposition that the FCC's authority to regulate interstate communications and the states' authority to regulate intrastate communications is part of a system to provide "a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." *Cheyenne*, 595 N.W.2d at 610. Specific to telecommunications, the congressional goal of the Act is to protect telecommunication consumers and to ensure that those consumers are provided with functioning facilities and fair rates. *Id.* Further, this protection applies to all citizens whether inside or outside Indian land. *Id.* at 611. Moreover, telecommunications regulation is a vital government function and state regulatory authority in this area furthers the overall goals and purposes of the Act rather than interfering with said objectives. *Id.*

Applying the Congressional intent of the Act to the present matter, it is certain that the State of Oklahoma has substantial authority to regulate all intrastate telecommunications within its borders, including those located on Indian land. Oklahoma's power in this area is expanded further as a result of the creation of the Oklahoma Corporation Commission ("OCC"). The OCC is analogous to the state regulatory authority (the PUC) in *Cheyenne* as it is charged with the duty of governing telecommunications and telephone utilities operating intrastate communications facilities. Okla. Const. art. IX; Okla. Stat. tit. 17, § 131. Notably, Petitioner is licensed by the OCC to operate the underground telecommunication facilities that sustained damage at the hands of the Respondent in this matter. Appellee's Answer Brief at 2, *Seneca Telephone Co. v. Miami Tribe*, Ottawa County District Court of Oklahoma (2010) (No. 107431). The OCC's regulation of all intrastate communications, including those on Indian lands, only furthers the overall federal communications scheme and a contrary determination would frustrate the goals of the Congressional plan.

Continuing to afford little weight to tribal sovereignty tradition and considering the relevant federal interests in the present matter, the preemption analysis proceeds to consider state interests at stake. State interests in this case further the overall purposes of the Act and only help to tip the weighted scales entirely in favor of state regulation. It is undisputed that Oklahoma and the OCC have a heightened interest in regulating, supervising, and controlling telecommunications for the public safety and welfare. *See* Okla. Const. art. IX, § 18; Okla. Stat. tit. 17 § 131; Okla. Stat. tit. 63 § 142.1 *et. seq.* The

state legislature has promulgated various statutes to protect public health and safety in this context, but the UFDPA is most relevant to the instant case and is indicative of the substantial state interests.

The UFDPA is a comprehensive statutory scheme created by the legislature to protect both the public and underground facilities. *Jones v. Okla. Nat. Gas Co.*, 894 P.2d 415, 418 (Okla. 1994). The UFDPA defines “underground facility” to include telecommunication facilities. Okla. Stat. tit. 63 § 142.2(15). Undoubtedly, the UFDPA is intended to safeguard against the potential effects caused by damaged underground telecommunication facilities. Damage to said facilities could result in harm or even death in situations where citizens cannot call for assistance in emergency situations. Relevant to the instant matter, destruction of facilities located on Indian land may have perilous effects both on and off Indian land because telephone companies provide service to both Indians and non-Indians through an interconnected network. Significantly, “[a] State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.” *Rice*, 463 U.S. at 724.

The state interests at stake in this matter are substantial as evidenced by the enactment of the UFDPA and its intended safety goals. These interests would be afforded extreme weight under the relevant preemption principles because the “off-reservation” effects certainly “necessitate state intervention.” *Id.* The state interests informing the preemption analysis should result in the ability to exercise jurisdiction over tribal entities, especially in situations where the UFDPA is violated.

Petitioner acknowledges that the Act does not specifically mention Indians or Indian country or the States' authority to regulate the same. However, as in *Rice*, where it was not necessary for Congress to indicate expressly that States' had regulatory jurisdiction over Indians in the absence of sovereignty tradition and the presence of substantial state interests; in the present matter, the Act need not indicate expressly that the States' have regulatory jurisdiction over tribal entities because there is an absence of sovereignty tradition and a presence of substantial state interests. *See generally Rice*, 463 U.S. 713.

The application of the relevant preemption principles in the context of Petitioner's case reveals the flawed reasoning of the OK Supreme Court. Proper application of the preemption analysis should have resulted in a fair and just remedy for Petitioner, which the OK Supreme Court haphazardly denied. The illustration of the Petitioner's case under the purview of a proper preemption analysis supports the already compelling reason for this Court to grant this Petition and answer this question of first impression.

Pursuant to Supreme Court Rule 14(a), "the statement of any question presented is deemed to comprise every subsidiary question fairly included therein." While not directly included in the second question presented, the issue of Oklahoma's adjudicatory authority derived from the Act requires discussion. This inquiry is in line with the states interest portion of the preemption analysis. The State of Oklahoma has a strong interest in ensuring that its citizens have a judicial forum to address injuries caused by tortious conduct of others. *Bittle v. Bahe*,

192 P.3d 810, 819 (Okla. 2008). Article II, § 6 of the Oklahoma Constitution states “the courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.” Further, Indian law jurisprudence has recognized the importance of access to state courts and has reiterated the authority of state courts as “courts of general jurisdiction” and further asserted the “dual sovereignty” by which state courts have concurrent jurisdiction with federal courts. *Nevada*, 533 U.S. 353.

The UFDPA charges excavators with a duty to protect underground telecommunication facilities. An excavator who breaches said duty is liable for the resulting damage. Assuming that this Court agrees with Petitioner’s application of the preemption principles to these cases and further agrees that Oklahoma can regulate intrastate telecommunications in the context of these matters, then Petitioner urges that any excavator, whether a tribal entity or not, may be haled into state court for violating the UFDPA. The inability to exercise adjudicatory jurisdiction would not only irreparably harm substantial state interests in regulating intrastate communications, it would also be in contravention of the purposes of the Act. Moreover, this Court’s decision in *Rice* likewise stands for the proposition that regulatory authority necessarily includes the right to implement enforcement mechanisms whether legislative, executive, or adjudicative in nature. *See generally Rice*, 463 U.S. 713.

If this Court does not grant this Petition, the Oklahoma Supreme Court's decision will have the effect of defeating the inherent federal and state interests to ensure that citizens have the opportunity to be heard and to seek redress for injuries caused by the tortious conduct of others. Respondent, a tribal entity providing services in the private sector, must be held accountable for repeatedly damaging Petitioner's facilities. Review by this Court is the last avenue for pursuing justice left to Petitioner. Only this Court can revoke the unencumbered license issued by the Oklahoma Supreme Court to tribal entities like the Respondent to act with reckless abandon in the private economy without fear or consequence.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 10, 2011
