No. 12-1410

# In the Supreme Court of the United States

TERRY TONASKET, dba STOGIE SHOP,
and DANIEL T. MILLER, an individual,
*Petitioners*,

v.

TOM SARGENT, TOBACCO TAX ADMINISTRATOR; THE COLVILLE BUSINESS COUNCIL; MICHAEL O. FINLEY, CHAIRMAN; HARVEY MOSES JR.; SYLVIA PEASLEY; BRIAN NISSEN; SUSIE ALLEN; CHERIE MOOMAW; JOHN STENSGAR; ANDREW JOSEPH; VIRGIL SEYMOUR SR.; MIKE MARCHARD; ERNIE WILLIAMS; DOUG SEYMOUR; SHIRLEY CHARLEY; RICKY GABRIEL; and THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION,
a federally recognized Indian tribe,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit correctly affirmed the district court's determination that the sovereign immunity of the Colville Confederated Tribes ("CCT") deprived the court of subject matter jurisdiction over Petitioners' claims that CCT's entry into a tribal-state cigarette compact with the State of Washington to equalize taxation on and off the Tribes' Reservation constitutes unlawful "price-fixing."

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## BRIEF IN OPPOSITION

## INTRODUCTION

Petitioners – a tribal member smokeshop owner and one of his non-Indian customers – seek to invalidate a cigarette tax compact between the Colville Confederated Tribes ("CCT") and the State of Washington ("Compact") so they can exploit a supposed tax haven for on-Reservation cigarette sales this Court eliminated 33 years ago in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) ("*Colville*"). The Ninth Circuit rejected Petitioners' challenge to the Compact on the basis of CCT's sovereign immunity, and also rejected nearly identical claims brought by Petitioner Miller in a companion case challenging a compact between the State of Washington and the Puyallup Tribe. *Tonasket v. Sargent*, No. 11-36001, 2013 WL 792768 (9th Cir. Mar. 5, 2013) (CCT Compact); *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013) (Puyallup Compact). This Court recently declined to review the Ninth Circuit's decision in *Miller* upholding the Puyallup Compact, *Miller v. Wright*, No. 12-1237 (cert. denied June 17, 2013), and should likewise decline to review the Ninth Circuit decision in the instant case.

Petitioners have not identified any compelling reason for this Court to review the lower court decision. Petitioners' main contention is that CCT's sovereign immunity is inapplicable because CCT's implementation of the Compact exceeded its lawful taxing authority. However, the authority of tribes to impose cigarette taxes on sales occurring on Indian trust lands is well-established by this Court. In

*Colville*, the Court expressly upheld CCT's authority to impose cigarette taxes on sales by CCT retailers to non-members. 447 U.S. at 152 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), the Court confirmed that a tribe's taxing authority extends to "transactions occurring on trust lands and significantly involving a tribe or its members . . . ." (citing *Colville*, 447 U.S. at 152); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (reconciling the *Merrion* and *Colville* decisions with limits on tribal civil jurisdiction first articulated in *Montana v. United States*, 450 U.S. 544 (1981)). The *Colville* Court also expressly rejected the argument that there is a federal right for on-reservation cigarette outlets to market a tax exemption, exploitation of which is Petitioners' obvious goal in trying to set aside the Compact. *See* 447 U.S. at 154-55. Petitioners' efforts also run directly afoul of this Court's repeated endorsement of efforts by tribes and states to cooperate regarding taxation of on-reservation sales of cigarettes, including by entry into tribal-state agreements to adopt a mutually satisfactory tax regime. *See Okla. Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("*Potawatomi*"); *see also Colville*, 447 U.S. at 161-62 (criticizing absence of such cooperation).

Despite the long-standing precedent on the subject, Petitioners adhere to their argument that CCT's collection of cigarette taxes pursuant to the Compact is unlawful and this purportedly unlawful conduct waives or otherwise abrogates CCT's sovereign immunity. As detailed below, this argument is wrong as a matter of law, and is also premised on Petitioners' misunderstanding of the manner in which CCT

implements the Compact on the Reservation. Finally, Petitioners' attempt to decimate the Compact without joining the State of Washington runs afoul of fundamental indispensability standards under Fed. R. Civ. P. 19.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

Petitioner Terry Tonasket is a CCT member and a CCT-licensed cigarette retailer who operates the "Stogie Shop," a retail outlet located on Indian trust land within the Colville Reservation in Omak, Washington. App. 30 (¶ 3); SER 2 (¶ 3); SER 4-8.[1] Petitioner Daniel T. Miller is a non-Indian who claims to travel from the Spokane Valley to the Stogie Shop (a distance of approximately 140 miles each way) to avoid paying state taxes on his cigarette purchases. App. 30-31 (¶ 3); App. 37 (¶ 15). Petitioners are unhappy with CCT's implementation of the Compact, a 2009 agreement between CCT and the State of Washington designed to end a perceived tax haven for cigarette sales on the Colville Reservation and resolve decades of conflict between CCT and the State regarding the taxation of cigarettes sold on the Colville Reservation.

Under the Compact, CCT agreed to "impose and maintain in effect a tax equal to 100% of the state

[1] "App." refers to the appendix Petitioners submitted to the Court with their Petition for a Writ of Certiorari. "SER" refers to the supplemental excerpts of record Respondents filed in the Ninth Circuit Court of Appeals.

cigarette tax *upon the wholesaler* who buys the stamps, stamps the cigarettes, and sells cigarettes to Colville retailers." App. 91 (¶ 6.2.1) (emphasis added). In exchange, the State of Washington "waive[d] its right to collect the state cigarette tax and state and local sales and use taxes against [CCT], its wholesalers, retailers, or buyers, subject to [CCT] being in conformance with this Compact." App. 93 (¶ 6.3.4). All of the revenue that CCT collects under this arrangement must be used by CCT "for essential government services . . . ." App. 114-15 (¶¶ 25.1-25.2). The Compact expressly preserved the sovereign immunity of both CCT and the State of Washington. App. 82 (¶ 1.1). CCT implements the Compact through its Tobacco Code ("Code"), as overseen by CCT's Tobacco Code Administrator, Tom Sargent. SER 2 (¶ 1); SER 15-19. Nothing in the Compact or the Code sets prices at either the wholesale or retail level. Instead, the net effect of the Compact and the Code is to equalize the tax burden on cigarette sales to non-tribal members on and off the Reservation.

## II. PROCEEDINGS BELOW

On May 26, 2011, Petitioners filed an amended complaint in the district court for the Eastern District of Washington, seeking refunds, damages, and injunctive relief for CCT's allegedly unlawful implementation of the Compact. App. 28-65. CCT moved to dismiss the amended complaint because (1) the suit is barred by CCT's sovereign immunity, and (2) Petitioners failed to join the State of Washington, an indispensable party. Around the same time, Petitioner Miller and other parties brought an action in the Western District of Washington challenging the

Puyallup Tribe's cigarette tax compact with the State of Washington on similar grounds. *See Miller v. Wright*, No. 3:11CV05395(RBL), 2011 WL 4712245 (W.D. Wash. Oct. 6, 2011).

The district court for the Eastern District of Washington granted CCT's motion to dismiss on November 10, 2011, concluding that Petitioners' claims were "barred by the tribal and tribal officials' sovereign immunity, which was neither abrogated nor waived." *Tonasket v. Sargent*, 830 F. Supp. 2d 1078, 1083 (E.D. Wash. 2011). The district court also determined that "the State has significant interests in this case that would be affected if the Court were to grant the relief that [Petitioners] request." *Id.* However, the district court dismissed the case on sovereign immunity grounds and declined to "determine if the State can or cannot be joined." *Id.*[2] The case challenging the Puyallup compact was also dismissed on sovereign immunity grounds. *Miller*, 2011 WL 4712245 at *3-4.

Petitioners sought Ninth Circuit review of both district court decisions. On January 14, 2013, the Ninth Circuit issued an amended decision affirming dismissal of the challenge to the Puyallup compact. *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013). Thereafter, the Ninth Circuit issued an unpublished

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[2] Petitioners have never attempted to join the State of Washington in this case, despite their effort to decimate the compact between CCT and the State. The district court did not reach the issue of whether Petitioners' claims should be dismissed pursuant to Fed. R. Civ. P. 19 for a failure to join the State as a defendant, and the Ninth Circuit did not address the issue on appeal.

decision affirming dismissal of the challenge to the Colville Compact on the same reasoning:

> Here, as in *Miller*, the district court lacked subject matter jurisdiction over [Petitioners'] claims because [CCT] did not waive sovereign immunity by entering into a [cigarette tax compact] with the state of Washington; tribal sovereign immunity extends to Sargent, who is a tribal official; and federal antitrust laws do not abrogate tribal sovereign immunity.

*Tonasket v. Sargent*, No. 11-36001, 2013 WL 792768 (9th Cir. Mar. 5, 2013) (internal citation omitted). Miller filed Petitions for Certiorari in both cases. *Miller v. Wright*, No. 12-1237 (docketed April 12, 2013); *Tonasket v. Sargent*, No. 12-1410 (docketed June 3, 2013). The Court denied the petition in *Miller* on June 17, 2013.

## REASONS FOR DENYING THE WRIT

### I. PETITIONERS HAVE FAILED TO PRESENT THEIR ARGUMENTS WITH ACCURACY, BREVITY, AND CLARITY.

The Court should deny review because Petitioners have failed to "present with accuracy, brevity, and clarity" their claims in this case. *See* Sup. Ct. R. 14(4). As described below, Petitioners make numerous factual and legal errors in their petition rendering this case unsuitable for review.

Petitioners continue to mischaracterize the Compact and CCT's implementation of it. For example,

Petitioners claim that CCT has been engaged in unlawful "price fixing" by setting minimum prices for Petitioner Tonasket's sale of cigarettes to Petitioner Miller. *E.g.*, Pet. for Cert. at i, 3. This allegation runs contrary to the unrebutted evidence in the record. Specifically, Administrator Sargent furnished two declarations and exhibits documenting the manner in which CCT implements the Compact. SER 1-19. These materials establish that CCT does "not set wholesale prices charged by any wholesaler" and does "not set retail prices charged by any retailer to any customer . . . ." SER 11 (¶ 4). Rather, wholesalers selling to CCT-licensed retailers are free to charge any price they wish for their product, but are required to pay CCT's wholesale tax, which, as required by the Compact, is set at a rate equal to the State's combined wholesale and retail taxes on cigarette sales. Retailers such as Petitioner Tonasket are also free to charge whatever prices they wish for their products. *See* SER 11 (¶ 5).

Petitioners also allege that CCT is engaged in "unfair competition" because it does not collect cigarette taxes from the retail outlets owned and operated by CCT, but imposes such taxes on Petitioners. *See* Pet. for Cert. at 2-3. This argument is flawed in multiple respects. First, as discussed above, CCT does not impose its cigarette tax on retailers or consumers, but rather imposes its tax on cigarette wholesalers, and CCT does "not require that wholesalers pass on the tribal tax to retailers, or that any tax be passed on to the consumer." SER 11 (¶ 5). Second, CCT-owned retailers, such as the Tribal Trails store mentioned by Petitioners, are subject to the same provisions of the Code as Petitioner Tonasket, including the requirement that they buy cigarettes

either from state-licensed wholesalers, or from other wholesalers (who may be tribally-certified of "self-certified"), each of whom pays CCT's wholesale tax on cigarettes. SER 12 (¶ 7). No taxed wholesaler has challenged the Compact or CCT's implementation of it.

Petitioners also include in their Petition wild allegations that CCT is seeking super-sovereign status by using its sovereign immunity as a sword to "unfairly rule the marketplace." Pet. for Cert. at 14. Such statements are irresponsible in the extreme. Here, CCT and the State, following this Court's ruling in *Colville* and its invitation in *Potawotami*, entered into the Compact to equalize tax burdens on sales to non-tribal members on and off the Reservation. Petitioners' effort to decimate the Compact in the guise of combating "unfair competition" is nothing more than an effort to re-create the tax haven this Court closed in *Colville*.

In addition to the faulty factual foundation on which Petitioners' claims are built, Petitioners continue to misstate the basic legal principles at issue in this case. For example, throughout this litigation, Petitioners have confused concepts of "tribal sovereignty" with the doctrine of "tribal sovereign immunity." *E.g.*, Pet. for Cert. at i ("The core issue in this case is tribal sovereignty."). As this Court has explained, these concepts are distinct, and incursions into tribal sovereignty are not necessarily abrogations of tribal sovereign immunity. *See Kiowa Tribe of Oklahoma v. Mfg. Techs.*, 523 U.S. 751, 755 (1998) ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit."); *see also Vann v. Kempthorne*,

534 F.3d 741, 747 (D.C. Cir. 2008) (it is erroneous to "treat every imposition upon tribal sovereignty as an abrogation of tribal sovereign immunity") (footnote omitted).

Petitioners also erroneously assert that, if the Court were to invalidate the Compact and CCT's cigarette tax scheme, they would be liberated from cigarette taxation because "the State of Washington retroceded its tax since a tribal/state cigarette tax contract is in effect." Pet. for Cert. at 3 (citing App. 93; Wash. Rev. Code § 82.24.295). However, this "retrocession" is effective only "during the effective period of a cigarette tax contract . . . ." App. 25 (Wash. Rev. Code § 82.24.295(1)); *see also* App. 93 (¶ 6.3.4.) (waiver of State's right to collect cigarette taxes on the Colville Reservation is conditioned on CCT "being in conformance with this Compact"). As the Court has instructed, in the absence of an agreement between the State and CCT, both the State and CCT may impose their taxes on cigarette transactions between CCT-licensed retailers and non-members. *Colville*, 447 U.S. at 152-55. Accordingly, Petitioners would actually be in a worse situation if the Court were to grant their requested relief, as they would be subject to double taxation by CCT and the State of Washington, which the Compact was specifically adopted to protect against.[3] *See Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1083 (9th Cir. 2011) ("*Yakama*") (Washington

[3] Because Petitioners' injuries would be exacerbated if they were to prevail in this case, their claims lack redressability, and Petitioners accordingly lack legal standing.

Department of Revenue reinstated State cigarette tax on Yakama Reservation following termination of compact between Yakama Tribe and State of Washington).

In addition, Petitioners erroneously contend that the incidence of CCT's cigarette tax is on the retail customer. Pet. for Cert. at 4, 7. In so asserting, Petitioners ignore this Court's decision in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), and mischaracterize the Ninth Circuit's decision in *Yakama*. These cases make it clear that a determination as to legal incidence of cigarette taxes requires an analysis of the particular taxing scheme at issue and the legal obligations imposed by such scheme. *Wagnon*, 546 U.S. at 101-05; *Yakama*, 658 F.3d at 1084-86. As the *Yakama* court explained:

> The "legal incidence" of an excise tax refers to determining which entity or person bears the ultimate legal obligation to pay the tax to the taxing authority. Identifying legal incidence requires a court to analyze the taxing statute and its implementation to determine which entities or individuals will likely face detrimental legal consequences if the tax is not paid. . . . The person or entity bearing the legal incidence of an excise tax is not necessarily the one bearing an economic burden from the tax.

658 F.3d at 1083 (internal citations omitted). In light of this precedent, the incidence of the CCT cigarette tax falls on wholesalers, not consumers as contended by Petitioners, because wholesalers have the legal obligation to pay the Colville tax, and there is no

requirement that wholesalers pass the tax to retailers or consumers. SER 11 (¶¶ 4-5). Again, no wholesaler has challenged the Compact or CCT's tax.

The above discussion is only a sample of the numerous factual and legal errors contained in the Petition. Petitioners' failure to present accurate and clear arguments provides sufficient basis for the Court to deny review.

## II. PETITIONERS HAVE FAILED TO PROVIDE ANY COMPELLING REASONS FOR THE COURT TO REVIEW THIS CASE.

To the extent coherent legal arguments can be extracted from the Petition, these arguments run contrary to long-standing precedent regarding tribal sovereign immunity and cigarette taxation, and thus fail to provide a compelling reason for the Court to grant review. *See* Sup. Ct. R. 10.

CCT, as a federally-recognized sovereign Indian tribe, 78 Fed. Reg. 26,384, 26,385 (May 6, 2013), is immune from suit unless that immunity has been (1) expressly waived by the CCT or (2) unequivocally abrogated by Congress. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). This Court has recognized that the scope of tribal sovereign immunity is broad, extending to commercial as well as governmental activities of tribes, and even to off-reservation activities. *Kiowa*, 523 U.S. at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); *see also Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718,

725 (9th Cir. 2008) (Tribal immunity "applies to the tribe's commercial as well as governmental activities.") (citing *Kiowa*, 523 U.S. at 754-55); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The Court has further recognized that it is the responsibility of Congress, not the Court, to modify the parameters of tribal sovereign immunity should Congress see fit to do so. *E.g.*, *Potawatomi*, 498 U.S. at 510 ("Congress has always been at liberty to dispense with such tribal immunity or to limit it. . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine. . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.").

Petitioners ignore this precedent, failing to identify any "express waiver" or "unequivocal abrogation" of CCT's immunity. Instead, Petitioners proffer arguments that CCT's immunity has been impliedly abrogated by Congress through adoption of federal statutes of "general applicability" or impliedly waived by CCT's conduct. *E.g.*, Pet. for Cert. at 5. These arguments are plainly contrary to the Court's well-established precedent and do not provide a compelling basis for reviewing this case.

Petitioners also appear to argue that, even if CCT is immune from suit, the Court should allow Petitioners to proceed with their claims against the named CCT officials. However, it has long been established that, as a general matter, tribal sovereign immunity extends to

tribal officials acting in their official capacity.[4] *See, e.g.*, *Cook*, 548 F.3d at 727 ("Tribal sovereign immunity 'extends to tribal officials when acting in their official capacity and within the scope of their authority.'") (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)). Some courts have expressed a willingness to apply the limited exception to sovereign immunity the Court articulated in *Ex parte Young*, 209 U.S. 123 (1908), in the context of tribal sovereign immunity. However, even if *Ex parte Young* creates an exception to tribal sovereign immunity, this exception would not save Petitioners' case, as *Ex parte Young* only allows suits against officials of an otherwise immune sovereign that are (1) for prospective injunctive relief (2) to prevent wrongful impairment of federally-protected rights. *See, e.g*,

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[4] Petitioners did not argue individual liability against CCT officers in any proceeding before the lower courts. However, for the first time in the Petition, Petitioners claim they have alleged "individual liability." Pet. for Cert. at 9. The Court should not consider this new argument, which was not raised below. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 954 (2012). This new argument is also inconsistent with Petitioners' (erroneous) position that *Ex parte Young* provides an exception to CCT's sovereign immunity in this case. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978) ("In the landmark decision in *Ex parte Young*, the Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials *in their official capacities*.") (emphasis added). Furthermore, Petitioners have failed to identify any individual conduct of the named officials that could give rise to individual liability or to seek any redress from such officers as individuals. *Cf. Alden v. Maine*, 527 U.S. 706, 756-57 (1999) (suits against officers in their individual capacity allowed if "the relief is sought not from the state treasury but from the officer personally") (internal citations omitted).

*Virginia Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638-39 (2011).

Petitioners' claims satisfy neither of the *Ex parte Young* elements. First, as mentioned above, Petitioners seek retrospective relief, including damages and refunds, from CCT. *E.g.*, App. 61 (¶ A) (seeking "refunds of tribal cigarette taxes . . ."); App. 63 (¶ J) (seeking "damages against Defendant Colville Tribe for violation of the laws restraining trade and commerce . . ."); App. 63 (¶ J) (seeking "damages for negligence in implementing the tribal tax and torturous [sic] interference with Terry Tonasket's business . . ."); App. 64 (¶ A) (asking "[t]hat all Colville tribal tax and state sales tax charged to Plaintiff Daniel T. Miller . . . be refunded to him"); App. 64 (¶ B) (asking "for a refund of the additional price caused by Defendants' limitation of selected wholesalers . . ."). The Court has made it clear that such claims for retrospective relief cannot proceed under the *Ex parte Young* exception. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *see also Virginia Office*, 131 S. Ct. at 1638 (*Ex parte Young* doctrine does not apply "when the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)); *see also TFWS Inc. v. Schaefer*, 242 F.3d 198, 204 (4th Cir. 2001) (*Ex parte Young* exception only available after determining that complaint "does not request money damages or other retrospective relief for past violations" but rather "alleges an ongoing violation of federal law and *seeks only prospective relief* . . . .") (emphasis added).

Second, Petitioners have failed to identify any unlawful conduct of CCT or its officials supporting application of *Ex parte Young*. As discussed above, the authority of tribes to impose cigarette tax on sales to non-members *occurring on Indian trust lands* is well-established. *Colville*, 447 U.S. at 152; *Merrion*, 455 U.S. at 137; *see also Atkinson*, 532 U.S. at 653. In addition, Petitioners' allegations of unlawful "price fixing" and "unfair competition" are contradicted by the unrebutted evidence. As described above, contrary to Petitioners' assertions, CCT does "not set wholesale prices charged by any wholesaler" and does "not set retail prices charged by any retailer to any customer . . . ." SER 11 (¶ 4). Rather, wholesalers selling to CCT-licensed retailers are free to charge any price they wish for their product, but are required to pay CCT's wholesale tax, and retailers such as Petitioner Tonasket are also free to charge whatever prices they wish for their products. *See* SER 11 (¶ 5). In addition, contrary to Petitioners' unsupported assertions, CCT-owned retailers are subject the same provisions of the Code as Petitioner Tonasket, including the requirement that they buy cigarettes from "certified" or state-licensed wholesalers that are subject to CCT's wholesale tax on cigarettes. SER 12 (¶ 7). Rather than being unlawful, the Compact and the Code are direct responses to this Court's explicit encouragement of tribal-state cooperation regarding cigarette taxation. *See Potawatomi,* 498 U.S. at 514.

In sum, Petitioners have not made even a *prima facie* case for circumventing CCT's sovereign immunity in this case, and have thus failed to provide the Court with any compelling reason to review the Ninth Circuit's decision rejecting Petitioners' claims.

## CONCLUSION

CCT respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted this 26th day of June, 2013.

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