No. 04-631

IN THE
SUPREME COURT OF THE UNITED STATES

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,

Petitioner,

PRAIRIE BAND POTAWATOMI NATION,

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS IN SUPPORT OF RESPONDENT PRAIRE BAND POTAWATOMI NATION

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INTEREST OF AMICI CURIAE

In addition to the Prairie Band Potawatomi Nation, the State of Kansas includes three other federally recognized Indian tribes within its borders: (1) The Sac and Fox Nation of Missouri in Kansas and Nebraska, (2) the Iowa Tribe of Kansas and Nebraska, and (3) the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. As with the Prairie Band, these other three resident Kansas tribes also operate small retail gasoline stations within their Indian country. These other resident Kansas tribes share the Prairie Band's concern for the encroachment by the State of Kansas on their sovereign rights as tribal governments. These other resident Kansas tribes submit this brief in support of Respondent Prairie Band Potawatomi Nation.[1]

SUMMARY OF ARGUMENT

In Indian tax cases, as this Court well knows, a state may only impose a tax whose legal incidence falls on a non-Indian if the balance of federal, state, and tribal interests favors the State and federal law is not to the contrary. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). The Tenth Circuit correctly balanced these interests in finding for the Prairie Band. In addition to interests raised in the briefs filed by and in support of the Prairie Band, the other three resident Kansas tribes file this brief to highlight two Kansas-specific factors also favoring the Prairie Band in the balancing test.

First, the interest of the State of Kansas is weak and not longstanding with respect to motor fuel taxes that impact the ability of a tribe to impose its own tax. In the early 1990s, the State of Kansas entered tax compacts with each of the four resident tribes. Under the compacts, the State of Kansas agreed to forgo certain excise taxes – including motor fuel taxes – so long as the tribes imposed a comparable tax. These tax compacts were consistent with the State's broader policy of respecting the sovereignty of other governments and avoiding double taxation of motor fuels.[2] Over the objections of

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

[2] These compacts may have also reflected the State's effort to make amends for decades of hostility toward

the resident Kansas tribes, the State abruptly changed course in 1995, essentially reneged on the compacts, and sought to impose state motor fuel taxes on tribal commerce. The State's relatively recent change in course and disregard for previously recognized tribal taxing power and tribal sovereignty over tribal commerce weighs in favor of the federal/tribal interests.

Second, the Federal Government has a particularly strong interest favoring the Prairie Band as reflected in the Kansas Act for Admission. That federal statute prohibits the State of Kansas from construing its boundaries to "impair the rights of person or property now pertaining to the Indians of said territory" so long as those rights remain unextinguished by federal treaty. *See* 12 Stat. 127, ch. 20, § 1 (1861). While the right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development have not been extinguished by treaty, they have been impaired by the State of Kansas construing its boundaries to include the Prairie Band Potawatomi Nation. The intent of this federal statute was to protect those rights from infringement by the State. But for the State of Kansas treating the Prairie Band as being located within the State's boundaries for tax purposes, the Prairie Band would be considered outside the boundaries and eligible for the state tax exemption for out-of-state deliveries.

In violating the Kansas Act for Admission, the State has effectively nullified the Prairie Band's power to impose its own tax on gasoline sales by a tribally owned, on-reservation gas station. The impairment of tribal rights in violation of the Kansas Act for Admission also weighs in favor of the federal/tribal interests. This Court should affirm the Tenth Circuit based on the balancing test.

ARGUMENT

I. The State's Abandonment of the Tax Compacts Weighs in Favor of the Federal/Tribal Interests

Contrary to positions now taken in its merit brief, the State of Kansas once recognized the sovereignty of the resident Kansas tribes and the inability of the State to impose a motor fuel tax on tribal commerce. In tax compacts entered in the early 1990s, the State relinquished any jurisdiction it may have had to levy and collect excise taxes on tribal commerce so long as the tribes imposed a tax.

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and mistreatment of the resident Indian tribes. Up until then, the State of Kansas had consistently acted on what it perceived "as the best interest of its citizenry and economy, even when such actions undermine[d] tribal sovereignty and self-determination." *See* Melissa A. Rinehart and Kate A. Berry, *Kansas and the Exodus of the Miami Tribe*, Ch. 2, p. 45 from *The Tribes and the States: Geographies of Intergovernmental Interaction*, edited by Brad A. Bays and Erin Hogan Fouberg (Rowman & Littlefield Publishers, Inc. 2002) (discussing the history of exploitation and mistreatment of Indian tribes by the State of Kansas). These tax compacts may have been an attempt to remedy some of that past misbehavior. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies.")

The State now takes the opposite position. The State's relatively recent change in course and disregard for previously recognized tribal taxing power and tribal sovereignty over tribal commerce reflect a weak State interest.

In 1991, the State of Kansas and the resident Kansas tribes opened negotiations over imposition and collection of state taxes. "Several Indian tribes in Kansas [had] been selling gasoline without collecting or remitting" the state sales tax. Stacy L. Cook, Comment, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members – States Have a Right Without a Remedy*, 31 Washburn L.J. 130, 138 n.72 (1991). After this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), "[s]tate officials immediately entered into negotiations with the four Indian tribes of Kansas." *Id.* The Attorney General for Kansas "wanted to allow the tribes to levy their own taxes, as long as those taxes were only a few cents lower than the state tax." *Id.* Ultimately, the Governor of the State of Kansas entered into tax compacts in which the State would forgo its taxation authority over sales on reservation provided the tribes continued to levy at least as much tax as they had been imposing on fuel and other items. *See* Tax Compact Between the Sac and Fox Nation of Missouri in Kansas and Nebraska and the Kansas Department of Revenue; Tax Compact Between the Iowa Tribe of Kansas and Nebraska and the Kansas Department of Revenue; Tax Compact Between the Kickapoo Nation and the Kansas Department of Revenue; Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas (attached hereto as Appendix A).

The State of Kansas recognized that the resident Kansas tribes provided significant services and programs funded by tribal taxes that benefitted both tribal and non-tribal persons. These programs and services included construction of roads and bridges on or near the respective reservations, operation of tribal justice systems, operation of substance abuse treatment centers, maintenance of water plants and distribution systems, operation of volunteer fire departments, operation of low-income housing programs, operation of schools, operation of community heritage centers, operation of food distribution programs, and a host of other programs and services benefitting Indians and non-Indians alike in the rural communities in which the tribes resided. *See* Tax Compacts.

In fact, these tribes still operate many of these and other government programs and functions funded, in part, by tribal motor fuel tax revenue. For example, the Sac and Fox Nation maintains about 33 miles of its own roads and bridges within the Sac and Fox Indian Reservation funded in part with motor fuel tax revenue. The Sac and Fox Nation spends in excess of $50,000 a year of its money to maintain these roads and bridges. The Sac and Fox Nation also uses its fuel tax revenue to support tribal education, housing, police, fire, and capital improvements. The Iowa Tribe maintains 32.7 miles of its roads (plus other roads) within its reservation at a cost in excess of $180,000 per year. The Iowa Tribe also has its own police force and fire department. The Kickapoo Tribe has built and maintains about 41.5 miles of road within its reservation and also uses fuel tax revenue to support a police department and fire department. Just like states, these resident Kansas tribes (along with the other Indian tribes across the nation) depend on their ability to tax to fund government functions and services that benefit both members and non-members.

In the tax compacts, the State of Kansas also recognized that if the resident Kansas tribes did not fund and operate these programs, the State would likely be forced to offer such programs at its

expense. Therefore, the State agreed to refrain from taxing certain transactions so long as the tribes imposed tribal taxes on those same transactions.[3] The resident Kansas tribes would then be able to raise revenue through taxation with which to fund these programs and services (saving the State of Kansas from having to fund these programs itself). The parties viewed this compromise as a fair and equitable way "to eliminate problems which result from tribal and state taxation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on reservations and those off reservations." *See* Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas at 2.

While the tax compacts initially worked well, the State of Kansas abruptly changed course in 1995 and essentially reneged on the compacts. The State amended its motor vehicle fuel taxing scheme and announced its intention to impose its motor fuel taxes on fuel deliveries to Indian reservations within Kansas. *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 569 (10th Cir. 2000). That change led to this litigation.

[3] The Prairie Band, for example, agreed to impose a tribal tax not less than 60% of the state rate. *See* Tax Compact Between the Prairie Band of Potawatomi Nation and the State of Kansas at 2. The tribal taxes helped ease the concern raised by this Court that tribes might "market an exemption from state taxation to persons who would normally do their business elsewhere" if no state tax was imposed. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

As evidenced by the cost of the ongoing litigation between the State of Kansas and the Prairie Band, a renewal of the tax compacts entered between the State and the resident Kansas tribes would have been the best resolution. The State's recent reversal of its position recognizing tribal sovereignty and the right of tribes to tax tribal commerce shows just how weak the State interest is in now taxing the tribal commerce at issue. The State's abandonment of the tax compacts weighs in favor of the federal/tribal interests.[4]

II. The State's Violation of the Kansas Act for Admission Also Weighs in Favor of the Federal/Tribal Interests

The Federal Government has a particularly strong interest favoring the Prairie Band as reflected in the Kansas Act for Admission. That federal law prohibits the State of Kansas from construing its boundaries to "impair the rights of person or property now pertaining to the Indians of said territory" so long as those rights remain unextinguished by federal treaty. *See* 12 Stat. 127, ch. 20, § 1 (1861). Despite this limitation, the State of Kansas has construed its boundaries to physically include the Prairie Band Potawatomi Nation for tax purposes. But for the Prairie Band being located within the boundaries of Kansas for tax purposes, the Prairie Band would be considered outside the boundaries and eligible to avail itself of a state tax exemption for the exportation of motor vehicle fuel outside the boundaries of Kansas.

Pursuant to the first proviso of Section 1 of the Kansas Act for Admission into the Union:

> [N]othing contained in the said constitution respecting the boundary of [Kansas] shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . . .

[4] The nominal amount of money at issue for the State further highlights the weakness of the State's interest. The potential fuel tax revenues the State of Kansas seeks from the Prairie Band totals only about 0.09% of the state motor fuel taxes collected in 1999 – an extremely small sum.

12 Stat. 127 (1861).[5] Congress required these "disclaimer" clauses to be included in some of the territorial acts, enabling acts, and constitutions of states "to assure both tribes and the federal government that the territory/state [would] never, without federal consent and/or a treaty modification, interfere with the internal affairs of tribal nations." David E. Wilkins, *Tribal-State Affairs: American States as "Disclaiming" Sovereigns*, Ch. 1, p. 2 from *The Tribes and the States: Geographies of Intergovernmental Interaction* (Rowman & Littlefield Publishers, Inc. 2002). These "disclaimer" clauses "recognized the general principle that Indian territories were beyond the legislative and judicial jurisdiction of state governments." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 142 (1984).[6]

"The first enabling act containing an explicit disclaimer clause was the act authorizing Kansas to be admitted to the Union in 1861." Wilkins at 12. "This measure reflected congressional intent to abide by preexisting treaties with Kansas tribes and to remind states of federal supremacy in the field of Indian policy." *Id.* Through these "disclaimer" clauses, the "Indians continued thereafter, as previously, in possession of the lands, and their rights, whatever their nature and extent . . . ." *Missouri, K. & T. Ry. Co. v. Roberts*, 152 U.S. 114, 120 (1894). "Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired . . . ." *The Kansas Indians*, 72 U.S. 737, 756 (1866). In later discussing *The Kansas Indians* case, this Court stated:

> In the cases of the Kansas Indians, 5 Wall. 737, we held that a state, when admitted into the Union, was bound to respect an exemption from taxation which it had previously granted to tribes of Indians within its borders, because, as the court said, the state of Kansas 'accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or voluntary abandonment of their tribal organization.'"

Ward v. Race Horse, 163 U.S. 504, 519 (1896). This Court has construed the first proviso of Section 1 of the Act for Admission to prohibit the impairment of Indian rights.[7]

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[5] While the Tenth Circuit in an earlier decision did address Section 1 of the Kansas Act for Admission, it did not address this first proviso. *See Pierce*, 213 F.3d at 576-77. Instead, it examined the second proviso which provides that nothing in the constitution will be construed "to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; . . . ." The Tenth Circuit did not address the impairment of Indian rights.

[6] While this Court had indicated that a disclaimer of right and title by a state may have only been a disclaimer of proprietary rather than governmental interest, *see Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962), this Court later clarified that disclaimers could not have been only proprietary because there would then have been no need for Congress to enact Public Law 280 allowing states to assume jurisdiction over reservation Indians. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 177-78 (1973).

[7] The Kansas Supreme Court made a similar finding in 1997 by stating: "Under the 1861 Act for Admission of Kansas into the Union, no personal or property rights that Indians possessed before the State of Kansas was admitted into the Union, or before the Territory of Kansas was organized, can be impaired unless such rights are extinguished by treaty between the United States and the Indians . . . ." *In the Application for Tax Exemption of Nina Kaul*, 261 Kan. 755, 770 (1997). The next year, though, the Kansas Supreme Court again reviewed the first proviso of Section 1 and upheld the denial of the state fuel tax exemption for deliveries to Indian reservations for individual retailers. *See Kaul v. State Dep't of Revenue*, 266 Kan. 464, 477-78 (1998). In contrast to the case before

These "rights" protected by the Act for Admission include the Prairie Band's right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development. The actions of the State of Kansas impair these rights. The Prairie Band cannot continue to sell motor vehicle fuel if both the state and tribal taxes are imposed. The price of motor vehicle fuel will be too high and customers will simply go to non-tribal competitors (who do not pay the double tax). Imposition of the state tax effectively nullifies the Prairie Band's power to impose its own motor fuel tax (and use that tax revenue to pay for roads, bridges, and the like on the Prairie Band Reservation).

These actions also deprive the Prairie Band of a tax exemption under state law. The State of Kansas taxes the "distributor of the first receipt" of motor fuel in Kansas (as opposed to an importer or manufacturer). Kan. Stat. Ann. 79-3408(c). However, the State of Kansas exempts from taxation a distributor who exports motor vehicle fuel from Kansas to a state, territory, or foreign country outside the boundaries of Kansas:

> No tax is hereby imposed upon or with respect to . . . [t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

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this Court, the *Kaul* case did not involve the impairment of tribal rights because no tribal governmental interest was involved.

Kan. Stat. Ann. 79-3408(d)(1). But for the state boundary being construed as including the resident Kansas tribes within the State of Kansas for tax purposes, the resident Kansas tribes would be considered outside the State of Kansas for export purposes and able to use this tax exemption. The loss of this state exemption due to inclusion within the State's boundaries for tax purposes impairs the Prairie Band's right to engage in the sovereign functions of self-government and self-determination through taxation, trading and economic development contrary to a reasonable reading of the first proviso of Section 1 of the Act for Admission.[8]

The State of Kansas has acted in violation of the Act for Admission. Because the Kansas Act for Admission precludes the State of Kansas from impairing the rights of the Prairie Band to self-governance and self-determination, the Federal Government has a strong interest which favors the Prairie Band in the balancing of federal, state, and tribal interests.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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[8] To the extent that language in the Kansas Act for Admission may be regarded as ambiguous, "it is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes*, 467 U.S. at 149. Therefore, any ambiguities in the Kansas Act for Admission should be construed in favor of the Prairie Band. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).