SUPREME COURT OF THE UNITED STATES

No. 04–631

JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER *v.* PRAIRIE BAND POTAWATOMI NATION

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

[December 6, 2005]

JUSTICE GINSBURG, with whom JUSTICE KENNEDY joins, dissenting.

The Kansas fuel tax at issue is imposed on distributors, passed on to retailers, and ultimately paid by gas station customers. Out-of-state sales are exempt, as are sales to other distributors, the United States, and U. S. Government contractors. Fuel lost or destroyed, and thus not sold, is also exempt. But no statutory exception attends sales to Indian tribes or their members. Kan. Stat. Ann. §§79–3408; 79–3409; 79–3417 (1997 and 2003 Cum. Supp.).

The Prairie Band Potawatomi Nation (hereinafter Nation) maintains a casino and related facilities on its reservation. On nearby tribal land, as an adjunct to its casino, the Nation built, owns, and operates a gas station known as the Nation Station. Some 73% of the Nation Station's customers are casino patrons or employees. *Prairie Band Potawatomi Nation* v. *Richards,* 379 F. 3d 979, 982 (CA10 2004). The Nation imposes its own tax on fuel sold at the Nation Station, pennies per gallon less than Kansas' tax. *Ibid.*[1]

[1] The Federal Government also imposes a tax on the "removal, entry, or sale" of all motor fuel. 26 U. S. C. §4081(a)(1). Neither the State nor the Nation contests the applicability of this tax to fuel destined for the Nation Station.

Both the Nation and the State have authority to tax fuel sales at the Nation Station. See *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 137 (1982) (describing "[t]he power to tax [as] an essential attribute of Indian sovereignty[,] . . . a necessary instrument of self-government and territorial management," which "enables a tribal government to raise revenues for its essential services"). As a practical matter, however, the two tolls cannot coexist. 379 F. 3d, at 986. If the Nation imposes its tax on top of Kansas' tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all. In these circumstances, which tax is paramount? Applying the interest-balancing approach described in *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136 (1980), the Court of Appeals for the Tenth Circuit held that "the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax." 379 F. 3d, at 983. I agree and would affirm the Court of Appeals' judgment.

I

Understanding *Bracker* is key to the inquiry here. *Bracker* addressed the question whether a State should be preempted from collecting otherwise lawful taxes from non-Indians in view of the burden consequently imposed upon a Tribe or its members. In that case, Arizona sought to enforce its fuel-use and vehicle-license taxes against a non-Indian enterprise that contracted with the White Mountain Apache Tribe to harvest timber from reservation forests. 448 U. S., at 138–140. The Court recognized that Arizona's levies raised difficult questions concerning "the boundaries between state regulatory authority and tribal self-government." *Id.*, at 141. Determining whether taxes formally imposed on non-Indians are preempted, the

Court instructed, should not turn "on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.*, at 145. This inquiry is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law," *ibid.*, or "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them,'" *id.*, at 142 (quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959)). Applying the interest-balancing approach, the Court concluded that "the proposed exercise of state authority [was] impermissible" because "it [was] undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe," "the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber," and the state officials were "unable to justify the taxes except in terms of a generalized interest in raising revenue." 448 U. S., at 151.

The Court has repeatedly applied the interest-balancing approach described in *Bracker* in evaluating claims that state taxes levied on non-Indians should be preempted because they undermine tribal and federal interests.[2] In many cases, both pre- and post-*Bracker*, a balancing analysis has yielded a decision upholding application of the state tax in question. See, *e.g.*, *Cotton Petroleum Corp.* v. *New Mexico,* 490 U. S. 163, 183–187 (1989) (State permitted to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production); *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134,

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[2]The Court has also applied the interest-balancing approach to other forms of state regulation relating to Indian tribal societies. See, *e.g.*, *California* v. *Cabazon Band of Mission Indians,* 480 U. S. 202, 216–217 (1987) (State prohibited from regulating non-Indian customers of tribal bingo operation); *New Mexico* v. *Mescalero Apache Tribe,* 462 U. S. 324, 333–343 (1983) (*Mescalero II*) (State barred from enforcing game laws against non-Indians for on-reservation hunting and fishing).

154–159 (1980) (State permitted to tax non-Indians' purchases of cigarettes from on-reservation tribal retailers); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U. S. 463, 481–483 (1976) (same). Sometimes, however, particularized inquiry has resulted in a holding that federal or tribal interests are superior. See, *e.g.*, *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of N. M.,* 458 U. S. 832, 843–846 (1982) (State prohibited from imposing gross-receipts tax on a non-Indian contractor constructing an on-reservation tribal school).

Kansas contends that the interest-balancing approach is not suitably employed to assess its fuel tax for these reasons: (1) the Kansas Legislature imposed the legal incidence of the tax on the distributor—here, a non-Indian enterprise—not on retailers or their customers; and (2) the distributor's liability is triggered when it receives fuel from its supplier—a transaction that occurs off-reservation. Reply Brief 2–6. Given these circumstances, Kansas urges and the Court accepts, no balancing is in order. See *ante*, at 12–13; Brief for Petitioner 6, 14–21. It is irrelevant in the State's calculus that its approach would effectively nullify the tribal fuel tax.

I note first that Kansas' placement of the legal incidence of the fuel tax is not as clear and certain as the State suggests and the Court holds. True, the statute states that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.). But the statute declares initially that the tax "is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . used, sold or delivered in this state for any purpose whatsoever," §79–3408(a), and it authorizes distributors to pass on the tax to retailers, §79–3409. Notably, the statute excludes from taxation several "transactions," including the "sale or delivery of motor-vehicle fuel . . . for export from the state of Kansas to any other state or territory or to any foreign

country"; "sale or delivery . . . to the United States"; "sale or delivery . . . to a contractor for use in performing work for the United States"; and "sale or delivery . . . to another duly licensed distributor." §79–3408(d). Kansas also excludes from taxation "lost or destroyed" fuel, which is never sold by the distributor. §79–3417 (1997). These provisions indicate not only that the Kansas Legislature anticipated that distributors would shift the tax burden further downstream. They reveal as well where the Court's analysis of the fuel tax goes awry.

When all the exclusions are netted out, the Kansas tax is imposed not on all the distributor's receipts, but effectively *only* on fuel actually *resold* by the distributor to an in-state nonexempt purchaser. To illustrate: Suppose in January a distributor acquires 100,000 gallons of fuel and promptly sells 80,000 to in-state nonexempt purchasers and 20,000 to exempt purchasers, for example, the United States or a U. S. contractor. The distributor would compute its tax liability by "deducting" the 20,000 gallons, see *ante*, at 11, n. 3, but would *remit tax* only on the 80,000 gallons bought by in-state nonexempt retailers.[3] If the distributor elected to build inventory in January by holding an additional 10,000 gallons for resale in February, Kansas would tax in January, but the distributor would effectively offset in February the tax paid in January on the inventory buildup. Again, in the end, only fuel actu-

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[3] The Court analogizes the fuel excise tax "deduction" of exempt sales to the federal income tax deduction for home mortgage interest. *Ante*, at 12. The analogy is misconceived. An excise tax "deduction" bears no realistic resemblance to a personal income tax deduction provided by Congress for a nonbusiness personal expense. An excise tax "deduction," however, may fairly be compared to the standard income tax treatment of merchandise returns. In any period, goods returned and held for resale offset goods sold, so that only net sales yield gross profits for taxation purposes. See 26 CFR §1.446–1(a)(4)(i) (2005); cf. §1.458–1(g) (adjustments under elective treatment of certain post-year-end returns of magazines, paperback books, and recordings).

ally sold to in-state nonexempt buyers would be burdened by Kansas' fuel tax.[4]

Kansas' attribution of controlling effect to the formal legal incidence of the tax rests in part on the State's misreading of *Oklahoma Tax Comm'n* v. *Chickasaw Nation,* 515 U. S. 450 (1995). See Brief for Petitioner 8, 16–20. The Court in that case distinguished instances in which the legal incidence of a State's excise tax rests on a Tribe or tribal members, from instances in which the legal incidence rests on non-Indians. When "the legal incidence . . . rests on a tribe or on tribal members for sales made inside Indian country," the Court said, "the tax cannot be enforced absent clear congressional authorization." 515 U. S., at 459. This "bright-line standard," *id.*, at 460, is sensitive to the sovereign status of Indian Tribes, and reflects the Court's recognition that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U. S., at 154.[5]

When a State places the legal incidence of its tax on non-Indians, however, no similarly overt disrespect for a Tribe's independence and dignity is displayed. In cases of this genre, *Chickasaw Nation* recognized, the Court has resisted adoption of a categorical rule. In lieu of attributing dispositive significance to the legal incidence, the Court has focused on the particular levy, and has evaluated the federal, state, and tribal interests at stake. 515 U. S., at 459; see *Cotton Petroleum*, 490 U. S., at 176

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[4] If in February, the 10,000 gallons were destroyed and thus not sold, Kansas would nonetheless offset the fuel tax burden as Kan. Stat. Ann. §79–3417 (1997) provides, because these gallons would never be sold to in-state nonexempt buyers.

[5] The standard also accords with our repeated admonition that a State may not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980) (quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959)). Accord *Mescalero II,* 462 U. S., at 332–333; *McClanahan* v. *Arizona Tax Comm'n,* 411 U. S. 164, 171–172 (1973).

(Instead of a "mechanical or absolute" test, the Court has "applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'" (quoting *Ramah*, 458 U. S., at 838)).

Chickasaw Nation did observe that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U. S., at 460. Kansas took the cue. After our decision in *Chickasaw Nation*, Kansas amended its fuel tax statute to state that "the incidence of this tax is imposed on the distributor." Kan. Stat. Ann. §79–3408(c) (2003 Cum. Supp.); see 1998 Kan. Sess. Laws, ch. 96, §2, pp. 450–451; see also *Kaul* v. *Kansas Dept. of Revenue*, 266 Kan. 464, 474, 970 P. 2d 60, 67 (1998).[6]

Kansas is mistaken, however, regarding the legal significance of this shift. *Chickasaw Nation* clarified only that a State could shift the legal incidence to non-Indians so as to avoid the categorical bar applicable when a state excise tax is imposed directly on a Tribe or tribal members for on-reservation activity. 515 U. S., at 460. At the same time, *Chickasaw Nation* indicated that a shift in the legal incidence of the kind Kansas has legislated would trigger—not foreclose—interest balancing. *Ibid.*[7]

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[6] As earlier observed, *supra*, at 4, Kansas retained the opening declaration that the tax "is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . used, sold or delivered in this state for any purpose whatsover." Kan. Stat. Ann. §79–3408(a) (2003 Cum. Supp.).

[7] The only "bright-line standard" *Chickasaw Nation* advanced is the categorical bar on tolls imposed directly on Tribes or their members. 515 U. S., at 460. No doubt a tribal retailer may find an upstream state tax on its suppliers less burdensome than a downstream tax on its consumers. See *ante*, at 14, n. 5. But administrative ease is hardly the dispositive consideration. The Court has never limited interest-balancing to state taxes imposed on the non-Indian consumers of tribal

Kansas and the Court heavily rely upon *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145 (1973) (*Mescalero I*). That case involved a ski resort operated by the Mescalero Apache Tribe on off-reservation land leased from the Federal Government. This Court upheld New Mexico's imposition of a tax on the gross receipts of the resort. Balancing was not in order, the Court explained, because the Tribe had ventured outside its own domain, and was fairly treated, for gross receipts purposes, just as a non-Indian enterprise would be. In such cases, the Court observed, an express-preemption standard is appropriately applied. As the Court put it: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.*, at 148–149. Accord *Chickasaw Nation*, 515 U. S., at 462–465 (State permitted to tax income of tribal members residing outside Indian Country). Cases of the *Mescalero I* kind, however, do not touch and concern what is at issue in the instant case: taxes formally imposed on nonmembers that nonetheless burden *on-reservation* tribal activity.

Conceding that "we have never addressed th[e] precise issue" this case poses, the Court asserts that "our Indian tax immunity cases counsel against" application of the *Bracker* interest-balancing test to Kansas' fuel tax as it impacts on the Nation Station. *Ante*, at 13. The Court so maintains on the ground that the Kansas fuel tax is imposed on a non-Indian and is unrelated to activity "on the reservation." *Ante*, at 12–16. As earlier explained, see *supra*, at 6–7, one can demur to the assertion that the

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enterprises; it has also applied this approach to state regulation of the non-Indian suppliers of tribal enterprises. See, *e.g.*, *Department of Taxation and Finance of N. Y.* v. *Milhelm Attea & Bros.,* 512 U. S. 61, 73–75 (1994).

legal incidence of the tax falls on the distributor, a nontribal entity. With respect to sales and deliveries to the Nation Station, however, the nontribal entity can indeed be described as "engaged in [an on-reservation] transaction with [a Tribe]." *Arizona Dept. of Revenue* v. *Blaze Constr. Co.,* 526 U. S. 32, 37 (1999).

The reservation destination of fuel purchased by the Nation Station does not show the requisite engagement, in the Court's view, but I do not comprehend why. The destination of the fuel counts not only under §79–3408(a) (2003 Cum. Supp.) (fuel tax "is hereby imposed on . . . all motor vehicle fuels . . . used, sold or delivered in this state").[8] To whom and where the distributor sells are the criteria that determine the "transactions" on which "[n]o tax is . . . imposed," §79–3408(d), and, correspondingly, the transactions on which the tax is imposed. As earlier explained, see *supra*, at 4–6, the tax is in reality imposed only on fuel actually resold by the distributor to an in-state nonexempt purchaser. Here, that purchaser is the Nation Station, plainly an on-reservation venture.[9]

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[8] Because §79–3408(a) (2003 Cum. Supp.) does not aid the Court's theory that the State's tax operates entirely off reservation, the Court essentially reads the provision out of the statute, or treats it as harmless surplus. See *ante*, at 9.

[9] At the Court of Appeals level, the Nation presented no "starkly different interpretation of the statute." *Ante*, at 8. This Court, in citing Appellant's Reply Brief 3 to the contrary, apparently failed to read on. At page 12, the Reply Brief states: "The fact that the state tax is technically imposed off-reservation on a non-Indian is not controlling. The state tax is directed at and burdens reservation value." Moreover, it is surely putting words in the Nation's mouth to assert that "[u]nder the Nation's view . . . any off-reservation tax imposed on the manufacture or sale of any good imported by the Nation or one of its members would be subject to interest balancing." *Ante*, at 16. The Nation itself expressly "does not contend . . . that a non-discriminatory, off-reservation state tax of general applicability may be precluded simply because the tax has an adverse economic impact on a Tribe or its members." Brief for Respondent 1. As the Nation points out and the

Balancing tests have been criticized as rudderless, affording insufficient guidance to decisionmakers. See *Colville*, 447 U. S., at 176 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part) (criticizing the "case-by-case litigation which has plagued this area of law"); Brief for Petitioner 30–32. Pointed as the criticism may be, one must ask, as in life's choices generally, what is the alternative. "The 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 the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U. S., at 156. No "bright-line" test is capable of achieving such an accommodation with respect to state taxes formally imposed on non-Indians, but impacting on-reservation ventures. The one the Court adopts inevitably means, so long as the State officially places the burden on the non-Indian distributor in cases of this order, the Tribe loses. *Faute de mieux* and absent congressional instruction otherwise, I would adhere to precedent calling for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U. S., at 145.

II

I turn to the question whether the Court of Appeals correctly balanced the competing interests in this case. Kansas and the Nation both assert a substantial interest in using their respective fuel taxes to raise revenue for road maintenance. Weighing competing state and tribal

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Court of Appeals comprehended, "the actual issue presented here [is] the permissibility of a state tax that effectively *nullifies* a Tribe's power to impose a comparable tax on fuel sold at market price by a tribally owned, on-reservation gas station." *Ibid.* (emphasis in the original); see *Prairie Band Potawatomi Nation* v. *Richards*, 379 F. 3d 979, 986 (CA10 2004).

interests in raising revenue for public works, *Colville* observed:

> "While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." 447 U. S., at 156–157.

In *Colville*, it was "painfully apparent" that outsiders had no reason to travel to Indian reservations to buy cigarettes other than the bargain prices tribal smokeshops charged by virtue of their claimed exemption from state taxation. *Id.*, at 154–155. The Court upheld the State of Washington's taxes on cigarette purchases by nonmembers at tribal smokeshops. No "principl[e] of federal Indian law," the Court said, "authorize[s] Indian tribes . . . to market an exception from state taxation to persons who would normally do their business elsewhere." *Id.*, at 155.

This case, as the Court of Appeals recognized, bears scant resemblance to *Colville*. "[I]n stark contrast to the smokeshops in *Colville*," the Nation here is not using its asserted exemption from state taxation to lure non-Indians onto its reservation. 379 F. 3d, at 985. The Nation Station is not visible from the state highway, and it advertises no exemption from the State's fuel tax. Including the Nation's tax, the Nation Station sells fuel "'within 2¢ per gallon of the price prevailing in the local market.'" *Id.*, at 982 (quoting the Nation's expert's report); see also

App. 36–40.[10] The Nation Station's draw, therefore, is neither price nor proximity to the highway; rather, the Nation Station operates almost exclusively as an amenity for people driving to and from the casino.

The Tenth Circuit regarded as valuable to its assessment the opinion of the Nation's expert, which concluded: "'[T]he Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero.'" 379 F. 3d, at 986. Kansas "submitted [no] contradictory evidence" and did not argue that the expert opinion offered by the Nation was "either incorrect or exaggerated." *Ibid.*[11] In this respect, the case is indeed novel. It is the first case in which a Tribe demonstrated below that the imposition of a state tax would prevent the Tribe from imposing its own tax. Cf. *Cotton Petroleum*, 490 U. S., at 185 (state and tribal taxes were not mutually exclusive because "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development").

The Court of Appeals considered instructive this Court's decision in *California* v. *Cabazon Band of Mission Indians,* 480 U. S. 202 (1987). See 379 F. 3d, at 985. The Court

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[10] Tribes, it should be plain, cannot prevail in the interest-balancing analysis simply because they tax the same product or activity that the State seeks to tax. See *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 156 (1980). Otherwise, "the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." *Id.,* at 155; see *infra*, at 15–16.

[11] At oral argument, it was suggested that the Nation Station might pass on both taxes to its customers if it were willing to forgo some of its profits. Tr. of Oral Arg. 3–6, 25–27, 48–50. This speculation apparently did not take account of the opinion and explanation of the Nation's expert, which stands uncontradicted in the record developed in the lower courts. Moreover, the Nation's counsel informed the Court: "[T]he [T]ribe is being forced right now to subsidize the sales at the [Nation S]tation at a loss, which it's doing for the balance of this litigation." *Id.,* at 25; cf. *ante*, at 17.

there held that tribal and federal interests outweighed state interests in regulating tribe-operated facilities for bingo and other games. *Cabazon*, 480 U. S., at 219–220. Distinguishing *Colville*, the Court pointed out that the Tribes in *Cabazon* "[were] not merely importing a product onto the reservatio[n] for immediate resale to non-Indians"; they had "built modern facilities" and provided "ancillary services" so that customers would come in increasing numbers and "spend extended periods of time" playing their "well-run games." 480 U. S., at 219; see also *New Mexico* v. *Mescalero Apache Tribe,* 462 U. S. 324, 327, 341 (1983) (*Mescalero II*) (State barred from regulating hunting and fishing on-reservation where the Tribe had constructed a "resort complex" and developed wildlife and land resources).

As in *Cabazon*, so here, the Nation Station is not "merely importing a product onto the reservatio[n] for immediate resale to non-Indians" at a stand-alone retail outlet. 480 U. S., at 219. Fuel sales at the Nation Station are "an integral and essential part of the [Tribe's] on-reservation gaming enterprise." 379 F. 3d, at 984. The Nation built the Nation Station as a convenience for its casino patrons and, but for the casino, there would be no market for fuel in this otherwise remote area. *Id.*, at 982.

The Court of Appeals further emphasized that the Nation's "interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance." *Id.*, at 985. The Nation's fuel revenue comes exclusively from the Nation Station, and that revenue (approximately $300,000 annually) may be used only for "'constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.'" *Id.*, at 985–986 (quoting Prairie Band Potawatomi Law and Order Code §10–6–7 (2003)).

The Nation's interests coincide with "strong federal

interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments." 379 F. 3d, at 986. The United States points to the poor condition of Indian reservation roads, documented in federal reports, conditions that affect not only driving safety, but also the ability to furnish emergency medical, fire, and police services on an expedited basis, transportation to schools and jobs, and the advancement of economic activity critical to tribal self-sufficiency. Brief for United States as *Amicus Curiae* 26; see, *e.g.*, Dept. of Commerce, Bureau of Indian Affairs, TEA–21 Reauthorization Resource Paper: Transportation Serving Native American Lands (May 2003). The shared interest of the Federal Government and the Nation in improving reservation roads is reflected in Department of the Interior regulations implementing the Indian Reservation Roads Program. See 69 Fed. Reg. 43090 (2004); 25 CFR §170 *et seq*. (2005). The regulations aim at enhancing the ability of tribal governments to promote road construction and maintenance. They anticipate that Tribes will supplement federal funds with their own revenues, including funds gained from a "[t]ribal fuel tax." §170.932(d). Because the Nation's roads are integrally related to its casino enterprise, they also further federal interests in tribal economic development advanced by the Indian Gaming Regulatory Act, Pub. L. 100–497, 102 Stat. 2467, 25 U. S. C. §2701 *et seq*.

Against these strong tribal and federal interests, Kansas asserts only its "general interest in raising revenues." 379 F. 3d, at 986. "Kansas' interest," as the Court of Appeals observed, "is not at its strongest." *Id.*, at 987. By effectively taxing the Nation Station, Kansas would be deriving revenue "primarily from value generated on the reservation" by the Nation's casino. *Ibid.* Moreover, the revenue Kansas would gain from applying its tax to fuel destined for the Nation Station appears insubstantial when

compared with the total revenue ($6.1 billion in 2004) the State annually collects through the tax. See *id.,* at 982; Brief for Respondent 12 (observing that "[t]he tax revenues at issue—roughly $300,000 annually—are less than one-tenth of one percent of the total state fuel tax revenues").

The Court asserts that "Kansas uses the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the Nation's reservation." *Ante*, at 18. The record reveals a different reality. According to the affidavit of the Director of the Nation's Road and Bridge Department, Kansas and its subdivisions have failed to provide proper maintenance even on their own roads running through the reservation. App. 79. As a result, the Nation has had to assume responsibility for a steadily growing number of road miles within the reservation (roughly 118 of the 212 total miles in 2000). *Ibid.;* see also Brief for Respondent 3, 40, 44–45. Of greater significance, Kansas expends *none* of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads. 379 F. 3d, at 986–987; cf. *Ramah*, 458 U. S., at 843, n. 7 ("This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the efforts to provide, adequate [tribal services]."). In contrast, Kansas sets aside a significant percentage of its fuel tax revenues (over 40% in 1999) for counties and localities. Kan. Stat. Ann. §79–3425 (2003 Cum. Supp.); see also §79–34,142 (1997) (prescribing allocation formula); 1999 Kan. Sess. Laws, ch. 137, §37. And, as indicated earlier, *supra*, at 4–5, Kansas accords the Nation no dispensation based on the Nation's sovereign status. The Nation thus receives neither a state exemption so that it can impose its own fuel tax, nor a share of the State's fuel tax revenues. Accordingly, the net result of invalidating Kansas' tax as applied to fuel distributed to the Nation Station would be a somewhat more equitable distribution of road maintenance revenues in

Kansas.

Kansas argues that, were the Nation to prevail in this case, nothing would stop the Nation from reducing its tax in order to sell gas below the market price. Brief for Petitioner 30. *Colville* should quell the State's fears in this regard. Were the Nation to pursue such a course, it would be marketing an exemption, much as the smokeshops did in *Colville*, and hence, interest balancing would likely yield a judgment for the State. See 447 U. S., at 155–157. In any event, as the Nation points out, the State could guard against the risk that "Tribes will impose a 'nominal tax' and sell goods at a deep discount on the reservation." Brief for Respondent 34–35. The State could provide a credit for any tribal tax imposed or enact a state tax that applies only to the extent that the Nation fails to impose an equivalent tribal tax. *Id.*, at 35.

Today's decision is particularly troubling because of the cloud it casts over the most beneficial means to resolve conflicts of this order. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.,* 498 U. S. 505 (1991), the Court counseled that States and Tribes may enter into agreements establishing "a mutually satisfactory regime for the collection of this sort of tax." *Id.*, at 514; see also *Nevada* v. *Hicks,* 533 U. S. 353, 393 (2001) (O'CONNOR, J., concurring in part and concurring in judgment) (describing various state-tribal agreements); Brief for United States as *Amicus Curiae* 28–29, and n. 12; Brief for National Intertribal Tax Alliance et al. as *Amici Curiae;* Ansson, State Taxation of Non-Indians Who Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective States, 78 Ore. L. Rev. 501, 546 (1999) ("More than 200 Tribes in eighteen states have resolved their taxation disputes by entering into inter-

governmental agreements.").[12] By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.

In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas' collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation's tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.

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For the reasons stated, I would affirm the judgment of the Court of Appeals for the Tenth Circuit.

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[12] In 1992, Kansas and the Nation negotiated an intergovernmental tax compact. App. 20–26. When the initial five-year term expired, the State declined to renew the agreement. Brief for United States as *Amicus Curiae* 3–4.