No. 15-1064

In the Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

LEON BIEGALSKI, Executive Director,
Florida Department of Revenue,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Florida's tax on gross receipts of payments for utility services may be reasonably construed to place the legal incidence on the utility provider that receives those payments, as the Eleventh Circuit held?

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INTRODUCTION

This case turns on an issue of first impression involving a Florida statute that imposes a gross receipts tax on utility services. *See* Fla. Stat. § 203.01 (the "Utility Tax").

Although the Utility Tax is imposed on gross receipts received by utility providers and remitted by these same providers, Petitioner Seminole Tribe of Florida (the "Tribe") contends that the legal incidence of the Utility Tax is on the utility customer. As a result, the Tribe argues it bears the legal incidence of tax on the utilities it purchases, in violation of federal law. The Eleventh Circuit, however, disagrees with the Tribe's interpretation. After a thorough consideration of the statute and its application, the court concluded that the legal incidence of the tax lies with the utility provider.

Under this Court's precedent, the legal incidence of a state tax is a question of state law, on which this Court defers to the local appellate court so long as the construction is reasonable. Reversal in this case would be both exceedingly unlikely and of exceedingly little impact, for it would resolve only the state-law issue of the legal incidence of a single Florida tax.

In an attempt to make the implications of this case appear broader, the Tribe isolates a specific aspect of the Utility Tax—a so-called permissive pass-through provision, which allows the utility to itemize the amount of gross receipts tax it will pay on a customer bill—and claims for the first time here that courts are divided over the significance of such provisions. The

purported split evaporates under scrutiny. Every case the Tribe cites considered the permissive pass-through provisions in the context of other case-specific factors, just as the Tribe contends that courts must do. None articulates a bright-line rule that a permissive pass-through automatically places the legal incidence with the seller. Indeed, the Tribe's attempt to portray a circuit split goes so far astray that one decision the Tribe claims to be "incorrect" was explicitly approved by this Court.

In any event, even if the Eleventh Circuit erred, a decision in this case would have a vanishingly small impact. It is well established that Florida could remedy any defect through a simple statutory revision declaring the legal incidence to lie with the utility provider, not the customer, and any other State concerned with the implications of a reversal in this case could enact a similar statutory fix while doing nothing to change the actual operation of the tax. Such insignificant error correction would hardly merit this Court's time.

The Court should deny the Petition.

STATEMENT

Florida imposes a tax "on gross receipts from utility services that are delivered to a retail consumer." Fla. Stat. § 203.01(1)(a)(1) In recognition of the economic reality that taxes on businesses are generally passed through to customers, the State allows—but does not require—utility providers to inform consumers of the amount of the bill that the utility provider must remit to the state as gross receipts tax by "separately stat[ing]" that amount "as a component of the charge" for providing utility services. *Id.* § 203.01(4).

When a utility separately states the tax amount, nothing about the transaction changes: the separately stated tax is merely "a component part of the debt of the purchaser" to the utility provider and "is recoverable at law in the same manner as any other part of the charge for such taxable services"—i.e., through an action for breach of contract for failure to pay a debt. *See ibid.* The utility provider "remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill." *Id.* § 203.01(5). And just as Florida cannot sue the utility customer for failure to pay its bill, it "cannot pursue customers for unpaid Utility Tax amounts" itemized on the customer's bill. Pet. App. 63a.

Nevertheless, the Tribe claims that the legal incidence of the Utility Tax on gross receipts lies with the consumer. The district court agreed with the Tribe, but a unanimous panel of the Eleventh Circuit reversed. Although the Tribe's position had "some merit," the court concluded that the "'fair[est]' reading of the Florida taxing scheme" placed the legal incidence on the utility provider, not the consumer. Pet. App. 49a (quoting *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 461 (1995)).

The court determined that section 203.01(1)(a)1. "points strongly towards a legislative intent to impose the tax on utility companies." Pet. App. 53a. In addition, the court found it significant that Florida imposes a separate sales tax on electricity. Pet. App. 61a–64a.[1]

[1] Along with gross receipts from natural and manufactured gas, gross receipts from electricity service are subject to the Utility Tax. Fla. Stat. §§ 203.01, 203.012(3).

As this Court has recognized, gross receipts taxes like the Utility Tax are generally incident on the seller, whereas sales taxes are generally assessed on the buyer. *Id.* at 62a (citing *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 n.3 (1995)). Indeed, unlike the Utility Tax, Florida's sales tax contains strong language indicating the legal incidence lies with the consumer, *id.* at 62a-63a (quoting Fla. Stat. §§ 212.06(3)(a), 212.07(1)(a), 212.07(4)), leading a Florida court to find the sales tax legally incident on the consumer, *id.* at 61a (citing *Fla. Dep't of Revenue* v. *Naval Aviation Museum Found., Inc.*, 907 So. 2d 586, 587 (Fla. Dist. Ct. App. 2005)). Although the Eleventh Circuit considered it theoretically possible that separate gross receipts and sales taxes on the same transaction could both be legally incident on the consumer, it found the existence of separate sales and gross receipts taxes "more indicative of an intent to impose the Utility Tax on the utility [provider]." *Id.* at 63a–64a.

In light of these considerations, the permissive pass-through provision in section 203.01(4) was not on its own enough to "shift the legal incidence to [the] consumer." *Id.* at 58a. Under *Chickasaw Nation*, the court recognized that explicitly requiring a seller to pass a tax through to the consumer constituted a dispositive statement of intent to place legal incidence with the consumer and that the legal incidence of a tax could lie with a consumer even absent an explicit pass-through provision, *id.* at 51a–52a. Because the pass-through provision did not "*require[]* a utility provider ever to itemize the tax," the permissive pass-through could not overcome indications that the legislature intended the legal incidence to lie with the utility provider. *Id.* at 54a. Rather, the provision merely acknowledged the

"economic realit[y]" that a "tax may, or even likely will be passed through to a consumer." *Id.* at 54a, 58a. As the court observed, "it's hard to imagine any business tax that wouldn't be passed along ultimately to the consumer unless doing so was expressly or economically prohibited." *Id.* at 58a n.20. Under this Court's precedent, however, legal incidence does not turn on economic realities. *Id.* at 50a, 54a, 58a n.20. Thus, after rejecting several other arguments, the court held the legal incidence lay with the utility provider, not the consumer.[2]

After the Eleventh Circuit denied its petition for rehearing *en banc*, the Tribe filed its Petition.

REASONS FOR DENYING THE PETITION

Although framed as a request to resolve a circuit split, much of the Tribe's Petition focuses on a state-law issue of first impression: where Florida's Legislature intended to place the legal incidence of the Utility Tax. The Tribe does not challenge the framework for determining whether federal law preempts a tax in Indian country. Rather, it argues that the Eleventh Circuit erred in its careful analysis of Florida's Utility Tax. The purported circuit split concerning permissive pass-through provisions and conflict with this Court's precedent emerges as illusory under even the slightest

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[2] The court went on to reject the Tribe's argument that the Utility Tax failed the balancing test in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). Pet. App. 64a–67a. In addition, the court agreed with the Tribe's argument that the State's rental tax, Fla. Stat. § 212.031, was preempted by federal law and, in any event, failed the *Bracker* analysis. Pet. App. 8a–43a. The Tribe raises none of those issues in the Petition.

scrutiny. But even if there were a circuit split, and even if the Eleventh Circuit's careful consideration of the Utility Tax yielded an unreasonable, not merely incorrect, result warranting reversal, there would be little reason to grant *certiorari*. That is because, under this Court's precedent, it is clear that Florida could remedy any defect by doing nothing more than passing a law declaring the legal incidence of the Utility Tax to lie with the utility provider. Any other State that believed its taxes to be affected by a decision in this case could do the same. The Court should deny the Petition.

I. THE FRAMEWORK FOR EVALUATING A CLAIM OF INDIAN TAX IMMUNITY IS WELL ESTABLISHED AND NOT AT ISSUE HERE.

There is no dispute that determining the validity of a state tax in Indian country involves a two-step inquiry. This framework is well settled and not at issue here.

First, a court must determine whether the legal incidence of the tax falls on a tribal member. *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). If so, the tax is categorically barred. *Id.* at 101–02.

If the statute contains "dispositive language" that "expressly identif[ies] who bears the tax's legal incidence," then there is no further inquiry. *See Chickasaw Nation*, 515 U.S. at 461. In the context of taxes collected from sellers, a pass-through provision "*requiring* distributors and retailers to pass on the tax's cost to consumers" constitutes such dispositive language, because it makes clear that the legislature intends the buyer, not the seller, to pay the tax. *Ibid.* (citing *Moe* v.

Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 482 (1976)) (emphasis added).

Absent such dispositive language, the legal incidence inquiry turns on a "fair interpretation of the taxing statute as written and applied." *Chickasaw Nation*, 515 U.S. at 462 (quoting *Cal. Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Because this determination requires interpreting state law, the Court defers to reasonable interpretations of the local circuit court. *See id.* at 461 (citing *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983)); *see also Wagnon*, 546 U.S. at 103–04 (rejecting interpretation of the tribe and United States in favor of that adopted by the district and circuit courts).

Second, even if the tax is not incident on a tribal member on tribal land, the tax may still be unconstitutional if it fails the balancing test set out in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). *See Wagnon*, 546 U.S. at 110 (discussing circumstances under which *Bracker* applies).

Instead of challenging this constitutional framework—which plainly framed the Eleventh Circuit's analysis, Pet. App. 48a–51a, 64a–65a—the Tribe's Petition merely asks this Court to review the Eleventh Circuit's conclusion that the legal incidence of the Utility Tax lies with the seller under step one. Pet. i.[3]

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[3] The Tribe does not challenge the Eleventh Circuit's holding that the Utility Tax satisfies the *Bracker* analysis.

II. TAX-SPECIFIC FACTORS, NOT A CIRCUIT SPLIT ABOUT PERMISSIVE PASS-THROUGH PROVISIONS, ACCOUNT FOR THE DIFFERENT OUTCOMES IN THE CASES THE TRIBE CITES.

The specific issue in this case is whether Florida's Utility Tax places the legal incidence on the consumer—in this case, the Tribe—or the utility provider. The Tribe does not claim that a circuit split exists on this issue. That would be impossible, as this case is the first to address the issue.[4] In any event, as the court of appeals that includes Florida, the Eleventh Circuit's conclusion that the legal incidence lies with the Tribe's utility providers, not the Tribe itself, would be entitled to deference so long as it is reasonable. *Chickasaw Nation*, 515 U.S. at 461; *see also Haring*, 462 U.S. at 314 n.8 ("It is our practice to accept a reasonable construction of state law by the Court of Appeals even if an examination of the state-law issue without such guidance might have justified a different conclusion." (quotation marks omitted).

Instead, the Tribe claims a circuit split about what significance to give a specific aspect of the Utility Tax: the permissive pass-through provision in section 203.01(4). The Tribe claims a circuit split between the Sixth and Ninth Circuits, which it says correctly recognize that the legal incidence of a tax may fall on a consumer even if a pass-through is merely permissive in light of the statute's "other features," whereas it claims the Tenth and Eleventh Circuits incorrectly

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[4] Unlike the legal incidence of the sales tax, *Naval Aviation Museum Found.*, 907 So. 2d at 587, no Florida court has ever considered where the legal incidence of the Utility Tax lies.

hold that the permissive, rather than mandatory, nature of a pass-through "automatically means that the legal incidence of the excise tax remains with the seller." Pet. 15. This claim is both new and incorrect.

The claim is new because the Tribe never identified the purported circuit split concerning permissive pass-through provisions to the Eleventh Circuit. The Tribe failed to cite any of the cases that it claims create the split to the court until its petition for rehearing *en banc*, and then cited only *Keweenaw Bay Indian Community* v. *Rising*, 477 F.3d 881 (6th Cir. 2007). *See* C.A. Pet. for Reh'g *En Banc* iii–iv. Even then, the basis for *en banc* consideration was an asserted conflict with *Chickasaw Nation*, not a purported circuit split. *See id.* at i.

The claim is incorrect because there is no circuit split. All of the cases the Tribe cites show courts considering permissive pass-through provisions in the process of "interpret[ing] . . . the taxing statute as written and applied" to determine where the legislature intended the legal incidence of the tax to lie, just as the Tribe argues they should. *See Chickasaw Nation*, 515 U.S. at 462. Courts' understanding of those provisions depends on the strength of the other relevant factors involved in each case-specific examination of the state laws at issue. When other factors suggest the legislature intended the legal incidence to lie with the consumer, the pass-through, even when permissive, is viewed as consistent with that intent. By contrast, when other factors weigh strongly in favor of finding the legal incidence remains with the seller, and there is no mandatory pass-through, or other dispositive statement of legislative intent, a merely permissive

pass-through will not shift the legal incidence from the seller to the consumer. None of the decisions the Tribe cites imposes an "automatic[]" rule, *see* Pet. 15, that permissive pass-through place the legal incidence on the seller.

A. The Sixth and Ninth Circuits Have Held Taxes Legally Incident on Consumers Even Where the Pass-Through Provisions Are Merely Permissive.

The Tribe is correct that the Sixth and Ninth Circuits have held taxes remitted by sellers to be legally incident on consumers where pass-throughs are merely permissive. The Tribe's presentation of those cases gives short shrift, however, to the specific aspects of the taxes at issue that caused the legal incidence to lie with the consumers. These case-specific factors, not any bright-line rule, set the Sixth and Ninth Circuit decisions apart from the Tenth and Eleventh Circuit ones the Tribe criticizes.

The Tribe first cites approvingly the Sixth Circuit's decision in *Keweenaw Bay Indian Community* v. *Rising*, 477 F.3d 881 (6th Cir. 2007). That case involved a Michigan tobacco tax collected and remitted by retailers, with the Indian retailer arguing that the incidence was on the Indian seller, not the customer. *Id.* at 887. The Sixth Circuit disagreed, and while the permissive pass-through was relevant, it was hardly the most relevant factor. The Tribe's Petition fails to mention the court's reliance on the Legislature's "'dispositive' statement" that "'[i]t is the intent of this act to impose the tax levied under this act upon the consumer of the tobacco products by requiring the consumer to pay the

tax at the specified rate.'" *Id.* at 888 (quoting Mich. Comp. Laws § 205.427a). The pass-through provision was "consistent with the legislature's intention . . . that the legal incidence fall[] on the consumer." *Id.* at 889. Thus, the "encourage[ment]" of the dispositive statement and the pass-through sufficed to show the legislature intended the legal incidence to with the consumer, even though the pass-through was not "mandatory." *See ibid.*

Next, the Tribe points to the Ninth Circuit's holding that a tax's legal incidence lay with the consumer even though the pass-through provision was only voluntary in *United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *summarily aff'd* 456 U.S. 901 (1982). As the Tribe acknowledges, the legal incidence there lay with the consumer because the regime created a "strong economic incentive" that "all but compel[led] the lessor to collect the tax on the lessee," a factor that is absent here. *Id.* at 1132; Pet. 18–19; *supra* pp. 2–3 (explaining operation of the Utility Tax). Under the gross receipts tax on leases in *Board of Equalization*, if the lessee paid the tax, the tax was lower, allowing the lessor to capture more of the economic value of the lease. *Bd. of Equalization*, 650 F.2d at 1132 n.6.

In *Keweenaw Bay* and *Board of Equalization*, factors other than the pass-through provision drove the courts' determination that the legal incidence lay with the consumer. As explained below, differences in the particular tax regimes, not a different rule of decision, accounts for the different outcomes in the Tenth Circuit decision and the decision below.

B. The Tenth and Eleventh Circuits Do Not Hold That Permissive Pass-Through Provisions "Automatically" Place the Legal Incidence on the Seller.

According to the Tribe, the Tenth and Eleventh Circuits erroneously hold that the permissive nature of a pass-through provision "automatically means that the legal incidence of the excise tax remains with the seller," regardless of any "other features" that might suggest that the tax's legal incidence lay with the consumer. *See* Pet. 15. The decisions the Tribe cites do nothing of the sort. Rather, the courts determined that other aspects of the tax showed the legislature intended the legal incidence to lie with the seller. While the cases acknowledged that a mandatory pass-through would shift the incidence to the consumer, the permissive pass-throughs were not enough to shift the incidence of the particular tax schemes at issue.

The issue in *Sac and Fox Nation of Missouri* v. *Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied* 531 U.S. 1144 (2001), was whether Kansas's fuel tax was legally incident on a non-Indian distributor or an Indian retailer that purchased fuel from the distributor. The fuel tax provided that the legal incidence "is imposed upon the distributor of first receipt of the motor fuel," and explicitly did not apply to "any licensed retailer who is native American" and operating on Indian lands. *Id.* at 579 (quoting Kan. Stat. Ann. §§ 79-3408(b), 79-3408c(c)) (quotation marks omitted). The court acknowledged that a mandatory pass-through would place the legal incidence on the retailer, *id.* at 580, but found it "[s]ignificant[]" that the pass-through provision was "permissive rather than mandatory," *id.*

at 579. Even absent the permissive pass-through provision, the court reasoned that "distributors could (and most assuredly would) pass along the cost of the fuel tax to retailers." *Id.* at 580. That the Indian retailers—that is, the distributors' customers—would bear the "ultimate economic burden" did not shift the legal incidence. *Ibid.* (citing *Chickasaw Nation*, 515 U.S. at 972); *accord* Pet. 24–25 (acknowledging that "economic incidence" is "not relevant" to legal incidence).

Setting aside whether *Sac and Fox Nation* comports with the Tribe's understanding of the law, it evidently comports with the Court's understanding. In *Wagnon*, this Court explicitly approved the Tenth Circuit's conclusion—a fact that apparently did not merit mention in the Tribe's Petition. *See* 546 U.S. at 103 (discussing lower-court decisions and *Sac and Fox Nation*, on which the Tenth Circuit relied in *Wagnon*). Indeed, this Court's analysis of the same Kansas fuel tax in *Wagnon* shows that it agreed that the permissive, not mandatory, nature of the pass-through was "[s]ignificant[]." *See Sac & Fox Nation*, 213 F.3d at 579. The Court noted that regardless of the statute's "dispositive language" placing the legal incidence on the distributor,[5] the requirement that "[e]very distributor . . . compute and . . . pay" the tax placed the legal incidence on the distributor, not the downstream purchasers. *Wagnon*, 546 U.S. at 103 (quoting Kan.

[5] The Tribe makes much of the fact that the Utility Tax lacks such dispositive language, Pet. 30, but the Court did not rest its holding on that language, *Wagnon*, 546 U.S. at 102–03 ("[E]ven if the state legislature had not employed such 'dispositive language,' . . . we would nonetheless conclude that the legal incidence of the tax is on the distributor.").

Stat. Ann. § 79-3410(a) (2003 Cum. Supp.)) (internal quotation marks omitted). Like the Tenth Circuit, the Court acknowledged that distributors were "'entitled' to pass along the tax to downstream purchasers," but because the distributors were "not required to do so," the legal incidence was on the distributor. *See ibid.*

As in *Sac and Fox Nation* and *Wagnon*, the absence of a mandatory pass-through was significant to the Eleventh Circuit here because other factors suggested that the legislature intended the legal incidence to lie with the seller. Specifically, the Eleventh Circuit noted that the "tax is imposed . . . for the privilege of conducting a utility . . . business" and that "even if the tax is separately stated as a line item" on the customer's bill, the "provider remains fully and completely liable for the tax." Pet. App. 52a–53a (quoting Fla. Stat. § 203.01(5)) (quotation marks and emphasis omitted).[6] Although declining to characterize this language as a "'dispositive statement,'" the court concluded that it did "point[] strongly towards a legislative intent to impose the tax on utility companies." *Id.* at 53a. In addition, the court noted that the State separately imposes a separate sales tax on the consumer for purchases of electricity. *Id.* at 61a–64a. Such separate sales and gross receipt taxes on the same transactions, the court concluded, were "more indicative of an intent to impose the Utility Tax on the utility." *Id.* at 63a–64a. In light of these indications that the legislature intended the

[6] The court also noted that Department of Revenue regulations similarly identify the tax as being "imposed on the privilege of doing business" and "an item of cost to the distribution company," not the consumer. *Id.* at 53a (quoting Fla. Admin. Code R. 12B-6.0015(3)(a)) (quotation marks and emphasis omitted).

legal incidence to lie with the seller, the permissive pass-through was not enough to "shift the legal incidence to [the] consumer." *Id.* at 58a.

The Tribe's emphasis on the language in the Tenth and Eleventh Circuit cases contrasting mandatory and permissive pass-throughs fails to support its claim that those courts impose a bright-line rule that permissive pass-throughs "automatically" place the legal incidence with the seller. *See* Pet. 15, 19–21. Read in context, that language reflects something much more modest: an acknowledgement that a mandatory pass-through automatically means the legal incidence lies with the consumer, because such a requirement constitutes a dispositive statement that the legal incidence lies with the consumer. *See Sac & Fox Nation*, 213 F.3d at 579 (citing *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 111 (1954)); Pet. App. 51a–52a (citing *Chickasaw Nation*, 515 U.S. at 461). Plainly, both courts understand that a legal incidence may fall on the consumer even absent a mandatory pass-through. This Court has affirmed a decision of the Tenth Circuit holding the legal incidence lay with a buyer under such circumstances in *Chickasaw Nation*, 515 U.S. at 461–62, and the Eleventh Circuit acknowledged that the legal incidence lay with the consumer even though the tax in that case "did not contain dispositive language." Pet. App. 51a. Indeed, had the Eleventh Circuit believed that a permissive pass-through "automatically" placed the legal incidence on the seller, *see* Pet. 15, there would have been no reason for the court to consider the numerous other arguments advanced by the Tribe. *See* Pet. App. 52a-64a (addressing various arguments advanced by the Tribe and relied upon by the district court).

The Tribe ignores these features of the decisions and instead points to the courts' indication that the pass-throughs at issue were not mandatory. *See* Pet. 19–21. But noting the absence of a mandatory pass-through is hardly controversial, nor does it indicate an unwillingness to find the legal incidence lies with the customer when other considerations indicate that is the correct conclusion. The Ninth Circuit has similarly observed that the absence of an "express pass through requirement" is both "significant and problematic" for any argument that a tax is legally incident on a consumer. *Confederated Tribes & Bands of the Yakama Indian Nation* v. *Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). Thus, when Washington argued that a "pre-collection obligation" constituted "an implied pass through" to the consumer, the court, in language reminiscent of the decision below, recognized that although it "would be prudent" for a retailer to pass the tax on to the consumer, "the Act does not *require* it." *Ibid.* (emphasis in original). Nevertheless, the court held that the legal incidence lay with the consumer based on "numerous provisions" indicating that the legislature intended such a result. *See id.* at 1087–89.

Fundamentally, the claimed circuit split founders on the Tribe's unwillingness to acknowledge that the cases it discusses involved significantly different tax regimes. "Because few statutes are identical, legal-incidence determinations necessarily will depend on myriad, often situation-specific factors." *Yakama Indian Nation*, 658 F.3d at 1085. Nothing in the Eleventh Circuit's decision suggests that the court would diverge from its sister circuits were it faced with a "'dispositive' statement" that the legislature intended consumers to bear the legal incidence of a tax, *see Keweenaw Bay*,

477 F.3d at 889; a tax that, unlike the one here, provided a "strong economic incentive," to pass the tax through to the consumer, *Bd. of Equalization*, 650 F.2d at 1132; or "numerous provisions" suggesting the legal incidence lay with the consumer, *Yakama Indian Nation*, 658 F.3d at 1087–89. The decision below and *Sac and Fox Nation* merely reflect, consistent with this Court's decision in *Wagnon*, 546 U.S. at 103, that a permissive pass-through is not on its own enough to shift the legal incidence of a tax from retailer to consumer when there are strong indications that the legislature intended the legal incidence to lie with the seller.[7]

In short, the purported circuit split simply does not exist.

III. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The Tribe's claim that the decision below is "fundamentally irreconcilable" with this Court's decision in *Chickasaw Nation*, Pet. 23, and other cases similarly betrays a misunderstanding of the Eleventh Circuit's reasoning.

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[7] That the Sixth Circuit was unaware of any case concluding that "a permissive pass-through suggests the incidence lies with the retailer" is not to the contrary. *Keweenaw Bay*, 477 F.3d at 889 (quoted at Pet. 17). The opinion below, *Sac and Fox Nation*, and *Wagnon* (which the Sixth Circuit repeatedly cited, *Keweenaw Bay*, 477 F.3d at 883, 887, 888), did not view the permissive pass-through as evidence that the legal incidence lay with the retailer; they merely found that the permissive pass-through was not enough to shift the legal incidence to the consumer in light of strong indications that the legal incidence lay with the seller.

The Tribe asserts, Pet. 23, that the court below "disregard[ed]" this Court's guidance that "[i]n the absence of . . . dispositive language [such as a mandatory pass-through provision], the question [of legal incidence] is one of fair interpretation of the taxing statute as written and applied." *Chickasaw Nation*, 515 U.S. at 461. The Tribe, however, disregards that the decision below quotes that sentence in full. *See* Pet. App. 51a. Indeed, the court acknowledged that the tax in *Chickasaw Nation* "did not contain dispositive language" in the form of a "clear declaration of legal incidence or mandatory 'pass through' provision," but this Court nevertheless affirmed the Tenth Circuit's conclusion that "the legal incidence of the tax fell on tribal retailers," not the upstream distributor. *Ibid.* Far from "disregard[ing]" *Chickasaw Nation*, the Eleventh Circuit discussed the factors relevant to this Court's analysis in the case, acknowledged that the Utility Tax "bears some of the hallmarks" of the tax at issue in *Chickasaw Nation*, and explained why its examination of the Utility Tax nonetheless required a different result. *Id.* at 50a–52a, 55a–57a & n.19. Thus, the Tribe's claim that the Eleventh Circuit erred because "[t]his Court has never required the presence of a mandatory pass-through provision before concluding that the legal incidence of a tax falls on the consumer," Pet. 22, misses the point. Having acknowledged that mandatory-pass throughs are not required in its discussion of *Chickasaw Nation*, the court below simply disagreed that "the 'fair[est]' interpretation" of the Utility Tax revealed legislative intent to place the legal incidence on the consumer. *Id.* at 64a (quoting *Chickasaw Nation*, 515 U.S. at 462).

In light of the court's conclusion that other aspects of the Utility Tax "point[]strongly toward legislative intent to impose the tax on utility companies," Pet. App. 53a, this case is much more akin to *Wagnon*, in which a permissive pass-through did not shift the legal incidence to the consumer in light of statutory text suggesting that the legal incidence should lie with the retailer. *See supra* pp. 14–15. The Tribe, of course, disagrees, but that does not render the Eleventh Circuit's conclusion unreasonable, much less "fundamentally irreconcilable" with this Court's precedents. Because the court below explicitly stated the rule, the Tribe claims it "disregard[ed], *compare* Pet. App. 51a *with* Pet. 23, the most that could be said is that the court "misappl[ied] . . . a properly stated rule of law." *See* S. Ct. R. 10 (noting that *certiorari* is "rarely granted" in such circumstances).

IV. ADDITIONAL FACTORS SUPPORT DENYING THE PETITION.

Because there is no circuit split and the decision below is consistent with this Court's precedent, *certiorari* is inappropriate. Three additional reasons favor denying the Tribe's Petition.

First, although the Tribe makes much of the purported circuit split and conflict with this Court's precedent, none of those cases addresses the question the Tribe claims to be presented here: whether a permissive pass-through places the legal incidence on the customer when a "utility provider exercises a state-law right to expressly pass on a utility tax." Pet. i. None of the cases the Tribe cites relied on whether the seller actually availed itself of the permissive pass-through

provision. *See, e.g.*, *Keweenaw Bay*, 477 F.3d at 889 ("critical inquiry . . . is whether the retailer is *encouraged* to pass on the cost of the tax," not whether it actually does (emphasis added)). The Tribe never explains why the legal incidence of the tax—which is judged based on legislative intent as expressed in the statute—would vary based on a choice made by a third party. In any event, there is no reason for this Court to address such an issue before any lower-court consideration of the issue.

Second, a decision here would provide little guidance. *See Yakama Indian Nation*, 658 F.3d at 1085 (legal incidence "often" depends on "situation-specific factors" due to statutory differences). Although the Tribe focuses on a purported split concerning the significance of permissive pass-throughs as a basis to grant *certiorari*, its argument that the Eleventh Circuit erred relies heavily on "other factors" unique to Florida's Utility Tax. *See* Pet. 26–31 (discussing factors other than the permissive pass-through). The court considered all of these arguments and reasonably disagreed with the Tribe's position. Pet. App. 52a–64a. The Tribe does not claim that any of the court's analysis of those arguments creates any split among circuits.[8] On the contrary, the Eleventh Circuit's decision was based on a careful analysis of factors specific to Florida's Utility Tax. Such a case-specific analysis is unlikely to

[8] And although the Tribe points to permissive pass-through provisions in other jurisdictions, Pet. 33 n.4, it says nothing about how those provisions have been construed or the tax regimes to which they apply.

provide significant guidance to other States, tribes, or the federal government.

Third, and more significantly, Supreme Court review in this case will likely have little or no practical effect—in Florida or elsewhere—and therefore is unlikely significantly to affect the tribal and federal sovereignty interests the Tribe says warrant review, *see* Pet. 31–34. In *Chickasaw Nation*, the Court explained 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" by, for example, passing a law that "declar[es]" the legal incidence to be on a non-Indian individual. *See* 515 U.S. at 460–61 (characterizing such language as "dispositive" of legal incidence).[9]

The Tribe has not asked the Court to alter this aspect of the legal incidence inquiry, nor does it appear even to understand it; after all, the Tribe faults the decision below for providing a "roadmap" for States to place a tax's legal incidence on a non-Indian taxpayer, Pet. 4–5, apparently not realizing that the point of the legal incidence framework is to "respond[] to the need for substantial certainty as to the permissible scope of state taxation authority" with a "bright-line standard." *Chickasaw Nation*, 515 U.S. at 460. In other words, a

[9] Notably, this Court has not granted *certiorari* to address legal incidence since *Chickasaw Nation*. *Wagnon* addressed the legal incidence of the tax at issue, but the Court had granted *certiorari* to address a different issue and the issue had not been included in the petition. 546 U.S. at 101.

primary goal of the legal incidence analysis is to provide a roadmap for States wishing to avoid placing the legal incidence on an untaxable individual or entity.[10]

Because any decision in this case is unlikely to affect any other tax—or even whether Florida may impose the Utility Tax on the same transactions in the future—the only reason to grant *certiorari* in this case would be if the Court believes that the Eleventh Circuit's legal incidence holding is unreasonable. Not only would the Tribe face a high burden in advocating for reversal, *see supra* p. 8, it is established that "[e]rror correction is outside the mainstream of the Court's functions." *Cavazos* v. *Smith*, 132 S. Ct. 2, 9 (2011) (Ginsburg, J., dissenting) (quotation marks omitted)).

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[10] That is not to say, of course, that States have complete freedom to impose taxes in Indian country so long as they use the right magic words—just that the legal incidence inquiry is not an obstacle. The *Bracker* balancing analysis, unlike the legal incidence analysis, looks to the substance of the tax's burdens, considering "the nature of the state, federal, and tribal interests at stake" to determine "whether, in the specific context, the exercise of state authority would violate federal law." Pet. App. 26a (quoting *Bracker*, 448 U.S. at 144–45). As the Eleventh Circuit recognized, if the Utility Tax fails the *Bracker* analysis, Florida cannot impose it on Indian lands, regardless where the Utility Tax's legal incidence lies. The court held, however, that the Utility Tax is valid under *Bracker*, *id.* at 64a–67a, and the Tribe chose not to challenge that holding in its Petition.

CONCLUSION

The Tribe's Petition should be denied.

Respectfully submitted,

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