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.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The electricity bills received by the Seminole Tribe of Florida ("Tribe") include an added, separately enumerated charge for a tax that the Tribe is legally obligated to pay. *See* Fla. Stat. § 203.01 ("Utility Tax"). Yet the Eleventh Circuit held that this is not actually a tax on the Tribe, on the ground that the utility is not *required* to add a line item for the tax. The Tribe's petition demonstrated that the court's single-minded focus on whether the line item is mandatory contravened both this Court's precedents and decisions of other courts of appeals.

Respondent's brief in opposition is notable for what it does not say. Respondent does not deny that the case implicates critical tribal sovereignty interests. Nor does he dispute that the court of appeals' analysis would apply equally in the context of federal immunity to state taxation. Most tellingly, respondent barely musters a defense of the court of appeals' analysis—repeatedly stating that it is merely "reasonable" (rather than correct).

This Court's review is warranted.

ARGUMENT

A. The Court Of Appeals' Decision Is Wrong

1. The court erroneously found the absence of a mandatory pass-through dispositive

This Court has said: "None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary" for the legal incidence of the tax to fall on the purchaser. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam). The court of appeals here said the opposite: "To shift the legal incidence to a consumer, *Chickasaw Nation* insists that any pass-through be mandatory." Pet. App. 58a (citing *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995)).

That stark error led the court to conclude that the incidence of the Utility Tax falls on utilities, not customers. Had the court instead based its inquiry on "a fair interpretation of the taxing statute as written and applied," *Chemehuevi*, 474 U.S. at 11, it would not have reached that conclusion.

Rather than defend the decision that the court of appeals actually issued, respondent substitutes a different, fictional one and then defends that. In respondent's telling, the panel merely "not[ed] the absence of a mandatory pass-through" but based its decision not on that absence but instead on "other aspects of the Utility Tax." Opp. 16, 19.

That gets the court's rationale exactly backwards. The court could not have been clearer about what was driving its analysis: "it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax." Pet. App. 54a (emphasis in original). The court determined that the legal incidence falls on the utility *because* "there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters." *Ibid.* (emphases in original). More than twenty-five times, the court repeated variations of the words "required" and "mandatory" in reference to pass-through provisions, frequently using italics or underlining. Pet. App. 50a-64a; *see* Pet. 20-21.

Respondent argues that if the court of appeals' ruling was really based on the absence of a mandatory pass-through, "there would have been no reason for the court to consider the numerous other arguments advanced by the Tribe." Opp. 15. But the court rejected those arguments *because of* the permissive nature of the pass-through. The same fundamental error therefore infected every aspect of the court's analysis.

For example, the Tribe pointed out that if a statutory exemption from the tax was erroneously given, "the Department of Revenue will look to collect the tax directly from the consumer, not the utility company." Pet. App. 88a; *see* Pet. 27-28. The court's sole response was that the pass-through is permissive: "recognition that a tax may, or even likely will be passed through to a consumer is not the same as *mandating* that the tax

be passed through." Pet. App. 58a (emphasis in original).

Similarly, when the Tribe noted the similarities between the Utility Tax and Florida's sales tax (which is incident on consumers), the court rejected that comparison based solely on the permissive nature of the Utility Tax's pass-through: "Florida has * * * expressly codified that the sales tax must be passed through to, and be paid by, the consumer—something it has not done with respect to the gross-receipts tax." Pet. App. 62a.

2. The legal incidence of the tax falls on the Tribe

A "fair interpretation" of the Utility Tax "as written and applied," *Chemehuevi*, 474 U.S. at 11, demonstrates that its legal incidence falls on customers. Pet. 25-29. If the utility "separately state[s]" the tax on the customer's bill, the tax is "added as a component part of the total charge." Fla. Stat. § 203.01(4). The utility then becomes merely a collection and transmittal agent for the customer's payment of the tax. The customer is legally obligated to "remit the tax," and if it does not do so the amount is "recoverable at law." *Ibid.* The utility is never responsible for remitting the tax to the State unless and until the customer sends its tax payment to the utility.

a. Respondent never directly refutes any of this. Indeed, notably absent from his brief is a full defense of the court of appeals' ultimate conclusion that the legal incidence of the tax rests on the utility. Instead of

attempting to explain why the court's decision was correct, respondent repeatedly asserts that the decision was merely "reasonable" and should therefore stand whether it was right or not. *See* Opp. 1, 6-8, 19-20, 22.

While this Court in *Chickasaw Nation* upheld the court of appeals' "altogether reasonable" conclusion about legal incidence in that case, 515 U.S. at 461, the Court has routinely conducted plenary review of this question. It has explained that "the duty rests on this Court to decide for itself" the question of legal incidence of a state tax. *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 609 n.7 (1975) (quoting *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)). In *Chemehuevi*, for example, the Court based its incidence analysis on what it concluded was "the fairest reading of California's cigarette scheme as a whole." 474 U.S. at 11. It did so over the dissent of Justice Stevens, who argued that the Court should not have "undertake[n] to decide the state-law question" de novo and instead should have deferred to the Ninth Circuit's interpretation of California law. *Id.* at 13-14.

In any event, the court of appeals' dispositive treatment of the lack of a mandatory pass-through provision in the face of this Court's repeated statements to the contrary was unreasonable in addition to being wrong.

b. In his cursory discussion of the merits, respondent misrepresents what occurs when a utility exercises its statutory right to pass on the Utility Tax to its customer. According to respondent, itemizing the

amount of the tax on the bill merely "inform[s] consumers of the amount of the bill that the utility provider must remit to the state as gross receipts tax." Opp. 2. Respondent asserts that "[w]hen a utility separately states the tax amount, nothing about the transaction changes." Opp. 3.

That is incorrect. Separately stating the Utility Tax on the customer's bill ensures that the customer is responsible for paying the tax.

Each customer's utility bill must show how the total amount was calculated by itemizing each separate charge. Fla. Admin. Code §§ 25-6.100(2)(c), 25-7.085(1)(c). A utility that does *not* separately state the Utility Tax on the customer's bill has to pay the tax out of the amounts it receives from its customers for utility services. Thus, if a customer's utility charges total $100 and the customer pays its bill in full, the utility receives $100, pays the State $2.50 out of that, and keeps $97.50. Pet. 27.

If a utility does separately state the Utility Tax, it is *added* to the customer's bill as an itemized entry in the category of "other line item charges." Fla. Admin. Code §§ 25-6.100(2)(c)5., 25-7.085(1)(c)4. Thus, if a customer's utility charges (before adding the Utility Tax) total $100, the utility adds a separate line item of $2.56 for the Utility Tax, for a total of $102.56 in charges. *See* Pet. App. 125a-126a. Inclusion of the line-item thus has real substantive consequences.

c. Respondent points out (Opp. 3, 14) that the utility "remains fully and completely liable for the tax, even if the tax is separately stated." Fla. Stat. § 203.01(5). But this Court has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *Miss. Tax Comm'n*, 421 U.S. at 607; *see* Pet. 25. What matters is who pays the tax, not who ultimately transmits it to the tax collector. *See Chickasaw Nation*, 515 U.S. at 461-62.

d. Finally, respondent suggests that the legal incidence of the Utility Tax should not "vary based on a choice made by a third party," *i.e.*, the utility provider's exercise of its statutory right to pass the tax through. Opp. 20. But the Florida legislature contemplated that the Utility Tax would be passed on to the customer in all cases because the legislature provided strong incentives for utilities to do so. As discussed above, if the tax is separately stated, the tax is *added on* to the utility charges, meaning that the utility is able to keep the full amount of the charges rather than deducting the tax from them. *Supra* pp. 5-6. It is therefore no wonder that the head of Florida's field-audit program testified that he had never heard of a utility not exercising its pass-through rights. D. Ct. ECF No. 63-1 at 51-52.

Even if the legal incidence of the Utility Tax does change based on the utility's choice, that would merely be a consequence of how the Florida legislature structured the tax. And it would not be the first time that legal incidence changes based on the role of a third

party. In *Chemehuevi*, the Court held that "the fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers *if the vendors are untaxable*." 474 U.S. at 11 (emphasis added). In so holding, the Court explained that it had previously decided a similar tax must be paid by consumers "whenever the vendor was untaxable, and thus the legal incidence of the tax fell on purchasers *in such cases*." *Ibid.* (emphasis added).

B. The Court Of Appeals' Decision Deepens A Division Within The Circuits

The Eleventh Circuit's decision not only misread this Court's precedents, but it also deepened a divide among the courts of appeals concerning how to determine the legal incidence of a tax with a permissive pass-through provision.

1. The Sixth and Ninth Circuits correctly hold that legal incidence can fall on the consumer despite the lack of a mandatory pass-through provision

Contrary to the Eleventh Circuit's decision here, the Sixth and Ninth Circuits have held that the existence of a merely permissive pass-through provision does not automatically determine where the legal incidence of a tax lies. Pet. 16-19. Respondent states that "case-specific factors, not any bright-line rule," dictated the result in those decisions. Opp. 10. That is exactly the Tribe's point: "the Sixth and Ninth Circuits have (correctly) held that where the pass-through is permissive rather than mandatory, the legal incidence

of an excise tax may still fall on the consumer *due to the tax scheme's other features*." Pet. 15 (emphasis added). Those courts avoided the Eleventh Circuit's error because, unlike that court, they did *not* adopt a "bright-line rule" (Opp. 10) based on the absence of a mandatory pass-through.

Thus, as respondent acknowledges (Opp. 10-11), the Sixth Circuit in *Keweenaw Bay Indian Community v. Rising* held that the permissive nature of the pass-through did not preclude the legal incidence of Michigan's excise tax from resting with the consumer. 477 F.3d 881, 886-90 (2007). Likewise, the Ninth Circuit held in *United States v. California State Board of Equalization* that the legal incidence of a tax fell on consumers even though the statute lacked a mandatory pass-through provision. 650 F.2d 1127, 1130-32 (1981), *summarily aff'd*, 456 U.S. 901 (1982).

2. In the Tenth and Eleventh Circuits, a permissive pass-through provision precludes the legal incidence from falling on the consumer

By contrast, the Tenth Circuit in *Sac & Fox Nation of Missouri v. Pierce* held that the legal incidence of the Kansas motor-fuel tax fell on the wholesale fuel distributor instead of the retailer tribes that purchased the fuel, because the statutory pass-through provision was "permissive rather than mandatory." 213 F.3d 566, 577-80 (2000). The court emphasized that the law "does *not* require distributors to pass the cost of the

motor fuel tax to retailers; it simply permits them to do so." *Id.* at 579 (emphasis in original).

Respondent asserts that the Tenth Circuit's decision was based on "other aspects of the tax." Opp. 12. But the tribes there argued that the legal incidence of the tax fell on them because the distributors passed the tax on to the tribes. *Sac & Fox Nation*, 213 F.3d at 579. The *sole* reason that the court gave for rejecting the tribes' argument was that "the law's pass-through provision * * * is permissive rather than mandatory." *Ibid.*

Respondent is correct that in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), this Court "approved the Tenth Circuit's *conclusion*" about the legality of the fuel tax at issue in *Sac & Fox Nation.* Opp. 13 (emphasis added). But *Wagnon* most certainly did *not* approve of the Tenth Circuit's dispositive treatment of the permissive nature of the pass-through provision. To the contrary, the Court relied instead on several features of the tax in finding that its incidence lay with distributors: the legislature's express statement of incidence, 546 U.S. at 102; that "the distributor's off-reservation receipt of the motor fuel, and not any subsequent event, * * * establishes tax liability," *id.* at 106; and that, "under Kansas law, a distributor must pay the tax even for * * * fuel that is not (or at least has not yet been) used, sold, or delivered," *id.* at 108. The Utility Tax shares none of those features and is therefore fundamentally "different from the tax considered" in *Wagnon*. Pet. App. 89a.

C. This Case Implicates Critical Tribal And Federal Sovereignty Interests

Review is also warranted because this case implicates the Tribe's core sovereignty interests. Pet. 31-32. Florida is unlawfully taxing the activities of another sovereign on that sovereign's own land.

1. The petition further explained that the same legal incidence test that determines whether a state tax may be applied to a tribe also determines whether that tax may be applied to the federal government. Pet. 33-34. Respondent offers no response. He has therefore implicitly conceded that the court of appeals' holding means that Florida could apply the Utility Tax to military bases and other federal installations in the State. It is therefore uncontested that the question presented here implicates federal sovereignty interests.

2. Respondent contends that "a decision here would provide little guidance" because it involves only one state's statute. Opp. 20. Not so: the Court's decision would clarify generally how to determine the legal incidence of a state tax with a permissive pass-through provision. Such provisions are pervasive, Pet. 33 & n.4—a point that respondent does not dispute.

Once the Court sets aside the Eleventh Circuit's dispositive reliance on the permissive pass-through provision, it would necessarily then consider "case-specific" facets of the Utility Tax to decide where its legal incidence lies. Opp. 20. That consequence follows from the rule that incidence is determined by "a fair interpretation of the taxing statute as written and applied."

Chemehuevi, 474 U.S. at 11. As the many cases from this Court cited by petitioner and respondent demonstrate, that analytical requirement has not stopped this Court from repeatedly granting certiorari in cases like this one to police the boundaries between tribal (and federal) sovereignty on the one hand and state tax authority on the other.

3. Finally, respondent suggests that even if this Court were to grant certiorari and reverse, Florida could flip the outcome by enacting a provision merely declaring the legal incidence of the Utility Tax to be on the utility, without making any substantive changes to it. Opp. 21-22. Respondent's argument (even if correct) would apply to *every* petition presenting a legal-incidence question. Yet, as just noted, this Court has repeatedly granted review in this area.

In any event, it is far from clear that Florida could change the outcome through adoption of such a labeling provision. While respondent reads dictum in *Chickasaw Nation* to suggest this possibility, *see* 515 U.S. at 460, the Court has long held that the legal incidence test "must look through form and behind labels to substance." *City of Detroit v. Murray Corp.*, 355 U.S. 489, 492 (1958). Indeed, the Court has rejected a rule that would permit a State to alter incidence "by merely adding a few words to its statutes" while "their operation and practical effect would remain precisely the same." *Id.* at 493. Courts of appeals have also dismissed the notion that a state legislature could change the legal incidence of a tax merely through labeling.

See Keweenaw Bay, 477 F.3d at 888; *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 683-84 (9th Cir. 2004).

The important point, however, is that Florida's statute, as written, impermissibly encroaches on the Tribe's sovereignty. The case therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons and those in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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