No. _____

In The
Supreme Court of the United States

THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; and CONSTANCE IRBY, Secretary-Member of the Oklahoma Tax Commission,

Petitioners,

v.

OSAGE NATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, an Indian tribe is seeking a declaratory judgment in a federal court holding that a state's largest county is and has remained—for more than a century—an Indian reservation, and it is seeking an injunction that would enjoin state tax officials from making contrary findings in administrative tax refund cases pursued by tribal members (non-parties to the litigation) even though the state has long exercised jurisdiction and sovereignty over tribal taxpayers who reside in the county, but not on Indian lands. The questions presented are:

1. May federal courts employ the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to permit suits by Indian tribes, otherwise barred by state sovereign immunity, that seek to establish sovereignty and jurisdiction over historical reservations, without taking into consideration the substantial impact of the relief on the sovereignty and jurisdiction long-exercised over such lands by states?

2. In view of this Court's ruling in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and other decisions, may a federal court allow an Indian tribe's suit—otherwise barred by the Eleventh Amendment—to proceed against state officers under the so-called "straightforward inquiry" used to determine the application of the *Ex parte Young* exception, when the relief would divest a state of substantial and long-exercised civil and criminal jurisdiction over its largest county?

3. Does a suit by an Indian tribe seeking a judicial determination that its historical reservation "remains" a present-day reservation involve the type of retrospective relief that cannot be pursued against state officers under the *Ex parte Young* exception to state sovereign immunity?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Petitioners are officers of the State of Oklahoma who constitute the members of the Oklahoma Tax Commission, a state governmental agency. The petitioners have no corporate parents, and no publicly held companies or corporate subsidiaries are involved in this case.

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The court of appeals decided this case in an unpublished order and judgment, which is reproduced as Appendix A. (Pet. App., *infra*, 1a-19a.) The order of the district court denying the petitioners' motion for dismissal is also unreported, but is reproduced as Appendix B. (Pet. App., *infra*, 20a-23a.)

JURISDICTION

The court of appeals entered its judgment on December 26, 2007. A timely filed petition for rehearing and rehearing en banc was denied on February 26, 2008. (Pet. App. C, 24a-25a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

STATEMENT OF THE CASE

Upon Oklahoma's entry into the Union in 1907, the Osage Nation Indian reservation was incorporated into the new state as its largest county by area, Osage County. In 2001, after almost a century of the exercise

of state sovereignty and jurisdiction over the county, the tribe initiated this action in a federal court to judicially establish that the entire county is an Indian reservation. While the tribe's suit nominally seeks to enjoin Oklahoma's collection of state income taxes from tribal members who live in Osage County, the tribe necessarily must establish that the entire county is a present-day Indian reservation in order to demonstrate that ongoing state taxation is improper. The primary relief the tribe is seeking would thus effectively roll back a century of state jurisdiction across an entire county, and it would therefore have, as the Tenth Circuit acknowledged, "far-reaching implications on Oklahoma's sovereignty."

Although recognizing that the tribe's suit is one essentially *against the state* and thus barred by Oklahoma's immunity from suit guaranteed under the Eleventh Amendment, the court of appeals nevertheless permitted the action to proceed against the individual tax commissioners under the doctrine of *Ex parte Young*, a legal fiction intended to be applied in an appropriate case to ensure the supremacy of federal law. Yet as a judicially crafted doctrine permitting the exercise of federal jurisdiction notwithstanding the states' constitutionally recognized immunity, the *Young* fiction must have—and does have—limits. As this Court recognized in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the *Young* doctrine cannot be applied in cases—such as this one—in which Indian tribes seek to divest states of sovereignty and jurisdiction over lands within their boundaries, and to enjoin them from enforcing their own laws.

The Tenth Circuit, however, interpreted this Court's recent jurisprudence as placing virtually no meaningful limits on the application of *Young*—even in important sovereignty disputes—other than that the relief sought must be *prospective* and not *retrospective* in nature. Not only is that approach contrary to the result in *Coeur d'Alene*, but it means that the *Young* doctrine can be applied not only for its core purpose—to ensure the enforcement of federal law—but for almost any purpose, including subjecting the core sovereignty and jurisdiction of states to review in federal courts. Under such an approach "the Eleventh Amendment, and not *Ex parte Young*, [will] become the legal fiction." *Verizon Md. Inc.* v. *Public Service Comm'n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). This case thus presents an important federal question, and one that has caused uncertainty in the federal circuits and district courts—namely, whether the *Ex parte Young* exception may properly be applied in litigation seeking relief that challenges core state sovereignty interests.

Factual Background

Until the last years of the 19th century, virtually all of the lands that make up the State of Oklahoma were Indian lands. In the 1890s, Congress began forcing the allotment of those lands in severalty.[1] By

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[1] In 1890, Congress, in preparation for statehood, created the Oklahoma Territory in the western half of the present-day state, and most of the tribal lands there were allotted before the turn of the century pursuant to the General Allotment Act, or the "Dawes Act." *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW

1901, only the Five Tribes' lands, two small reservations, and the Osage Reservation remained unallotted within the boundaries of the future state.[2]

The Osage Nation had, in 1871—due to pressure from the United States government and harassment on its Kansas reservation from settlers, squatters, and other tribes—purchased a nearly 1.5 million acre reserve in present-day north central Oklahoma.[3] In the early years of the statehood movement for Oklahoma, the Osages were exempted from the provisions of the General Allotment Act and other federal initiatives to force allotment.[4] Even so, by the turn of the century the Osages were a minority on

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§ 4.07[1][a], at 296 (2005 ed.) [hereinafter FEDERAL INDIAN LAW]; *see also* General Allotment Act, 24 Stat. 388 (1887); Oklahoma Organic Act, 26 Stat. 81 (1890). At the same time, Congress began forcing the allotment of tribal holdings in eastern Oklahoma—long known as "Indian Territory"—through a series of legislative enactments and through the Dawes Commission, created in 1893 to negotiate the allotment of the Five Tribes' lands. *See* FEDERAL INDIAN LAW § 4.07[1][a], at 296-97.

[2] *See, e.g.*, Jeffrey Burton, INDIAN TERRITORY & THE UNITED STATES, 1866-1906, at 244 (Univ. Okla. 1995).

[3] *See, e.g.*, III GALE ENCYCLOPEDIA OF NATIVE AM. TRIBES at 318-19 (Gale Research, Inc. 1998) [hereinafter GALE ENCYCLOPEDIA]; W. David Baird, THE OSAGE PEOPLE at 55-58 (1972); Terry P. Wilson, THE UNDERGROUND RESERVATION: OSAGE OIL at 14-19 (Univ. Neb. 1985) [hereinafter UNDERGROUND RESERVATION].

[4] *See, e.g.*, III GALE ENCYCLOPEDIA at 319; THE OSAGE PEOPLE at 57-58; *see also* General Allotment Act, ch. 119, § 8, 24 Stat. 388 (1887).

their own reservation, and there was increasing pressure not only from outside but from within the tribe to accept allotment of the tribal estate.[5] For some 15 years, the Osages debated the allotment question.[6] Eventually Congress passed the Act of June 28, 1906, ch. 3572, 34 Stat. 539—known as the "Osage Allotment Act"—under which the entire surface of the reservation was allotted in severalty to the members of the tribe.

At statehood in 1907, the Osage Reservation was incorporated into Oklahoma—with the approximate boundaries of the historic reservation marking Osage County—and the state began exercising jurisdiction over all of the county, with the exception of the tribal

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[5] *See, e.g.*, Berlin B. Chapman, *Dissolution of the Osage Reservation* (pt. 1), XX CHRONICLES OF OKLA. 244, 244 (Sept. 1942) [hereinafter *Dissolution*]; *Dissolution* (pt. 2), XX CHRONICLES OF OKLA. 375, 375-76 (Dec. 1942); III GALE ENCYCLOPEDIA at 319; OSAGE PEOPLE at 67-71; John Joseph Mathews, THE OSAGES: CHILDREN OF THE MIDDLE WATERS 772-73 (Univ. Okla. 3d ed. 1982); UNDERGROUND RESERVATION at 47.

[6] Support for dissolution of the reservation grew gradually within the tribe, and in June 1904 a pro-allotment principal chief and council were elected. Shortly thereafter the Osage Nation began negotiating allotment legislation with the Department of Interior and Congress. An initial version of the act was drafted and approved by the tribe itself, and the resulting legislation dissolving the reservation had strong support among the Osages. *See* H.R. Conf. Rep. No. 59-4996, at 4 (1906) (noting "tribe was almost unanimous for the measure"); H.R. Rep. 59-3219, at 1-2 (1906) (noting "all factions" of the tribe approved allotment legislation); *see also* OSAGE PEOPLE at 70; *Dissolution* (pt. 2) at 377.

and individual Indian trust lands.[7] (Pet. App. at 4a.) Covering some 2,250 square miles, Osage County is larger in area than each of the states of Delaware and Rhode Island. (Pet. App. at 3a.) Today Indian lands comprise only a small fraction of the land within Osage County.

In 1999, a member of the Osage Nation who was employed by the tribe and who lived in Osage County (although not on Indian land) protested the state's assessment to her of income tax. (Pet. App. at 5a.) The Oklahoma Tax Commission denied the tribal member's requested exemption on the ground that she did not live within "Indian country" for purposes of 18 U.S.C. § 1151. (Pet. App. at 5a.) The tribal member did not appeal the administrative determination to a state court, as required under Oklahoma law. Instead, the tribe subsequently brought this action on its own behalf.[8]

District Court's Decision

The Osage Nation filed this litigation in the United States District Court for the Northern District of Oklahoma in 2001 seeking declaratory and injunctive relief legally re-establishing its historic reservation and prohibiting state taxation of tribal members

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[7] *See* UNDERGROUND RESERVATION at 97; *see also* Oklahoma Enabling Act, 34 Stat. 267 (1906).

[8] No individual tribal members are parties to this action.

within Osage County.[9] Initially, the Tribe named as the party defendants the State of Oklahoma and the Oklahoma Tax Commission. (Pet. App. at 5a & n.3.) Subsequently, the tribe amended the suit to add the three members of the Commission, the governing body of the state taxation agency. At the outset of the litigation, the state parties moved to dismiss the tribe's claims as barred in their entirety by the state's sovereign immunity.

In deciding the motion to dismiss, the trial court concluded that Indian tribes are permitted under 28 U.S.C. § 1362 to seek injunctive relief from state taxation in federal courts, and therefore ruled that

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[9] The tribe requested that the trial court enter a judgment:

> "(a) Pursuant to 28 U.S.C. § 2201, enter a declaratory judgment holding:
>
> (1) that the Nation's reservation is and remains Indian country of the Nation; and
>
> (2) that the Nation's members who earn income and reside within the geographical boundaries of the Nation's reservation are not subject to or required to pay taxes to the State and the Commission on the income earned by the Nation's members from their employment in the Indian country of the Nation.
>
> (b) Ordering a permanent injunction restraining and prohibiting Defendants, and all their employees, agents and those acting in concert or participation with them from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who are employed, earn income and reside within the geographical boundaries of the Nation's reservation;
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> . . . ."

(Am. Complaint at 5 (filed Sept. 10, 2001).)

neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, bar suits by tribes seeking injunctive relief from state taxation. (Pet. App. at 22a-23a.)

DECISION OF THE COURT OF APPEALS

On December 26, 2007, a panel of the Tenth Circuit entered an unpublished order reversing in part and affirming in part the trial court's decision. Addressing the trial court's primary holdings, the Tenth Circuit noted that 28 U.S.C. § 1362 is a general jurisdictional statute that does not, under this Court's decision in *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), provide for a congressional abrogation of state sovereign immunity. (Pet. App. at 9a-13a.) Tribal challenges to state taxation have been permitted to proceed under § 1362, the appeals court explained, because they involved only claims against officials seeking injunctive relief from state taxation. (Pet. App. at 11a.) But the court recognized that "the essence of this case is whether the Nation or the State of Oklahoma is the supreme sovereign with respect to Osage County or whether some form of dual sovereignty may apply." (Pet. App. at 11a.) The court of appeals thus concluded that the Osage Nation's "suit is not a mere tax injunction suit," and that it could proceed in federal court only if it fell within an exception to the bar of state sovereign immunity. (Pet. App. at 12a-13a.)

Noting that no party contends Oklahoma has waived its immunity for this case, or that Congress has abrogated the state's immunity in this context, the court of appeals held that the trial court had erred in

ruling the case could proceed against the State of Oklahoma and the Commission. (Pet. App. at 13a.) The Tenth Circuit, however, held that the claims against the individual Commissioners could proceed under the doctrine of *Ex parte Young*.

The Tenth Circuit acknowledged the decision in *Coeur d'Alene*, but decided that as a decision representing a limitation on the application of *Young* in sovereignty disputes it is no longer controlling. Following this Court's decision in *Verizon Maryland Inc.* v. *Public Service Commission of Maryland*, *supra*, the court of appeals concluded, the test for the application of the *Young* exception simply turns solely on whether certain pleading requirements are satisfied and whether the relief alleged is prospective in nature. (Pet. App. at 18a.)

At the time this case was briefed and argued, the Tenth Circuit's leading decision in the area, *ANR Pipeline Co.* v. *Lafaver*, 150 F.3d 1178 (10th Cir. 1998), required a consideration of whether the relief sought "implicates special sovereignty interests" of the state before an application of the *Young* exception. *Id.* at 1190. Shortly before this case was decided the Tenth Circuit had, in *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), eliminated such a consideration in favor of what it understood as the "straightforward inquiry" set forth in *Verizon Maryland*. The circuit thus explained its understanding that in applying *Young* "'a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (Pet. App. at 16a (quoting *Verizon Maryland*, 535 U.S. at 645).)

In a departure from its earlier analysis, the appeals court read *Coeur d'Alene* as having a narrow application to cases involving the "equivalent to a quiet title action." (Pet. App. at 14a-15a.) Distinguishing *Coeur d'Alene* on the basis of this analysis, the appeals court reasoned that the relief sought in this case "does not involve an actual title dispute" since "[s]overeignty is the issue here, not ownership of land." (Pet. App. at 18a.)

Yet the Tenth Circuit also acknowledged that uncertainty exists over the continuing meaning of the *Coeur d'Alene* decision, in part in view of the apparent conflict between the principal and concurring opinions in *Coeur d'Alene*, and in part because of this Court's statement of the "straightforward inquiry" for the application of *Young* in *Verizon Maryland*. (Pet. App. at 15a-16a.) In general, the Tenth Circuit concluded that "[i]t is not clear what is left of *Coeur d'Alene* following *Verizon Maryland*." (Pet. App. at 17a.) Nevertheless, in view of its understanding that *Verizon Maryland* clarified the *Young* analysis the court explained that "[w]e may consider only whether the relief sought by the Nation is prospective in caption and substance, and we conclude it is," and that while "[t]he relief sought may have far-reaching implications on Oklahoma's sovereignty, . . . it nonetheless falls within the *Young* exception to Eleventh Amendment immunity . . . ." (Pet. App. at 18a-19a.)

REASONS FOR GRANTING THE PETITION

As the Tenth Circuit accurately observed, this case—far from being a mere tax case—"'calls to mind

the sort of literal land grab effort'" made by an Indian tribe in *Coeur d'Alene*, and thereby places at risk before a federal court substantial sovereignty interests and jurisdiction of the State of Oklahoma. (Pet. App. at 19a.) Indeed, if the historical Osage Reservation were to be judicially recognized as a present-day Indian reservation, more than a century of the exercise of state sovereignty and civil and criminal jurisdiction—in areas from environmental jurisdiction to traffic regulation, and from land use planning to taxation—would be subject to being rolled back in favor of tribal jurisdiction. At stake in this case is, as the court of appeals accurately observed, the future of the state's jurisdiction over approximately a county consisting of approximately 2,250 square miles. (Pet. App. at 3a.)

Not only is this case of extreme importance to the State of Oklahoma, but it also involves an important question in Eleventh Amendment jurisprudence—namely, whether the *Ex parte Young* exception may be applied to permit federal jurisdiction over cases involving substantial challenges to state sovereignty and jurisdiction. As the Tenth Circuit's decision illustrates, uncertainty exists over not merely the meaning of the *Coeur d'Alene* decision but also how state sovereignty interests are to be treated in the *Young* analysis. This case thus demonstrates the need for this Court to address and clarify the application of the *Young* exception to cases involving efforts to divest states of substantial sovereignty and jurisdiction.

Since *Coeur d'Alene*, this Court has not revisited the application of the *Young* doctrine in a case involving a similar effort by a plaintiff to divest a state

of core sovereignty interests, particularly those involving sovereignty over large land areas. As a result of the uncertainty that has arisen, an uneven application of *Young* has developed among the courts of appeals. Several circuits, including, now, the Tenth Circuit, no longer consider the sovereignty interests at issue in a case such as this one before applying *Young*. Other circuits continue to acknowledge such a consideration, if only by applying *Coeur d'Alene* under their interpretation of its factual holding. Neither of these approaches, though, adequately addresses cases of this type in a clear and coherent manner. The first approach does a disservice to the states' constitutionally guaranteed immunity. The latter purports to limit *Coeur d'Alene* to a vague class of cases involving the "functional equivalent of a quiet title action," but it yields no meaningful guidance to the federal district courts concerning when state interests prevent an application of *Young*.

This case and others like it present circumstances far from those to which the doctrine of *Ex parte Young* was intended to apply—cases in which federal courts are asked to enjoin state officials from engaging in ongoing violations of federal law. In this case, the tribe's ability to demonstrate an "ongoing" violation of law depends entirely on the ultimate outcome of its sovereignty claim. There is no ongoing violation of federal law unless the tribe can establish that the over 100 years of federal and state interpretation of the legal status quo were in error. In short, under no reasonable interpretation of the complaint is there an allegation that the state officers in this case are violating any plainly stated mandate of federal law,

and therefore the implications on the supremacy of federal law are, at best, minimal.

On its face, this case involves a request for a clarification—or perhaps a re-interpretation—of federal laws (in particular Oklahoma's statehood acts) adopted more than a century ago. If the relief requested—indistinguishable in any meaningful way from that sought in *Coeur d'Alene*—is permitted under the *Young* doctrine it is difficult to conceive of any relief impacting a state's sovereignty and jurisdiction that would prevent the application of *Young*. If *Young* has no limits, at least with respect to efforts to divest a state of substantial sovereignty, then the value of sovereign immunity, as recognized under the Eleventh Amendment, becomes meaningless.

I. THE TENTH CIRCUIT'S FAILURE TO TAKE STATE SOVEREIGNTY AND JURISDICTION INTO CONSIDERATION IN ITS APPLICATION OF THE *YOUNG* DOCTRINE ADDS TO THE CONFLICT AND UNCERTAINTY AMONG THE CIRCUITS ON AN IMPORTANT FEDERAL QUESTION

Since *Coeur d'Alene*, the decisions of the courts of appeals increasingly have reflected unevenness in the application of the *Ex parte Young* doctrine to cases—such as this case—that represent substantial challenges to state sovereignty. Almost every circuit to address this issue has expressed uncertainty about the application of *Coeur d'Alene*, and as a result non-uniform analyses have emerged in this context. Under the interpretation and application of the so-called "straightforward inquiry" prevailing in the

courts of appeals, no consideration is given to the impact of the relief alleged on a state's sovereignty or other important interests. Under another approach, courts have continued to acknowledge the ultimate holding in the *Coeur d'Alene* case, although they have attempted to limit its potential application to their understanding of the facts in that case. Neither of these approaches provides satisfactory guidance on an important question of federal law.

A. The Courts of Appeals Have Struggled to Find Clear Guidance in *Coeur d'Alene*, Particularly in Light of Subsequent Decisions Applying *Young*

Long ago this Court interpreted the Eleventh Amendment as protecting the states from private suits based upon federal law. *See Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890). This constitutional privilege has been applied to suits against states by certain sovereigns, including, as is relevant here, Indian tribes. *See Blatchford*, 501 U.S. at 782. Far from a mere rule of the federal common law, state sovereign immunity has been established as an important attribute of sovereignty that the states retained in entering the Union, and that is part of the very structure of our federal system. *See Alden* v. *Maine*, 527 U.S. 704, 712-54 (1999). Accordingly, recent decisions of this Court have made plain that Congress's and the federal courts' powers to abrogate state immunity from suit are limited. *See, e.g.*, *Alden*, 527 U.S. 748-54; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72-73 (1996).

Of course the states have, as part of the constitutional plan, provided "an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Alden*, 527 U.S. at 755 (quoting U.S. Const. art. VI). In other words, the constitutional privilege of a state to assert its sovereign immunity does not permit state officials to disregard federal laws, and it does not bar all judicial review of state officials' compliance with federal law. *See id.* But that overriding principle is not in dispute in this case, which focuses, rather, on the limits of the federal courts' power to adjudicate suits against the states involving core state sovereignty and jurisdiction.

It is well-established that *Ex parte Young* represents a so-called legal fiction—necessary to ensure the supremacy of federal law—that a suit against a state official to enjoin an ongoing violation of federal law is not barred by the states' constitutionally guaranteed immunity. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). But such a judicial doctrine must have limits or it could overtake the underlying constitutional principle. Over time this Court has recognized such limits on the application of the *Young* doctrine, including that it does not extend to suits seeking "retroactive" relief. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). As a result, this Court's decisions have established that suits seeking prospective injunctive relief from a state official's violation of federal law generally are not barred by state sovereign immunity. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 73; *Green* v. *Monsour*, 474 U.S. 64, 68 (1985).

Similarly, the *Coeur d'Alene* decision represented an unremarkable recognition that the broad limitation represented by the *prospective-retrospective* distinction does not adequately respect states' constitutional immunity in every instance. *See Coeur d'Alene*, 521 U.S. at 270 (Kennedy, J., opinion of the court) (noting "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction"). Such cases include those that seek effectively to alter the sovereignty and jurisdiction of a state. Such suits, moreover, are far from those within the core purpose of the *Young* doctrine—to stop plainly *ultra vires* acts of state officials with respect to federal law.

In *Coeur d'Alene*, an Indian tribe sought to establish beneficial ownership, control, and jurisdiction over submerged lands and a lakebed. The tribe in *Coeur d'Alene* was seeking to establish that its ownership in—and therefore its sovereignty over—such lands had never been extinguished, 521 U.S. at 264-65, and the Osage Nation makes a very similar claim that its sovereignty and jurisdiction over Osage County has never been extinguished. In *Coeur d'Alene*, this Court held that the tribe's claim was barred by state sovereign immunity, and further that the action could not proceed as a claim against state officers under *Young*. *Id.* at 269, 287-88. That the Tenth Circuit reached a different result in this case on facts closely similar to those in *Coeur d'Alene* demonstrates the confusion or uncertainty about the appropriate application of *Young* in this context.

The precise meaning of *Coeur d'Alene* has been much debated, largely because, as the Tenth Circuit explained, it "involved multiple and fractured opinions."[10] 478 F.3d at 1257. For example, the Tenth Circuit initially interpreted the concurring opinion in *Coeur d'Alene* as "provid[ing] the controlling guidance for lower courts and sought to apply that approach, as best we understood it." *Hill*, 478 F.3d at 1258. Virtually every circuit to address *Coeur d'Alene* has observed similar uncertainty about its meaning and about how it described a limitation on the application of *Ex parte Young*.[11]

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[10] The Tenth Circuit's reading of the decision illustrates the source of much of the uncertainty. As the court of appeals has notes, the opinion of the court in *Coeur d'Alene* did not command a majority on certain issues, including "the key question [of] how lower courts should change their analyses under *Ex parte Young*." 478 F.3d at 1257. On that point, Justice Kennedy, joined only by Chief Justice Rehnquist, proposed "a 'case-by-case' approach in which lower courts should 'reflect a sensitivity' to a 'broad' range of questions ranging from the nature and significance of the federal rights at stake, the state interests implicated by the lawsuit, and the availability of a state forum.'" *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 280, 117 S. Ct. at 2028 (Kennedy, J., opinion of the Court). Justice O'Connor, joined by Justices Scalia and Thomas, authored a separate opinion rejecting the concept of a balancing approach, but joined in the holding that the suit should be dismissed. 521 U.S. at 288. As a result, the courts of appeals have attempted to derive guidance from the ultimate holding, if not from the rationale in the decision that failed to command a majority.

[11] *See, e.g.*, *Western Mohegan Tribe & Nation* v. *Orange County*, 395 F.3d 18, 21-23 (2d Cir. 2004); *Dakota, Minn. & E. R.R.* v. *South Dakota*, 362 F.3d 512, 516-18 (8th Cir. 2004); *Agua Caliente Band of Cahuilla Indians* v. *Hardin*, 223 F.3d 1041,

This uncertainty notwithstanding, many federal courts viewed *Coeur d'Alene* as announcing a new limitation on the *Young* doctrine. The Tenth Circuit's leading post-*Coeur d'Alene* precedent, *ANR Pipeline Co.* v. *Lafaver*, specifically required a consideration of the impact of the relief sought on a state's sovereignty interests. In *ANR Pipeline*, the court of appeals explained that

> "'federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment,' such as a retrospective money judgment."

Hill, 478 F.3d at 1258 (quoting *ANR Pipeline*, 150 F.3d at 1190). This approach prevailed until the Court's decision in *Verizon Maryland*.

In *Verizon Maryland*, the Court addressed the sovereign immunity defense asserted by state officers faced with litigation brought under a federal telecommunications act. Reversing the Fourth Circuit's decision not to apply *Young*, the Court explained that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an

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1045-48 (9th Cir. 2000); *Earles* v. *State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1039-40 (5th Cir. 1998).

ongoing violation of federal law, and seeks relief properly characterized as prospective." 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296).) This statement of the *Young* test prompted a reassessment by the Tenth Circuit and other courts of appeals of the analyses they had implemented after *Coeur d'Alene*. But after this reassessment uncertainty remains, since the *Verizon Maryland* decision involved issues different than those in *Coeur d'Alene*, and since it left unclear how sovereignty disputes such as this case are to be analyzed under *Young*.

This is due in part because the *Verizon Maryland* decision did not address relief that sought to divest a state of sovereignty and jurisdiction over part of its land base. Rather, the Eleventh Amendment defense in *Verizon Maryland* was based on the holding in *Seminole Tribe*, which involved a federal statute that contained a specific remedial scheme evidencing an intent to foreclose federal court jurisdiction over disputes. *See Verizon Md.*, 535 U.S. at 645-47. Despite this, the *Verizon Maryland* decision has been viewed as a shift in this Court's application of the *Young* exception away from any consideration of the sovereignty interests implicated in a particular suit.

B. Uneven Approaches Have Emerged to Applying the *Young* Analysis in Cases Involving Sovereignty Disputes

Since *Verizon Maryland*, the courts of appeals have struggled to try to reconcile the result in *Coeur d'Alene* with the Court's most recent statement of the "straightforward" analysis for the application of *Young*. In some circuits litigation seeking to divest a

state of substantial sovereignty and jurisdiction will be permitted to proceed in federal court, while in others the courts of a state will appropriately have the first opportunity to determine the matter. Not only do these different approaches appear to be yielding different results, but the states' constitutionally recognized immunity from suits deserves a uniform application of *Young*.

The Tenth Circuit changed course concerning the application of the *Young* doctrine to sovereignty disputes in its decision in *Hill* v. *Kemp*, issued shortly before this case was decided. In *Hill*, the court explained that

> "[t]he Supreme Court's formulation of *Coeur d'Alene* in *Verizon Maryland* is . . . somewhat different from what we had understood it to be in *ANR Pipeline*. In rejecting the Fourth Circuit's analysis, the Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring 'federal courts [to] examine whether the relief sought against a state official "implicates special sovereignty interests",' we recognize today that *Verizon Maryland* abrogated this step."

Hill, 478 F.3d at 1259 (quoting *ANR Pipeline*, 150 F.3d at 1190, and *Verizon Md.*, 535 U.S. at 645) (citation omitted). The Tenth Circuit thus adopted the so-called

"straightforward" analysis for the application of *Young*, under which "the sole question for us becomes whether the relief sought by the [plaintiff] is prospective, not just in how it is captioned but also in its substance." 478 F.3d at 1259. The Tenth Circuit and others have read *Verizon Maryland* as limiting the analysis for the application of *Young* to the "straightforward inquiry," and either have not applied the *Coeur d'Alene* decision or have expressed uncertainty about its continuing viability as a vehicle for protecting state sovereignty interests.[12]

In contrast, in other circuits there continues to be a recognition that a consideration must be made in appropriate cases of the impact of the relief alleged on a state's sovereignty interests. One such application

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[12] *See, e.g.*, *Hill*, 478 F.3d at 1259 (holding *Verizon Maryland* abrogated consideration in *Young* analysis of sovereignty interests, and expressing uncertainty as to future application of *Coeur d'Alene*); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005) (following statement of *Young* test in *Verizon Maryland*); *Dakota, Minn. & E. R.R.*, 362 F.3d at 516-17 (noting *Verizon Maryland* unanimously reaffirmed the "traditional articulation" of the *Young* doctrine); *MCI Telecomms. Corp.* v. *BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1272 (11th Cir. 2002) (applying "straightforward inquiry"); *Pennsylvania Fed'n of Sportsmen's Clubs Inc.* v. *Hess*, 297 F.3d 310, 324 (3d Cir. 2002) (noting *Verizon Maryland* "made it quite clear that 'a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"'"); *Ameritech Corp.* v. *McCann*, 297 F.3d 582, 586-87 (7th Cir. 2002) (applying "straightforward inquiry" and noting the "Supreme Court helped define precisely when the *Ex Parte Young* exception applies" in *Verizon Maryland*).

of this alternative approach is represented by the Second Circuit's decision in *Western Mohegan Tribe & Nation* v. *Orange County*, 395 F.3d 18 (2d Cir. 2004), in which an Indian tribe sought a judicial determination that its rights in a historical reservation had never been extinguished. 395 F.3d at 20. While noting that it had declined to extend the holding of *Coeur d'Alene* to other contexts, the Second Circuit found that case controlling and held that the tribe's claims were barred by the State of New York's sovereign immunity, and it further concluded that the case could not proceed under the *Young* exception against state officers. *Id.* at 23. Such an approach appears to recognize that the ultimate holding in *Coeur d'Alene* remains a viable part of the *Young* analysis.[13]

In the *Western Mohegan* decision, the Second Circuit acknowledged that it has "stated that in determining whether the *Ex parte Young* doctrine applies to avoid an Eleventh Amendment bar . . . 'a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 21 (quoting *CSX Transp., Inc.* v. *New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002), in turn quoting *Verizon*

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[13] *See, e.g.*, *Dubuc* v. *Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (following rule of *Verizon Maryland* relating to a "straightforward inquiry," but also considering whether relief sought was the "functional equivalent of a quiet title action"); *Western Mohegan*, 395 F. 3d at 21-23 (acknowledging "straightforward" inquiry but applying test for "functional equivalent of a quiet title action").

Maryland, 535 U.S. at 645). Yet the Second Circuit also viewed *Coeur d'Alene* as continuing to provide a limitation on an application of *Young*. The circuit noted that *Coeur d'Alene* continues to be valid precedent, and the tribe's claims before it in *Western Mohegan* "raising the core issues of land, state regulatory authority, and sovereignty" involved relief that was "as much as that sought in *Coeur d'Alene*, the functional equivalent of [an action to] quiet the Tribe's claim to title in the New York counties named in the complaint." *Id.* at 23 (noting "[w]hile we express no opinion on the *limits* of *Coeur d'Alene's* applicability, we are bound to follow the case where, as here, it directly controls") (emphasis in original).

Thus, after *Verizon Maryland*, at least two analyses for the application of *Young* have emerged. One limits the *Young* analysis largely to a determination of whether the relief alleged is "prospective." Courts such as the Tenth Circuit have made clear that their understanding of this approach, the "straightforward inquiry," does not allow a consideration of state sovereignty interests. The other approach, however, continues to acknowledge the factual holding in *Coeur d'Alene*. Courts applying this analysis have indicated that under the latter challenges to state sovereignty will foreclose an application of *Young* if the factual circumstances are found be analogous to those in *Coeur d'Alene*.

II. CONFLICTING APPROACHES OF THE CIRCUITS TO THE APPLICATION OF *YOUNG* IN CASES SUCH AS THIS ARE YIELDING INCONSISTENT RESULTS ON AN IMPORTANT FEDERAL ISSUE

The conflict inherent in the different analyses of *Young* being applied in the courts of appeals is readily apparent in this case. The relief sought by the Osage Nation, on its face, involves claims which are indistinguishable in substance from those in the Second Circuit's decision in *Western Mohegan*. Yet the different courts of appeals reached opposite results. In two suits, both brought by Indian tribes against states and both involving closely similar relief, the *Young* doctrine was applied in one to confer federal jurisdiction but not in the other. In typical commercial litigation, such differing results might be explained away by the differences in applicable state law. But they cannot be justified in the application of a universal doctrine relating to an important constitutionally guaranteed immunity.

For purposes of a *Young* analysis, the relief sought by the Osage Nation and by the tribes in *Western Mohegan* and in *Coeur d'Alene* cannot be distinguished in any meaningful manner. In each case, an Indian tribe filed an action in federal court seeking to establish or re-establish its jurisdiction over lands that, in recent history, had been subject to the jurisdiction of the states. Unquestionably, there were some differences in the legal theories used in each

case.[14] But what is relevant here is that in all three cases, Indian tribes sought judicial determinations in federal court essentially rolling back long-exercised state sovereignty and jurisdiction in favor of tribal sovereignty and jurisdiction.[15]

As it was applied by the Tenth Circuit, the "straightforward" analysis of the applicability of *Young* did not take into account the sovereignty interests of

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[14] In *Coeur d'Alene*, the tribe asserted a right to a "beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters . . . within the original boundaries" of its reservation in Idaho. *Coeur d'Alene*, 521 U.S. at 264-65. In the *Western Mohegan* case, the tribe sought a similar judicial declaration of its alleged rights, also subject to federal trusteeship, to lands within 10 counties in New York which it claimed had been improperly conveyed without federal approval sometime before 1790. *See Western Mohegan*, 395 F.3d at 20. The claim in *Western Mohegan* arose, in part, under the federal Nonintercourse Act, 25 U.S.C. § 177. In this case, the Tribe is seeking a judicial determination that its historical reservation in Oklahoma, largely subject to state jurisdiction since 1907, "exists as it did in 1871." (Pet. App. at 4a.)

[15] The concurring opinion in *Coeur d'Alene* emphasized this point in conclusion: "Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring). More recently, the concurring opinion in *Verizon Maryland* likewise underscored this point by observing that it was "unlike the case in *Coeur d'Alene*, where the plaintiffs tried to use *Ex parte Young* to divest a State of sovereignty over territory within its boundaries." *Verizon Maryland*, 535 U.S. at 648.

the state at issue in this case. In fact, the Tenth Circuit has expressly articulated an understanding of this analysis that eliminates any such consideration. *See Hill*, 478 F.3d at 1259 (noting that the "courts of appeals need not (and should not) linger over the question of whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought"). Under this analysis, federal jurisdiction was conferred, because the relief alleged—an injunction supposedly impacting only future tax collections—was characterized as "prospective" in nature.

On the other hand, in *Western Mohegan*, which applied the result in *Coeur d'Alene*, the suit seeking to challenge state jurisdiction was not permitted to proceed under the *Young* doctrine. This result was reached because the Second Circuit read *Coeur d'Alene* as "a case raising the core issues of land, state regulatory authority, and sovereignty" and because the relief sought "a declaration from the court that New York's exercise of fee title remains 'subject to' the Tribe's rights, *i.e.*, a 'determination that the lands in question are not even within the regulatory jurisdiction of the State.'" 395 F.3d at 23. That appeals court thus concluded that the relief sought was "as much as that sought in *Coeur d'Alene*, the functional equivalent of [a claim to] quiet the Tribe's claim to title in the New York counties named in the complaint." *Id.*

No circuit, of course, rejects the "straightforward inquiry" as the basic analysis for an application of *Young*. But what has emerged are at least two very different conceptions of the "straightforward inquiry."

One, that set forth by the Tenth Circuit in this case, purports to focus on a strict consideration of the prospective-retrospective distinction. That approach lacks any criteria for analyzing the exceptional case involving relief such as that sought in *Coeur d'Alene* and in this case. The result, then, is that the "straightforward inquiry" should result in the exercise of federal jurisdiction in every case in which the relief sought can be characterized as "prospective." The problem with this approach is that state sovereign immunity can be overcome by simple pleading.

The other approach continues to recognize that *Coeur d'Alene* has a continuing application to the exceptional case, if only on narrow factual grounds. That analysis, used by the Second Circuit, purports to determine whether the relief sought is "as much as that sought in *Coeur d'Alene*" the "functional equivalent" of a quiet title action. Such a test takes into account, if only indirectly, the sovereignty interests of a state that are at stake in a particular case. But its application is largely unguided, other than by a court's interpretation of the meaning of the "functional equivalent" of a quiet title action. That approach—when it is applied—is more protective of state sovereign immunity. But, as this case illustrates, when it will be applied depends on a court's largely subjective reading of *Coeur d'Alene*.

The elevated status of the states' sovereign immunity warrants a uniform application of the *Young* doctrine. Additionally, the cases in which sovereignty is at stake are important to the states, and involve matters the states should decide in the first instance. At risk in this case is the state's exercise of sovereignty

and jurisdiction over a significant portion of its land area, and all that such sovereignty and jurisdiction entail. These important cases should not depend on which circuit hears a case. No justification exists for the states' constitutionally guaranteed immunity to bar a suit in a New York federal court, but for the virtually identical suit to be permitted to proceed in an Oklahoma federal court. This type of uneven application of a judicially created exception to Eleventh Amendment immunity results in something very close to the case-by-case application of *Young* that this Court has avoided. *See, e.g.*, *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring) (rejecting case-by-case balancing approach to applying *Young*).

Suits such as this one involve invasive and far-reaching relief. As in *Coeur d'Alene*, the relief sought in this case "would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory" and it would "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *See Coeur d'Alene*, 521 U.S. at 282 (Kennedy J., opinion of the Court). The relief sought in this case would alter jurisdiction and sovereignty over a large land area that contains very little Indian land. What the Osage Nation is seeking is plainly much more intrusive on state sovereignty than was the tribe's claim in *Coeur d'Alene* to the right to control submerged lands. Such actions are suits *against the state*, regardless of which federal court hears them.

III. THE TENTH CIRCUIT'S ANALYSIS ALLOWS THE APPLICATION OF THE *YOUNG* DOCTRINE TO HISTORICAL CLAIMS THAT DO NOT INVOLVE EITHER ONGOING VIOLATIONS OF CLEAR FEDERAL LAW BY STATE OFFICERS OR "PROSPECTIVE" RELIEF

Aside from the lack of uniformity and consistency on an important federal question, the analysis adopted by the Tenth Circuit and other circuits is resulting in the application of *Young* to cases involving relief that is not truly "prospective" in nature. Under the prevailing formulation of the "straightforward" analysis for the application of *Young*, the prospective-retrospective distinction remains the primary and only real safeguard against the misapplication of the doctrine beyond its intended purpose and scope. Yet in this case the relief permitted under *Young* goes well beyond any reasonable conception of a forward-looking injunction to bring state officials back into compliance with federal law. It involves a long unasserted claim that can best be characterized as a claim to change the status quo based upon historical events.

As this case illustrates, there is a danger that the "straightforward inquiry" may be applied mechanically, and without an examination of the true nature of the relief being alleged, This Court's discussion in *Verizon Maryland* of a "straightforward" test for the application of *Young* did not expressly state that it was foreclosing the inclusion of relevant considerations concerning the relief sought in a particular case, nor did it impliedly do so. *See* 535

U.S. at 645. Nor did *Verizon Maryland* expressly overturn the *Coeur d'Alene* decision. As the Second Circuit correctly observed, *Coeur d'Alene*—despite its potential limits—remains valid precedent, and cannot simply be overlooked. *See Western Mohegan*, 395 F.3d at 23 (noting "we are bound to follow" *Coeur d'Alene* where "it directly controls").

Nor do this Court's decisions indicate that *Young* should be applied without a careful consideration of the actual nature of the relief alleged. The Court's Eleventh Amendment jurisprudence, in fact, indicates that the application of *Young* should have limits if the important nature of the states' immunity from suit is to be respected. It is recognized that Congress has narrow powers to abrogate the states' sovereign immunity, *see, e.g.*, *Alden*, 527 U.S. at 756, and, likewise, the federal courts' powers to confer federal jurisdiction over otherwise barred suits cannot be open-ended if such immunity is to be meaningful.

The ultimate result in *Coeur d'Alene* represented a recognition that some actions are not appropriate for an application of the *Young* doctrine, because they seek relief that truly is against a state (*e.g.*, its core sovereignty and jurisdictional interests) and are far from the types of suits that can fairly be characterized as necessary to ensure that state officials respect the supremacy of federal law. The case that falls within the core scope of *Young*—or the "run of the mill" *Young* suit, *Hill*, 478 F.3d at 1258—is a suit that seeks to bar further implementation of laws or regulations by a state officer in a manner alleged to be inconsistent with federal law.

This case represents something different. The only "ongoing" violation of federal law the tribe has alleged in this case—like that alleged by the tribes in *Coeur d'Alene* and in *Western Mohegan*—is, essentially, that a historical error or perhaps oversight resulted in the longstanding exercise of state jurisdiction. The result in *Coeur d'Alene* can be fairly read as a determination that the relief sought in that case was not the kind of "prospective" relief that is permissible under *Young*. In fact, historical claims, such as those asserted in *Coeur d'Alene* and in this case, seek to do much more than simply bring state officials back into compliance with clear mandates of federal law. They seek, rather, to alter or change the historical record, and it is a record upon which much state law and jurisdiction is based.

In certain instances, this Court has characterized as "prospective" injunctive and other relief allowed against state officials to remedy the *ongoing* consequences of past or historical violations of constitutionally protected rights. *See, e.g.*, *Papasan* v. *Allen*, 478 U.S. 265, 282-83 (1986); *Milliken* v. *Bradley*, 433 U.S. 267, 289-90 (1977). Yet the Osage Nation has alleged no violations of constitutional rights or any other well-defined federal rights. In cases such as this one the relief cannot be "prospective" in the accepted understanding of that term, because it seeks to remedy alleged violations that occurred sometime in the past. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998).

A court in this case would be called upon to declare void the state's sovereignty over most of Osage County as of statehood more than a century ago. Although the

tribe is not seeking money damages for itself for past "violations" of its sovereignty, the impact of the tribe's claims certainly would have a monetary impact on the state, not only in the loss to its tax base but in the potential for monetary claims against the state.[16] This Court recognized in *Edelman* that "the difference between the type of relief barred by the Eleventh Amendment and that permitted by *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. This is a case in point. Upon a careful examination what the Osage Nation has pleaded as "prospective" injunctive relief plainly is backward-looking, both in its nature and in its ultimate effect on the state.

The further that plaintiffs stray from the core cases under *Young*, the less justified is the rationale that such suits are suits against the named officials, not the state itself. This is especially true when *Young* is misused as a vehicle for the pursuit of historical claims. Oklahoma's state tax officials are charged, by state law, solely with the responsibility for

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[16] A declaration that the Osage Reservation was never disestablished could give rise to individual income tax refund claims by tribal members who work for the Nation, but who live in Osage County on non-Indian lands, going back for three years worth of taxes paid. *See* Okla. Stat. Ann. tit. 68, § 2373 (West 2001) (noting three years as statute of limitations period on an income tax refund claim). This right to individual refunds arises under *state law*, and is within the sole control of the state, and can neither be relinquished by the Nation on behalf of its members nor limited by a judgment of a federal court. *See, e.g.*, *Austin* v. *New Hampshire,* 420 U.S. 656, 661 (1975) (noting in area of taxation, state legislatures possess broad discretion).

administration of Oklahoma's tax laws, *see* Okla. Stat. Ann. tit. 68, § 102 (West 2001), and they have no special responsibilities to determine the overall sovereignty of the state. The Osage Nation's suit might as well have been brought against the governor of the state or the secretary of the environment or the state transportation director—all of whom carry out their legal mandates in Osage County as a matter of routine. An appropriate application of *Young* necessitates that the official being sued have some responsibility for the ongoing violation of law. *See Fitts* v. *McGhee*, 172 U.S. 516 (1899). The application of *Young* to historical claims necessarily gives rise to suits being filed against state officials for reasons other than because they are actually ignoring mandates of federal law.

Although the Court stopped short of expressly recognizing in *Coeur d'Alene* that claims involving deeply invasive relief with respect to state sovereignty are not "prospective" in nature, the ultimate holding does just that, at least in the case of tribal suits against states seeking to establish or re-establish tribal sovereignty and jurisdiction over state lands. The *Young* doctrine was not intended to serve as a vehicle for suits seeking merely to change existing or even longstanding interpretations of federal law, or for suits against officials who have no authority over or responsibility for the alleged historical "violation."

If the requirements for satisfying the *Young* doctrine can be met in this case, it is difficult to conceive of what appropriate boundaries remain on the application of this legal fiction. This case involves historical claims that could have been remedied

between the tribe and its federal trustee, through congressional action, or through individual taxpayer actions in state court at any time over the last century. It is not a typical or run-of-the-mill *Ex parte Young* action, and the relief sought is not "prospective." Additional guidance is needed from this Court to prevent the open-ended and inappropriate use of *Young* in cases such as this.

CONCLUSION

The Commissioners' petition for certiorari should be granted.

Respectfully submitted,

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