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IN THE SUPREME COURT OF THE UNITED STATES

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JOAN WAGNON, SECRETARY, :

KANSAS DEPARTMENT OF REVENUE, :

Petitioner, :

v. : No. 04-631

PRAIRIE BAND POTAWATOMI NATION. :

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Washington, D.C.

Monday, October 3, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:38 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioner.

IAN HEATH GERSHENGORN, ESQ., Washington, D.C.; on behalf of the Respondent.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

[11:38 a.m.]

CHIEF JUSTICE ROBERTS: We will now hear
argument in Wagnon vs. Prairie Band Potawatomi Nation.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF PETITIONER

MR. OLSON: Thank you, Mr. Chief Justice, and
may it please the Court:

Kansas imposes a tax on the distributors of
motor fuel. The legal incidence of that tax is
explicitly, by statute, imposed on the distributor of the
first receipt of the fuel. The tax is, thus, imposed and
collected off-reservation from non-Indians. The who,
when, and where of the tax is all off-reservation and non-
Indian.

JUSTICE SOUTER: Mr. Olson, may I ask you to go
one step beyond that on an issue of fact that I just don't
understand from reading the briefs? Let me give you three
quick quotations.

First, the court of appeals opinion contains
this statement, "An expert on behalf of the tribe reported
that basic economic theory teaches that the nation's
station cannot charge prices high enough to allow
collection of both the Kansas and the nation's fuel

1 taxes."

2 The red brief says, on page 8, "It is undisputed
3 that enforcing the State tax on fuel sold and delivered to
4 the station would effectively nullify the tribal fuel
5 tax."

6 Finally, the yellow brief, on page 13, says, "By
7 selling its fuel at market prices, respondent" -- the
8 tribe -- "is making both a profit and collecting a tax."

9 My question is, Do we know, from the record,
10 whether the tax that is assessed on the distributor is, in
11 fact, passed through to the tribe so that, in economic
12 effect, the tribe is collecting, via pass-through, the
13 State tax and imposing its own tax and still selling at
14 market prices?

15 MR. OLSON: I had -- I had the same question,
16 Justice Souter, as I was looking at this yesterday. And I
17 investigated it. And it is my understanding, but I did
18 not find this completely in the record, that the
19 distributor is, indeed, paying the tax, and that the tribe
20 is also collecting a tax. Now, I don't quite understand
21 how you reconcile those two points that you've just
22 raised. If it's -- if it's something that is economically
23 not possible, how can it -- how is it that it's being
24 done. Despite the fact that the tenth circuit held the
25 tax impermissible, it's my understanding that the

1 distributor is still paying the tax. Now, I --

2 JUSTICE SCALIA: Make it up on volume, I think.

3 MR. OLSON: Maybe they make it up on volume.

4 Maybe people that are at the casino are willing to pay
5 more of the tax. There is a differential between the
6 amount of the State tax and the tribe tax. It's only a
7 couple of cents, as I understand it. But I think the
8 point --

9 JUSTICE SOUTER: But if -- if I may interrupt
10 you -- if it's getting passed through, and they're still
11 selling their gas, then there's no -- then the tribe
12 cannot make an argument here that their sovereign taxing
13 authority is being compromised or threatened. And the
14 argument, basically, would boil down to the argument that
15 they want to make a bigger profit.

16 MR. OLSON: Well, I agree with that. And I also
17 would point out --

18 JUSTICE SCALIA: Or want to impose a higher tax.

19 MR. OLSON: Pardon me?

20 JUSTICE SCALIA: Or want to impose a higher tax.

21 JUSTICE SOUTER: Yeah.

22 MR. OLSON: Yes.

23 JUSTICE SOUTER: Yeah.

24 MR. OLSON: Yeah. And what -- I think that what
25 -- what this boils down to -- and I'm skipping ahead of

1 myself -- is that the tribe would like to be able to
2 market a product without having to pay the burdens of
3 taxation all the way upstream. There are taxes on the
4 distributors' property, there's taxes that are imposed
5 when the fuel comes out of the ground and at the refinery
6 stage. So, the tribe would like to market a product
7 unburdened by any upstream taxation, the cost of doing
8 business --

9 JUSTICE KENNEDY: Well, but aren't they going to
10 tell us that -- as a practical matter, that the tax is
11 really being collected for the retailers? It's just being
12 passed on to the retailers, but paid by the -- I take it
13 that the distributor -- the way this works -- I, again,
14 had problems with effect -- I take it the distributor
15 sends out a truck. And if he sends out the truck to the
16 tribe, then the distributor just pays the tax, and the
17 tribe would want that tax to be -- that fuel to be
18 distributed, less the cost of the tax.

19 MR. OLSON: Yes.

20 JUSTICE KENNEDY: And if the tribe view
21 prevails, then the distributor still sends the truck to
22 the stations that are in the State and passes on the tax
23 for those --

24 MR. OLSON: It's --

25 JUSTICE KENNEDY: -- distributors only. I take

1 it that's --

2 MR. OLSON: It's my understanding -- and this is
3 explained -- the details of this are explained in Section
4 3410 -- I can't give you a citation to the record, but the
5 statutes, I'm presuming, are available -- that the
6 distributor pays a -- pays a tax as a result of taking the
7 fuel down from what they call the rack, and then taking it
8 to various service stations --

9 JUSTICE O'CONNOR: Well, what event triggers, if
10 you will, the incidence of the tax on the distributor?

11 MR. OLSON: It's --

12 JUSTICE O'CONNOR: Is it -- is it the obligation
13 -- is it the minute the fuel is brought into Kansas? Is
14 it when it is delivered to the distributor?

15 MR. OLSON: It's --

16 JUSTICE O'CONNOR: Or is it later?

17 MR. OLSON: The statute explicitly says, Justice
18 O'Connor -- this is on page 2 of the petition -- the
19 incidence of this tax is imposed on the distributor of the
20 first receipt of the motor fuel. And then Section --
21 that's Section 3408(c) -- Section 3410 then describes, in
22 a little bit more detail, the physical operation of the
23 reports that the distributor has to make, and the
24 distributor has to pay the tax.

25 JUSTICE O'CONNOR: So, the distributor gets the

1 fuel and incurs the obligation at that point, whether or
2 not it's resold.

3 MR. OLSON: That's correct.

4 JUSTICE GINSBURG: But doesn't incur it, or gets
5 a credit or get it back, if it sells to the United States
6 or if it sells out-of-State. In other words, it's not
7 just the receipt.

8 MR. OLSON: It's -- Justice Ginsburg, it is the
9 receipt that triggers the liability for the tax. There is
10 a -- an exemption that may be taken in connection with
11 sales to the United States, and that's a part of a massive
12 quid pro quo operation, where fuel is sold to the United
13 States, and the United States pays the State back
14 substantially all of the tax that --

15 JUSTICE GINSBURG: And out-of-State or abroad --

16 MR. OLSON: And out-of-State, there is a
17 deduction for fuel sold out-of-State. That's logical,
18 because the purpose for the tax is to pay for the roads in
19 Kansas, and it's --

20 JUSTICE BREYER: Then that's the problem, right
21 there, because I thought -- first, there is a tax -- you
22 get a credit if you don't sell the fuel to anybody. So, I
23 don't think it's quite -- if you just sit there with --

24 MR. OLSON: I don't --

25 JUSTICE BREYER: Maybe not --

1 MR. OLSON: I think -- I would disagree with
2 you, Justice Breyer.

3 JUSTICE BREYER: You don't? All right.

4 MR. OLSON: I think it's my understanding that
5 if you sat on that fuel for the next year --

6 JUSTICE BREYER: You'd still have to pay tax.

7 MR. OLSON: -- you'd still have to pay --

8 JUSTICE BREYER: Okay.

9 MR. OLSON: -- the tax.

10 JUSTICE BREYER: Now, on --

11 MR. OLSON: That's my understanding. Now --

12 JUSTICE BREYER: All right.

13 MR. OLSON: -- with respect to the out-of-State
14 distribution --

15 JUSTICE BREYER: Yes.

16 MR. OLSON: -- that's because --

17 JUSTICE BREYER: All right.

18 MR. OLSON: -- that fuel is not going to be used
19 on --

20 JUSTICE BREYER: Fine.

21 MR. OLSON: -- Kansas highways, presumably.

22 JUSTICE BREYER: You are Kansas. You sell --
23 the retailer in Kansas sells it to Nebraska. Nebraska is,
24 in a sense, a foreign and independent State. And I guess,
25 at some level, the tribes are arguing, "Well, you sell to

1 us, our local retailer. We, too, are a foreign and
2 independent State, even more so. So, if you're going to
3 treat them this way -- give the people in Nebraska a
4 credit so they don't have to pay -- why don't you treat us
5 that way? We drive on Kansas roads sometimes. So do the
6 Nebraskans" --

7 MR. OLSON: Well, sometimes.

8 JUSTICE BREYER: -- -- "sometimes."

9 MR. OLSON: The vast --

10 JUSTICE BREYER: So, they say -- get into
11 interest balancing.

12 MR. OLSON: Well --

13 JUSTICE BREYER: Now, what -- now you have the
14 whole argument that I'm thinking of. What do you respond?

15 MR. OLSON: Well, one of my responses is that
16 the tribe is located entirely within the State. The
17 record is clear that most of the fuel purchased at that
18 station is used on highways paid for by Kansas. An
19 overwhelming majority of the fuel is not used on a
20 reservation road; its used on the highways of the State of
21 Kansas to get to the casino or to leave the casino. The
22 road that's at issue in this case is 1.5 miles long. The
23 rest of the driving, according to the record, is on the
24 highways of Kansas. So, there's a clear difference there.

25 When you sell -- when the distributors market

1 fuel in Nebraska --

2 JUSTICE STEVENS: But, Mr. Olson, would it make
3 any difference if all of the driving was inside the
4 reservation? Would it --

5 MR. OLSON: No, we would --

6 JUSTICE STEVENS: -- make any difference?

7 MR. OLSON: -- we would argue that it would not
8 make any difference, Justice Stevens, because this is a
9 tax on distributors. It is -- the Legislature of Kansas
10 followed the specific advice of this Court in its
11 unanimous opinion in the Chickasaw Nation that if there is
12 an issue with respect to the tax being imposed on --
13 arguably burdening the tribe, the State can change the
14 legal incidence of the tax. That's a --

15 JUSTICE GINSBURG: Well, that -- that has been
16 what's discussed in the brief, and I think that the court,
17 in Chickasaw, was saying, If the State puts the incidence
18 on the tribe itself, we don't have to look any further.
19 That's what it said. When the State levies a tax directly
20 on the tribe or members inside the reservation, no
21 balancing. But then it also said that if the incidence
22 rests on non-Indians, as here, with the distributor here,
23 then there is no categorical bar, than balancing kicks in.
24 So, all Chickasaw dealt with, with the categorical rule,
25 is when the State says the incidence of the tax is on the

1 tribe.

2 MR. OLSON: I -- that's correct, Justice
3 Ginsburg. But the answer is that this is an entirely off-
4 reservation tax on non-Indians. We're -- we submit that
5 there's no balancing necessary in this case unless you're
6 going to involve an -- require States to submit to
7 litigation and engage in balancing every time an off-
8 reservation tax on non-Indians has some downstream
9 economic effect. But what about the tax on the car that
10 brings the casino patron to the reservation? What about
11 the tax on the cigarettes or the alcohol or the gambling
12 machinery?

13 CHIEF JUSTICE ROBERTS: Well, Mr. Olson, the
14 Solicitor General tells us that -- and here we have -- you
15 have the statute, but they have the Kaul case that
16 suggests that this tax is imposed on the reservation.

17 MR. OLSON: But the Kaul case, in the context of
18 deciding whether other retailers there had standing,
19 basically said that there was an economic impact that
20 affected the retailers. The Kaul case specifically
21 referred, Mr. Chief Justice, to the fact that the
22 legislature had -- and this is on page 67 of the Pacific
23 2nd cite of the Kaul opinion -- the legislature amended
24 the statute -- this is at the bottom of the second column
25 -- or the first column -- to clarify the question where

1 the incidence of taxation falls. The legislature provided
2 that, unless otherwise specified, the incidence of the tax
3 falls on the distributor. Then, Mr. Chief Justice, the
4 court went on to evaluate the standing question and
5 allowed the distributors the -- to raise the issue,
6 because the economic burden did come through the
7 distributors.

8 It's important, in that context, to note that
9 the ultimate burden of any of these taxes is not falling
10 on the retailer, it's falling on the consumer. It's
11 falling on the consumer of the gasoline. The consumer
12 puts the gasoline in the car, and then the car is driven
13 overwhelmingly -- the facts are unquestionable in this
14 case -- overwhelmingly on the highways of the State of
15 Kansas. So that the burden -- ultimately, the burden --

16 JUSTICE STEVENS: Yes, but, again, that would
17 still be true if the incidence -- the tax was on the
18 retailer rather than the wholesaler.

19 MR. OLSON: It still would be true. And -- but
20 the fact is, in this case you have a -- off-reservation
21 tax, on the -- all distributors --

22 JUSTICE STEVENS: Which the statute contemplates
23 will be collected when the gas is sold to the -- by the
24 retailer.

25 MR. OLSON: It -- what the statute specifically

1 says -- this is Section 3409 -- it says that the
2 distributor may pass on -- "may" -- it's a permissive
3 provision -- may pass on the cost of the taxation as a
4 part of the cost of doing business. And, of course, the
5 distributor does that with respect to the cost of its
6 vehicles, the cost of other taxes it pays. It may include
7 those provisions.

8 JUSTICE SCALIA: But what a strange provision.
9 I mean, who would have thought that he couldn't? Why did
10 --

11 MR. OLSON: I --

12 JUSTICE SCALIA: -- they ever put that provision
13 in, unless it means something different from --

14 MR. OLSON: I think what it means -- I
15 understand, Justice Scalia, and I -- because I've had the
16 same reaction, "Well, of course he could. Why does he
17 need a statute to do that? It is a cost of doing
18 business." I think that provision is a part of the effort
19 to make clear one of the factors that distinguishes this
20 case from the Chickasaw Nation case, where the court found
21 that it was significant that the distributor was required
22 to pass on the tax, act as a collection agent for the
23 retailer, and took a 1.5 percent commission. So, this
24 court thought that might be significant. Kansas, in part,
25 I think, want to make -- wanted to make it very clear that

1 the -- what was happening in the economic chain is cost of
2 production of gasoline, including tax paid by the
3 distributor, could be passed on in the form of cost of
4 business to the retailer.

5 Now, of course its cost -- it passed on, also,
6 to the consumer. The question --

7 CHIEF JUSTICE ROBERTS: Mr. Olson, what does it
8 mean when they say, in law, the "incidence of the taxes on
9 the distributor"? Does that mean anything other than that
10 he has to pay it?

11 MR. OLSON: It is unclear from this court's
12 decisions precisely what "legal incidence" means. At
13 least it was unclear to me as I was looking through the
14 court's decisions. But I think it's a combination of the
15 liability for the tax, the responsibility to pay the tax,
16 the fact that -- in this case, the retailer has no
17 liability for the tax. The only liability for the tax is
18 on the distributor. The relationship is between the State
19 of Kansas and the distributor. And all of those factors
20 together make it clear to me, from this court's previous
21 decisions, that "legal incidence" is a term of art,
22 especially in the field of taxation. And, as the court
23 pointed out in the Chickasaw Nation case, it's important
24 to have a --

25 CHIEF JUSTICE ROBERTS: Well, I guess the reason

1 for my question is, they look back at the court's
2 decisions and see that it turns on where the incidence of
3 the tax is. And so, there's some bright lawyer in Kansas
4 who said, "All we have to do is pass a law saying the
5 incidence is -- of the tax is on the distributor, and
6 we're going to win."

7 MR. OLSON: Well --

8 CHIEF JUSTICE ROBERTS: So, it suggests that we
9 shouldn't give too much weight to that.

10 MR. OLSON: Well, the bright lawyer in Kansas
11 who may have done that was the Kansas Legislature,
12 following the unanimous decision of this court in
13 Chickasaw Nation, saying, "If you want to avoid the
14 potential problems that would exist, change" -- and it's
15 not just the incidence of the tax, it's the legal
16 incidence of the tax, it's -- of course, the economic
17 burden of taxation is spread out throughout the chain of
18 distribution. The legal incidence of the tax, as I read
19 this court's opinions, are -- is, it is exactly what it is
20 here, the distributor must pay for the tax, the
21 distributor must account for the tax, the distributor is
22 liable and may be penalized if the tax is not paid.
23 Nobody else is liable for it. The distributor has to pay
24 the tax even if it doesn't sell the gasoline.

25 Here, not only the language is as clear as it

1 could be -- I mean, the legislature specifically says it
2 -- but the operation of the statute -- and the two -- the
3 -- twice, the tenth circuit considered this -- the tenth
4 circuit decided the legal incidence of the tax was on the
5 distributor. The two district courts that decided it
6 before those two tenth circuit decisions, decided that the
7 legal incidence was on the distributor. The facts support
8 that the legal incidence is on the distributor. And
9 respondents, on page 16 of the respondent's brief, it
10 seems to me, acknowledge precisely that. They, in their
11 effort to distinguish the Central Machinery case, which is
12 the Indian taxation statutes -- and we're not --
13 specifically said there, referring to Central Machinery,
14 "The State tax was imposed on the sale of merchandise.
15 The legal incidence of the tax there, as here, fell on the
16 non-Indian seller." So, the respondents have even said
17 that, on page 16 of their own brief.

18 JUSTICE SOUTER: May I go back to one factual
19 nuance on that? Apart from legal incidence, somebody
20 mentioned earlier that the tax would not necessarily be
21 payable until, in fact, the gasoline was distributed to
22 the retailer. Is that correct?

23 MR. OLSON: That's not my understanding. I may
24 be wrong. But, as I read Section 3410, the distributor
25 must file monthly reports with the State describing the

1 amount of tax it's drawn down at the rack when it takes
2 the -- unloads fuel into its trucks. And it's responsible
3 monthly --

4 JUSTICE SOUTER: But isn't that a surrogate for
5 sale to the -- well, I guess what I'm getting at, the tax
6 apparently is not payable when the distributor receives
7 the fuel, but only when the distributor transfers the fuel
8 to a retailer.

9 MR. OLSON: No. I --

10 JUSTICE SOUTER: No?

11 MR. OLSON: That's not my understanding. The --
12 it is not -- the incidence -- or the occasion for the
13 payment of the tax isn't a sale to a retailer. You'd have
14 -- I can imagine the practicalities of that would drive
15 everybody crazy. The distributor --

16 JUSTICE SOUTER: Well, why would he be drawing
17 it down, except to sell --

18 MR. OLSON: Well, of course -- of course, the
19 distributor is drawing it down to sell fuel to gasoline
20 stations.

21 JUSTICE SOUTER: Yeah.

22 MR. OLSON: It may -- there may be some storage
23 involved, there may be other occasions. But the fact is
24 that the distributor files a monthly report describing how
25 much fuel is -- it receives.

1 JUSTICE GINSBURG: Mr. Olson, in terms of the
2 text of the statute that is -- the incidence is on the
3 distributor of the first receipt, but then there's this
4 language -- and it appears in a few places -- "the tax is
5 hereby imposed on the use, sale, or delivery." What does
6 -- what does that mean, that the tax is imposed on the
7 use, sale, or delivery?"

8 MR. OLSON: Well, this is -- this is an effort
9 by the legislature to say that fuel, which is going to be
10 used in Kansas, by and large -- there's always going to be
11 exceptions -- fuel that is used, by and large, in Kansas
12 on the roads of Kansas, shall be subject to a tax so that
13 those roads can be built and maintained. Now, how shall
14 we, mechanically, impose and collect that tax? We will do
15 it on the first receipt by the distributor.

16 JUSTICE STEVENS: Does that mean, Mr. Olson,
17 that the tax that the -- the fuel, rather, that's sold to
18 the United States Government, later, out-of-State, when is
19 the credit for the sales out-of-State made? Is that made
20 at the time of the initial delivery, or is -- do they ask
21 for a refund a month later?

22 MR. OLSON: I don't know the answer.

23 JUSTICE STEVENS: I couldn't tell from the --

24 MR. OLSON: I don't know the answer to that,
25 Justice --

1 JUSTICE STEVENS: It seems to me that might be a
2 way of identifying whether the term "legal incidence"
3 really has any significance.

4 MR. OLSON: Well, I would say that the -- that
5 if the -- this Court's prior decisions have any consistent
6 meaning, that the person who has the obligation to pay the
7 tax, and who might claim some credits or deductions, like
8 we all do when we file our tax returns, the legal
9 incidence of the tax is on us, as taxpayers. The taxpayer
10 here is the distributor. The statute says so. The way
11 the statute works --

12 JUSTICE STEVENS: I, sort of, take "legal
13 incidence" to mean the duty to pay the tax. And I'm just
14 wondering whether -- when fuel is sold to a distributor
15 that the -- I mean, the distributor knows the fuel is
16 going to be resold to the United States -- does he have an
17 exemption from the tax, because he knows what's going to
18 happen to it, or does he have to pay the tax, or accept
19 the obligation to pay the tax, and then --

20 MR. OLSON: I think --

21 JUSTICE STEVENS: -- subtract, later on?

22 MR. OLSON: -- I think, but I can't represent to
23 you know that I know for sure, that that is an accounting
24 process that takes place. Because these are transactions
25 -- thousands of transactions that are taking place all of

1 the time. Kansas also has a practical reason for imposing
2 this tax on the distributors. There are X number of
3 distributors. You can imagine how many times X there
4 might be retailers and how many different disputes and so
5 forth.

6 The point -- one of the points that this Court
7 has repeated made in connection with tax cases, and inter-
8 sovereign immunity issues with respect to tax cases, is
9 vitally important that there be certainty, predictability,
10 and some understanding of fixed events with respect to
11 taxation. States can't be engaged in litigation
12 constantly, depending upon how many casino customers were
13 here, how many people bought this gasoline, how many
14 people bought that gasoline the next month, and how much
15 did the tribe charge for the gasoline on its reservation.
16 That kind of balancing process makes no sense whatsoever,
17 and it -- and it sentences the States to litigation, and
18 this Court to repeated decisions, based upon specific
19 facts. That's why, we submit, that although the balancing
20 is overwhelmingly in favor of the State, because it's a
21 tax for gas that will enable someone to drive on roads
22 that the State has to pay for, that, in this situation,
23 one balancing test makes little sense. It simply invites
24 litigation --

25 JUSTICE SCALIA: Mr. Olson, you mentioned

1 Section 3410. Where does that appear on --

2 MR. OLSON: Well --

3 JUSTICE SCALIA: I can't find it in anybody's --

4 MR. OLSON: -- I was not able to find it,
5 either, in the briefs. It's -- the Kansas -- it's the --
6 it's in the Kansas statutes, of course, but I couldn't
7 find it set out verbatim in the -- in the briefs. I
8 suspect it's in there someplace, but I couldn't find it
9 when I was looking.

10 JUSTICE GINSBURG: Mr. Olson --

11 JUSTICE STEVENS: I couldn't either.

12 JUSTICE GINSBURG: -- could we go back --

13 JUSTICE STEVENS: May I ask -- excuse me.

14 JUSTICE GINSBURG: -- to the question that
15 Justice Souter raised at the outset? Because I'm really
16 puzzled. This is the picture I have of the case. And
17 please tell me where it's wrong.

18 Two jurisdictions, both with authority to impose
19 a tax, the State and the tribe. So, if the other weren't
20 taxing, there wouldn't be any question, that the tribe can
21 tax and the State can tax. But the two can't coexist,
22 because the consumer's not going to pay the price. So,
23 only one can. And the issue is, which one dominates, and
24 which is one is subordinate? But you have unquestionable
25 authority to tax in both. And I thought it was clear that

1 the two taxes did -- this is not a case where the tribe
2 can impose a tax, the State can im- -- oppose. I read the
3 briefs to accept that the tribe tax -- couldn't put its
4 tax on top of the State tax.

5 MR. OLSON: The -- it's a matter of economics,
6 Justice Ginsburg, just as your question suggests. The
7 tribe would not -- would like to be able to market tax-
8 free fuel at its non-regulated casino. It would --
9 probably would like -- and if this case is decided against
10 the State, it would probably not like to pay the tax on
11 the -- on the car that brings the patron --

12 JUSTICE GINSBURG: But not tax-free. I mean,
13 the -- a big thing that was made in this case was that,
14 unlike the cigarette sales in the smoke shops, the tribe
15 is not trying to market a tax exemption. It is putting on
16 its own tax, which will cost the customer, in the end, the
17 same as if there had been a State tax.

18 MR. OLSON: Well, it wouldn't have to use a tax
19 to do that. It owns the station. It would --

20 JUSTICE SCALIA: Who is it taxing? Is it taxing
21 itself?

22 MR. OLSON: It's --

23 JUSTICE SCALIA: I mean, the tribe sells the gas
24 --

25 MR. OLSON: That's --

1 JUSTICE SCALIA: -- doesn't it?

2 MR. OLSON: -- precisely the point, that the
3 tribe would probably not like to pay the taxes that are
4 paid by the distributor or the refiner or the person that
5 brings the fuel -- the petroleum product out of the
6 ground. What it -- what it simply means is, the margin
7 between the cost and the sale, that's what the tribe would
8 like. It's perfectly understandable. But it would like
9 to have that and -- that tax -- and I'd like to save the
10 balance of my time for rebuttal -- but that tax is
11 overwhelmingly used on the roads of Kansas -- overwhelming
12 used on the roads of Kansas -- which are paid for, built,
13 and maintained with the revenue produced by that taxation.
14 That's what it's for.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

16 Mr. Gershengorn.

17 ORAL ARGUMENT OF IAN HEATH GERSHENGORN

18 ON BEHALF OF RESPONDENT

19 MR. GERSHENGORN: Mr. Chief Justice, and may it
20 please the Court:

21 In the tribe's view, the State's defense of its
22 tax today depends on a tax that does not exist. Two
23 distinct sovereigns have imposed fuel taxes here. The
24 Prairie Band Potawatomi Nation has imposed a tribal tax on
25 a tribal station operating on tribal trust land.

1 JUSTICE SOUTER: Is it collecting that tax?

2 MR. GERSHENGORN: It is, Your Honor. The --

3 JUSTICE SOUTER: Then what's its gripe? It

4 wants a bigger profit? It wants to increase --

5 MR. GERSHENGORN: Your Honor --

6 JUSTICE SOUTER: -- the taxation?

7 MR. GERSHENGORN: -- the record is clear that

8 the two taxes cannot coexist in the long run, because it

9 would price the --

10 JUSTICE SOUTER: No, but if --

11 MR. GERSHENGORN: -- price the --

12 JUSTICE SOUTER: -- if the tribe is collecting

13 -- it's assuming that -- if the tribe is collecting its

14 tax, and it does not have a claim to greater taxation or

15 greater profit, then how is its sovereign right as a

16 taxing authority being interfered with?

17 MR. GERSHENGORN: Your Honor, the tribe is being

18 forced right now to subsidize the sales at the station at

19 a loss, which it's doing for the balance of this

20 litigation.

21 JUSTICE SOUTER: Loss of profit --

22 MR. GERSHENGORN: But the --

23 JUSTICE SOUTER: -- as an entrepreneur.

24 MR. GERSHENGORN: Your Honor, the tribe -- the

25 tribe is --

1 JUSTICE SOUTER: Well, isn't -- I mean, isn't
2 that necessarily the case? If it's collecting all of its
3 tax, then what it's complaining about is that it's getting
4 less profit as the -- as the retailer.

5 MR. GERSHENGORN: Your Honor, that's correct, at
6 the moment --

7 JUSTICE SOUTER: All right. Then is that an
8 issue that we should consider on a question of preemption
9 which arises from the tribe's assertion of sovereignty?

10 MR. GERSHENGORN: I think it is, Your Honor,
11 because the tribe should not be put to the choice, as a
12 sovereign, where it's running a tribal business, of
13 choosing between -- of generating revenues by the tax
14 versus generating revenues by the profit. There is no --

15 JUSTICE SOUTER: Well, in other words --

16 MR. GERSHENGORN: -- suggestion, Your Honor --

17 JUSTICE SOUTER: -- should we, in effect, say
18 there is no distinction between the tribe's position as
19 sovereign and the tribe's position as retail gasoline-
20 seller.

21 MR. GERSHENGORN: Your Honor, I think, in that
22 situation, that the two are very similar, in the same way
23 when a State sells at a State liquor store --

24 JUSTICE SOUTER: Well, they're similar, because
25 it -- ultimately, it's all going into the same pocket. We

1 realize that. But, unless there is a claim that its
2 taxing authority, as such, is being threatened or
3 interfered with, I don't quite see why a preemption theory
4 that rests upon tribal sovereignty has any place in the
5 analysis.

6 MR. GERSHENGORN: Because, Your Honor, the -- it
7 is exactly the tribal taxing authority that interfered.
8 It's a -- it's quite a strange form of taxing authority
9 that says you can tax the -- you can tax the station, but
10 then -- but then essentially have to operate the station
11 at a loss. That's not --

12 JUSTICE SOUTER: But it's not operating at a
13 loss.

14 JUSTICE BREYER: What's strange about it? I
15 mean, every upstream tax, as Mr. Olson said, raises the
16 price of goods and services. And it's harder to retail
17 them, because they cost more. So, that's true of every
18 single good sold on the reservation. So I take it your

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22 claim must -- and, of course, it may or may not be true

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1 that the tribe can put a tax on that. It depends upon

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1 MR. GERSHENGORN: That is not a --

2 JUSTICE BREYER: But suppose they can't?

3 MR. GERSHENGORN: That is not a --

4 JUSTICE BREYER: Well, my question is, If we
5 hold for you here, and we don't take an absolute
6 principle, well, I guess States are forbidden to put any
7 upstream taxes on.

8 MR. GERSHENGORN: Your Honor --

9 JUSTICE BREYER: Why isn't that so?

10 MR. GERSHENGORN: Because that does not describe
11 the tax that's at issue here. The tax at issue here is
12 imposed on the sale or delivery of fuel to the tribe on
13 the reservation, and that is plain --

14 JUSTICE O'CONNOR: Well, isn't it -- but they
15 say no, that it's imposed on the delivery to the
16 distributor --

17 MR. GERSHENGORN: And --

18 JUSTICE O'CONNOR: -- of fuel.

19 MR. GERSHENGORN: -- and that, Your Honor, is
20 not correct. What they have done is conflate two
21 concepts, the incidence of the tax --

22 JUSTICE O'CONNOR: Well, it's what the --

23 MR. GERSHENGORN: -- and the --

24 JUSTICE O'CONNOR: -- statute says.

25 MR. GERSHENGORN: I -- with respect, Your Honor,

1 I don't think it is what the statute says. The statute
2 says, in 3408, "a tax per gallon is hereby imposed on the
3 use, sale, or delivery of fuel." It does not say "the
4 receipt of fuel." "The distributor" is defined as
5 somebody who receives and uses, sells, or delivers fuel.
6 All of the critical exemptions in the statutes are based
7 on the distributor's subsequent sale or delivery of fuel
8 to the United States, out-of-State, the Federal contract
9 --

10 CHIEF JUSTICE ROBERTS: But that's just a
11 subsequent deduction. I mean, if we get income, we're
12 taxed on it. If we make a charitable contribution, we get
13 a deduction. But that doesn't mean we don't have to pay
14 and are subject to the income tax.

15 MR. GERSHENGORN: Your Honor, this would be a
16 very different case if the State had -- if the legislature
17 had passed a tax that said, "This is a tax on receipt,"
18 and we were trying to argue that these -- that somehow
19 these exemptions made it not a tax on receipt. But the
20 legislature has said it is a tax on the "use, sale, or
21 delivery." And if I could point to two provisions that I
22 think make this crystal clear, that it is not a tax on
23 receipt, but on the subsequent use, sale, or delivery.

24 The first is 3417, which provides --

25 CHIEF JUSTICE ROBERTS: Where is --

1 MR. GERSHENGORN: -- and that is --

2 CHIEF JUSTICE ROBERTS: -- where is it?

3 MR. GERSHENGORN: -- at 10(a) in the appendix,

4

5 has received the fuel, if he subsequently loses the fuel

6 -- has it lost or burned -- gets a refund of the tax, if

7 it's -- if that happens before he uses, sells, or

8 delivers.

9 CHIEF JUSTICE ROBERTS: But that --

10 MR. GERSHENGORN: The other thing that --

11 CHIEF JUSTICE ROBERTS: -- works with the income

12 tax, too. You have casualty losses and things like that.

13 It turns out you were subject to the tax, but you don't

14 have to pay it, because you get a deduction. But that

15 doesn't mean you're not subject to it in the first place.

16 MR. GERSHENGORN: Your Honor, there are -- there

17 is literally nothing in the statute except for the

18 incidence provision, which is what the State relies on,

19 that makes this a tax on receipt. And, if I could, in

20 Central --

21 JUSTICE BREYER: Well, we ought to know, because

22 they've been -- haven't they had this for a while? So,

23 there must be a dealer somewhere who's not on the

24 reservation -- he's a distributor -- somebody delivered to

25 him a thousand gallons, and it's sitting there in his

1 tank. Doe he have to pay the tax, or doesn't he?

2 MR. GERSHENGORN: Your Honor, I don't -- I think
3 that you're -- that he would pay the tax in that instance
4 --

5 JUSTICE BREYER: Well, if he would --

6 MR. GERSHENGORN: -- but I don't think --

7 JUSTICE BREYER: -- pay the tax, then it is not
8 --

9 MR. GERSHENGORN: I don't think so --

10 JUSTICE BREYER: -- on his --

11 MR. GERSHENGORN: -- Your Honor.

12 JUSTICE BREYER: -- redistribution.

13 MR. GERSHENGORN: I don't think so, Your Honor.

14 JUSTICE BREYER: He is -- sorry -- if -- I'd
15 like to ask the question.

16 MR. GERSHENGORN: I'm sorry, Your Honor.

17 JUSTICE BREYER: If -- and you can say why this
18 is wrong -- if he gets a thousand gallons from whoever --
19 Exxon or somebody -- and he puts it in the tank, and he
20 hasn't sold it, and he has to pay the tax, then it would
21 seem to me to be a sale on the distribution to him, not
22 the sale on his distribution to somebody else. Now, why
23 is that wrong?

24 MR. GERSHENGORN: Because -- two reasons, Your
25 Honor -- in the real world, what happens is the

1 distributor picks up the fuel at the rack and delivers it
2 to the retailer. If the -- if the distributor takes the
3 fuel and holds it, he's not a distributor under the
4 statute. A distributor is somebody who receives and uses,
5 sells, or delivers. That's in -- on page 2(a) of the red
6 brief, Your Honor. So that --

7 JUSTICE BREYER: So, now you're telling me
8 something different from what I understood. I thought you
9 said it probably has happened in the history of this tax
10 --

11 MR. GERSHENGORN: I --

12 JUSTICE BREYER: -- that a distributor picked up
13 a gallon of fuel, held it, and has not yet redistributed
14 it. So, you're saying that's never happened.

15 MR. GERSHENGORN: Your Honor, I'm not aware of
16 that happening. But what I would say -- the point that I
17 would like to --

18 JUSTICE BREYER: If I'm certain about what the
19 tax is on, what should we do? Dismiss the case or send it
20 to the -- ask a question, or what?

21 MR. GERSHENGORN: Your Honor, I think that this
22 Court can decide this question based on what the face of
23 the statute is -- itself says.

24 JUSTICE KENNEDY: I think we can --

25 MR. GERSHENGORN: No court --

1 JUSTICE KENNEDY: -- I think we can decide it on
2 the basis that we know that when the distributor puts --
3 delivers gas to the gas station, it's not instantly sold.
4 I mean, even we know that.

5 MR. GERSHENGORN: No, Your Honor -- that's
6 correct, Your Honor. But the statute provides that the
7 tax is on the sale by the distributor to the tribe on its
8 reservation. It is exactly like what happened in Central
9 Machinery. In Central Machinery, the incidence of the tax
10 was indisputably on the off-reservation seller. This
11 Court, nevertheless, said, correctly, that the taxable
12 event, the thing that was being taxed, was the sale of
13 tractors to the tribe on the reservation --

14 CHIEF JUSTICE ROBERTS: Well, the statute says
15 --

16 MR. GERSHENGORN: -- that was, therefore,
17 preempted.

18 CHIEF JUSTICE ROBERTS: -- the statute says it's
19 a tax on the sale, but then it goes on and says it's the
20 first sale, and the first sale is to the distributor, and
21 that's why the incidence of the tax is on him.

22 MR. GERSHENGORN: With respect, Your Honor, what
23 part (c) says, which is what you're reading from, it says,
24 "the incidence of the tax is imposed on the distributor of
25 first receipt." That is the "who." That is not the

1 "what." The "what" is in -- is in 79-3408(a), and it is
2 clearly imposed on the use, sale, or delivery of the fuel.

3 If I could, another provision of the statute
4 that also --

5 CHIEF JUSTICE ROBERTS: But nobody -- but it's
6 not sold -- it's not taxed twice. If it's sold to a
7 distributor, that distributor has to pay the tax. The
8 distributor then sells it to someone else. That someone
9 else doesn't have to pay the tax.

10 MR. GERSHENGORN: That's right, Your Honor. But
11 the question is, What exactly is the State purporting to
12 tax? This is a situation in which the State is not being
13 unambiguous -- is being unambiguous about what it's
14 taxing.

15 JUSTICE SCALIA: What if -- what -- perhaps the
16 State expresses it that way just to cover some people who
17 get their gas illegally, and they would say the tax is
18 still due, even if you haven't gotten your gas from a
19 distributor who has paid the State tax. Wouldn't that
20 suffice for why the court imposes the tax on the use,
21 sale, or delivery? Use, sale, or delivery.

22 MR. GERSHENGORN: Your Honor, I think the term
23 "use" is the distributor's use. The scheme that Kansas
24 has set up is a sensible one. It is, the distributor gets
25 the tax and then has three choices. It can use it, sell

1 it, or deliver it. And if the distributor -- if the
2 distributor is -- hasn't done one of those things, then
3 it's -- then it -- then the distributor can be made liable
4 for any tax increases that have -- that happen while the
5 distributor is holding the tax. And so, in our view, and
6 in every court that we're aware of's view -- tenth circuit
7 didn't decide this case on the assumption that this was a
8 tax on receipt of fuel off the reservation. What the
9 tenth circuit said was that Kansas is now attempting to
10 collect its tax for the first time, a tax on motor fuel
11 distributed to Indian lands. It is, again, the same thing
12 --

13 JUSTICE BREYER: All right, suppose you're
14 right. Can you answer my first question? Can you even
15 remember it? I'll summarize. On your assumption. Look,
16 the Indians, if there is a tax -- they have a retail shop
17 or they have things on the reservation, they go buy them
18 -- Kansas can't impose a tax on what goes on, on the
19 reservation. We go through the balance. But they
20 certainly could impose a tax on the department store in
21 Kansas City, couldn't they?

22 MR. GERSHENGORN: That's right.

23 JUSTICE BREYER: And so, the Indian then goes to
24 the department store and buys it. He has to pay the tax,
25 doesn't he?

1 MR. GERSHENGORN: Yes.

2 JUSTICE BREYER: Okay. Now what he does, he
3 says, "Call up and" -- he says, "Please deliver it." Now
4 he doesn't have to pay the tax?

5 MR. GERSHENGORN: Your Honor, the answer is:
6 that's correct, and that's exactly what happens in the
7 commerce clause when a person from Virginia buys something
8 from Illinois and has it delivered to himself in Virginia.
9 They don't pay the sales tax.

10 JUSTICE BREYER: Is the commerce
11 constitutionally --

12 MR. GERSHENGORN: No, Your Honor, under
13 interstate sales tax.

14 JUSTICE BREYER: All right. Well --

15 MR. GERSHENGORN: It's the same situation --

16 JUSTICE BREYER: -- we're now talking Federal
17 rules. Go ahead.

18 MR. GERSHENGORN: I'm sorry. It was -- it's the
19 same situation there. The question is, Where does the
20 relevant sale take place? And it takes place -- in the
21 Virginia/Illinois situation, the sale takes place in
22 Virginia, which is why you don't pay Illinois sales tax,
23 though you may pay Virginia use tax. It would be the same
24 thing in the tribal situation. The sale in that place,
25 just like the sale in Central Machinery, takes place on

1 the reservation. And what this Court said, in Central
2 Machinery, is that a sale to a tribe of goods on the
3 reservation is -- cannot be taxed by the State. And,
4 indeed, because this tax is on the sale on the
5 reservation, the broader balancing principles apply. The
6 tribe here has imposed the -- its tax on a tribal station,
7 on a tribal land, right where this Court has said its
8 tribal taxing authority is strongest, and has dedicated
9 those revenues to improving the miles of dirt and gravel
10 road on the reservation.

11 JUSTICE KENNEDY: Is it relevant --

12 JUSTICE STEVENS: May I ask you what the --

13 JUSTICE KENNEDY: -- to the balancing test --

14 JUSTICE STEVENS: -- may I ask you a question
15 about the Federal exemption? In your view, is that made
16 available at the time of the initial purchase by the
17 distributor, or does he have to, in effect, claim a credit
18 later on?

19 MR. GERSHENGORN: It -- that way it works, in
20 practice, Your Honor, is -- and their form is in the back
21 of the red brief -- is that the distributor writes down
22 the number of gallons received, and writes down the number
23 of gallons sold to the United States, nets that out, and
24 pays the tax on the net, so that it's -- it's essentially
25 done at the -- at the same time.

1 JUSTICE STEVENS: So that he -- his obligation
2 to sell the gas is -- arises at the same time as his
3 purchase.

4 MR. GERSHENGORN: I'm not sure his obligation to
5 do so, but the form is due on the 25th of the month -- of
6 the next month. And so --

7 JUSTICE STEVENS: And it shows both what they
8 resell to the United States and what they acquired.

9 MR. GERSHENGORN: Correct, Your Honor. It shows
10 gallons received, gallons exported, gallons sold to the
11 United States.

12 JUSTICE STEVENS: And let me ask you this
13 question, too, on that subject. Do you think that the
14 exemption that the State allows for resales to the United
15 States is constitutionally compelled?

16 MR. GERSHENGORN: Your Honor, I think the answer
17 to that is yes, under our theory of the case, but no,
18 under their theory of the case. The exemption to the
19 United States --

20 JUSTICE STEVENS: And it's no under our --

21 MR. GERSHENGORN: -- is constitutionally --

22 JUSTICE STEVENS: -- our precedent, I think,
23 isn't it?

24 MR. GERSHENGORN: I'm sorry?

25 JUSTICE STEVENS: It's no, under our precedent.

1 MR. GERSHENGORN: Well, it depends, Your Honor,
2 on whether the legal incidence is on the United States or
3 whether the incidence is on the seller. Under this --

4 JUSTICE O'CONNOR: Well, on that --

5 MR. GERSHENGORN: -- Court's precedence --

6 JUSTICE O'CONNOR: -- on the legal incidence of
7 the tax, we suggested, in the Chickasaw Nation case, that
8 a tax statute's own declaration of the legal incidence
9 would be dispositive. So, why don't we read the statute
10 and say the incidence is on the distributor, and that's
11 the end of it?

12 MR. GERSHENGORN: Because, Your Honor, I don't
13 think that's what this Court's cases say. I think what
14 this Court's --

15 JUSTICE O'CONNOR: Well, I thought that's --

16 MR. GERSHENGORN: -- cases say --

17 JUSTICE O'CONNOR: -- what we suggested in
18 Chickasaw Nation.

19 MR. GERSHENGORN: I think --

20 JUSTICE GINSBURG: Chickasaw said when the tax
21 was imposed on the tribe, we would take the State at its
22 word. It said it's taxing the tribe. If the State put
23 the tax on a non-Indian, then there would be balancing.
24 And that's what Chickasaw --

25 MR. GERSHENGORN: That's my understanding, as

1 well. And this Court has always held it's a Federal
2 question where legal incidence lies, and has not deferred
3 -- has given --

4 JUSTICE BREYER: All right. So, if balancing --

5 MR. GERSHENGORN: But if I --

6 JUSTICE BREYER: -- then how do you come out?

7 Because what they're saying is, "Okay, balance. Fine.

8 You want to balance? Here's how you balance."

9 MR. GERSHENGORN: Your Honor?

10 JUSTICE BREYER: On the one hand, the Indians
11 have to pay the tax. Okay, that's true. And it's harder
12 for them to impose their own tax. That's true of every
13 upstream tax. And it goes for roads that they use all the
14 time. And they just have a one-and-a-half mile -- and why
15 shouldn't they be treated every -- like everybody else,
16 when they're going to use the roads the tax pays for? So,
17 the balancing works in their favor. Now, what's your
18 response?

19 MR. GERSHENGORN: That the -- Your Honor, we
20 disagree with that at every level. This -- the tribal tax
21 is addressed to a specific road -- road problem that the
22 Federal Government has identified and addressed in the
23 Reservation Road Program. The reservation roads are in
24 abysmal shape, as the Federal Government has recognized.
25 More than 70 percent are in poor shape, poor condition.

1 The fatality rate is four times the national average. And
2 the tribe is using those revenues to fix -- advance that
3 particular Federal interest, which is reflected in Federal
4 statutes and in the Federal regulatory scheme.

5 JUSTICE KENNEDY: Why should all of that make a
6 difference? You make a big point in the briefing, "Well,
7 you're not marketing the exemption, you're taxing, you're
8 using" -- if the -- if the tribe does have the sovereign
9 right to tax or not to tax, why can't it use it not to tax
10 at all and say, "We're giving" -- why is there a
11 presumption in favor of imposing taxes? Why can't the
12 tribe say, "We're not going to tax you if you come to the
13 reservation. Come on in and buy our gas. No tax"?

14 MR. GERSHENGORN: This --

15 JUSTICE KENNEDY: Why isn't -- why isn't that
16 part of the tribal sovereign right?

17 MR. GERSHENGORN: Because this Court has held,
18 in Colville -- and we don't dispute here -- that when the
19 tribe is marketing an exemption, it has no -- it has no --
20 there are no Federal and tribal interests implicated. And
21 we're not challenging that here. What this Court has said
22 is that when a tribe is generating real value on the
23 reservation so that it has created a market, as this tribe
24 has, to draw people onto the reservation and can sell its
25 fuel at market value, it has a sovereign right and

1 interest in taxing that -- in imposing a tax that the
2 State can't interfere with. And the State here has
3 accommodated --

4 JUSTICE SCALIA: Who is -- who is the tribe
5 taxing? Is the tribe taxing the purchaser of the gas? Is
6 that --

7 MR. GERSHENGORN: No, it taxes --

8 JUSTICE SCALIA: Is that --

9 MR. GERSHENGORN: -- the retailer. It taxes the
10 retailer, Your Honor.

11 JUSTICE SCALIA: I thought the retailer was the
12 tribe.

13 MR. GERSHENGORN: It is. It taxes the tribal
14 station.

15 JUSTICE SCALIA: So, it's taxing itself.

16 MR. GERSHENGORN: It is, Your Honor, but that
17 tax is --

18 JUSTICE SCALIA: That's real neat. I have never
19 heard of that before.

20 [Laughter.]

21 MR. GERSHENGORN: Your Honor, actually, it
22 happens all the time. Pennsylvania imposes a tax on
23 State-sold liquor. North Carolina does it. All the
24 State-run liquor stores are subject to a State-imposed
25 tax. But --

1 CHIEF JUSTICE ROBERTS: Counsel, did I
2 understand your earlier discussion, about the department
3 store, to suggest that if the tribe had the tanker truck,
4 and they picked up the fuel and then brought it back,
5 that, in that case, you have no objection to the tax, even
6 though the economic incidence and effect is going to be
7 the same?

8 MR. GERSHENGORN: Your Honor, at that point,
9 Central Machinery wouldn't apply. I think that would be a
10 closer case for the balancing, in that situation. The --
11 so, we wouldn't -- we wouldn't concede that. But, in this
12 case, it's much stronger, because the tax is on the
13 reservation.

14 If I could also just point to one thing that
15 Justice Breyer raised about the -- about the exemptions
16 for other States. What this -- what Kansas has done is
17 provide an exemption for every other sovereign that's
18 implicated -- for other States, for other countries, for
19 --

20 JUSTICE STEVENS: But is it --

21 MR. GERSHENGORN: -- the United States --

22 JUSTICE STEVENS: -- constitutionally compelled
23 to do so?

24 MR. GERSHENGORN: It's -- it is, Your Honor, in
25 this sense. It comes in, in two situations. First, it is

1 -- the Constitution and the Federal preemption doctrine
2 prohibit discrimination. And so, it is, in that sense.
3 But it also goes to the strength of the State interest
4 here. The State has not only -- has accommodated the out-
5 of-State interest, it has also accommodated the in-State
6 Government interests, other than the tribe. It gives 30
7 to 40 percent of the fuel revenues to counties and to
8 cities for roads. Every other sovereign is accommodated
9 here except for the tribe, and we think that's exactly
10 what Federal law prohibits and why the strength of the
11 tribal interest here, and the tribe's interest in imposing
12 the tax to fix reservation roads, to advance that Federal
13 interest, is exactly what deserves protection.

14 JUSTICE SCALIA: Cities and counties --

15 JUSTICE STEVENS: But your --

16 JUSTICE SCALIA: -- aren't sovereign.

17 JUSTICE STEVENS: -- your claim wouldn't
18 disappear if they decided to tax all these other
19 sovereigns.

20 MR. GERSHENGORN: I'm sorry, Your Honor?

21 JUSTICE STEVENS: Your claim, as a tribe, would
22 not disappear if they decided to become nondiscriminatory
23 and tax all of the sales.

24 MR. GERSHENGORN: Your Honor, it wouldn't
25 disappear, but it might alter the -- it would alter the

1 balance. If the -- what is troubling here is that the
2 State has asserted a right in predictability, but the
3 State's right in predictability is only coming at the
4 expense of a refusal to accommodate the tribal interests
5 in the say way it accommodates every other sovereign. And
6 so, we do think that that goes to the strength of the
7 State's interest here, and to the State -- the strength of
8 the -- of the State's assertion of its tax.

9 JUSTICE SOUTER: And your view generally was
10 that it was -- that it was indicative of discrimination.

11 MR. GERSHENGORN: I think it --

12 JUSTICE SOUTER: And I thought that was the
13 stronger argument, because the -- you're saying, "Look,
14 the State has only the most trivial interest in the amount
15 of taxation it would get here." That would be equally
16 true whether it forgives taxes that -- on fuel that goes
17 to the United States or not. But the discrimination
18 point, if it's a fair one, would be the same.

19 MR. GERSHENGORN: Your Honor, I think -- that's
20 correct, and we've made both arguments, that it's a --

21 JUSTICE STEVENS: Well, it would matter.

22 MR. GERSHENGORN: -- that the discrimination is
23 a freestanding reason that, even under an express
24 preemption test like the State has articulated, we would
25 prevail and that --

1 JUSTICE SCALIA: All the other sovereigns you
2 mentioned do not consume the gas -- or the gas sold to
3 them is not consumed primarily on the roads of this State,
4 except for cities and counties, which aren't sovereigns.
5 I mean, they simply aren't sovereign. That's the State,
6 itself. They're subdivisions of the State. So, it's
7 making exemptions for its own -- its own State, plus
8 exemptions for sovereigns, where the gas sold to those
9 sovereigns probably will not be used primarily on the
10 roads of this State.

11 MR. GERSHENGORN: Your Honor, there is --

12 JUSTICE SCALIA: It makes perfect sense. I
13 don't see there's any discrimination.

14 MR. GERSHENGORN: Mr. Chief Justice, thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 Mr. Kneedler.

17 ORAL ARGUMENT OF KNEEDLER

18 ON BEHALF OF THE UNITED STATES

19 MR. KNEEDLER: Mr. Chief Justice, and may it
20 please the Court:

21 The tribe here has imposed a tribal tax on sales
22 at a tribal business on the tribe's own reservation on
23 tribal land. The exercise of that power of taxation is at
24 the core of tribal sovereignty, as this Court has long
25 recognized, and that power --

1 JUSTICE SOUTER: Is it being interfered with?

2 MR. KNEEDLER: Yes. And, as to that question, I
3 would point the Court to page 142 of the joint appendix,
4 or page 12 of the petition appendix, in which the Court
5 discusses the expert opinion that the tribe introduced
6 into the record.

7 JUSTICE SOUTER: Well, that expert opinion is
8 that, as an economic matter, you can't collect both.

9 MR. KNEEDLER: Yes, he says --

10 JUSTICE SOUTER: You can't impose both. But the
11 tribe is still imposing its tax, and it's getting every
12 penny that it -- that it purports to impose.

13 MR. KNEEDLER: But it is operating at a loss.
14 As I understand it, the tribe has chosen to subsidize --

15 JUSTICE SOUTER: Is --

16 MR. KNEEDLER: -- out of --

17 JUSTICE SOUTER: -- is that --

18 MR. KNEEDLER: -- revenues.

19 JUSTICE SOUTER: -- in the record?

20 MR. KNEEDLER: That is my understanding of
21 what's happening. That's not in the record. What is in
22 the record --

23 JUSTICE SOUTER: Let's assume -- let's assume
24 that is true. What difference does that make to an
25 analysis based on a preemption theory which is supposed to

1 take account of tribal sovereignty? The sovereign act is
2 not selling gas, it's taxing. They are taxing. They're
3 getting everything they want under their tax statute.

4 Where, then, is there a basis for a preemption --

5 MR. KNEEDLER: I think, for example, in this
6 Court's decision in Colville, where the Court stressed
7 there that the Court was marketing an exemption from State
8 taxation; that portion of the analysis of the Court there
9 did not turn on whether the tribe was imposing its own
10 tax. It turned --

11 JUSTICE SOUTER: No, I mean, it was --

12 MR. KNEEDLER: -- it turned on economic --

13 JUSTICE SOUTER: -- an entirely separate -- an
14 entirely separate rationale. It was saying the tribe is
15 getting this tremendous advantage by -- or wants this
16 tremendous advantage -- by marketing the exemption.

17 MR. KNEEDLER: But the flip side of that in
18 Colville was that if the -- if the tribe, in that case,
19 had been selling to people who would have been on the
20 reservation anyway -- in other words had not come onto the
21 reservation to take -- just to take advantage of an
22 exemption from State taxation -- but would have been on
23 the reservation anyway, the Court specifically
24 contemplated, in that situation, that the tax might well
25 be preempted, because it would be interfering --

1 JUSTICE SOUTER: Well, maybe -- maybe it
2 contemplated that, and maybe it simply contemplated that
3 that particular -- that particular argument against it --
4 i.e., that it was simply selling a tax exemption -- would
5 not have been an argument against it. But it doesn't
6 follow, from that, that the tribe would necessarily have
7 had a winning argument on a preemption theory.

8 MR. KNEEDLER: No, but we -- but we believe it
9 is a winning argument. I think the fair reading of
10 Colville is that the Court would have seen that as quite
11 different.

12 JUSTICE BREYER: Well, if that's a winning -- of
13 course it is different, in the sense you say, but if, in
14 fact, it's an interference -- look, every upstream tax
15 raises the price of goods and services. Every upstream
16 tax -- indeed, every tax in the world -- makes it harder
17 to sell the product. So, every tax makes it harder for
18 the tribe to tax that item which was taxed by somebody
19 else. Now, if that's the basis for saying it's an
20 interference, then every tax is an interference. And I
21 don't see how that could be.

22 MR. KNEEDLER: Right. This is -- this is not
23 just any upstream tax, and it -- and the theory here is
24 not based on economic impact.

25 JUSTICE BREYER: But, so far, your theory is

1 based on economics, as I've heard it.

2 MR. KNEEDLER: No --

3 JUSTICE BREYER: But if it isn't, I would like
4 to know what it is.

5 MR. KNEEDLER: Yes. Under the -- first of all,
6 in our -- it is our position that, under the Kansas
7 Supreme Court's decision in Kaul, which should get
8 deference in terms of understanding operative incidence of
9 the State tax. The incidence of the tax is, in fact, on
10 the retailer. And the court there found it critical --

11 JUSTICE BREYER: The incidence of the tax --

12 MR. KNEEDLER: The legal incidence --

13 JUSTICE BREYER: Oh.

14 MR. KNEEDLER: -- was -- is on the retail --

15 JUSTICE BREYER: That's very surprising. When I
16 read the statute, it doesn't have one word about the
17 retailer being obliged to pay --

18 MR. KNEEDLER: And --

19 JUSTICE BREYER: -- anything.

20 MR. KNEEDLER: As we read the Kansas Supreme
21 Court's decision, it's not without ambiguity, but we
22 believe the better reading of that -- of that decision is
23 that, as a matter of legislative intent, the incidence of
24 the tax, who is ultimately going to pay the tax --

25 JUSTICE BREYER: All right, if that's --

1 MR. KNEEDLER: -- is on the retailer.

2 JUSTICE BREYER: -- the legal incidence of the
3 tax, I would think their side would win, in my mind. Now
4 suppose, actually, the legal incidence of the tax is not
5 on that retailer, but, rather, is on the distributor.

6 MR. KNEEDLER: That would tell -- that would
7 tell you -- I'm sorry --

8 JUSTICE BREYER: If that's so, and if we get
9 into balancing, which I don't know, what is to be said in
10 favor of the Indian side? It sounded to me as if it's
11 harder for them to tax. So, I'm thinking, well, that's
12 true of every tax. And then, put it on something else.
13 Put it on the tires. Put it on anything else, if you can.
14 It'll be harder for them to tax non-Indians. But I didn't
15 know they had a Federal right to tax the non-Indians.

16 MR. KNEEDLER: Yes, they do. And, again, this
17 is the situation contemplated in Colville. It's analogous
18 to what this Court said in Cabazon with respect to the
19 gambling facility, where the tribe has introduced on-
20 reservation value. And in Colville, the court
21 contemplated if the tribe puts a service station and sells
22 to people who would be there anyway, that is on-
23 reservation value; they are not simply marketing a tax
24 exemption and drawing people in by virtue of a tax
25 exemption.

1 But, beyond that, just because -- if the Court
2 concludes that the incidence of the tax is on the
3 distributor, notwithstanding the Kansas Supreme Court's
4 decision, the subject matter of the tax, the "what is
5 being taxed," is the sale or distribution, and that is a
6 sale between the distributor and the retailer. That is
7 clearly --

8 CHIEF JUSTICE ROBERTS: Well, why isn't it the
9 sale between whoever is selling it to the distributor and
10 the distributor?

11 MR. KNEEDLER: I -- because if you look in -- it
12 becomes particularly clear if you look at the form that is
13 at the back of the respondent's brief, but we also believe
14 it's clear from the -- from the provisions of the statute
15 that are on page 8(a) of the brief. One that hasn't been
16 discussed, for example, is exemption D5 -- excuse me --
17 the exception for deliveries to other distributors. In
18 that -- in that situation, there is no tax. And, in fact,
19 the form, on page 19(a), makes it clear that any sales by
20 one distributor to another are automatically exempted and
21 not counted in the computation at all.

22 So, distributor-to-distributor taxes are
23 exempted. And this Court, in the Chickasaw case, said
24 that's very instructive, that the incidence of the tax is
25 on the retailer. Whether or not the incidence is there,

1 the transaction --

2 JUSTICE STEVENS: It would seem to me exempting
3 distributor-to-distributor taxes just means that only one
4 distributor has to pay.

5 MR. KNEEDLER: Only one distributor has to pay,
6 but it means that a sale between the first distributor and
7 the second distributor, for example, is not taxed.

8 JUSTICE STEVENS: No, but that's because there
9 was a tax on the first sale to the first distributor. And
10 may I ask this? Supposing --

11 MR. KNEEDLER: Actually, there is not. The tax
12 is on the last distributor, with respect to his sale to
13 the -- to the retailer.

14 JUSTICE SCALIA: Yeah, but that's because when a
15 distributor sells to another distributor, he is not
16 acting, for purposes of that sale, as a distributor.

17 MR. KNEEDLER: I think that --

18 JUSTICE SCALIA: If you sell to another
19 distributor, you're not being --

20 MR. KNEEDLER: That makes -- that makes my
21 point, that the -- that the statute, in applying to any
22 use, delivery, or sale, the sale at issue is the sale that
23 ultimately comes from a distributor to a retailer. And,
24 under this Court's decisions in Central Arizona Machinery
25 and the Bracker case, a sale by a -- by someone residing

1 off the reservation, but where the sale takes place on the
2 reservation, as this one clearly does -- the gasoline
3 that's delivered there -- that is absolutely preempted
4 under Central Arizona Machinery and the Indian Trader
5 Statutes, because you --

6 CHIEF JUSTICE ROBERTS: But none of this -- none
7 of this mattered to the tenth circuit, though, did it? I
8 mean, they didn't care where the incidence was. They just
9 went right into the balancing, right?

10 MR. KNEEDLER: Right, that's true. And if --

11 CHIEF JUSTICE ROBERTS: And you think that was
12 wrong.

13 MR. KNEEDLER: We think the court was wrong to
14 conclude that the incidence was on the -- was on the
15 distributor. And if the Court has a question about that,
16 it could remand to certify that question to the Kansas
17 Supreme Court to clear it up, any ambiguity after Kaul.
18 But, even on the tenth circuit's own way of approaching
19 it, we believe that it was then correct, because it
20 properly applied this Court's approach of looking at the
21 particular context of the Federal, State, and tribal
22 interests. And here, there are very powerful tribal
23 interests in maintaining --

24 JUSTICE BREYER: Is the one other -- the
25 interest other than the interest on being able to tax an

1 item that an upstream tax prevents you from doing because
2 of the economics?

3 MR. KNEEDLER: It is the very same --

4 JUSTICE BREYER: Is that the only one, or are
5 there other ones?

6 MR. KNEEDLER: -- it's the very same interest
7 that the State is asserting, which is the interest to
8 impose a fuel tax in order to --

9 JUSTICE BREYER: I've got the -- --

10 MR. KNEEDLER: -- maintain the roads --

11 JUSTICE BREYER: -- I --

12 MR. KNEEDLER: -- on the reservation.

13 JUSTICE BREYER: -- I want to hear you and know
14 if there's an additional one. I'm not disputing that one.
15 I just want to be sure I get them all. One is -- one is
16 that one.

17 MR. KNEEDLER: Is this --

18 JUSTICE BREYER: What else?

19 MR. KNEEDLER: -- is the general -- the general
20 ability to impose a tax. But here, the interest is
21 augmented by the fact that the tax is dedicated by tribal
22 law to maintaining tribal roads, not just this one-and-a-
23 --

24 JUSTICE KENNEDY: And I just don't --

25 MR. KNEEDLER: -- -half mile --

1 JUSTICE KENNEDY: -- understand. Why doesn't
2 the tribe have an incidence of not having any tax at all,
3 helping --

4 MR. KNEEDLER: It --

5 JUSTICE KENNEDY: -- helping its members?

6 MR. KNEEDLER: It --

7 JUSTICE KENNEDY: Why does the balancing only
8 work if it taxes?

9 MR. KNEEDLER: We don't think it does. Under
10 the Colville's decision, if the State is not just -- or
11 the tribe is not just marketing an exemption from State
12 taxation, we think that the tribe -- that the State tax is
13 preempted there, as well. But here, where the tribe is
14 asserting not simply a commercial interest, selling at
15 market value and not marketing a tax exemption of States
16 --

17 JUSTICE KENNEDY: No, no, no. You say that it
18 could --

19 MR. KNEEDLER: -- it's imposing a --

20 JUSTICE KENNEDY: -- market the exemption?

21 MR. KNEEDLER: Pardon me?

22 JUSTICE KENNEDY: You say that a tribe can
23 market its exemption?

24 MR. KNEEDLER: No, we do not. Under this --
25 under this Court's decision in Colville, it can't -- the

1 tribe cannot market an exemption, at least to people who
2 would not otherwise be on the reservation. But here, the
3 tribe is asserting both a commercial interest -- selling
4 at profit; and also a sovereign interest -- in taxing.
5 And where you have a tribe asserting both --

6 JUSTICE KENNEDY: Well, why isn't that sovereign
7 interest in not taxing?

8 MR. KNEEDLER: It could. But here, the tribe
9 has asserted a sovereign interest in its tax, and that is
10 what is being substantially interfered with.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.
12 Mr. Olson, you have four and a half minutes
13 left.

14 REBUTTAL ARGUMENT OF THEODORE OLSON
15 ON BEHALF OF PETITIONER

16 MR. OLSON: Thank you, Mr. Chief Justice.

17 JUSTICE KENNEDY: What about the Supreme Court's
18 characterization of this as being --

19 MR. OLSON: The Kaul --

20 JUSTICE KENNEDY: Yes.

21 MR. OLSON: -- Kaul case? I read -- I don't
22 think the Kansas Supreme Court could have been any more
23 clear. It said the legislature amended the legislation to
24 clarify where the incidence of taxation falls. It
25 provided that the incidence of the tax falls on the

1 distributor. Then, in *Victa*, in connection with the
2 standing issue, because economic burden fell on the
3 retailers, it found that the retailers and -- those other
4 retailers had standing.

5 Kansas could not have been more clear. In
6 Section 3401(f)(3), it defines a "distributor" as someone
7 who receives the product. In 3408(c), it's -- taxes the
8 distributor on the first receipt of the tax. In 3410, it
9 again says it's on the distributor. Two district courts
10 and two courts of appeals found that the legal incidence
11 of the tax was on the distributor. The Kansas Supreme
12 Court said the same thing, the distributor is liable for
13 the tax, pays the tax. The retailer has no liability for
14 the tax. What in the world can Kansas do to make it
15 clearer?

16 Now, the *Central Machinery* case that's -- that
17 my opponents have been speaking about is a case that was
18 decided under the *Indian Trader Statutes* with respect to
19 the trading with the Indians, with respect to *Central*
20 *Machinery* case, was -- over tractors sold on the
21 reservation for use on the reservation. It fell within
22 the scope of the *Indian Trader Statute*. But this Court
23 has made clear, in a number of cases, the *Indian Trader*
24 *Statutes* would not remotely apply.

25 JUSTICE SOUTER: I take it Kansas has not

1 indicted the distributor for failing to register under the
2 Indian Trading Statute.

3 MR. OLSON: No, they're -- it hasn't really been
4 mentioned until the -- I mean, hardly mentioned at all,
5 until the Government decided to -- the United States
6 Government decided to discuss that point.

7 JUSTICE SCALIA: Aren't there usually two
8 incidents? You talk about the incident of the taxes on a
9 person, but it's also on an event. And what event is --
10 in your -- in your judgment is --

11 MR. OLSON: Well, the statute could not be more
12 clear, Justice Scalia. It is the receipt by the
13 distributor of the fuel. That is what the statute says.
14 It is as plain --

15 JUSTICE STEVENS: But if the fuel --

16 MR. OLSON: -- as it could be.

17 JUSTICE STEVENS: -- were destroyed by flood or
18 lightning or something like -- before it was resold to the
19 retailer, there would be no tax --

20 MR. OLSON: There's an exemption for losses like
21 -- one of the Court's questions with respect to a casualty
22 loss or something that -- but it's limited. The
23 liability, nonetheless, exists on the distributor.

24 JUSTICE STEVENS: Are there any incidents in
25 which the distributor would pay the tax if he was not able

1 to resell it to somebody else?

2 MR. OLSON: I think that -- I think the reading
3 of the statute is plain. If the distributor took the
4 fuel, kept it, decided to warehouse it because the costs
5 are going up or something like that, it would still have
6 to pay the tax, because the tax is on the receipt by the
7 distributor.

8 In answer to your question, Justice Stevens,
9 Would those other exemptions, the United States Government
10 be required by the Constitution, or the other States? No,
11 not under this Court's decision in the Blaze case, which,
12 as I understood it, was unanimous. The Fresno case, U.S.
13 vs. New Mexico, it's not a tax on the United States. It's
14 -- or an agency of the United States. So they wouldn't be
15 required. But they make sense, because the sales to other
16 States are for people that drive on other States'
17 highways. The sales to the United States Government is an
18 exchange for almost the same amount of money that comes
19 back. So, there's a rational purpose. It's not
20 discrimination.

21 The tribe makes the point that it's generating
22 real value and reservation value. This is fuel that's
23 used in cars that are -- drive all over the State of
24 Kansas. The casino is there, so people come to the
25 casino. And, under Cabazon, there might be some value

1 added by the casino, which, by the way, is an exempt value
2 created by an exemption from regulation. But the value
3 for someone who puts fuel in their car is so that that car
4 will then drive. And that -- cars that drive, in this
5 case, drive on Kansas highways.

6 This, ultimately is --

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

8 MR. OLSON: Thank you.

9 CHIEF JUSTICE ROBERTS: The case is submitted.

10 (Whereupon, at 12:34 p.m., the case in the
11 above-entitled matter was submitted.)

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