IN THE SUPREME COURT OF FLORIDA

SEMINOLE TRIBE OF FLORIDA,
a federally recognized Indian Tribe,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.
_____/

Sup. Ct. Case No. SC11-1854
DCA Case No. 4D10-456
Lower Case No. 08-13474 CACE

PETITIONER'S BRIEF ON JURISDICTION

On Review From A Decision Of The Fourth District Court Of Appeal

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STATEMENT OF THE CASE AND FACTS

This case involves Respondent Florida Department of Revenue's ("**DOR**") authority to tax fuel purchased off Indian tribal lands by an Indian tribe but used on tribal lands in the performance of the tribe's functions as a sovereign government.

Petitioner Seminole Tribe of Florida ("**the Tribe**") filed suit seeking a refund of taxes because the Indian Commerce Clause of the United States Constitution[1] prohibits the State from taxing fuel used by an Indian tribe on its own tribal lands. *Fla. Dep't of Rev. v. Seminole Tribe of Fla.*, 65 So. 3d 1094, 1095 (Fla. 4th DCA 2011). The trial court entered summary judgment in the Tribe's favor. *Id*. at 1096. The trial court construed the Indian Commerce Clause as prohibiting the State from taxing the use of fuel by the Tribe on its reservation. *Id*. The trial court also found that the motor fuel taxes were excise taxes imposed on the use or consumption of the fuel, not retail sales taxes on the purchase of fuel. *Id*. The trial court concluded that, even though the fuel was purchased off tribal lands, it was exempt from tax because it was actually used by the Tribe on its tribal lands. The court ordered DOR to refund the taxes. *Id*.

Consistent with the trial court's decision, DOR conceded the Florida fuel tax is an excise tax on the "use" of fuel. However, DOR relied on section 206.01(24),

[1] Art. I, § 8, Cl. 3, U.S. Const.

Florida Statutes, which defines "use" as the placing of fuel in the tank.[2] *Seminole Tribe*, 65 So. 3d at 1095-96. Since the fuel was placed into the Tribe's vehicles' fuel tanks at off-reservation fuel stations, DOR argued the fuel should be considered "used" off-reservation, so the Indian Commerce Clause does not apply.

The Tribe argued the Indian Commerce Clause prohibits states from taxing the "use" of fuel by an Indian tribe on its reservation unless specifically authorized by Congress—regardless of where it is purchased. *Id*. at 1096. Congress has not authorized Florida, or any state, to tax the "use" of fuel by an Indian tribe on its own reservation. *Id*. The Tribe relied on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)—both of which involved tax schemes similar to Florida's. *Colville* invalidated an excise tax on the on-reservation "use" of an Indian tribe's vehicles—because the "taxable event" was the "use" of the vehicle, not the "purchase" of the vehicle. *Bracker* similarly invalidated a tax scheme on the on-reservation "use" of fuel by an Indian tribe's contractor where the taxable event was the "use" of the fuel.

Noting the issue was one of first impression in Florida, the district court reversed, expressly construing the Indian Commerce Clause as allowing the tax. *Seminole Tribe*, 65 So. 3d at 1097. Rather than relying on *Colville* and *Bracker*,

[2] Section 206.01(24), Florida Statutes, (2004), defines "use" as "the placing of motor or diesel fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof."

which address tax schemes such as Florida's, the district court relied on *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). Unlike Florida's, the tax scheme in *Wagnon* taxed the "purchase" of the fuel by the distributor, not the "use" of the fuel by the ultimate consumer (i.e., the Tribe). The Supreme Court upheld the tax in *Wagnon* because the "taxable event" triggering the tax was the distributor's "purchase" of the fuel which occurred off of the reservation. In relying on *Wagnon*, and on DOR's representation that it made an administrative decision not to tax fuel purchased by the Tribe on the reservation, regardless of where it is used, the district court focused solely on where the fuel was purchased; not on where the fuel was used, stating:

> The Tribe reaps the benefit of untaxed fuel when it is purchased on tribal lands even if the fuel is used off of tribal lands. Common sense suggests that the tax should correspondingly be imposed if the fuel is purchased off the reservation <u>regardless of where it is consumed</u>.

Seminole Tribe, 65 So. 3d at 1097 (emphasis added). Even DOR agrees the "taxable event" triggering the Florida fuel tax is the consumer's use of the fuel—not the purchase of the fuel. However, DOR's argument is that, under section 206.01(24), "use" of the fuel occurs the moment it is placed into the fuel tank, and, because the fuel is placed in the tank off-reservation, it is taxable. The Tribe's position is that DOR cannot rely on this definition to evade the Indian Commerce Clause.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction because the district court expressly construed the Indian Commerce Clause of the United States Constitution. The district court concluded the clause did not prohibit DOR from taxing fuel used by the Tribe on tribal lands in the performance of its functions as a sovereign government; finding that the "taxable event" that triggers the Florida fuel tax is the retail purchase transaction, not the use of the fuel. The district court concluded "[o]ff-reservation transactions, even by tribal members, are susceptible of taxation without running afoul of the Indian Commerce Clause. . . . [T]he tax should be . . . imposed if the fuel is purchased off the reservation regardless of where it is consumed." *Id*.

Exercising jurisdiction in this case is critical. As the district court recognized, this is an issue of first impression in Florida.[3] The decision will have a significant impact on the law of this State by allowing the State to tax fuel used by Indian tribes on tribal lands—in clear violation of the Indian Commerce Clause and contrary to United States Supreme Court precedents applying it.

The application of well-settled precedent from the United States Supreme Court mandates a conclusion that the State may not tax the on-reservation use of fuel by an Indian tribe. The district court reached a contrary result only after mischaracterizing the Florida fuel tax as a retail sales tax on the purchase

[3] While the Florida fuel tax statute has never been examined under the Indian Commerce Clause, the legal principle involved (*i.e.*, that a state may not tax the use by an Indian tribe of property on its reservation) is firmly established.

transaction, rather than an excise tax on the use of fuel. Without discussion, the district court assumed that the off-reservation purchase transaction is the "taxable event". This assumption is contrary to numerous provisions of the Florida fuel tax scheme and this Court's precedent that the Florida fuel tax is compensation a consumer pays for use of the State's roadways.

The district court accorded undue weight to DOR's claim that it made an administrative decision not to tax fuel purchased by the Tribe on its reservation, regardless of where the fuel is actually used. The validity of the tax scheme under the Indian Commerce Clause does not depend on DOR's administrative decision not to tax fuel it is allowed to tax.

ARGUMENT

I. THE DISTRICT COURT'S OPINION EXPRESSLY CONSTRUES THE INDIAN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IN WRONGLY CONCLUDING THAT A TRIBE'S ON-RESERVATION USE OF FUEL IS SUSCEPTIBLE TO STATE TAXATION—A CONCLUSION THAT VIOLATES THE CLAUSE AND IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

A. *Standard of Review.* This Court has discretionary jurisdiction to review a district court's decision that expressly construes a provision of the federal constitution. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii).

B. *Argument*. The Commerce Clause of the United States Constitution provides only "[Congress shall have Power]" to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, Cl.

3, U.S. Const. The portion of the clause referring to regulating commerce with the Indian Tribes is referred to as the "Indian Commerce Clause." In this case of first impression in Florida, the district court expressly construed the Indian Commerce Clause, concluding the clause did not prohibit DOR from taxing fuel used by an Indian tribe on tribal lands in the performance of its functions as a sovereign government. Specifically, the court applied the clause, and the United States Supreme Court precedent interpreting it, and concluded "[o]ff-reservation transactions, even by tribal members, are susceptible of taxation without running afoul of the Indian Commerce Clause." *Seminole Tribe*, 65 So. 3d at 1097.

This Court has accepted jurisdiction of a district court's similar construction and application of a constitutional provision. *See City Nat'l Bank of Fla. v. Tescher*, 578 So. 2d 701 (Fla. 1991). In *City National Bank of Florida v. Tescher*, 557 So. 2d 615, 616 (Fla. 3d DCA 1990), the Third District noted "[a]rticle X, section 4(c) of the Florida Constitution . . . prohibit[s] the devise of homestead property where the decedent is survived by a spouse or a minor." The Third District then construed the constitutional provision to apply to the facts at issue. It concluded "although the decedent's husband was physically alive at the time of decedent's death, the valid antenuptial agreement which he signed is the legal equivalent of his having predeceased the decedent" and therefore, the decedent "was free to devise the homestead with without restriction." *Id*. at 616-17. Although *Tescher* involved a state rather than federal constitutional provision, the

basis on which this Court exercised jurisdiction is identical to this case, *i.e.*, application of a constitutional provision to the particular facts of a case.

DOR may argue that the district court decisions in *Tescher* and this case do not "expressly" construe a state or federal constitutional provision. However, this Court has granted jurisdiction on this basis even where the district court decision made absolutely no mention of the constitutional provisions at issue. *See, e.g.*, *Melbourne v. State*, 679 So. 2d 759, 762 (Fla. 1996) (granting jurisdiction to review *Melbourne v. State*, 655 So. 2d 126 (Fla. 5th DCA 1995)), on the basis of express construction of state and federal constitutional provisions never explicitly referenced in the district court opinion).

Exercising jurisdiction in this case of first impression is of critical importance. The district court's erroneous decision will have a significant impact on the law of this State by allowing the State to unlawfully tax fuel used by Indian tribes on tribal lands—in clear violation of the Indian Commerce Clause.

The district court confused the distinction between an excise tax on the use of fuel and a sales tax on the purchase of fuel. *See Seminole Tribe*, 65 So. 3d at 1097. After mischaracterizing the tax as a sales tax, the district court wrongly applied *Wagnon*, which involved a Kansas sales tax that was triggered by the fuel distributor's purchase of the fuel. *Wagnon* has no application to an excise tax scheme, such as Florida's, in which the "taxable event" is the use of the fuel and such use is by an Indian tribe on its own reservation. Without discussion, the

district court wrongly assumed the off-reservation purchase transaction is the "taxable event." This is contrary to numerous provisions of the Florida fuel tax scheme[4] and this Court's holding in *Acme Freight Lines v. Lee*, 143 Fla. 635 (1940), that the Florida fuel tax is the compensation that a consumer pays for use of the State's roadways.

Even DOR agrees that the "taxable event" triggering the Florida fuel tax is the ultimate consumer's use of the fuel. The only disagreement between DOR and the Tribe is when and where the fuel is considered to be used for purposes of the Indian Commerce Clause. DOR relies on section 206.01(24), which defines "use" of the fuel as occurring the moment it is placed into the fuel tank of the vehicle. Since that occurred at off-reservation fueling stations, DOR contends the fuel should be considered used off-reservation in applying the Indian Commerce

[4] For example, section 207.003, Florida Statutes, provides that the tax on fuel used in commercial motor vehicles is imposed for the privilege of operating those vehicles on the State's public highways. Whether the tax is incurred depends entirely on how and where the fuel is actually used. For instance, fuel used for off-road agricultural purposes is exempt from tax regardless of where it is purchased. § 206.41(4)(c), Fla. Stat. Section 206.01(24) defines "use" of the fuel because "use" is the "taxable event" that triggers the Florida fuel tax. Section 206.41(3) specifically exempts any fuel that is already in the tank when a vehicle enters the State. If the "taxable event" were the retail purchase transaction, this provision would serve no purpose because the purchase transaction occurred outside the State. Section 206.01(24),which defines "use" of the fuel as occurring when it is placed into the fuel tank of the vehicle, specifically preserves the character of the fuel tax as a tax on the "use" of the fuel, and speaks only to the timing of that "use".

Clause. The Tribe contends the application of the Indian Commerce Clause depends on where the fuel is actually used.

Instead of relying on *Wagnon,* the district court should have relied on *Colville* and *Bracker,* both of which invalidated tax schemes very similar to Florida's. *Colville* invalidated an excise tax on the on-reservation "use" of an Indian tribe's vehicles—because the "taxable event" was the "use" of the vehicle, not the "purchase" of the vehicle.[5] *Bracker* similarly invalidated a tax scheme on the on-reservation "use" of fuel by an Indian tribe's contractor where the taxable event was the "use" of the fuel.[6] Quite simply, the State may tax fuel the Tribe uses off-reservation, but it may not tax fuel it uses on-reservation. *See also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985); *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164 (1973).

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[5] Because the Florida fuel tax scheme imposes tax on all fuel use by the Tribe, including fuel use on its reservation, the tax scheme is invalid in its entirety under *Colville* as it relates to the Tribe. Indeed, the district court acknowledged: "The [Supreme] Court suggested [in *Colville*] that if the State had tailored its tax to the amount of actual off-reservation use, the [tax in that case might have been upheld.]" *Seminole Tribe*, 65 So. 3d at 1097 (emphasis added). As in *Colville*, if the State tailors the fuel tax to the actual off-reservation use, the tax on that use would be appropriate. However, to the extent the State imposes the fuel tax on fuel used on the reservation, the fuel tax is clearly invalid.

[6] Although *Bracker* did not indicate where the fuel was purchased, it was presumably purchased off reservation. Arizona's statute treated all fuel purchased in the state as having been used on the (off-reservation) highways of the state.

The district court also wrongly accorded significant weight to DOR's claim that it made an administrative decision not to tax fuel purchased by the Tribe on its reservation, regardless of where the fuel is actually used. In the district court's view, common sense dictates fuel purchased by the Tribe off-reservation should be taxed regardless of where it is used. Even if it were true that DOR chooses not to tax fuel the Tribe purchases on-reservation but uses off-reservation, it is not prohibited from taxing fuel the Tribe uses off-reservation. Since the Florida fuel tax is imposed on the use of fuel, the State may tax fuel the Tribe uses off-reservation regardless of where it is purchased.

As United States Supreme Court precedent makes clear, the validity of a State excise tax on the use of fuel under the Indian Commerce Clause depends on where the fuel is actually used, not on where it is fictitiously deemed to be used under a state statute. Accordingly, to the extent the State imposes the tax on the use of fuel by the Tribe on its reservation, the tax is invalid.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction to review the district court's decision and allow full briefing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ____ day of October, 2011, to attorneys for Respondent, Department of Revenue, Pamela Jo Bondi, Attorney General, Courtney Brewer, Deputy Solicitor General, and Joseph C. Mellichamp, III, Special Counsel, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050.

Katherine E. Giddings

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

Katherine E. Giddings