No. 13-266

IN THE

Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
Petitioner,

v.

STATE OF OKLAHOMA EX REL. E. SCOTT PRUITT, ATTORNEY GENERAL OF OKLAHOMA, STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, AND STATE OF OKLAHOMA EX REL. OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES AND RULES

BLANK PAGE

INTRODUCTION

In accordance with Supreme Court Rule 15.6, petitioner Grand River Enterprises Six Nations, Ltd. files this reply brief to address new points raised in the State of Oklahoma's brief in opposition.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because The State Courts Misinterpreted and Misapplied This Court's Decisions In *Moe*, *Colville*, And *Attea*.

The fundamental question presented here is whether this Court's precedents allow Oklahoma (along with 45 other States and various U.S. territories with similar statutes) to impose onerous escrow obligations on tobacco product manufacturers that have not joined the "Master Settlement Agreement" (i.e., "non-participating manufacturers" or "NPMs") based partly on cigarette sales by Indian tribes to tribal members in Indian country. Oklahoma's trial and appellate courts answered "yes." But in reaching that conclusion, the state courts misinterpreted and misapplied this Court's precedents — including this Court's decisions in *Moe*, *Colville*, and *Attea*. (*See* Pet., at pp. 10-13.)

The State, in its brief in opposition, does not even attempt to justify, rationalize, or otherwise defend the decisions of the state trial and appellate courts in this case, opting instead to reargue the merits of other cases. The State's opposition is premised largely on factual findings and legal conclusions reached by federal courts in unrelated cases involving different parties and different

issues. (*See* Opp'n Br., at pp. 6-8, 12-13, citing *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, No. 02 Civ. 5068 (JFK), 2006 WL 1517603 (S.D.N.Y. May 31, 2006).) The State does not — and, plainly, cannot — show that the state courts' interpretation of Oklahoma's Escrow Statute is compatible with this Court's precedents.

For instance, the State contends that in *Muscogee (Creek) Nation*, the Tenth Circuit found that the Escrow Statute and "complementary legislation" are "non-discriminatory state laws of general application that do not specifically pertain to Indian Tribes, Tribal Members, or Indian Country." (Opp'n Br., at p. 8.) But as Grand River noted in its petition, the Tenth Circuit specifically found that "the Escrow Statute applies only to cigarettes bearing the Oklahoma excise tax stamp and not to cigarettes bearing tax-free stamps." (Pet., at p. 9 n.4, quoting *Muscogee (Creek) Nation*, 669 F.3d at 1164 (emphasis added).) The Tenth Circuit did not address the "payment-in-lieu-of-tax" stamp category at issue in this case. Consequently, the Tenth Circuit had no occasion to decide whether the Escrow Statute imposes escrow obligations on NPMs based on cigarette sales by Indian tribes to tribal members in Indian country; indeed, the plaintiff Indian tribe in *Muscogee (Creek) Nation* was not even a tobacco product manufacturer. *See* 669 F.3d at 1180.

Here, by contrast, Oklahoma's trial and appellate courts — at the State's urging — held that the Escrow Statute extends to on-reservation sales of cigarette packs bearing a "payment-in-lieu-of-tax" stamp — including,

critically, on-reservation sales by Indian tribes to tribal members. (*See* Pet., at p. 11, citing App. 22a, 25a.) In other words, the state courts in this case —unlike the Tenth Circuit in *Muscogee (Creek) Nation* — decided that the Escrow Statute imposes escrow obligations on NPMs such as Grand River based partly on cigarette sales by Indian tribes to tribal members in Indian country. Thus, Grand River's alleged escrow deficiency, by definition, includes cigarettes in packs bearing a payment-in-lieu-of-tax stamp sold by Indian tribes to tribal members in Indian country.[1]

Remarkably, the State continues to assert unfettered power to tax and regulate all sales of Grand River tobacco products, to Indians and non-Indians alike — including on-reservation sales by Indian tribes to tribal members. (*See* Opp'n Br., at pp. 10-12.) However, the State's rationale is quite obviously wrong; indeed, it verges on being frivolous.

According to the State, "[Grand River] is not located on Tribal land in the United States" (*id.* at p. 11), so, *ipso facto*, "[a]ll of [Grand River's] sales in Oklahoma are off-reservation sales (*id.* at 12). But the State's reasoning nullifies the very question decided by the state courts and raised in Grand River's petition.

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1. The State notes that under 68 Okla. Stat. § 349, cigarettes sold by tribal retailers were "taxed" in an amount equaling 75% of the excise taxes on cigarettes sold by non-Indian retailers. (Opp'n Br., at p. 9.) It is beyond dispute, however, that the State's escrow calculation based on such sales was not similarly reduced; that is, the State's calculation included 100% of the statutorily defined escrow obligation for every "unit sold," including cigarettes (units) subject to the 75% payment-in-lieu-of-tax rate under section 349.

Specifically, at every stage of this litigation, Grand River has challenged the State's assertion of power to impose escrow obligations based on cigarette sales by Indian tribes to tribal members in Indian country. (*See* Pet., at p. 10; App. 20a.) The State's argument — until now — was that "cigarette packs (and 'roll your own' tobacco containers) sold on tribal lands properly bear excise tax stamps of the state and the cigarettes in these packs should be included in the calculation of 'units sold' for purposes of determining the escrow obligation of [Grand River]." (App. 21a, emphasis added.) The state trial and appellate courts agreed with the State's (former) argument, holding that "packs of cigarettes manufactured by [Grand River] 'which have a tax stamp issued by the State of Oklahoma affixed thereto and are sold in the State of Oklahoma by retailers owned, licensed, or operated by an Indian tribe are "units sold" upon which escrow is due.'" (App. 25a, 38a-39a, emphasis added.) In rejecting Grand River's federal law challenge, the state courts misinterpreted and misapplied this Court's precedents — including, most notably, *Moe*, *Colville*, and *Attea*. Having led the state courts into error, the State should not be allowed to switch horses in midstream.

To be sure, this Court's Indian law cases establish that the distinction between on- and off-reservation activities is vitally important. *See generally Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110-13 (2005). However, it is the location of the activity being taxed or regulated that matters; thus, for example, "even where a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy

the *Bracker* interest-balancing test." *Id.* at 102 (emphasis added). A State does not acquire unlimited power to tax or regulate on-reservation sales — whether of cigarettes or any other product — merely because the thing being sold was manufactured elsewhere. *Cf. White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980) (rejecting state authorities' argument that they could lawfully assess taxes on non-Indians engaged in commerce on the reservation absent an express congressional statement to the contrary, and noting the Court's prior decisions "[holding] that state authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject"); *see also, e.g., Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 691-92 (1965) (holding that state tax could not be imposed on Indian trader with respect to trader's sales to Indians on the reservation); *Central Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 164-66 (1980) (holding that state tax could not be imposed on sale of farm equipment that occurred on the reservation even though the seller did not reside there). Therefore, in this context, the location of the transaction giving rise to an alleged escrow obligation is what counts, not where the tobacco was grown or the cigarettes manufactured. *See, e.g., Wagnon*, 546 U.S. at 102.[2]

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2. Moreover, as noted in Grand River's petition, *Moe*, *Colville*, and *Attea* are "cases about state taxation of non-Indians." (Pet., at p. 12, quoting *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 n.8 (1995) (emphasis added).) These cases — and the various other cases the State cites without discussion (*see* Opp'n Br., at pp. 11-12) — simply do not support the state courts' conclusion that Oklahoma has unfettered power to impose escrow obligations on NPMs such as Grand River based on cigarette sales by Indian tribes to tribal members occurring on the reservation.

Accordingly, for the foregoing reasons, and the reasons set out in Grand River's petition, this Court should grant the instant petition in order to reaffirm and enforce the important federal limits on States' power over on-reservation conduct involving only Indians. (*See* Pet., at pp. 11-13.) The State's brief in opposition only underscores the compelling need for review by this Court.

II. The Petition Should Be Granted Because The State Courts' Interpretation Of The Oklahoma Escrow Statute Imperils The Federal Law Rights Of NPMs, Indian Tribes, Tribal Members, And Indian Traders In Oklahoma And Numerous Other States And U.S. Territories.

The State's brief in opposition does not include a meaningful response to the additional reasons for granting the petition set out on pages 14 to 18 of Grand River's petition. Curiously, the State's opposition brief instead addresses a number of arguments not included in Grand River's petition. Indeed, "Proposition II" in the State's brief appears to consist almost exclusively of material copied from earlier state court briefing. Consequently, this portion of the State's opposition does not warrant further discussion in this reply brief.

CONCLUSION

For all the foregoing reasons, and the reasons set out in Grand River's petition for a writ of certiorari, the Court should grant Grand River's petition to decide the important federal questions presented in this case.

Respectfully submitted,

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