No. 04-624

IN THE

Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, in their official capacity as Commissioners of the Idaho State Tax Commission,
Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO; NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,
Respondents.

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

OPPOSITION OF RESPONDENTS COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE, SHOSHONE-BANNOCK TRIBES TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Idaho Supreme Court had previously held that the legal incidence of the state motor fuels tax is on the retailer and therefore does not apply to tribal retailers on Indian reservations, and the tax was subsequently amended, is the incidence of the amended tax determined by the State legislature's mere statement that it intended to change the legal incidence of the tax, or by the substantive provisions of the amended tax, which were not materially changed from those relied upon by the Idaho Supreme Court and still require the distributor to pass on and collect the tax from the tribal retailer?

2. Whether Congress, by enacting the Hayden-Cartwright Act without mentioning Indians, Indian tribes or Indian reservations, abrogated Indian immunity from state taxation in unmistakably clear terms.

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INTRODUCTION

The petition for a writ of certiorari should be denied because it does not present any conflict among the lower courts or any other question worthy of review by this Court. Both questions presented concern the application of this Court's *per se* rule barring state taxation of Indian tribes and their members on Indian reservations unless Congress' intent

to abrogate that immunity is unmistakably clear. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Whether the *per se* rule applies turns on the legal incidence of the state tax. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). The petition provides no valid reason why the court of appeals' application of the *per se* rule should be reviewed by this Court.

Applying this Court's decision in *Chickasaw Nation*, the court of appeals properly held that the substantive provisions of the state motor fuels tax, not the legislature's mere say-so, control the ultimate federal question of where the legal incidence falls. The court reasoned that petitioners' assertion that the legislature's incantation is conclusive would give the states complete control over the taxation of Indian tribes and their members in Indian country, in direct conflict with this Court's decisions barring state taxation of Indians absent clear Congressional authorization. In so holding, the court emphasized the unique circumstances in which the question arose, namely the Idaho Supreme Court had held in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002), that the legal incidence of the tax was on the retailer, and although the State legislature had then amended the tax to state its intent to impose the legal incidence on the distributor, the amendments had not substantively altered the provisions on which the legal incidence ruling in *Goodman Oil* was based. As the court of appeals held, the amended tax still requires the distributor to pass on and collect the tax from the retailer, and in this and other key respects continues to mirror the Oklahoma statutes at issue in *Chickasaw Nation*, thus placing the legal incidence of the tax on the retailer. Pet. App. 17-22. While petitioners urge that the South Dakota Supreme Court's ruling in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004), *vacated, in part, on other grounds by* 674 N.W.2d 314 (S.D. 2004), conflicts with the court of

appeals decision in this case, *Pourier* simply holds that the legal incidence of a tax which the retailer passes through to the consumer is on the consumer. No such question is presented here. The court of appeals ruling is consistent with *Chickasaw Nation*, does not present any split of authority, and does not warrant review by this Court.

Applying the rule set out by this Court that state taxation of Indian tribes and tribal members in Indian country is barred unless Congress has abrogated that immunity in unmistakably clear terms, the court of appeals properly held that the Hayden-Cartwright Act, ch. 582, 49 Stat. 1519 (1936) (codified as amended at 4 U.S.C. § 104), does not abrogate Indian immunity from state taxation. That ruling is consistent with the decision of every federal and state court to consider the issue and does not warrant review.[1] As these decisions establish, because the Hayden-Cartwright Act does not refer to "Indians" or "Indian tribes," who hold the immunity petitioners contend was abrogated by the Act, or to "Indian reservations," which are legally distinct from the federal enclaves included within the term "United States military or other reservations," it is not unmistakably clear that Congress intended to abrogate Indian immunity from state taxation in enacting the Act.

STATEMENT OF THE CASE

A. Factual Background

Respondents Coeur d'Alene Tribe, Nez Perce Tribe and Shoshone-Bannock Tribes (collectively "Tribes") are feder-

[1] This Court previously denied the Idaho State Tax Commission's petition for a writ of certiorari with respect to this same issue in *Goodman Oil*, 534 U.S. 1129 (2002). The State of Idaho was also among the states appearing as *amici* in support of the petition for a writ of certiorari in *Pourier*, *see* Br. for Idaho, et al. as *Amici Curiae* (May 10, 2004), which presented the same Hayden-Cartwright Act issue decided in this case, and in which review was also denied. 124 S. Ct. 2400 (2004).

ally recognized Indian tribes residing on Indian reservations in Idaho, on which they own and operate retail gasoline stations. Pet. App. 4. For several years prior to the Idaho Supreme Court's decision in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002), the State had imposed a tax of 25 cents per gallon on all motor fuel delivered to tribal retailers. Pet. App. 4. Pursuant to Idaho statute, the fuel distributor collected the tax from the tribal retailers and remitted it to the State. *Id.*[2] In *Goodman Oil*, the Idaho Supreme Court declared the State's taxation on Indian reservations to be unlawful. Pet. App. 5. After the decision in *Goodman Oil*, each Tribe enacted its own fuel tax for use in improving and maintaining roads on its own Reservation. Pet. App. 6.[3]

In *Goodman Oil*, the Idaho Supreme Court first held that the Hayden-Cartwright Act does not authorize state taxation of motor fuel sales on Indian reservations because neither the text nor the legislative history of the Act makes it "unmistakably clear" that Congress intended to authorize such taxation. *Goodman Oil*, 28 P.3d at 998-1002. Interpreting the Idaho fuel tax statutes, the court then held that while the tax was imposed on all gasoline when received by the distributor, *id.* at 1002, the legal incidence of the tax fell on the tribal retailer. *Id.* at 1002-04. In so holding, the court found controlling the substantial

[2] In 1994, the Coeur d'Alene Tribe and the Idaho State Tax Commission entered into an agreement pursuant to which the Tribe collected and remitted the state fuel tax on retail sales of gasoline to non-Indians. *Goodman Oil*, 28 P.3d at 997. These payments were made from that time until *Goodman Oil* was decided. *Id.*

[3] The Coeur d'Alene Tribe imposes a tax of 25 cents per gallon, Pet. App. 49 n.2, as do the Shoshone-Bannock Tribes. CR 64 ¶ 9 (No. CV-02-185-S-BLW). The Nez Perce Tribe imposes a tax of 15 cents per gallon. Pet. App. 49 n.2. Each Tribe has its own substantial road maintenance needs. CR 7 ¶ 2 (No. CV-02-185-S-BLW) (Coeur d'Alene Tribe); CR 6 ¶ 6 (No. CV-02-203-C-BLW) (Nez Perce Tribe); CR 64 ¶¶ 10, 11 (No. CV-02-185-S-BLW) (Shoshone-Bannock Tribes).

similarities between the Idaho tax and the Oklahoma tax invalidated in *Chickasaw Nation*, including (1) the requirement that the distributor pass on and collect the tax from the retailer, and then remit it to the State, (2) the tax credit provided to the distributor for collecting and remitting the tax on behalf of the State, (3) the ability of the distributor to deduct tax payments it was unable to collect from the retailer, and (4) the absence of any provision setting off the retailer's liability where consumers fail to pay. *Id*. at 1003. As the court concluded, where "'[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel; the motor fuel taxes are *legally imposed on the retailer* rather than on the distributor or the consumer.'" *Goodman Oil*, 28 P.3d at 1003 (quoting *Chickasaw Nation*, 515 U.S. at 462).

Idaho then petitioned this Court for a writ of certiorari to review the ruling in *Goodman Oil* only with respect to the Hayden-Cartwright Act issue. *Idaho State Tax Comm'n v. Goodman Oil Co.*, No. 01-794. Idaho's petition was denied on February 19, 2002. 534 U.S. 1129.

On March 23, 2002, the Idaho legislature amended the motor fuels tax in an effort to shift the legal incidence of the tax to the distributor. 2002 Idaho Sess. Laws ch. 174 ("Ch. 174") (Pet. App. 49). The Statement of Purpose attached to the bill that enacted Ch. 174 declared "[t]his bill establishes laws for the application of motor fuels taxes on Idaho's Indian reservations." Pet. App. 151. The legislature also explicitly stated in the law's uncodified Statement of Intent that:

> The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of *Goodman Oil* . . . . Specifically, the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel in [Idaho] . . . .

Ch. 174, § 1 (Pet. App. 133). The statutory definition of "receipt" referred to in § 1, set forth in Idaho Code § 63-2403, was not substantively amended. Pet. App. 140-41. While § 2 of Ch. 174 amended Idaho Code § 63-2402(1) to impose the tax "upon the receipt of motor fuel in this state by any distributor," Pet. App. 133, the *Goodman Oil* court had already construed the tax to be imposed on all gasoline when received by the distributor. 28 P.3d at 1002. Chapter 174 did not substantively amend the other provisions on which the *Goodman Oil* ruling was based. Pet. App. 15-16.

Chapter 174 was enacted by the State as emergency legislation, and was declared to be "in full force and effect on and after its passage and approval, and retroactively to July 1, 1996." Ch. 174, § 14 (Pet. App. 151).

B. District Court Proceedings

The instant litigation, begun by the action filed by the Coeur d'Alene Tribe on April 21, 2002, CR 1 (No. CV-02-185-S-BLW), was consolidated with actions later filed by the Nez Perce Tribe, CR 1 (No. CV-02-203-C-BLW), and the Shoshone-Bannock Tribes, CR 1 (No. CV-02-226-S-BLW). *See* CR 23 (No. CV-02-203-C-BLW) (first consolidation order); CR 56 (No. CV-02-226-S-BLW) (second consolidation order). Each action named the State Tax Commissioners in their official capacities as defendants and alleged, *inter alia*, that the legal incidence of the state motor fuels tax remained on the retailer after Ch. 174 was enacted, and federal law therefore barred its imposition on tribal retailers on Indian reservations.

On cross-motions for summary judgment, the district court addressed two issues: (1) whether the Hayden-Cartwright Act authorized application of the state tax to fuel sold to Indians and the Tribes on their Reservations, and (2) whether the legal incidence of the tax, as amended by Ch. 174, fell on the retailer or the distributor. Pet. App. 47-59. The court first

ruled, as the Idaho Supreme Court had a year earlier, that the Hayden-Cartwright Act did not expressly authorize state taxation of fuel sales on Indian reservations. *Id*. at 52-55. The court held that the use of the word "reservation" in the Act did not establish that Congress intended to grant states authority to tax Indians inside Indian country because Indian reservations are distinct from the types of reservations referred to in the Act. *Id*. at 54-55. While Congress had given up the federal government's exemption from state taxation to a limited extent in the Act, the court held that this did not mean that the federal government had given up the Indians' exemption from state taxation on Indian reservations. *Id*. at 55.

The court then determined that Ch. 174 did not change the legal incidence of the tax. While the new statute declared that the legal incidence fell on the distributor, the key provisions of the tax remained unchanged. "[E]ven while declaring the distributor legally obligated to pay the tax, the legislature imposed no real burden on the distributor. Instead, the statute retains the 'pass through' quality of the prior statute. No difference exists between the old statute and the new one." *Id*. at 58. Regarding the State's argument that the legislature's declaration was conclusive, the court held that a state could not be permitted to avoid a constitutional prohibition on taxing tribes by a "mere incantation" that the legal incidence fell on the distributor, with no change in the substance of the tax at all. *Id.*

C. Court of Appeals Ruling

The Ninth Circuit affirmed, holding that as a matter of federal law, the legal incidence of the tax remains on the tribal retailer and that the Hayden-Cartwright Act does not provide the express Congressional authorization necessary for the State to impose its motor fuels tax on Indian tribes.

Addressing the State's contention that the legislature's incantation on legal incidence conclusively resolved the issue, the court of appeals held that while the legislature's designation was dispositive of its intent, the "incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by a state legislature's mere statement." Pet. App. 11. As the court held, if state legislatures were permitted to do so, it would wholly undermine this Court's precedent prohibiting state taxation of Indians absent clear Congressional authorization, *id.* at 12, and allow states to tax Indian tribes simply by declaring that "the incidence of the tax lies elsewhere, [which] would permit the states indirectly to threaten the very existence of the Tribes," *id.* at 14. As the amended tax was substantively indistinguishable from the prior tax law, which the Idaho Supreme Court had already held imposed the legal incidence on the retailer, *id.* at 15-20, and continued to require the distributor to pass on and collect the tax from the retailer and then remit it to the State, *id.* at 17-22, the court held that the legal incidence remained on the retailer. *Id.* at 22.

The court of appeals then held that the Hayden-Cartwright Act does not provide the "unmistakably clear" Congressional intent necessary to abrogate the tribes' immunity from state taxation under this Court's decision in *Blackfeet Tribe*, 471 U.S. at 765. As the court noted, "[t]he Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that clear congressional authorization under the Hayden-Cartwright Act is not present." Pet. App. 28. The court rejected the State's argument that the unmistakably clear standard does not apply to a statute of general applicability, determining that "this argument misses the preliminary point of statutory interpretation," namely whether the Act gives a general command permitting state taxation of motor fuel sales on reservations. *Id.* at 31. The court declined to construe the Act's waiver of federal tax immunity as

an implied waiver of tribal tax immunity, especially where no mention was made in the text or legislative history of the abrogation of the tribes' immunity. *Id*. at 37. It determined that to interpret the Act as authorizing state taxation of on-reservation sales to tribally-owned retailers would require two unsupported assumptions: that Congress meant to include Indian reservations in the terms of the Act without specifically so stating, and that Congress intended to abrogate the immunity of Indian tribes without saying so. *Id*. In view of the ambiguous terms and legislative history, the court held that the Act did not provide the unmistakably clear intent necessary to achieve this abrogation. *Id*.

Judge Kleinfeld filed a dissenting opinion addressing only the Hayden-Cartwright Act issue. His opinion invoked the same "unmistakably clear" standard, but interpreted the Act as providing the requisite level of clarity.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW, HOLDING THAT THE LEGISLATURE'S MERE SAY-SO IS NOT CONCLUSIVE OF THE LEGAL INCIDENCE OF THE AMENDED STATE FUEL TAX WHERE THE TAX STILL REQUIRES THE DISTRIBUTOR TO PASS ON AND COLLECT THE TAX FROM THE TRIBAL RETAILER, IS CONSISTENT WITH *CHICKASAW NATION*

A. The Court of Appeals Properly Applied the Principles of *Chickasaw Nation* in Rejecting the Contention that the Legislature's Mere Statement of Intent Is Conclusive of Legal Incidence

Petitioners' contention that the State legislature's explicit intent to place the legal incidence of the state fuel tax on the distributor is conclusive of the question does not warrant review by this Court. Petitioners do not cite any case that has

ever so held, much less establish a split of authority on the question. Instead, petitioners' argument is based exclusively on this Court's statement in *Chickasaw Nation* of what was *not* before the Court, namely the statutes there at issue did not "expressly identify who bears the tax's legal incidence," or "contain a 'pass through' provision, requiring distributors and retailers to pass the tax's cost to consumers" and that "[i]n the absence of such dispositive language, the question is one of fair interpretation of the taxing statute as written and applied." 515 U.S. at 461 (internal quotations omitted). In arguing that the legislature's mere say-so is conclusive of legal incidence, petitioners contend that in *Chickasaw Nation*, this Court authorized states to tax Indians and Indian tribes in Indian country as long as the legislature declares that the legal incidence is elsewhere, and that if such a declaration is made it makes no difference how the tax statute is written and applied. *Chickasaw Nation* did not so hold and may not be so construed. To the contrary, in *Chickasaw Nation* this Court "adhere[d] to settled law" in holding that if the legal incidence of a state tax rests on a tribe or its members in Indian country, it is invalid absent clear Congressional authorization. *Id*. at 453, 458-59.

While acknowledging that the "Supreme Court in *Chickasaw Nation* was not facing the case of an explicit legislative designation," Pet. App. 11, the court of appeals gave careful consideration to the language in *Chickasaw Nation* on which petitioners rely. Based on this analysis, the court held "the Supreme Court's use of the term 'dispositive' in context appears to us to relate to the legislature's *intent* about where the incidence of the tax lies, and not to the ultimate federal question of where the tax's legal incidence lies." Pet. App. 12. This holding fully comports with this Court's decision in *Chickasaw Nation* and the settled law on which it is based.

The court of appeals began by recognizing that "if the state tax's incidence falls on the Indians, it is unlawful absent a

'clear congressional authorization' to the contrary," Pet. App. 8-9 (quoting *Chickasaw Nation*, 515 U.S. at 459), and that the determination of legal incidence is a question of federal law, *id*. at 9 (citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)).

The court held that because the legal incidence of a state tax is a question of federal law, it "cannot be conclusively resolved in and of itself by the state legislature's mere statement." Pet. App. 11. As this Court held in *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930), in rejecting a state's claim that its tax was imposed on oil and gas severed from the realty, rather than on an Indian allottee's legal interest in allotted lands: "[w]here a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."[4] Were the law otherwise, the state

[4] More broadly, this Court has consistently made its own determination of whether a state tax is barred by the Indian immunity from state taxation, rather than deferring to the state's construction of the tax. *See, e.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (rejecting state's contention that because state law made a state excise tax on sales of fee land a lien upon the property sold, the tax fell within the Burke Act's authorization of the "taxation of land" because "otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe* [*v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976)]) by merely making the unpaid tax assessable against the taxpayer's fee-patented mineral estate"); *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 126-28 (1993) (rejecting state's assertion that state vehicle excise tax should be treated as a sales tax on transactions occurring outside Indian country, and holding that state tax was a personal property tax preempted by the holdings in *Moe* and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)); *Colville*, 447 U.S. at 162-63 (state cannot avoid Indian exemption from state personal property tax recognized in *Moe* by labeling its tax an excise tax).

could name one party the taxpayer, while requiring another to pay the tax, and in the process defeat the second party's tax immunity, which the court of appeals found would directly conflict with this Court's decision in *Kern-Limerick*. Pet. App. 14.[5] That decision "squarely rejected the idea that 'a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign' because '[s]uch a conclusion . . . would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.'" Pet. App. 13-14 (quoting *Kern-Limerick*, 347 U.S. at 121).

Assessing the conflict between this Court's precedent and petitioners' contention, the court of appeals held "[i]f the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the legal incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization." Pet. App. 12 (citing *Blackfeet Tribe*, 471 U.S. at 765). That conclusion is well supported. "In the special area of state taxation of Indian tribes and tribal members, [this Court has] adopted a *per se* rule," under which the Court "'will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.'" *California v.*

[5] The court properly rejected petitioners' contention that legal incidence is determined by who the State intends the taxpayer to be. Pet. App. 11 n.4. While petitioners urge that position here, Pet. 19 (citing *First Agric. Nat'l Bank v. State Tax Comm'n,* 392 U.S. 339, 347-48 (1968)), this Court has made clear that "the test formulated by [*First Agric.*]" for determining legal incidence is that "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States v. State Tax Comm'n of Miss*., 421 U.S. 599, 608 (1975).

Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) (quoting *Blackfeet Tribe*, 471 U.S. at 765); *see also Yakima*, 502 U.S. at 258.[6] That rule is rooted in the Constitution and the retained sovereignty of Indian tribes:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), citing *Worcester v. Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Blackfeet Tribe, 471 U.S. at 764.[7] The *per se* rule protects the exclusive constitutional authority of the United States in Indian affairs by "accord[ing] due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459 (citing *Yakima*, 502 U.S. at 267). Petitioners' contention

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[6] In contrast, the petition for a writ of certiorari in *Richards v. Prairie Band Potawatomi Nation*, No. 04-631, concerns the balancing test, which is applied to determine whether federal law preempts state taxation of non-Indians. *See Colville*, 447 U.S. at 154-64. In this area, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Chickasaw Nation*, 515 U.S. at 459 (citing *Colville*, 447 U.S. at 154-57). While the Brief *Amicus Curiae* of the Multistate Tax Commission in *Prairie Band*, at 10-11, seeks to link that case to the instant one, this Court's decisions establish that the Indian immunity from state taxation is governed by principles that are categorically distinct from the rules which apply to state taxation of non-Indians, as discussed in the text above. Thus, the link suggested by *Amicus Curiae* in *Prairie Band* is plainly not legally significant.

[7] This Court has applied these principles since 1867, *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), and "has never wavered from the views expressed in these cases." *Blackfeet Tribe*, 471 U.S. at 765.

seeks to place states in the position that the Constitution has reserved for Congress, in direct conflict with the decisions of this Court.[8]

The court of appeals further found that "[i]f state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes" because "the unchecked power to tax is the power to destroy." Pet. App. 14 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). The *per se* rule, which is "'rooted in the unique trust relationship between the United States and the Indians,'" *Blackfeet Tribe*, 471 U.S. at 766 (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)), is informed by this same concern. As this Court stated in *Yakima*, "[i]n the area of state taxation, . . . Chief Justice Marshall's observation that 'the power to tax involves the power to destroy,' counsels in favor of the categorical approach." 502 U.S. at 258 (citation omitted).

In rejecting petitioners' contention that the State legislature's designation of legal incidence is conclusive of the issue, the court emphasized that its conclusion was reinforced by the unique circumstances in which the issue arose. Pet. App. 15-16. Specifically, before the Idaho legislature enacted Ch. 174, the Idaho Supreme Court had determined in *Goodman Oil* that the retailer bore the legal incidence of the motor fuels tax. That holding, the court of appeals found, was "entitled to weight on how we assess the legal incidence of the tax from its operation." *Id.* at 15 (citing *Am. Oil Co. v.*

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[8] Applying the *per se* rule, this Court has held that states may not tax Indian tribes and Indians in Indian country with respect to their income, *Okla. Tax Comm'n*, 508 U.S. at 126; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973), personal property, *Colville*, 447 U.S. at 163-64; *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe*, 425 U.S. at 480-81, or on-reservation sales and purchases, *Yakima*, 502 U.S. at 258; *Colville*, 447 U.S. at 160; *Moe*, 425 U.S. at 475-81.

Neill, 380 U.S. 451, 455-56 (1965)). Acknowledging that *Goodman Oil* had construed the tax before Ch. 174 was enacted, the court found that the operative provisions of the tax on which *Goodman Oil* was based "remained in substance unchanged by the state legislative efforts to circumvent *Goodman Oil*." Pet. App. 15. While the State relied heavily on § 2 of Ch. 174, which amended Idaho Code § 63-2402(1) to provide that the tax is imposed "upon the receipt of motor fuel," the court held that this change had not substantively altered the state fuel tax. Pet. App. 16 n.8. As the court explained, before Ch. 174 was enacted, the unamended tax had been "imposed on all gasoline received" by the distributor, as shown by Idaho Code § 63-2405, and "the *Goodman Oil* court had already interpreted the unamended statute as imposing a tax when the gasoline was received by the fuel distributor." *Id*. (emphasis omitted). In these circumstances, the court of appeals correctly held that it should not automatically defer to the Idaho legislature's statement of intent on legal incidence. *Id*. at 16. That holding does not present any split of authority and does not warrant review by this Court.

B. The Court of Appeals Ruling on Legal Incidence Is Fully Consistent with *Chickasaw Nation*

On legal incidence, petitioners seek review of only the question whether the State legislature's designation of legal incidence is conclusive. However, the soundness of the court of appeals' determination of legal incidence provides an additional reason for rejecting petitioners' position.[9] As the

[9] Petitioners also contend that the rule for which they argue was the "*quid pro quo*" which the *amici curiae* states urged upon the Court in *Chickasaw Nation* for their rejection of the Oklahoma Tax Commission's position in that case, Pet. 16, but this assertion reveals only the lack of support for their argument in the law.

court held, when a party simply collects taxes for transmittal to the state, the collecting party does not bear the legal incidence of the tax. Pet. App. 9 (citing *Chickasaw Nation*, 515 U.S. at 461-62). Rather, where "'[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel'; the 'motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer.'" *Chickasaw Nation*, 515 U.S. at 462 (quoting *Chickasaw Nation v. Oklahoma, ex. rel. Okla. Tax Comm'n*, 31 F.3d 964, 971-72 (10th Cir. 1994)).

The court of appeals began by emphasizing that "[c]ritical to our analysis is our conclusion that the relevant operative provisions of the fuel tax that the state supreme court analyzed have not changed." Pet. App. 17. The court of appeals first determined that Idaho law "still requires the non-tribal distributor who receives the motor fuel and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State." *Id.* at 17 and n.9.[10] In these respects, the court held, the Idaho motor fuels tax was similar to the state tax statutes at issue in *Chickasaw Nation*, which were held to impose the legal incidence of the tax on

[10] As the court of appeals further held, the express language of Idaho Code § 63-2435 "declares that state fuel taxes are included in every taxable sale of gasoline made by a distributor and that upon receipt of payment by the distributor, an amount equal to the tax is money due the state, which the distributor holds in trust for payment to the state." *Id.* at 17. Under this provision, the court explained "the source of the funds the distributor collects—which are placed in trust for the state—is the tax that is assessed on and collected from the *retailers*. That is, the distributor never receives title to the state's share of the retailer's funds." *Id.* at 18 n.11. As the court further found, state regulations also expressly require that "all invoices for sales by distributors to retailers must show that the state fuel tax was charged to the retailer." *Id.* at 18 (citing Idaho Admin. Code § 35.01.05.150.g).

the retailer. *Id.* at 18.[11] Second, the court of appeals found that State law "provides tax credits to the distributor for 'collecting and remitting' the tax on behalf of the State." Pet. App. 19 (quoting Idaho Code § 63-2407(4)). Here too, the court of appeals found that the Idaho tax was like the statutory scheme at issue in *Chickasaw Nation*. *Id.* Third, the court held that the Idaho statutes provided "tax credits to the distributor for fuel taxes that the distributor has paid but cannot then collect from the retailer," which again "square[d] with *Chickasaw Nation*." *Id.* at 20. Fourth, the court held that "Idaho law provides that the retailer has the right to any refund of fuel taxes sought by the distributor that the retailer has paid." *Id.* at 21. In contrast, the court of appeals pointed out, retailers are neither offered a tax credit when consumers fail to pay the tax, nor are they offered a tax credit for collecting and remitting the tax. *Id.* Furthermore, the tax must be paid whether or not the Indian retailer sells the fuel to consumers. *Id.* As the court stated, "it is plain that the tax buck stops with the Indian tribal retailers." *Id.*

While petitioners did not rely on the decision in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 399 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004), *vacated, in part, on other grounds by* 674 N.W.2d 314 (S.D. 2004), to support their position on legal incidence before the court of appeals,[12] they now contend that the court of appeals decision conflicts with *Pourier* on that very issue. This contention has no merit.

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[11] Petitioners simply ignore this analysis and the explicit statutory requirements quoted by the court of appeals, asserting that "the court of appeals did not identify, or even suggest the existence of, an explicit pass-through requirement." Pet. 20 (emphasis omitted). This contention is simply incorrect.

[12] Petitioners did, however, seek to distinguish the *Pourier* court's holding on the application of the Hayden-Cartwright Act. Reply Br. of Appellants in Nos. 02-35965, 02-35998 and 02-36020, at 14 and n.3 (9th Cir. July 8, 2003).

In *Pourier*, the South Dakota Supreme Court held that the legal incidence of the South Dakota fuel tax was on the consumer because the tax was passed through to the consumer.[13] That holding presents no conflict with the court of appeals' holding in this case that the legal incidence of a state tax which the distributor is required to pass on and collect from the retailer is on the tribal retailer.[14] Furthermore, *Pourier* did not pose the question whether a state may tax Indian tribes "merely on the assertion that the incidence of the tax lies elsewhere," as was the case here. Pet. App. 14. Indeed, the state conceded in *Pourier* that the legal incidence of the tax fell on the tribe or its members. 658 N.W.2d at 403 n.4. *Pourier* thus does not conflict with the court of appeals decision in this case.

[13] That holding was based on the state trial court's finding that the retailer passed the tax through to the consumer, *Pourier*, 658 N.W.2d at 398, as well as the state tax statute, and this Court's statement in *Chickasaw Nation* that the state could "'declar[e] the tax to fall on the consumer and direct[] the Tribe to collect and remit the levy.'" *Id*. at 405 (quoting *Chickasaw Nation*, 515 U.S. at 460). That statement simply recognizes that an express pass-through provision is not required to place the legal incidence of a state tax on the consumer. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam).

[14] That ruling is also consistent with *Chickasaw Nation*.

II. THE DECISION BELOW CORRECTLY HELD, CONSISTENT WITH EVERY FEDERAL AND STATE COURT TO CONSIDER THE ISSUE, THAT THE HAYDEN-CARTWRIGHT ACT DOES NOT SHOW THAT CONGRESS INTENDED TO ABROGATE INDIAN IMMUNITY FROM STATE TAXATION IN UNMISTAKABLY CLEAR TERMS

A. As the Court of Appeals Held, This Court's Rulings Make Clear that Indian Immunity from State Taxation Is Abrogated Only if Congress' Intent to Do So Is Unmistakably Clear

Petitioners seek review of the court of appeals ruling that the Hayden-Cartwright Act does not abrogate the tribes' immunity from state taxation, but do not allege any split of authority on the question presented. Nor could they. As the court of appeals held, "[t]he Eighth Circuit, every federal district court, and every state court to address the issue thus far has held that clear congressional authorization under the Hayden-Cartwright Act is not present, rejecting states' attempts to tax Indians for motor fuel delivered and sold on their own reservations." Pet. App. 28 (citing *Marty Indian Sch. Bd. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987); *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1304 (D. Kan. 2004); *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1307 (D. Kan. 2003);[15]

[15] *Prairie Band* is now before this Court on the State of Kansas' petition for a writ of certiorari with respect to other issues. *Richards v. Prairie Band Potawatomi Nation*, No. 04-631. The district court's ruling with respect to the Hayden-Cartwright Act was not cross-appealed to the court of appeals by the state, and accordingly was not addressed by the court of appeals in *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004).

Pourier, 658 N.W.2d at 399; *Goodman Oil*, 28 P.3d at 1001-02)).[16]

The principal basis on which review is sought is petitioners' contention that the court of appeals improperly "invok[ed] the Indian canons of construction" in ruling on the Hayden-Cartwright Act, which petitioners contend is a general act of Congress to which the Indian canons of construction do not apply. Pet. 25; *see also* Pet. 26 and n.10-11. But the only "canon of statutory construction from the Indian context" applied by the court of appeals was the settled rule that "'Indian tribes and individuals generally are exempt from state taxation within their own territory,' unless Congress has 'made its intention to do so unmistakably clear,'" Pet. App. 31 (quoting *Blackfeet Tribe*, 471 U.S. at 764-65).[17] *See Yakima*, 502 U.S. at 258; *Cabazon*, 480 U.S. at 215 n.17; *Blackfeet Tribe*, 471 U.S. at 765; *see also Chickasaw Nation*, 515 U.S. at 459 ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional

[16] As the court of appeals also noted, this Court has twice expressly declined to consider the Hayden-Cartwright Act issue presented by petitioners. Pet. App. 28 n.20 (citing *Chickasaw Nation*, 515 U.S. at 456-57; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980)).

[17] Contrary to petitioners' assertion, this Court has consistently applied the canon which requires that statutes be construed liberally in favor of the Indians, and that ambiguous provisions be interpreted to their benefit, to statutes which are claimed to abrogate Indian tax immunities, without regard to whether the statute is general or specific. *Yakima*, 502 U.S. at 269; *Blackfeet Tribe*, 471 U.S. at 766; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982); *Bryan*, 426 U.S. at 392; *McClanahan*, 411 U.S. at 174; *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). In any event, the court of appeals did not apply this canon.

authorization."). As this Court's decisions show, the court of appeals' application of this standard was clearly proper.[18]

These decisions reject petitioners' novel contention, unsupported by the ruling of any court, that this Court's decision in *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), set forth the standard for determining whether Congress has authorized state taxation of Indian tribes and their members. In *Tuscarora*, this Court held that a licensee under the Federal Power Act was empowered by Section 21 of the Act to condemn land owned in fee by the Tuscarora Indian Nation. While petitioners rely on the statement in *Tuscarora*, that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary," 362 U.S. at 120, this Court has made clear that "[i]n the special area of state taxation of Indian tribes and tribal members," the *per se* rule is controlling, and that rule requires that Congress' intent to abrogate Indian immunity from state taxation be unmistakably clear. *Cabazon*, 480 U.S. at 215 n.17. The court of appeals properly rejected petitioners' contention that *Tuscarora* requires otherwise. Pet. App. 31.[19]

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[18] *See also Pourier*, 658 N.W.2d at 399 (unmistakably clear standard); *Goodman Oil*, 28 P.3d at 1001-02 (unmistakably clear standard); *Prairie Band*, 241 F. Supp. 2d at 1304 (state taxation of Indians barred "[u]nless Congress makes it abundantly clear that it intends to grant taxing authority to the states").

[19] Furthermore, the statement from *Tuscarora* on which petitioners rely did not provide the basis of the decision. As the Court explained:

> [The Federal Power Act] neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

362 U.S. at 118. As the Tuscarora lands there involved were not "reservation" lands as defined by the Act, *id.* at 110-15, nor were they subject to

There is no split of authority with respect to that ruling and review is not warranted here.

B. The Court of Appeals Ruling with Respect to the Hayden-Cartwright Act Is Consistent with the Decision of Every Court to Consider the Issue and Does Not Warrant Review by This Court

Beyond this, petitioners simply restate their position with respect to the Hayden-Cartwright Act, which the court of appeals and every other federal and state court to consider the issue have rejected. In view of the fact that two federal courts of appeals, two state supreme courts and three federal district courts all have held that the Hayden-Cartwright Act does *not* apply to Indian reservations, it cannot be "unmistakably clear" that Congress intended the Act to so apply. Review of the court of appeals decision on this issue is not warranted.

While the Hayden-Cartwright Act "effectively waived the *federal* government's sovereign immunity from state tax collection," Pet. App. 37, this does not establish that Congress intended also to abrogate *tribal* immunity from state taxation. The Act makes no reference to Indian tribes, which are immune from state taxation as an element of their retained sovereignty. *Blackfeet Tribe*, 471 U.S. at 764. It cannot be said to be unmistakably clear that Congress extinguished that immunity without even referring either to its holder or to its existence. Pet. App. 37 (quoting *Bryan*, 426 U.S. at 381) ("'[S]ome mention [of the abrogation of tribal immunity] would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.'"). The district court reached the

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any treaty between the Tuscarora and the United States, *id*. at 123, the Court held that Section 21 of the Federal Power Act applied to these lands. *Id*. at 123-24.

same conclusion. Pet. App. 55 and n.4; *see also Prairie Band*, 241 F. Supp. 2d at 1306; *Pourier*, 658 N.W.2d at 403.

Nor does the Hayden-Cartwright Act refer to "Indian reservations." As the court of appeals held, simply because the term "reservation" could include Indian reservations does not mean that it does so whenever it is used. Pet. App. 32. As this Court made clear in *United States v. Celestine*, 215 U.S. 278, 285 (1909), "a reservation is not necessarily 'Indian country.'"[20] It has long been clear, as the court explained in *Goodman Oil*, that "Indian reservations are different; distinct from every other type of reservation, i.e., national parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law." 28 P.3d at 1000; *accord Prairie Band*, 241 F. Supp. 2d at 1303-05; *Pourier*, 658 N.W.2d at 399. That an express reference to Indian reservations is required before a federal statute may be held to authorize state taxation on Indian reservations is clear

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[20] In *Celestine*, this Court interpreted the Act of March 3, 1885, ch. 341, 23 Stat. 362 ("1885 Act"), which made the laws of the United States which apply to crimes committed within the exclusive jurisdiction of the United States applicable to seven listed crimes when committed by Indians on Indian reservations. 215 U.S. at 283-84. The defendant argued that the 1885 Act did not apply to Indian allotments because such lands, though within the Indian reservation on which the crime occurred, were not "Indian country," as that term was then defined by federal law. *Id*. at 283-87. In rejecting this argument, the Court stated that:

> the word 'reservation' has a different meaning, for while the body of land described in the section quoted as 'Indian country' was a reservation, yet a reservation is not necessarily 'Indian country.' The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, *or* an Indian reservation, *or*, indeed, one for any purpose for which Congress has authority to provide.

Id. at 285 (emphasis added). In *Celestine*, the statute made its meaning clear by expressly referring to "any Indian reservation," *id*. at 284, thus recognizing that the term "Indian reservation" has a separate and distinct meaning in the law.

from this Court's decision in *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965). There, this Court held that the Buck Act, ch. 389, 61 Stat. 644 (1947), 4 U.S.C. §§ 105-10, which authorizes states to apply sales and use taxes in "federal area[s]," defined by the Act as "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States," 4 U.S.C. § 110(e), does not apply to Indian reservations. *Id.* at 691 n.18. This Court has since twice reaffirmed that holding. *Cent. Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 166 n.5 (1980); *White Mountain Apache*, 448 U.S. at 151 n.16. Accordingly, as the court of appeals held, it is not "unmistakably clear" that Congress, without saying so, intended that the phrase "United States military or other reservations" include Indian reservations. Pet. App. 37; *see also Goodman Oil*, 28 P.3d at 1000; *Prairie Band*, 241 F. Supp. 2d at 1305; *Pourier*, 658 N.W.2d at 399, 401.

Petitioners' contention that, notwithstanding the absence of any reference to Indians, Indian tribes or Indian reservations in the Hayden-Cartwright Act, the inclusion of the term "licensed trader" extends its terms to Indian retailers on Indian reservations, has also been rejected by every court to consider it. As the court of appeals recognized, the term could well refer to non-Indian traders licensed to conduct business on the federal reservations which are subject to the Hayden-Cartwright Act. Pet. App. 33;[21] *accord Goodman Oil*, 28 P.3d at 1000 ("The term 'licensed trader' could refer to licensed distributors or sellers of goods in *all* federal reservations."); *Pourier*, 658 N.W.2d at 401 ("Congress gave no indication in the statute that the term referred to Indian

[21] As the court of appeals further found, even if the term could be so construed, it is not clear "that the tax could be imposed on Indian tribes, as opposed to on non-Indian traders licensed to do business on Indian reservations." Pet. App. 33.

traders as opposed to those non-Indian traders who were required to obtain a license to sell fuel."); *Prairie Band*, 241 F. Supp. 2d at 1304.

Acknowledging that the Hayden-Cartwright Act was passed in response to this Court's decision in *Standard Oil Co. v. California*, 291 U.S. 242 (1934), which invalidated a state tax on a gasoline distributor delivering fuel to a post exchange on a military reserve, petitioners assert that Congress "clearly had no thought of limiting the grant to military reserves." Pet. 24.[22] But what is required is an "unmistakably clear" showing of Congressional intent to abrogate tribal immunity, *Blackfeet Tribe*, 471 U.S. at 765, and as the court of appeals held, nothing in the legislative history of the Act shows that Congress unmistakably intended to extend the Act to Indian reservations. Pet. App. 35-36 (citing *Pourier*, 658 N.W.2d at 402-03).[23] Petitioners' argu-

[22] While the State refers to the federal instrumentality doctrine, Pet. 24-25, suggesting its relevance to the Hayden-Cartwright Act issue, this Court's decision in *Blackfeet Tribe* makes clear that the Indian immunity from state taxation is instead based on the federal government's exclusive constitutional authority in Indian affairs, and the retained sovereignty of Indian tribes. 471 U.S. at 764. It is also settled that Indian tribes are separate sovereigns, not arms of the United States. *United States v. Wheeler*, 435 U.S. 313, 328 (1978). In contrast, as this Court explained in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the federal instrumentality doctrine was applied to Indian lands to invalidate state taxes imposed on non-Indian lessees of Indian land. *Id*. at 174. The doctrine "has now been 'thoroughly repudiated' by modern case law." *Id*. (quoting *South Carolina v. Baker*, 485 U.S. 505, 520 (1988)).

[23] Petitioners also argue that, by reenacting the Hayden-Cartwright Act, Congress adopted two executive branch opinions interpreting the Act as applying to Indian reservations. This argument was rejected by the court of appeals, which held that "the agency interpretations underscore the ambiguity, not the clarity, of the executive branch's statements insofar as they speak to the applicability of the Act to Indian reservations." Pet. App. 36-37 n.28. Other courts have reached the same conclusion. *See Prairie Band*, 241 F. Supp. 2d at 1306-07; *Goodman Oil*, 28 P.3d at 1001; *Pourier*, 658 N.W.2d at 402; *see also Winnebago Tribe*, 297 F. Supp. 2d

ment that the Act was passed to allow states to build and maintain roads throughout the state fails for the same reason. Indeed, prior to passage of the Hayden-Cartwright Act, Congress had already passed legislation authorizing the "'appropriation of funds for survey, improvement, construction, and maintenance of Indian reservation roads.'" *See* Pet. App. 36 (quoting *Goodman Oil*, 28 P.3d at 1000).[24] Authorizing state taxation of Indian tribes would also have been directly in conflict with the federal Indian policy set forth in the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461-79, which was enacted in 1934. The "overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a

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at 1304. In fact, this Court rejected a nearly identical argument regarding deference to administrative interpretation in *Blackfeet Tribe*. 471 U.S. at 768 n.7.

Petitioners' reliance on *Lorillard v. Pons*, 434 U.S. 575 (1978), is also misplaced. *Lorillard* concerned enforcement of the Age Discrimination Enforcement Act (ADEA), which incorporated sections of the Fair Labor Standards Act (FLSA). The presumption that Congress was aware of existing interpretations was "particularly appropriate [in that case] since, in enacting the ADEA, Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation." 434 U.S. at 581. Such a situation is not present here. Reenactment of a statute cannot be deemed to be legislative approval of an administrative interpretation that is ambiguous and not clearly established by longstanding, consistent regulations or decisions. *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 49-53 (1939); *see also Sec. and Exch. Comm'n v. Sloan*, 436 U.S. 103, 121 (1978) ("We are extremely hesitant to presume general congressional awareness of the [agency's] construction based only upon a few isolated statements . . . .").

[24] Today, Indian tribes may assume responsibility for administering the Bureau of Indian Affairs Indian Reservation Roads program pursuant to the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450 *et seq.*), and the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (codified as amended at 23 U.S.C. § 204).

greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

The court of appeals ruling with respect to the Hayden-Cartwright Act presents no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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