

No. 04-631

IN THE
Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

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

PETITION FOR REHEARING

DAVID PRAGER, III
PRAIRIE BAND POTAWATOMI
NATION
16281 Q Road
Mayetta, KS 66509
(785) 966-4030

IAN HEATH GERSHENGORN *
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

December 29, 2005

**Counsel of Record*

PETITION FOR REHEARING

By this petition for rehearing, the Prairie Band Potawatomi Nation seeks a limited amendment to the Court's judgment to ensure that the Tenth Circuit and the district court will have the opportunity to determine in the first instance whether the Kansas statute here at issue is discriminatory.

Modifications to or clarifications of an opinion of this Court are appropriate in limited circumstances to "correct certain inaccuracies or omissions brought to light by a petition for rehearing, or to permit the lower court to pass on other issues left undecided by the Court." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 729 (8th ed. 2002); *see also Maryland for the Use of Levin v. United States*, 382 U.S. 159 (1965) (granting petition for rehearing after judgment on the merits in order to remand for further proceedings); *Union Trust Co. v. Eastern Air Lines, Inc.*, 350 U.S. 962 (1956) (same).

Such a modification or clarification is appropriate here because the Court decided an issue – whether the Kansas statute is discriminatory – that was not factually developed below in either the district court or the Tenth Circuit. The absence of briefing and factual development is not surprising because, at least since the Tenth Circuit's decision in *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 585 (10th Cir. 2000), the law of the Tenth Circuit was clear that the balancing test applied. The Court's elimination of the balancing test and its resolution of the discrimination claims without the benefit of a full record below has resulted in factual inaccuracies in the Court's opinion and is fundamentally unfair to the Tribe, which has been denied an opportunity to litigate the factual aspects of discrimination.

Accordingly, the limited relief sought here should be granted.

A. In its decision in this case, the Court held that the question of whether the State's tax should be preempted was governed not by a balancing of interests analysis, but rather by a test that looked only to discrimination. That worked a fundamental change in the law, at least in the Tenth Circuit. Prior to the Court's decision, the Tenth Circuit had unambiguously held that the balancing test governed the question whether the Kansas fuel tax was preempted. Indeed, in a case brought by other tribes challenging this exact tax, the Tenth Circuit had stated that

until the Tribes provide us with verifiable projections based upon historic statistics indicating . . . what the precise economic realities of the situation are both in the presence and absence of the motor fuel tax, we cannot adequately balance the federal, tribal, and state interests *as Supreme Court authority at this point requires*. . . . In this regard, we note that on remand the burden is on the Tribes to show whether and to what extent the motor fuel tax would burden commerce derived from value generated on Indian lands.

Sac & Fox Nation, 213 F.3d at 585 (emphasis added).

Consistent with the Tenth Circuit's directive, the instant case was litigated and decided entirely under the balancing test that the Tenth Circuit (relying on this Court's precedent) had said was controlling. The district court's final pretrial order concerned the balancing test only, and did not address discrimination. *See* Final Pretrial Order (dated Sept. 29, 2000). The decisions of the district court and the Tenth Circuit were also based entirely upon the application of the

balancing test. 241 F. Supp. 2d 1295 (D. Kan. 2003) and 379 F.3d 979 (10th Cir. 2004).

B. This Court has now held that the Tenth Circuit was wrong to apply the balancing test, and that the Kansas tax is invalid only if it discriminates against the Tribe. The Tribe does not seek to reargue that holding here. However, the Tribe strongly maintains that the Tribe should be allowed to adjudicate its factual case under the Court's new test. The factual determination of whether or not the Kansas tax is discriminatory should be the responsibility of the district court in the first instance, rather than the responsibility of this Court (or even of the Tenth Circuit).

That is all the more true because the tax in this case facially discriminates against the Tribe at least in favor of the United States and its contractors. K.S.A. §§ 79-3408(d)(2) and (3). Under the Commerce Clause, “[F]acial discrimination by itself may be a fatal defect” and “[a]t a minimum . . . invokes the strictest scrutiny.” *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Thus, “the burden falls on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986). The “empirical component of that [discrimination] scrutiny, like any other form of fact finding, is the basic responsibility of district courts, rather than appellate courts.” *Id.* at 144-45 (internal quotation marks omitted).

Similarly, in the context of intergovernmental tax immunity, the State has the burden of proving that “the inconsistent tax treatment is directly related to, and justified by, ‘significant differences between the two classes.’” *Davis v. Michigan Dep’t of the Treasury*, 489 U.S. 803, 816 (1989)

(citation omitted). The state tax exemption must turn on those differences rather than on the mere identity of the sovereign. *Id.* at 817 (“A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan’s statute does; rather, it would discriminate on the basis of the amount of benefits received . . .”). In this case, the State’s denial of an exemption turns entirely on the Tribe’s identity rather than on any state benefits that it or the United States may or may not receive.

This Court undertook a discrimination analysis notwithstanding the utter lack of a factual record on the issue and, as a result, made factual assumptions that are not supported. There is absolutely no record support, for example, for the Court’s assumption that “Kansas offers no [road and bridge] services to . . . the Federal Government.” 126 S. Ct. 676, 689 (2005). In fact, the Ft. Riley military reservation is crossed and served by U.S. 77 and other state-maintained highways. In addition, it appears that gas stations operated by the U.S. at its commissaries on military reservations in Kansas do not pay the state tax. In that respect the fuel tax does not “fall equally upon all retailers within the State,” *id.*, contrary to the Court’s factual assumption.

The United States and the Tribe are both sovereign governments engaged in governmental activities on their reservations. Even the Tribe’s gaming operations may be considered governmental in nature, given the fact that they support its entire government and that the States themselves are now generating \$41.9 billion per year in gross gaming revenues to fund their own governments. *See* <<http://www.census.gov/govs/state/03lottery.html>>.

Under its new standard, the Court has summarily upheld discrimination in the complete absence of factual proof for which the State bears the burden. It would be utterly unfair for the Court to establish this new legal standard and then to deny the Tribe the opportunity to prove its case for discrimination under factual issues that were never before the district court.

CONCLUSION

This case should be remanded to the district court for reconsideration under the Court's discrimination standard.

DAVID PRAGER, III
PRAIRIE BAND POTAWATOMI
NATION
16281 Q Road
Mayetta, KS 66509
(785) 966-4030

December 29, 2005

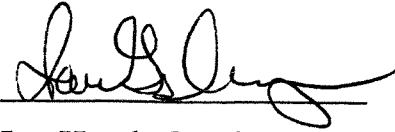
Respectfully submitted,

IAN HEATH GERSHENGORN *
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

**Counsel of Record*

CERTIFICATION OF COUNSEL

I certify that this petition is presented in good faith and is not presented for the purposes of delay.

A handwritten signature in black ink, appearing to read "Ian Heath Gershengorn", written over a horizontal line.

Ian Heath Gershengorn