No. 11-729

In the Supreme Court of the United States

UTE MOUNTAIN UTE TRIBE,

Petitioner,

v.

DEMESIA PADILLA, SECRETARY, TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, D.C. 20005
(202) 466-7767
John_Dossett@NCAI.org

PHILIP BAKER-SHENK
Counsel of Record
HOLLAND & KNIGHT, LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-3000
philip.baker-shenk@hklaw.com

Counsel for Amicus Curiae
(additional counsel listed on inside cover)

KATHLEEN NILLES
JENNIFER MODRICH
HOLLAND & KNIGHT, LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-3000
kathleen.nilles@hklaw.com
jennifer.modrich@hklaw.com

ZEHAVA ZEVIT
HOLLAND & KNIGHT, LLP
400 South Hope Street
8th Floor
Los Angeles, CA 90071
(213) 896-2400
zehava.zevit@hklaw.com

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BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Congress of American Indians ("NCAI") respectfully submits this brief as *Amicus Curiae* in support of the petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests. NCAI currently represents more than 250 tribes and Alaska native villages, including tribes in New Mexico, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. NCAI is dedicated to protecting the rights and improving the welfare of tribal governments and their members. This case involves an issue of fundamental importance for tribal economic welfare, self-government, and self-sufficiency: The extent to which state governments may tax the on-reservation activity of non-Indians.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of *Amicus Curiae's* intention to file this brief under Supreme Court Rule 37.2, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

This Court established a balancing test that determines when states may exercise such authority. The Tenth Circuit failed to apply that test, instead adopting a new analytical framework that directly conflicts with this Court's precedent, and creates a circuit split. The Tenth Circuit effectively created a presumption that states have authority to tax the on-reservation activity of non-Indians. If permitted to stand, this presumption would dramatically increase the instances of double taxation in Indian Country.

Amicus is in a unique position to more fully explain to this Court the devastating economic impact that double taxation has on Indian Country, particularly with regard to tribal governments seeking to provide governmental services to their citizens and to stimulate the development of reservation economies. *Amicus* frequently briefs Congress and the Administration on Indian Country taxation and economic development issues, and has continuously highlighted double taxation as a problem that should be addressed in order to better assist the development of tribal governments and reservation economies.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has long supported Indian tribal governments in their efforts to maintain economic well-being and governmental self-sufficiency. In recent decades Congress enacted numerous statutes and authorized many federal programs intended to enable tribal governments to become economically self-sustaining. Concurrently, Congress vested tribal governments with increasing responsibility for the well-being of tribal citizens.

Both Congress and this Court have recognized tribal taxing authority as a means by which tribal governments may raise the revenue needed for tribal economic viability and governmental self-sufficiency. Tribes tax the on-reservation activities of tribal members and non-members and use tax revenue to maintain tribal government, provide health, education and other services to their members, and otherwise implement longstanding Congressional policy. Without tax revenue many tribal governments would not be able to fulfill their roles as recognized by Congress.

Tribal governments face numerous challenges in exercising their inherent power to tax. Reservation tax bases are significantly diminished due to social, economic, and legal constraints. Additionally, the establishment by states of a concurrent state tax on activities occurring on tribal reservations further diminishes tribal tax bases because non-Indian entities out of economic self-

interest will avoid on-reservation business activity where they are taxed by both the state and a tribe. Finally, decreased tax revenues also reduce a tribal government's ability to obtain financing for economic development projects, and ultimately defeats the federal Indian policy of encouraging tribal self-determination and economic self-sufficiency.

The Tenth Circuit's holding creates a presumption -- favoring the imposition by states of taxes on activities occurring on tribal reservations -- which undermines longstanding federal policies. Unlike the balancing test established by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which takes tribal economic interests into account and affords them prominent weight, as required under the federal policies described above, the Tenth Circuit's presumption subordinates tribal interests and essentially disregards them as a practical matter. In so doing the Tenth Circuit's decision contravenes decades of Congressional policy.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Decided an Important Federal Question in a Way that Conflicts with Longstanding Federal Policy as Upheld by This Court

A. Current Federal Indian Policy Supports Tribal Self-Determination and Economic Development

Federal policy has consistently promoted Indian tribal self-determination and economic development for the past half century. Since 1960, "...through Democratic and Republican presidents and congresses, American Indian policy has remained relatively stable. This policy of tribal self-determination places strong emphasis on Native American decision-making, economic development and cultural preservation and extension." *Cohen's Handbook of Federal Indian Law*, § 1.07, at 112 (Nell Jessup et al. eds., 2005 ed.). Presidents from Kennedy and Nixon, through Reagan and Obama, have uniformly articulated a policy of self-determination for tribal governments. *See, e.g.,* 116 Cong. Rec. 23258 (daily ed. July 8, 1970) (Message from President Nixon); Exec. Order No. 12,401, 48 Fed. Reg. 2,309 (Jan. 18, 1983) (a Reagan era Executive Order establishing the Presidential Commission on Indian Reservation Economies); Advisory Council on California Indian Policy of 1992, Pub. L. No. 102-416, 106 Stat. 2131 (enacted during the George H.W. Bush Administration). President Johnson proposed "a new goal for our Indian programs ... that ...

stresses self-determination ... and promotes partnership [and] self-help." Special Message to the Congress on the Problems of the American Indian: "The Forgotten American", 1 Pub. Papers 335 (March 6, 1968). In 1975 Congress established the American Indian Policy Review Commission to consider "methods to strengthen tribal government ...." To Provide for the Establishment of the American Indian Policy Review Commission, Pub. L. No. 93-580, 88 Stat. 1910 (1975) (amended 1975 and 1977). The Commission's final report recommended that the federal government reaffirm and strengthen the doctrine of tribal sovereignty and increase its financial commitment to tribal government economic development. *Cohen's Handbook of Federal Indian Law*, *supra* at 104.

The policy of protecting and promoting tribal governmental self-determination, economic self-sufficiency and tribal cultural survival is reflected in a broad range of federal programs and statutes. *See, e.g.,* 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); 25 U.S.C. § 3601 ("The Congress finds and declares that (1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes..."); 25 U.S.C. § 4101(7) ("Federal assistance to

meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance..."); 25 U.S.C. § 450a(b) ("the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities").

The policy of ensuring strong tribal economies coincides with another policy, that of transferring to tribal governments responsibility for their members' well-being. More and more, tribal governments are assuming roles previously held by the federal, state or local governments and providing governmental services to both tribal members and non-members within Indian Country. One way tribal governments have stepped into roles previously held by the federal government is through self-governance compacts. *See* 25 U.S.C. § 458aa note ("transferring control to tribal governments, upon tribal request, over funding and decision-making for Federal programs, services, functions, and activities strengthens the Federal policy of Indian self-determination"). Similarly, the Tribal Law and Order Act of 2010 strengthens tribal governments' ability to maintain civil order and safety for the general public in Indian Country. One of the Act's purposes is to "empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country." *See* 25 U.S.C. § 2801 et. seq. As tribal governments continue to assume roles the federal

government once filled, their need for revenue increases.

The federal government also encourages tribal self-determination and self-governance with regard to the development of tribal natural resources. In the Indian Minerals Leasing Act of 1938 (25 U.S.C. §§ 396 et seq.) ("IMLA") and the Indian Minerals Development Act of 1982 (25 U.S.C. §§ 2101 et seq.) ("IMDA"), Congress expressed its intent that tribes maintain greater control of, and derive more revenue from, their natural resources. Specifically, under the IMLA Congress permitted tribes more control in the minerals leasing process and established a standardized system to manage leases. This Court interpreted the IMLA to prohibit state taxation of tribal mineral income. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-67 (1985). And the IMDA further involved tribes in the minerals leasing process by allowing them to directly negotiate the terms of an IMDA agreement. *See* 25 U.S.C. § 2101 et seq.

As Congress continues to pass legislation intended to assist tribes in maintaining their economic well-being and self-sufficiency, tribes continue to struggle to meet their members' needs and fill the roles Congress has assigned them. On a national scale, however, tribal governmental income today, as in decades past, remains "wholly inadequate to alleviate tribal poverty when distributed and applied to tribal needs." Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. Rev. 1, 33 (1975). Tribes must

therefore be able to raise revenue in order to fill the role Congress asks of them. Without practical opportunities for tribal taxation, longstanding federal policies of self-determination and economic development would be frustrated.

B. Federal Law Permits Tribal Governments to Impose Taxes Within their Reservations

In order to achieve self-sufficiency, a government must be able to fund essential public services. This Court has repeatedly held that Indian tribes are authorized to impose tribal taxes within their reservations. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985) ("[T]he 'power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.'") (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

Like other governments, tribal governments derive some revenues from business ventures, fees and licenses, and from the exploitation of their natural resources such as timber and minerals. Because these revenues are generally insufficient to meet governmental needs -- Indian tribes -- like other governments -- have relied on taxes as another source of funding for governmental operations. *See* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal*

Governmental Revenues, 2 Pittsburgh Tax Rev. 93, 119 (2005). Indeed, some tribes, such as the Navajo Nation, have found that the only reliable and economically feasible way to raise governmental revenue is through taxation. *See id.* at 103 n.46.

C. Tribal Governments Face Unique Challenges in Raising Governmental Revenue

Tribal governments face various social, economic, and legal constraints when exercising their inherent power to tax. For example, tribes are generally prohibited by the relative poverty of their citizens from imposing an income tax. According to a United States Census Bureau report, the United States has a general poverty rate of approximately 12.4%, whereas among American Indians and Alaska Natives, the rate is 25.7%. Stella U. Ogunwole, U. S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States* 1, 12 (2006), http://www.bia.gov/idc/groups/public/documents/text/idc-001819.pdf. Additionally, the Indian unemployment rate is nearly four times greater than the average rate in the United States. Maura Grogan, Rebecca Morse & April Youpee-Roll, Revenue Watch Institute, *Native American Lands and Natural Resource Development* 6 (2011), http://www.revenuewatch.org/sites/default/files/RWI_Native_American_Lands_2011.pdf. Most tribes therefore cannot, as a practical matter, impose any significant tax on the income of their members. *See* Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why*

Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter into Taxation Compacts with their Respective States, 78 Or. L. Rev. 501, 513 (1999).

Similarly, tribes are often precluded from imposing any property taxes, under applicable laws. *See* U. S. Dep't of the Treasury, *Report and Recommendations to Congress Regarding Tribal Economic Development Bond Provision Under Section 7871 of the Internal Revenue Code*, 14 (2011). Since much of tribal land in the United States is held in trust by the federal government, tribal governments cannot derive income from the land that is under their jurisdiction.

These unique circumstances leave tribes with little choice but to generate revenues by taxing on-reservation business activities such as those at issue in this case. Many of these activities involve or are conducted by non-Indians, particularly where the exploitation of natural resources is involved. *See* Cowan, *supra*, at 103-04. Absent an opportunity to tax on-reservation activities, many tribal governments will lack the revenue they need to govern their people.

Double taxation occurs when states tax on-reservation activities that are also taxed by a tribe. Non-Indians who become subject to double taxation are required to remit not only the tribal tax, but also the additional state tax imposed upon them. The effects of double taxation are devastating to tribes: Non-Indians and non-Indian businesses refrain from investing in ventures within Indian Country because

such ventures are not economically feasible. *See id.* at 95.

Tribes whose economy depends upon the exploitation of natural resources are especially impacted by double taxation because they often need to contract with non-Indian companies that have the knowledge and equipment required to develop reservation resources. *See id.* at 121; Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis*, 27 N.M. L. Rev. 387, 388 (1997). These companies are, understandably, unwilling to pay tax in an amount significantly greater than that required elsewhere. Tribes are thus forced to reduce their taxes -- and their governmental revenue -- in order to utilize their limited and finite natural resources. Double taxation can also affect tribal royalties and fees associated with minerals development. *See* Cowan, *supra*, at 122. In short, double taxation precludes tribes from realizing the full value of their natural resources because agreements with non-Indian producers factor in double taxation. *See id.*

Additionally, double taxation results in the under-development of natural resources in Indian Country by deterring developers from operating there. *See e.g. id.* at 94; Grogan, *supra*, at 22. In natural resources development there is a fine line between marginal production and profitable production. Double taxation tips the balance to make Indian county a marginal production location.

Double taxation also frustrates tribal efforts to obtain financing for economic development. State and local governments can use income and property tax revenues as either security for financing or as a means of paying down debt. Without income or property tax revenues, tribes lack the financing options enjoyed by all other governments. Instead, they must rely only on tax revenue derived by taxing on-reservation activities. When this revenue base is diminished as a result of double taxation by the state, tribes' ability to obtain outside financing decreases dramatically. *See* U. S. Dep't of the Treasury, *Report and Recommendations to Congress Regarding Tribal Economic Development Bond Provision Under Section 7871 of the Internal Revenue Code*, 14 (2011).

D. The Federal Government Recognizes the Negative Impact of Double Taxation

The federal government has begun developing tax policies to reduce the effects of double taxation on individuals and enterprises. Much of the literature on double taxation addresses the issue of payment of dividend income tax by an individual after a corporate income tax rate has already been applied to the same funds. *See e.g.,* Fred W. Peel, *A Proposal for Eliminating Double Taxation of Corporate Dividends*, 39 Tax Law 1 (1985); Robert H. Litzenberger & James C. Van Horne, *Elimination of the Double Taxation of Dividends and Corporate Financial Policy*, 33 J. Fin. 737 (1978); Bruce G. Kauffmann, *No (Double) Taxation: For an Industry with a Solid Reputation*, American Gas, Mar. 2003.

Double taxation in this context has been shown to slow economic growth, and "cause socially beneficial projects to go unfunded." *Economic Report of the President January 2009*, 157, Washington: Government Printing Office, 2009. To reduce the impact of double taxation in this situation, the government offers dividend tax relief to individuals in the form of a drastically reduced individual tax rate on corporate dividend income. *Id.* In the international tax realm, double taxation of income has been addressed through the negotiation of bilateral tax treaties with other countries. *See* 3 Rufus von Thülen Rhoades & Marshall J. Langer, *Rhoades & Langer, U.S. International Taxation and Tax Treaties*, § 41.01[2] (Matthew Bender). In short, the federal government widely acknowledges double taxation as a factor that negatively impacts economic development. Notwithstanding federal policy to the contrary, the Tenth Circuit adopted a presumption that favors it.

E. The Tenth Circuit's Holding Undermines the Longstanding Federal Policy of Ensuring Tribal Self-Sufficiency Authorized by Congress and Upheld by This Court

The Tenth Circuit undermines decades-old federal Indian policy, and this Court's supporting jurisprudence, when it concludes that New Mexico may impose state taxes on oil and gas activities occurring wholly within the Ute Mountain Ute Reservation. The lower court neither mentioned Congress's policy of supporting tribal economic well

being and governmental self-sufficiency nor analyzed this policy before reaching its erroneous conclusion. Nor did the court give the policy its proper weight as required under this Court's *Bracker* balancing test. And the court did not properly consider the impact of double taxation, as described above, on the Ute Mountain Ute Tribe's governmental operations. In short, the Tenth Circuit completely ignored, and ultimately subverted, longstanding federal policies that it was required to consider and support.

This Court's *Bracker* test requires that courts consider federal, state, and tribal interests in determining whether states may tax the on-reservation activities of non-Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). And while the Tenth Circuit purported to apply the *Bracker* test and weigh the relevant interests as required, its failure to consider or weigh the well-established federal and tribal interests in tribal economic well-being and self-sufficiency not only ignores this Court's *Bracker* jurisprudence, but also undercuts significant Congressional policy. When Congress expressly indicates its intent that Indian tribal economic well-being and self-sufficiency be maintained, courts should be held to their obligation to at least consider, if not uphold, that policy.

CONCLUSION

For the reasons stated above, *Amicus* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, D.C. 20005
(202) 466-7767
John_Dossett@NCAI.org

PHILIP BAKER-SHENK
Counsel of Record
HOLLAND & KNIGHT, LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-3000
philip.baker-shenk@hklaw.com

KATHLEEN NILLES
JENNIFER MODRICH
HOLLAND & KNIGHT, LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-3000
kathleen.nilles@hklaw.com
jennifer.modrich@hklaw.com

ZEHAVA ZEVIT
HOLLAND & KNIGHT, LLP
400 South Hope Street
8th Floor
Los Angeles, CA 90071
(213) 896-2400
zehava.zevit@hklaw.com

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