No. 13-10566

IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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SEMINOLE TRIBE OF FLORIDA, a federally recognized Indian Tribe,
Plaintiff/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, and MARSHALL STRANBURG, as Executive Director,

Defendants/Appellees.

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On Appeal from the United States District Court
for the Southern District of Florida

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# ANSWER BRIEF OF APPELLEES STATE OF FLORIDA, DEPARTMENT OF REVENUE, and MARSHALL STRANBURG

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*Seminole Tribe of Florida v. State of FL Dep't of Revenue*
*Eleventh Circuit Case No. 13-10566*

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. Rule 26.1-1, Appellees certify that the following persons have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

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State of Florida, Department of Revenue (Defendant/Appellee)

Stranburg, Marshall as Executive Director (Defendant/Appellee)

## STATEMENT REGARDING ORAL ARGUMENT

The correctness of the District Court's decision can be adequately demonstrated by the record provided and relevant case law and authorities. The Defendants/Appellees are prepared to present oral argument, however, should the Court think it helpful.

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## STATEMENT OF JURISDICTION

The United States District Court dismissed, with prejudice, the Seminole Tribe of Florida's complaint and action in its entirety for lack of subject-matter jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

I. Whether the district court properly determined that the *Rooker-Feldman* doctrine and Tax Injunction Act applied to the Tribe's present claims to deprive the court of jurisdiction.

II. Whether, even if this Court were to determine that neither the *Rooker-Feldman* doctrine nor the Tax Injunction Act bar the Tribe's suit, other grounds that were argued but not reached by the district court, including res judicata, Eleventh Amendment immunity, and the failure to state a claim upon which relief can be granted, warrant dismissal of the Tribe's action.

## STATEMENT OF THE CASE

### A. Nature of the Case

Appellant, the Seminole Tribe of Florida (Tribe), is challenging the imposition of a state tax on motor fuel that the Tribe purchases off tribal lands.

### B. Course of Proceedings and Disposition Below

The Tribe brought suit in the Southern District of Florida, seeking a declaration that its off-reservation motor fuel purchases are exempt from Florida's

fuel tax and an injunction ordering the continuing reimbursement of these pre-collected taxes from the state treasury. [D1:1, 14][1] The Tribe alleged that, although the fuel purchases at issue occurred off tribal lands, the fuel was consumed on tribal lands. [*Id.* at 5] The Tribe asserted that imposition of the state tax violated federal law, specifically the Indian Commerce Clause (Count I), the Indian Sovereignty Doctrine (Count II), and the Equal Protection Clause (Counts III-V). [*Id.* at 7-13] Count VI of the complaint requested permanent injunctive relief against Appellees' imposition of the tax on the basis of Counts I-V. [*Id.* at 13-15]

Appellees, the State of Florida, Department of Revenue and its Executive Director (collectively "the Department")[2], filed a motion to dismiss the Tribe's complaint, raising five grounds: 1) Eleventh Amendment immunity, 2) the *Rooker-Feldman* doctrine, 3) res judicata, 4) the Tax Injunction Act, and 5) failure to state a claim upon which relief could be granted. [D11]

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[1] The record on appeal will be referred to as [D#:*] or [D#:¶*] where # is the district court's docket entry number and * is the page number or paragraph number.

[2] Appellee Marshall Stranburg was confirmed as the Department of Revenue's Executive Director on April 23, 2013. Pursuant to Federal Rule of Civil Procedure 25(d), Director Stranburg's title and the case caption has been updated to reflect the change from Interim Executive Director/Deputy Executive Director to Executive Director.

After a hearing on the Department's motion, the district court dismissed the Tribe's complaint with prejudice, finding that 1) it lacked subject-matter jurisdiction under the *Rooker-Feldman* doctrine because the Tribe was essentially seeking review of its previous state court action, and 2) the Tribe's claims were barred by the Tax Injunction Act because the fuel tax applied only to purchases made off tribal lands. [D27:4] The district court did not address the three other grounds raised in the Department's motion to dismiss. The Tribe now appeals that dismissal.

### C. Statement of Facts

In its complaint, the Tribe alleges that between June 7, 2009 and March 31, 2012, it paid fuel tax on fuel that was purchased at stations located off tribal lands but used on tribal lands for essential government services. [D1:5, at ¶18] In June 2012, the Tribe sought a refund of those taxes, but the Department denied the claim. [*Id.*]

#### 1. Florida's Motor Fuel Tax

The Department is charged with regulating, controlling, and administering Florida's motor and other fuel taxes, codified at Chapter 206, Florida Statutes. *See* § 213.05, Fla. Stat.; [D1:1]. The legal incidence of Florida's fuel tax falls on the ultimate consumer at the fuel pump, who pays it as part of the purchase price of the fuel. *Id.* § 206.41(4)(a); [D1:3, at ¶ 12]. Critically, for purposes of Florida's fuel

tax, the statute defines **the taxable event** as the placing of fuel in a vehicle's fuel tank. *Id.* § 206.01(24) (defining "use"); [D1:4, at ¶ 14].

For administrative convenience, the State collects the tax at an earlier point from terminal suppliers when fuel is removed from the terminal. *Id.* §§ 206.41(2), (6); [D1:3, at ¶ 12]. A terminal is a storage and distribution facility for bulk amounts of motor or diesel fuel; fuel is removed from a terminal via a loading rack, which deposits the fuel into tanker trucks or rail cars. *Id.* § 206.01(18). Because the tax is pre-collected, any ultimate consumer who qualifies for an exemption from the tax must request a refund from the Department. *Id.* § 206.41(4)-(5); [D1:4, at ¶ 16].

**2. The Tribe's Previous Challenge in State Court**

The Tribe previously challenged the imposition of Florida's fuel tax in state court. [D1:5, at ¶ 19] In its state complaint, the Tribe sought 1) a refund of the fuel taxes it paid between January 1, 2004, and February 28, 2006, for fuel purchased off tribal lands but used for tribal functions, and 2) a declaration that the Tribe was exempt from the fuel tax, whether the fuel was purchased on or off tribal lands. [*Id.*]

Although the state trial court granted summary judgment in favor of the Tribe, the Fourth District Court of Appeal reversed. *Fla. Dep't of Revenue v.*

*Seminole Tribe of Fla.*, 65 So. 3d 1094 (Fla. 4th DCA 2011); [D1:6, at ¶¶ 21-22]. After analyzing Florida's statutory definition of **the taxable event** as the placing of fuel in a vehicle's tank, the appellate court concluded that the taxable event occurred off the reservation. *Fla. Dep't of Revenue*, 65 So. 3d at 1096-97. Recognizing that Supreme Court jurisprudence supported the conclusion that off-reservation transactions were "susceptible of taxation without running afoul of the Indian Commerce Clause," the court held that the off-reservation purchases were taxable. *Id.* (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115 (2005); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464 (1995)).

The appellate court's decision became final in March 2012, when the Florida Supreme Court declined to review the Fourth District's decision. *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 86 So. 3d 1114 (Fla. 2012) (table op.).

**D. Standard of Review**

The Court reviews the dismissal of a complaint for lack of subject matter jurisdiction under a de novo standard. *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003). This includes application of the *Rooker-Feldman* doctrine and res judicata. *Lozman v. City of Riviera Beach, Fla.*, -- F.3d --, No. 11-15488, 2013 WL 1285868, at *1 (11th Cir. 2013) (citing *Doe v.*

*Fla. Bar*, 630 F.3d 1336, 1340 (11th Cir. 2011) (*Rooker-Feldman*) & *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11th Cir. 2004) (res judicata)).

## SUMMARY OF ARGUMENT

This case does not belong in federal court. The Tribe sued the Department seeking a declaration that its off-reservation motor fuel purchases are exempt from Florida's fuel tax and an injunction ordering the continuing reimbursement of these pre-collected taxes from the state treasury. Not only did the complaint fail to state a claim upon which relief can be granted, but at least four jurisdictional bars deprived the district court of jurisdiction. The district court analyzed two of the jurisdictional grounds and found each warranted dismissal. This Court, of course, can affirm on any of the grounds raised below.

First, the Tribe's suit improperly attempts a second bite at the apple in violation of the *Rooker-Feldman* doctrine. The Tribe already unsuccessfully sought identical declaratory relief in Florida's state court system. The *Rooker-Feldman* doctrine precludes the Tribe from now bringing a federal suit seeking to undo the state court judgment. As this Court held in *Casale v. Tillman*, 558 F.3d 1258 (11th Cir. 2009), when claims, as here, are inextricably intertwined such that they succeed only to the extent the state court wrongly decided the issues, the *Rooker-Feldman* doctrine prevents the district court from proceeding.

Second, because the Tribe is seeking the same declaratory relief, against the same defendant, based on the same underlying facts and evidence as in its state court action, the principles of res judicata also bar relitigation. Shifting the years at issue, seeking future instead of past derivative relief, and raising alternate theories that could have been raised in state court cannot overcome the res judicata preclusion.

Third, Congress did not abrogate Eleventh Amendment immunity to federal suits by Indian tribes, and the Department did not waive its immunity in this case. Absent consent, abrogation, or waiver, Eleventh Amendment immunity applies. Notably, although the Tribe seeks injunctive relief, the *Ex parte Young* exception does not overcome Director Stranburg's immunity. Since Florida pre-collects its fuel taxes from terminal suppliers, the Tribe's requested relief would require a retroactive levy upon the State's treasury. Both the Supreme Court and this Court have recognized *Young*'s inapplicability to such situations. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287, 117 S. Ct. 2028(1997); *DeKalb Cnty. Sch. Dist. v. Schrenko*, 109 F.3d 680, 691 (11th Cir. 1997).

Fourth, as the district court found, the Tax Injunction Act bars federal district courts from adjudicating matters of state taxation where adequate relief can be had in state court. It is undisputed that Florida's state courts afford adequate

relief.

Finally, the Tribe's complaint fails to state a claim upon which relief can be granted. In *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676 (2005), the United States Supreme Court held that Indian tribes are subject to non-discriminatory state taxes imposed upon activities that occur off reservations. Under equally plain Supreme Court precedent, the determination of whether an activity occurs on or off reservation lands is resolved through state statute. Florida's fuel tax scheme is explicit that the taxable event is the placement of fuel into a vehicle's fuel tank. Here, it is undisputed that the Tribe's vehicles obtained their fuel at off-reservation gas stations. As such, even if there were federal jurisdiction for this case—which the district court correctly determined there was not—dismissal can be affirmed on the suit's merits.

## ARGUMENT

This appeal turns on jurisdictional grounds and a key substantive question—whether the taxable event for purposes of the fuel tax occurs on or off of the Tribe's lands. Florida's statutory language defines the taxable event. Although the Tribe complains that statutory language works a legal fiction, the Supreme Court made clear in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676 (2005), that the statute still governs. Under Florida's fuel tax statutes, the

taxable event is the placement of fuel in a vehicle's fuel tank. Here, **there is no dispute** that this dispositive event occurred off tribal lands.

In light of *Wagnon*, the Department argued for dismissing the case for failure to state a claim upon which relief can be granted. The Department additionally argued that the district court lacked jurisdiction under the *Rooker-Feldman* doctrine, res judicata, Eleventh Amendment immunity, and the Tax Injunction Act. In dismissing the action, the district court discussed only the *Rooker-Feldman* doctrine and the Tax Injunction Act. Regardless, the Department presents all five grounds for dismissal on appeal because this Court must affirm if dismissal would be proper under any of them. *See J.E. Riley Inv. Co. v. Comm'r of Internal Revenue*, 311 U.S. 55, 59, 61 S. Ct. 95 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."); *Thomkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1303 (11th Cir. 2007) (same).

## I. The District Court Properly Dismissed the Tribe's Complaint as Previously Litigated.

The ultimate goal of this present suit is the same as the previously litigated state court suit—to obtain a judicial ruling that the Tribe is not liable for state taxes imposed on fuel purchased off its tribal lands. The district court correctly ruled that it lacked jurisdiction under the *Rooker-Feldman* doctrine, as a ruling in favor of the

Tribe would effectively nullify the earlier state court decision. Additionally, although not addressed in the district court's order, the Tribe's claims are barred under res judicata.

### A. The District Court Properly Dismissed the Case in Accordance with the *Rooker-Feldman* Doctrine.

Under the *Rooker-Feldman*[3] doctrine, federal courts are precluded from "serving as appellate courts to review state court judgments." *Nicholson v. Shafe*, 558 F.3d 1266, 1272 (11th Cir. 2009) (citing *Dornheim v. Sholes*, 430 F.3d 919, 923 (8th Cir. 2005)). This doctrine arises from the federalist principle that state court judgments are entitled to "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." 28 U.S.C. § 1738. When there is a question or debate over the constitutionality of a state court judgment, Congress has provided only one avenue for review—petition to the Supreme Court by writ of certiorari. 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . ."). Thus, only the Supreme Court of the United States has the ability to review final judgments of the

[3] *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 44 S. Ct. 149 (1923); *D.C. Ct. of App. v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1986).

highest state court from which a judgment is rendered.

To that end, the *Rooker-Feldman* doctrine recognizes that federal district courts do not have jurisdiction to hear "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517 (2005); *Nicholson*, 558 F.3d at 1270.[4]

This doctrine applies "both to federal claims raised in the state court and to those 'inextricably intertwined' with the state court's judgment." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (quoting *Feldman*, 460 U.S. at 482

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[4] In its recent discussions of the doctrine, the Supreme Court has emphasized that *Rooker-Feldman* is limited in application. *See Lance v. Dennis*, 546 U.S. 459, 464, 126 S. Ct. 1198 (2006); *Exxon*, 544 U.S. at 291-92. But it did so in the context of holding that the doctrine was not triggered when there were concurrent or parallel cases proceeding in state and federal courts (*Exxon*), or when the federal court plaintiffs were not parties to the earlier state court action (*Lance*). Although the doctrine's scope is narrow, it is directly applicable to the present action because the Tribe is seeking an end-run around a valid, state court judgment on the basis that the state court decision is not only incorrect on the merits, but also intrudes upon the Tribe's rights under Federal law. Such an action squarely invokes the doctrine, which exists to prevent federal courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284.

n.16). "A claim is inextricably intertwined if it would 'effectively nullify' the state court judgment, or 'it succeeds only to the extent that the state court wrongly decided the issues.'" *Id.* (citations omitted) (quoting *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996); *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001)). When such "inextricably intertwined" constitutional claims are presented to a district court, "then the district court is in essence being called on to review the state-court decision. This the district court may not do." *Feldman*, 460 U.S. at 482 n.16.

**1. The Tribe Is Seeking Review of the Prior State Court Judgment.**

In the present case, the district court correctly determined that it lacked jurisdiction because the Tribe's complaint invited the court to review and reject a previous state court determination on the lawfulness of Florida's fuel tax. That previous decision by Florida's Fourth District Court of Appeal held that the off-reservation fuel purchases were taxable. *Fla. Dep't of Revenue v. Seminole Tribe of Fla.*, 65 So. 3d 1094, 1097 (Fla. 4th DCA 2011). In reaching this conclusion, the Fourth District analyzed several Supreme Court decisions that supported its conclusion that off-reservation transactions were "susceptible of taxation without running afoul of the Indian Commerce Clause." *Id.* (citing *Wagnon*, 546 U.S. at 115; *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464 (1995);

*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). The case became final in March 2012, when the Florida Supreme Court declined to review the Fourth District's decision. *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 86 So. 3d 1114 (Fla. 2012) (table op.). Notably, at that point, the Tribe did not seek review in the Supreme Court of the United States, even though it had every opportunity to do so. *See* 28 U.S.C. §1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari….").

Here, the Tribe's present claims are inextricably intertwined with the previous State court decision. In both suits, the Tribe asserted that federal law prohibits the State's imposition of a fuel tax upon purchases made off tribal lands. The Tribe failed at its attempt in state court. If the Tribe's claims succeed in the present case, then the state appellate court's decision would be nullified.

The Tribe argues that *Rooker-Feldman* is inapplicable because it "has not complained of any injuries caused by a state court judgment, or asserted that a state court judgment was entered in violation of its federal rights," and it is merely asking the district court to "independently determine whether federal law allows

states to tax fuel that Indian tribes use on their Tribal Land." Init. Br. at 27.[5] However, a review of the complaint and other filings in the district court reveals that the Tribe is alleging harm based upon the state court decision. In its complaint, the Tribe asserts:

> The Fourth District Court of Appeal characterized (without factual or legal basis) the Fuel Tax as a sales tax . . . rather than an excise tax . . . . It assumed that where and why the fuel was used was irrelevant. As such, the District Court of Appeal did not interpret or apply the Indian Commerce Clause—believing the Clause was inapplicable. The recharacterization of the Fuel Tax by the Fourth District Court of Appeal as a sales tax on the retail sales and purchase transaction implicates a variety of issues under Federal law, including issues under the Equal Protection Clause, Indian Commerce Clause and the Indian Sovereignty Doctrine, that depend on where and the purpose for which the fuel is used by the Tribe. The Tribe was deprived of the opportunity to litigate those issues of Federal law in the State courts.
>
> . . .
>
> A gross and manifest injustice will occur if the Tribe were denied the right to litigate the claims and issues raised in this Complaint.

[D1:6, at ¶¶ 22 & 25]

Accordingly, the complaint directly attacks the legal and factual basis of the

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[5] Citations to the Tribe's brief refer to page numbers assigned by the CM/ECF system, not to the brief's original pagination.

Fourth District Court of Appeals' decision and asserts that it implicates the Tribe's rights under federal law. Additionally, in the Tribe's response to the Department's motion to dismiss, the Tribe again attacked the legal analysis of the state appeals court, and reiterated that the decision's "mischaracterization" of the tax resulted in implicating the Tribe's sovereignty and equal protection rights. [D22:26-30] In short, the Tribe is challenging directly the state court decision and inviting a rejection and nullification of its ruling on the merits. The *Rooker-Feldman* doctrine squarely applies to the Tribe's present action and the District Court properly concluded that it did not have jurisdiction.

**2. The Tribe Had a Reasonable and Sufficient Opportunity to Litigate All of Its Federal Claims in the Prior State Court Proceedings.**

The Tribe likewise seeks to avoid application of the doctrine by asserting that it did not have a reasonable opportunity to litigate all of its present federal claims in the previous state court proceedings. In support of this claim, the Tribe makes much of what it characterizes as a "concession" by the Department, and how this, in combination with the "unforeseeable" ruling of Florida's Fourth District Court of Appeal, prejudiced its ability to raise these present federal claims. Init. Br. at 42-43. These complaints avoid the simple truth—the Tribe could have brought all of its federal claims in state court but, for whatever reason, did not. *See*

*Casale*, 558 F.3d at 1261 ("The state court clearly had jurisdiction over [the case] . . . . We are not a clearinghouse for Casale's overstock arguments; if he did not offer them to the state courts—or if the state courts did not buy them—he cannot unload them by attempting to sell them to us.").

At the time of filing the state court complaint, the Tribe did not know what arguments and defenses the Department would assert and, upon learning of anything unexpected, they could have amended their complaint appropriately. Therefore, any and all claims supporting the Tribe's position regarding the State's ability to assess the challenged tax under State and federal law should have been presented at that time. Further, the Department's position regarding the tax was in no way a surprising "concession." Rather, it was a state agency taking the very straightforward position that, under state law, the tax at issue was imposed on "use" and, by statutory definition, "use" means the placing of fuel into a vehicle. This very unsurprising position in no way prevented the Tribe from raising the additional federal claims that it now claims are determinative of the State's ability to assess the tax.

The Tribe's unfortunate focus on the word "use" rather than the statute's definition of the taxable event does not change the fact that it had a reasonable and sufficient opportunity to raise all of the federal claims it is now attempting to raise.

Although the state court claims involved a request for a refund, the Tribe ignores the necessary declaration of the validity of the tax underlying the denial of that refund. In seeking to overturn that declaration, the Tribe's federal court action violates the *Rooker-Feldman* doctrine.

**B. Appellant's Claims Are Precluded Under Res Judicata.**

Even if the Court were to disagree with the district court that the *Rooker-Feldman* doctrine bars relitigation of the Tribe's claims, the principle of res judicata serves to bar this repeat attempt at obtaining a declaration that Florida's fuel tax is inapplicable to off-tribal land purchases.[6] Although the district court found it unnecessary to reach the issue of res judicata, the Department properly raised and argued the preclusive effect of this doctrine in its motion to dismiss.[7] [D11:9, 12-14; D25:4-6]

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must

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[6] The Tribe asserts that the Department did not raise issue preclusion in its motion to dismiss as part of its argument that the district court somehow conflated *Rooker-Feldman* with issue preclusion. Init. Br. at 37-38 & n.11. But the Department did raise res judicata as a separate basis for why the entire action (encompassing both claims and issues) was precluded. [D11:9, 12-14; D25:4-6]

[7] "A party may raise a res judicata defense by a Rule 12(b) motion when the defense's existence can be judged on the face of the complaint." *Jones v. Gann*, 703 F.2d 513, 515 (11th Cir. 1983) (citing *Concordia v. Bendekovic*, 693 F.2d 1073 (11th Cir.1982)).

give the same preclusive effect to state court judgments that they otherwise would have in their state of origin. *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 102 S. Ct. 1883 (1982) ("[F]ederal courts must accord preclusive effect to issues litigated and decided on the merits . . . ."). To that end, under res judicata, a final judgment on the merits bars the parties to a prior action from relitigating a cause of action that was raised or could have been raised in that action. *See In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001) (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411 (1980)). The term res judicata "can refer specifically to claim preclusion or it can refer generally to the preclusive effect of earlier litigation." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010) (citing *Wacaster v. Wacaster*, 220 So. 2d 914, 915 (Fla. 4th DCA 1969).

In evaluating whether res judicata applies, federal courts employ the law of the state in which they sit. *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (citing *McDonald v. Hillsborough Cnty. Sch. Bd.*, 821 F.2d 1563, 1565 (11th Cir. 1987). Under Florida law, res judicata applies where there is "(1) identity of

the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed on the merits." *Lozman v. City of Riviera Beach, Fla.*, -- F.3d --, No. 11-5488, 2013 WL 1285868, at *6 (11th Cir. 2013) (quoting *Andela v. Univ. of Miami*, 692 F.Supp.2d 1356, 1371 (S.D. Fla. 2010)) (internal quotation marks omitted). If these elements are met, then res judicata prohibits not only relitigation of claims actually raised but also the litigation of claims *that could have been raised* in the prior action. *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001).

Here, the decision of the Fourth District should be given preclusive effect under Florida law. Review of the state court opinion conclusively shows that the issues raised in the instant litigation were or could have been litigated to final judgment and addressed on appeal. The necessary identities for the application of res judicata under Florida law are met: the Tribe is suing the Department a second time, seeking the same declaratory relief based on the same causes of action.

**1. The Tribe Is Seeking the Same Declaratory Relief as That Sought in the Prior State Court Action.**

The Tribe is seeking the same primary relief in this present action as it did in the prior state action—a declaration that it is not liable for fuel taxes imposed on fuel purchased off of tribal lands.

Before the district court, the Tribe maintained that in the prior state court action, it sought relief in the form of (1) a refund of taxes already paid, and (2) a declaration that it was exempt from paying the fuel tax under state and federal law, whereas in the present case it is seeking (1) injunctive relief from future payment of the tax, and (2) a declaration that the State's imposition of the tax violates federal law. [D22:23-24] However, in trying to cast the requested relief as different for purposes of defeating res judicata, the Tribe avoids the fact that the *derivative* relief it seeks—whether retrospective (a refund) or prospective (an injunction)—hinges solely upon the resolution of the *declaratory relief* requested in both cases; namely, whether the State can lawfully impose the fuel tax on the Tribe's off-reservation fuel purchases under federal law.

Accordingly, the Tribe's earlier state action and present federal action were brought to seek identical relief in the form of a declaration that federal law prohibits the State's imposition of the fuel tax upon the Tribe's off-reservation purchases. Therefore, the required identity of "the thing sued for" is met.

**2. The Tribe's Present Claims Are Based upon the Same Operative Facts as the Prior State Court Action.**

The causes of actions in both cases also have the necessary identities under the principle of res judicata. The principal test for determining whether the two cases involve the same causes of action focuses on "whether the primary right and

duty are the same in each case." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1503 (11th Cir.1990) (quoting *I.A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, (11th Cir. 1986)). In applying this test, a court compares the substance of the actions rather than their form—"a court must look to the factual issues to be resolved in the second cause of action, and compare them with the issues explored in the first cause of action." *Id.* (quoting *S.E.L. Maduro v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1482 (11th Cir. 1987)) (internal quotation marks omitted). More generally, "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, [then] the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Id*. (quoting *Ruple v. City of Vermillion, S.D.*, 714 F.2d 860, 861 (8th Cir. 1983)).

Notably, "[t]he presence of [identity of cause of action] is a question of 'whether the facts or evidence necessary to maintain the suit are the same in both actions.'" *Accardi v. Hillsboro Shores Home Improvement Ass'n*, 944 So. 2d 1008, 1012 (Fla. 4th DCA 2005) (quoting *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1209 (Fla. 4th DCA 2005)(en banc). Here, the facts and evidence are the same under both the state court action and the present federal action. Whether the tax complained of was assessed in 2005 or 2010, it was still assessed upon the transfer of fuel into a vehicle by a consumer. The relevant facts remain the same, and

shifting the timeframe of when the tax was (or will be) imposed does not avoid preclusion under the doctrine of res judicata.

Further, the Tribe argued below that res judicata was inapplicable because it could not have raised its alternate theories under the Indian Sovereignty Doctrine and Equal Protection in state court. [D22:28] In support of this assertion, the Tribe reiterated its complaints concerning the unforeseeability of the Fourth District not ruling in its favor, thus "implicating" these alternate theories. [*Id.* at 28-30] This does not excuse the Tribe's failure to bring these federal law challenges at the appropriate stage in the state court litigation. The Tribe had a timely opportunity to raise these claims when it was challenging the State's fuel tax on state and federal grounds in state court. It simply chose not to do so.

Accordingly, its present claims are barred under res judicata.

## II. Under the Eleventh Amendment and the Tax Injunction Act, the Tribe's Complaint Is Barred from Federal Court.

In the trial court proceedings, the Department argued both that the Eleventh Amendment and the Tax Injunction Act barred the Tribe from pursuing its claims against the Department in federal court. The trial court relied on the Tax Injunction Act as its second independent ground for dismissal. In addition, although the district court did not address Eleventh Amendment immunity, the Eleventh Amendment also immunizes the Department from the Tribe's suit.

### A. Eleventh Amendment Immunity Was Neither Waived nor Abrogated in This Case.

#### 1. Eleventh Amendment Immunity Bars the Tribe's Claims Against the State and the Department of Revenue as an Entity.

The Eleventh Amendment to the United States' Constitution precludes federal courts from hearing suits against a state government without that state's consent. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779, 111 S. Ct. 2578 (1991) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890)). In addition to consent, Congress may abrogate a state's immunity, but any attempt to do so must be "obvious from 'a clear legislative statement.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114 (1996) (citing *Blatchford*, 501 U.S. at 786). A state's immunity extends to agencies like the Department. *Schopler v. Bliss*, 903 F.2d 1373, 1378 (11th Cir. 1990) ("[T]he Eleventh Amendment extends to state agencies and other arms of the state").

Consent to federal suit can be express or implied through "the plan of the [constitutional] convention." *Blatchford*, 501 U.S. at 779. As an initial matter, the Department did not expressly consent to the Tribe's federal suit.[8] Likewise, no

[8] Section 768.28(18), Florida Statutes, provides:

implied constitutional consent to this suit exists. *Id.* at 781-82 (in adopting the Constitution, the States did not waive their immunity to suits by Indian tribes, who are akin to foreign sovereigns); *Seminole Tribe of Fla.*, 517 U.S. at 72-73 (holding the Indian Commerce Clause does not constitute a waiver of Eleventh Amendment immunity for Indian tribe cases).

Without consent, the Eleventh Amendment bars the Tribe's action unless Congress clearly and intentionally abrogated immunity for either Indian tribe cases or state taxation matters. It has not.

The Congressional grant of federal jurisdiction to Indian tribes in 28 U.S.C. § 1362 does not overcome immunity. *Blatchford*, 501 U.S. at 786 (concluding that "§ 1362 does not reflect an 'unmistakably clear' intent to abrogate immunity, made plain 'in the language of the statute.'"). Additionally, Congress has barred most

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> No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court.

§ 768.28(18), Fla. Stat.

state taxation matters from being brought in federal court under the Tax Injunction Act. Thus, there is no Congressional abrogation of Eleventh Amendment immunity.

Despite having no basis to find a waiver or abrogation of immunity, the Tribe argued below that the Eleventh Amendment does not apply to "bar an Indian tribe from accessing Federal court to obtain prospective relief against State taxation of activities on reservation lands." [D22:13] As support, the Tribe relied on *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S. Ct. 1634 (1976), and *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000). Neither case, however, supports the Tribe's position.

First, *Moe* does not address the Eleventh Amendment. It addresses only the Tax Injunction Act. Because Eleventh Amendment immunity is an affirmative defense that can be waived, the existence of federal Indian suits challenging state tax assessments does not suggest an abrogation of the Amendment. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389, 118 S. Ct. 2047 (1998) ("[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it." (citations omitted)).

Second, *Pierce*—which is not binding authority for this Court—has been limited to its facts, is not applicable, and is of questionable validity. *Pierce* held that the Eleventh Amendment did not bar an Indian tribe's suit "for injunctive relief against state taxation occurring on trust lands." 213 F.3d at 572. Subsequently, however, the Tenth Circuit cautioned that *Pierce* cannot be read broadly because any such reading "fails to account for the substantial narrowing effect *Blatchford* has upon our holding in that case." *Muscogee (Creek) Nation v. Okla. Tax Com'n*, 611 F. 3d 1222, 1228 (10th Cir. 2010). Specifically, the court explained that unless a tribe is "seek[ing] to enjoin state taxation 'within the tribe's territorial boundaries,'" "*Pierce* simply does not apply." *Id.* at 1230.

*Pierce*'s first criterion—that a lawsuit seeks injunctive relief—is of no moment. The Supreme Court has "often made it clear" that the type of relief sought is "irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe of Fla.*, 517 U.S. at 58. Because the type of relief sought has no bearing on immunity, *Pierce* stands only for the proposition that the Eleventh Amendment ceases to exist at a tribe's territorial boundaries. The conclusion that the Eleventh Amendment has geographical limits, however, has no support. *Pierce* relied on *Moe*, which, as discussed above, does not address the Eleventh Amendment.

Even if the geographic limits to immunity discussed in *Pierce* were valid, they are irrelevant here. Florida's fuel tax is imposed at the point that the fuel is purchased, and the Tribe's vehicles were fueled at stations off of reservation lands. The taxable events here occurred outside of reservation boundaries, and *Pierce*'s (questionable) exception to Eleventh Amendment immunity is inapplicable.

Because the Department never waived its Eleventh Amendment immunity and because there is no other basis to conclude that immunity has been abrogated, dismissing the State and the Department of Revenue as an entity on this ground alone would have been sufficient and the Court can affirm on Eleventh Amendment grounds.

**2. *Ex Parte Young* Does Not Abrogate Director Stranburg's Eleventh Amendment Immunity.**

Notwithstanding the Eleventh Amendment, the Tribe argued below that immunity did not apply to Director Stranburg under the *Ex parte Young* doctrine. [D22:15-17] However, both the declaratory and injunctive relief sought by the Tribe require continually reaching into the state treasury for refunds of pre-collected tax assessments. There would be no way to enforce a declaratory judgment except through continuous refunds. As the Supreme Court made clear in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), the *Young* exception does not apply when, as here, requested prospective relief is

actually a retroactive levy upon state funds. The precollection of the tax from terminal suppliers has been the law for decades and cannot be construed as a subterfuge to avoid any prohibition on taxing the Tribe's purchase of fuel.

Typically, suits against state officials in their official capacities are treated analogously to suits against state agencies for the Eleventh Amendment because such a suit "is no different than a suit against the State itself." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989). If, however, a suit seeks only prospective injunctive relief to end an official's continuing violation of federal law, the *Ex parte Young* exception applies to permit federal jurisdiction. *See Va. Office for Protection & Advocacy v. Stewart*, -- U.S. --, 131 S. Ct. 1632, 1638 (2011) ("[W]hen a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes").

Requesting prospective, injunctive relief, however, does not automatically trigger *Young*. If the State is the "'real, substantial party in interest,' as when the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration,'" *Young* does not apply. *Va. Office*, 131 S. Ct. at 1638 (citation omitted). Simply put, *Young* "cannot be used to obtain an injunction requiring the payment of funds from the State's treasury." *Id.* at 1639 (citing

*Edelman v. Jordan*, 415 U.S. 651, 666, 94 S. Ct. 1347 (1974)). Indeed, in declining to apply the *Young* exception in *Coeur d'Alene*, the Supreme Court explained that the exception was "inapplicable" because "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." 521 U.S. at 287 (effect of the requested relief was to shift ownership of lands to tribe, thus causing "offense to Idaho's sovereign authority").

To determine whether *Young* applies, a court conducts "a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S. Ct. 1753 (2002) (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part)). Here, the "straightforward inquiry" reveals that the Tribe's requested relief is not properly characterized as prospective.

The Tribe seeks to enjoin Director Stranburg's "continued and prospective refusal to refund the Fuel Tax on the fuel that the Tribe uses." [D1:14] Indeed, as Florida's fuel tax is pre-collected, [D1:3, at ¶12], the only way to accomplish an injunction against the Tribe's payment of the fuel tax for fuel obtained at off-reservation sites is to repeatedly issue refunds out of the State treasury. The

requested prospective relief therefore in reality is an impermissible retroactive levy upon state funds. It is exactly the type of relief identified by the Supreme Court in *Coeur d'Alene* as rendering the *Young* exception inapplicable. Indeed, as this Court has previously held, when the "only action the defendants are required to take to comply with [a] district court's injunction is to pay from the state treasury the [] funds specified by the district court," the injunctive relief "does not fall within the *Young* exception." *DeKalb Cnty. School Dist. v. Schrenko*, 109 F.3d 680, 691 (11th Cir. 1997) (determining Eleventh Amendment barred prospective injunctive relief involving solely the funding of future desegregative transportation costs).

Below, the Tribe relied on *Agua Caliente Band of Cahuilla v. Hardin*, 223 F.3d 1041 (9th Cir. 2000), to argue that the *Young* doctrine should apply to reach Director Stranburg. [D22:15-17] *Agua Caliente*, however, is distinguishable. *Agua Caliente* addressed a request for a declaratory judgment that the tribe in that suit should not have to pay California's sales and use tax on purchases of food and beverages made by non-tribal members at a resort on tribal lands. *Id.* at 1043. Critically, the tribe had not paid any of the tax and was being assessed for unpaid taxes. *Id.* at 1044. Unlike here, there would be no retrospective levy. In determining that the tribe could maintain their suit, the Ninth Circuit found the distinction relevant, explaining that the requested relief "would not affect

California's sovereignty interests to such 'a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury,' but would only ensure that the state sales and use tax be applied by state officials in a manner consistent with federal law." *Id.* at 1049 (citation omitted) (quoting *Coeur d'Alene*, 521 U.S. at 287).

The *Young* exception permits injunctive relief that directs a state official to conform their conduct to the requirements of federal law. However, when a retroactive levy upon state funds is the change in conduct sought, as here, the Supreme Court has never approved such relief.

For the foregoing reasons, the *Young* exception does not apply to permit the Tribe to seek its relief of continuous refunds of pre-collected tax assessments against Director Stranburg, and Director Stranburg should be dismissed along with the State and the Department of Revenue as an entity on Eleventh Amendment grounds.

### B. The Tax Injunction Act Bars Relief When a State Court Action Would Afford Adequate Remedy.

The Tax Injunction Act, 28 U.S.C. § 1341, prohibits a federal district court from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under the state law where a plain, speedy and efficient remedy may be had in the courts of such state." The Act, which also reaches actions for

declaratory judgment, *California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S. Ct. 2498 (1982), applies if two conditions are met. The plaintiff must be requesting that the court "enjoin, suspend, or restrain" a state tax assessment, and the available state court remedy must be "plain, speedy, and efficient." *Williams v. City of Dothan, Ala.*, 745 F. 2d 1406, 1411 (11th Cir. 1984).

The Tribe does not dispute that its claims satisfy the Act's conditions. Instead, the Tribe argues that it is exempt because *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S. Ct. 1634 (1976), held that 28 U.S.C. § 1362 "overrides the Act and allows an Indian tribe to bring an action in federal court to challenge the constitutionality of a state tax scheme." Init. Br. at 44. The district court, however, concluded that *Moe* addressed taxation of on-reservation activity and "Plaintiff has not presented any authority that *Moe* should be extended to off-reservation activity." [D27:9-10]

On appeal, the Tribe again offers no authority that *Moe* applies to off-reservation activities. *See* Init. Br. at 45 (citing *Osceola v. Fla. Dep't of Revenue*, 893 F.2d 1231 (11th Cir. 1990) (suit by individual Indian barred by the Act) and *Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) (addressing on-reservation activity)). As such, the district court's decision should be affirmed.

## III. This Court Can Affirm the Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted.

As argued in the district court, should this Court reach the substance of this case—which the district court did not find necessary to do—it should dismiss the Tribe's action for failing to state a claim upon which relief can be granted. Although the district court dismissed the Tribe's suit on jurisdictional grounds, this Court can affirm for failing to state a claim upon which relief can be granted. *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1206-07 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 126 (2012) ("While the district court did not reach the Defendants' 12(b)(6) motion for failure to state a claim, we may affirm the district court's dismissal on any ground found in the record.") (citing multiple cases).

The decisive issue in this case is whether the Tribe's off-reservation purchases of motor fuel are subject to Florida's motor fuel tax. The plain language of Florida's motor fuel tax statute and the explicit jurisprudence of the United States Supreme Court provide that the Tribe must pay state motor fuel tax when it places the fuel in the tanks of its vehicles off of its reservation and trust lands. Thus, because it is undisputed that all of the fuel purchases at issue occur off of tribal lands, [D1:5, at ¶ 18], there is no need to remand to determine how the fuel is consumed after purchase, and the propriety of the Department's refusal to issue continuous refunds of the prepaid fuel tax can be resolved as a legal matter.

As explained by the Supreme Court in *Wagnon*, for "Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences." 546 U.S. at 101. If the legal incidence of a state tax falls "on a tribe or on tribal members" for an event occurring "inside Indian country," the tax is categorically improper absent congressional authorization. *Id.* at 102. If the legal incidence falls on "non-Indians engaging in activity on [a] reservation," the validity of the tax depends on the outcome of an interest-balancing test. *Id.* at 110 (explaining that the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980), is limited to taxation of non-Indians engaging in on-reservation activity). Finally, if the legal incidence falls on a tribe or tribal members for an event occurring beyond the boundaries of the reservations, taxation has been permitted "without applying the interest-balancing test." *Id.* at 112-13.

When the legal incidence of the tax occurs off of tribal lands, the Supreme Court has consistently held that state tax transactions are valid. *E.g.*, *Wagnon*, 546 U.S. at 99 (state's motor fuel tax was permissible when assessed against non-Indian distributors who delivered fuel *to* reservation gas stations, because it arose out of transactions occurring *off* the reservation); *Okla. Tax Comm'n*, 515 U.S. at 464 (income of tribe members residing off the reservation, even if they earned that

income on the reservation, was subject to state tax); *Mescalero Apache Tribe*, 411 U.S. at 148-49 (state taxes on tribe's ski resort located outside the boundaries of the reservation were permissible) (citing multiple cases). The rule that Indian tribes and their members are generally immune from state taxation "*does not operate outside Indian country.*" *Okla. Tax Comm'n*, 515 U.S. at 464 (emphasis added). Therefore, "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Wagnon*, 546 U.S. at 113 (citations omitted).

To resolve the "who" and the "where" of a challenged tax in Indian tax immunity cases, the Supreme Court looks to the state's statutes. Indeed, as the *Wagnon* Court explained, "dispositive language from the state legislature is determinative of who bears the legal incidence of a state excise tax" and, in the absence of dispositive language, the Court looks to "a fair interpretation of the taxing statute as written and applied." *Id.* at 102-03 (citations omitted). In *Wagnon*, the Court noted that dispositive language within the Kansas statute was determinative, concluding that the distributor of motor fuel was responsible for the tax, and that this conclusion was supported by a fair interpretation of the statute. *Id.*; *see also Okla. Tax Comm'n*, 515 U.S. at 462 (looking to the law's statutory

definitions and plain language to determine when a tax was imposed, relying on the import of the language and the structure of the statute); *Moe*, 425 U.S. at 482 (finding that non-Indian consumer received the benefit of the tax exemption "necessarily follow[ed]" from the Montana tax statute).

Under section 206.41, Florida Statutes, although Florida's motor fuel tax is pre-collected, it is ultimately borne by the consumer at the fuel pump, who pays the tax as part of the purchase price. Thus, the legal incidence of the fuel tax falls on the Tribe, and the sole question is where the taxable event occurs—on or off the reservation. If it is on the reservation, then the Tribe is not subject to the tax. If the taxable event occurs off of the reservation, then the Tribe is subject to the tax under Supreme Court law. Florida law provides that the tax is on the "use" of motor fuel, and expressly defines "use" as "the placing of motor or diesel fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof." § 206.01(24), Fla. Stat.

In the district court and on appeal, the Tribe argues that the statutory definition of "use" reflects a legal fiction, and therefore cannot apply to them. Init. Br. at 47; [D22:7-11]. The Tribe reasons that because the Indian Commerce Clause prohibits state taxation of on-reservation activities, any fuel purchased off the reservation but consumed on the reservation should not be taxed. [D22:7-8]

According to the Tribe, the location of the purchase is immaterial. All that matters is where the fuel was actually consumed, and the State cannot "avoid the Constitutional limitations on its taxing authority by simply enacting a statute which deems an on-reservation activity to have occurred off-reservation." [D22:8; *see also* D31:18, 28-29]

The statutory definition of "use" provides administrative efficiency for both the Department and the Tribe. The Tribe benefits from this statutory language because the Tribe is allowed a refund for the tax paid on the fuel it purchases on tribal lands, regardless of whether the fuel was used on or off of tribal lands. *Fla. Dep't of Revenue*, 65 So. 3d at 1097. The Tribe is not burdened with the task of maintaining records of when and where each vehicle of the Tribe and its members were used. The Tribe is only required to provide documents showing the Tribe purchased fuel on tribal lands for it to receive a refund for the fuel tax it paid on those purchases. Similarly, the statutory definition of "use" provides the Department with administrative efficiency because the Department can issue or deny a refund for fuel tax simply by reviewing records showing where the fuel was purchased.

Supreme Court jurisprudence on this issue does not support the Tribe's position. It does not matter for purposes of determining the applicability of

imposing a state tax on an Indian tribe whether it reflects "economic realities." *Okla. Tax Comm'n*, 515 U.S. at 459. Rather, applying a legal incidence test is appropriate because it "accommodates the reality that tax administration requires predictability." *Id.* at 459-60. As the Court recognized in *Okla. Tax Comm'n*, inquiring into the economic reality as to how a tax is borne out—here, where the fuel is combusted by the vehicle—would be "daunting." *Id.* at 460. Indeed, the administrative difficulty in ascertaining the amount of fuel consumed on Florida roads versus reservation roads (or roads of other states) would simply be impracticable. Though the Tribe would prefer to apply an "economic realities" test, that is simply not the law. As a result of this fundamental misperception, the Tribe begins with the incorrect premise that the taxable event occurs on the reservation, rendering the tax improper.[9] *See* Init. Br. at 47.

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[9] The Tribe's assertion in its brief that determining where the fuel is "used" according to a legal fiction created by state statute is impermissible under *Bracker* is simply incorrect. Init. Br. at 34 n.15. The Arizona tax at issue in *Bracker* is not analogous to the tax here. The Arizona fuel tax was a tax imposed on certain businesses "in order to compensate [the State] for their greater than normal use of public roads." 448 U.S. at 153 (Stevens, J., dissenting). The statutory taxable event was "the ***propulsion*** of a motor vehicle on any highway within [the] state." *Id.* at 140 (quoting Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1979)) (emphasis added). Florida, by contrast, taxes the "***placing*** of motor or diesel fuel" into a vehicle's fuel tank. Because the Arizona statute taxed a different event than the

In sum, the Tribe purchased and placed fuel in the fuel tanks of its vehicles while outside its reservation and trust lands. Because Florida law says that the taxable event, as defined by Section 206.01(24), Florida Statutes, occurs off the reservation, the Tribe is subject to the motor fuel tax. Nothing in the Supreme Court's Indian Commerce Clause jurisprudence requires a different result. Indeed, these cases urge deference to state legislative decisions such as the one Florida made about when motor fuel is "used." In *Wagnon*, the Supreme Court accepted the state definition of the incidence of the tax as falling on the non-Indian distributor in an off-reservation transaction. In the same manner, here, the Court should accept the state's definition of the taxable event as the placement of the fuel in a vehicle's tank, which occurred off-reservation making the tax valid and collectable. Thus, there is no legal merit to the Tribe's claims and this Court can affirm the dismissal on grounds that the Tribe failed to state a claim upon which relief can be granted.

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Florida statute, the Supreme Court's conclusion that the tax in *Bracker* involved on-reservation activity has no bearing on this case.

## CONCLUSION

For all of the foregoing reasons, the Court should affirm the District Court's dismissal of the Tribe's lawsuit.

Dated: May 20, 2013

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 11th Circuit Rule 32-4. According to the word count in Microsoft Word 2007, there are 9,283 words in the applicable sections of this brief. I also certify that this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). The brief was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point, Times New Roman font.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2013, the foregoing brief was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following counsel of record.

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