No. _____

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
TENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state have the power to tax minerals production within the territorial boundaries of an Indian nation when the state provides no services in that location whatsoever, and where the tribe's members cannot even vote in that state's elections, amounting to taxation without representation?

2. Does *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), permit New Mexico to tax oil and gas operators' activities on Indian trust land even where, as here, "the State has nothing to do with the on-reservation activity, save tax it"?

PARTIES TO THE PROCEEDING

The petitioner, the Ute Mountain Ute Tribe, is a federally-recognized Indian tribe. The respondent, Secretary Padilla, is an individual and officer of the government of the State of New Mexico.

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PETITION FOR A WRIT OF CERTIORARI

The Ute Mountain Ute Tribe respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 660 F.3d 1177, and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-60a. The District Court opinion is reported at 775 F. Supp. 2d 1259, and is reprinted at Pet. App. 62a-136a.

JURISDICTION

The Court of Appeals, entered its judgment on July 27, 2011, and denied a petition for rehearing *en banc* on September 12, 2011, order reprinted at Pet. App. 61a, and issued its mandate in this case on September 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

This case involves the federal statutes regulating minerals development on tribal lands, specifically the Indian Minerals Leasing Act, 25 U.S.C. §§ 396a-396g, and the Indian Mineral Development Act, 25 U.S.C. §§ 2100-2108. The pertinent portions of these laws are reproduced at Pet. App. 148a-153a.

STATEMENT OF THE CASE

A. Factual Background

The Ute Mountain Ute Tribe ("Tribe") is a federally-recognized Indian tribe.[1] The Tribe's governmental seat is located in Towaoc, Colorado, although the Ute Mountain Ute Reservation ("Reservation") straddles portions of Colorado, Utah and New Mexico. The New Mexico portion of the Reservation ("the New Mexico Lands") was set aside for the Tribe by an 1895 Act of Congress.[2] All of the New Mexico Lands are held by the United States in trust for the Tribe.[3] No one resides on the New Mexico Lands and hence, no Tribal members resident on the Reservation are New Mexico voters. Rather, the New Mexico Lands are used by the Tribe exclusively for livestock grazing and oil and gas development.[4] New Mexico provides no services of any kind on the Reservation.[5]

The Tribe has just over 2,000 members, 38.5 percent of whom lived below the poverty line at the time of the 2000 census.[6] The average *per capita* income of Tribal members was $8,159 during the 2000 census, approximately half the average for the residents of the nearest off-reservation counties: Montezuma County, Colorado and San Juan County, New Mexico.[7] In 2000, the official unemployment rate among Tribal members was 11.3 percent, as

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[1] 75 FED. REG. 60,810, 60,813 (Oct. 1, 2010).

[2] 28 Stat. 677, Pet. App. 65a, 147a (Finding 9).

[3] Pet. App. 66a, 76a (Findings 15, 103).

[4] Pet. App. 66a (Findings 16-17, 19).

[5] Pet. App. 67a, 92a (Findings 28, 245).

[6] Pet. App. 64a, 100a (Findings 3, 308).

[7] Pet. App. 99a-100a (Findings 305-306).

compared to a range of 2.7 percent to 5.5 percent in the corresponding counties and states.[8]

Oil and gas leasing of the New Mexico Lands began in the 1950s.[9] Leasing on the New Mexico Lands has always been a federal and tribal concern, and not a state one. Leases were originally entered into pursuant to Indian-specific laws such as the Act of May 11, 1938, 52 Stat. 347, the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g.[10] Today, most of the minerals development agreements the Tribe negotiates and enters into are made pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108.[11] These agreements expand the Tribe's opportunity to be an active participant in development of its mineral resources.[12] All leases and associated agreements on the New Mexico Lands require the approval of the Secretary of the Interior, whose authority has been delegated to the Bureau of Indian Affairs (BIA).[13] Surface management, including the granting of easements and oversight of cultural resources, is the responsibility of the BIA and the Tribe.[14] Under federal law,[15] all downhole oil and gas operations are supervised by the Bureau of Land Management (BLM), in cooperation with the BIA and the Tribe.[16] On the New Mexico Lands, BLM approves permits to drill and the disposal of

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[8] Pet. App. 100a (Finding 307).

[9] Pet. App. 77a (Finding 114).

[10] Pet. App. 77a (Finding 113).

[11] Pet. App. 77a (Finding 115).

[12] Pet. App. 78a (Findings 119-124).

[13] Pet. App. 78a-79a (Findings 125, 129-130).

[14] Pet. App. 81a (Findings 148, 149, 155).

[15] 25 U.S.C. § 396d, Pet. App. 148a; 25 C.F.R. Part 211, Pet. App. 148a, 154a-159a.

[16] Pet. App. 79a-81a (Findings 138-145, 150-155).

water, protects the mechanical integrity of the wells, and oversees the abandonment and plugging of wells, among other operational activities.[17] There is no provision in federal or Tribal law for State approval of any oil and gas activities on the New Mexico Lands, and the District Court found the economic value of New Mexico's potential services to oil and gas operators on the Reservation to be *de minimis* at most.[18] The District Court also concluded that federal regulation of oil and gas operations on the Tribe's lands is exclusive.[19]

This exclusivity arises both because of the extensive nature of the federal regulatory scheme and the specific sovereign decisions of the Tribe, over a period of many years, to control the development of its Reservation oil and gas resources. Since 1992, the Tribe has barred New Mexico officials from entering the Reservation without permission.[20] Instead, the Tribe and the United States regulate on-Reservation oil and gas activities. All oil and gas operators on the New Mexico Lands pay royalties to the Tribe, and the federal Minerals Management Service performs royalty accounting and auditing in conjunction with the Tribe's own program.[21] In 2007, the Tribe's oil and gas royalties totaled $4,426.741.00, mostly from the New Mexico Lands.[22] Royalties are distributed to Tribal members on a *per capita* basis.[23] Since 1983,

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[17] Pet. App. 82a (Findings 158-165).
[18] Pet. App. 94a (Finding 264).
[19] Pet. App. 81-83a (Findings 142-168); *Ute Mountain Ute Tribe v. Homans*, 775 F. Supp. 2d 1259, 1289-1292 (D. N.M. 2009), Pet. App. 128a-131a.
[20] Pet. App. 87a (Finding 207).
[21] Pet. App. 79a (Findings 133-134).
[22] Pet. App. 96a (Finding 271).
[23] Pet. App. 95a (Findings 270).

the Tribe has also imposed taxes on reservation oil and gas development and uses that tax revenue to defray its costs of providing basic governmental services to Tribal members.[24]

New Mexico imposes five taxes on oil and gas development on the Tribe's lands: an Oil and Gas Severance Tax, an Oil and Gas Conservation Tax, an Oil and Gas Emergency School Tax, an Oil and Gas Ad Valorem Production Tax, and an Oil and Gas Ad Valorem Production Equipment Tax.[25] The revenues from these taxes go variously to meet the State's debt obligations, are put into the State's General Fund, are allocated to local governments – *not including the Tribe* – and are used to pay for plugging abandoned wells elsewhere in New Mexico, a service that has never been utilized on the Reservation.[26] For the years 2002-2007, the aggregate of the five New Mexico taxes on oil and gas production on the Tribe's lands totaled $8,052,449.00, or a yearly average of over $1.3 million.[27]

The District Court found that New Mexico's five taxes impose an economic burden on the Tribe and its members in a number of respects.[28] If the State taxes were not in place, the Tribe could either keep taxes low to increase exploration and production endeavors from oil and gas operators or increase tribal taxes to directly generate revenue for the Tribe. If, under the first option, oil and gas operators experienced a decrease in taxes, they could seek to increase production on the Reservation by discovering

[24] Pet. App. 95a-96a (Findings 272-278).
[25] Pet. App. 88a (Finding 213).
[26] Pet. App. 89a-90a (Findings 222, 224, 227, 229, 232).
[27] Pet. App. 98a (Finding 293).
[28] Pet. App. 100a (Finding 310).

new sources of oil and gas, by drilling infill wells on existing pools, or by bringing back into production wells that are not profitable under the current double taxation regime.[29] The increase in production through discovery of new sources of oil and gas would increase the Tribe's revenue from royalties and the current taxes.[30] Increased production through infill drilling or reopening closed wells on pools that lie within the Reservation would also increase the Tribe's revenue.[31] And if, as previously authorized by the Tribal Council, the Tribe were to impose taxes equivalent to those the State now imposes on Reservation oil and gas operators it would gain at least $1.3 million per year, which would increase Tribal revenue from all sources by more than eight percent, or if that additional revenue were distributed *per capita*, the average annual income of Tribal members would increase by $650.00.[32]

Thus, while the Tribe itself is largely impoverished and substantially burdened by New Mexico's taxes, it receives no direct governmental services of any kind from the State apart from the mere potential for access to its court system that citizens of all other states and foreign countries also enjoy.[33]

B. Proceedings Below

The Tribe filed and prevailed upon an action in the U.S. District Court for the District of New Mexico challenging the New Mexico taxes imposed on non-

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[29] Pet. App. 99a (Finding 299).
[30] Pet. App. 99a (Finding 300).
[31] Pet. App. 99a (Finding 301).
[32] Pet. App. 98a (Finding 297).
[33] Pet. App. 92a (Finding 246).

Indian lessees extracting oil and gas from the New Mexico Lands.[34] After multi-day evidentiary proceedings, Judge Parker ruled for the Tribe. He found that the five New Mexico taxes were preempted by federal law and enjoined New Mexico from further imposition of the taxes on the non-Indian lessees developing the Tribe's minerals on the New Mexico Lands. The State appealed to the Tenth Circuit, which, by a two-to-one vote, reversed the District Court and held that the five New Mexico taxes were not preempted by federal law, even when considered in light of the purposes of the relevant legislation and the history of Tribal sovereignty in the field.[35]

REASONS FOR GRANTING THIS PETITION

This case presents two issues. First, the Tenth Circuit's expansive new rule allows State taxation of on-Reservation production even in extreme instances that are devoid of any connection to on-Reservation State services, and where the Tribe's members resident on the Reservation and burdened by the taxes are not even eligible to vote in the State's elections. This amounts to impermissible taxation without representation. It is axiomatic that the power to tax is a power to destroy.[36] Yet the State exercises what amounts to extraterritorial taxing jurisdiction over the core economic affairs of another governmental sovereign, none of whose Reservation-based members resides within the

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[34] *Homans*, 775 F. Supp. 2d at 1259, Pet. App. 62a.

[35] *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011), Pet. App. 1a. Respondent Secretary Padilla took office following the last party submissions to the Tenth Circuit, so the case caption appears differently than it did below, but in accord with Rule 35(3) of this Court's Rules.

[36] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

State's boundaries or has any voice in the State's governmental affairs. No state, including New Mexico, may impose taxes in a place when it provides no services and lacks a single constituent who can petition the legislature for redress of grievances.[37] The uncontested record, as found by the District Court, is that the State's taxation without any corresponding benefit imposes a substantial adverse impact on the Tribe and its ability to govern itself. Even though "the power of taxing the people and their property is essential to the very existence of Government,"[38] in this case the Tribe, the Tenth Circuit majority rescues the State's erroneous and oppressive taxation at the expense of the Tribe and its members.

Second, the Tenth Circuit panel Majority reads *Cotton Petroleum*, *Bracker* and *Ramah*[39] out of the law, thereby turning this Court's federal preemption analysis on its head. The Majority's analysis rests on a misreading of the key facts in *Cotton Petroleum*, where there was no evidence that the State's taxes imposed *any* burden on the tribe or its members, let alone a substantial one.[40] The result here is an entirely new framework for preemption, not based on any facts in the record, that gives states a green light to impose taxes on minerals development on Indian lands regardless of tribes' own

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[37] *McCulloch*, 17 U.S. (4 Wheat.) at 428 ("In imposing a tax, the legislature acts upon *its constituents* . . . [as] security against erroneous and oppressive taxation")(emphasis supplied).
[38] *Id.*
[39] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mtn. Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980).
[40] *Cotton Petroleum*, 490 U.S. at 170.

interests as sovereign governments unless Congress has specifically disclaimed states' rights to do so.

With respect to both issues, the Majority erred in the application of the standard of review and improperly cast aside the District Court's careful fact-finding in favor of its own. While the Majority Decision and Dissent agreed on the basic law that governs whether federal law preempts New Mexico's taxation of minerals produced on the Ute Mountain Ute Reservation, the Dissent appropriately disagreed with the standard of review that the Majority applied to the District Court's factual determinations. The Majority improperly substituted its own version of the dispositive facts for the District Court's entirely uncontested factual findings, and then engaged in a preemption analysis that is inconsistent with that required by this Court's controlling precedent. This inexplicable new "fact-finding," along with the Majority's pervasive misapplication of this Court's binding law, changes the outcome of this case and sets up an untenable new rule that requires this Court's clarification.

I. There Is No Basis in Law for the Tenth Circuit to Overturn Judge Parker's Findings or for New Mexico to Be Able to Undercut the Sovereign Governmental Taxing and Regulatory Authority of the Tribe Where New Mexico Provides No On-Reservation Services to the Tribe or Its Members or to the Tribe's Non-Indian Lessees.

Both the Majority Decision and Dissent recognize – as the District Court did – that *Cotton Petroleum* controls this case. In discussing the limits of state taxation on Indian lands, the District Court carefully distinguished *Cotton Petroleum* from the

instant case based on 311 separate findings of fact determined at the conclusion of a trial. The District Court properly considered these findings in light of *Cotton Petroleum*, which permitted New Mexico to tax on-reservation production of minerals but held such taxation would be inappropriate where "the State ha[s] nothing to do with the on-reservation activity, save tax it."[41]

The legal parameters recognized by both the Majority Decision and the Dissent are correct: this Court's precedent requires consideration of four factors in order to determine when federal law impliedly preempts a state government's taxation powers on Indian lands.[42] Those factors are: (1) the historical backdrop of tribal sovereignty in the area taxed; (2) the extent of the federal regulatory scheme; (3) the tribe's sovereign and economic interest; and (4) the state's interest reflected by the services it provides.[43] Indeed, the same five taxes at issue in *Cotton Petroleum* were at issue here, but the District Court found that, unlike the evidence presented and arguments made in *Cotton Petroleum*, the evidence presented at trial demonstrated that New Mexico does not provide even the most basic or rudimentary governmental services on the Reservation, or indeed *any* direct services to the Tribe at all, apart from the availability of general access to New Mexico state courts.[44] Furthermore, unlike the Jicarilla Apache Tribe in *Cotton Petroleum*, the Ute Mountain Ute Tribe expressly discourages state regulatory

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[41] 490 U.S. at 186.

[42] 660 F.3d at 1186-87, Pet. App. 17a; 660 F.3d at 1203 (Lucero, J. dissenting), Pet. App. 53a.

[43] 660 F.3d at 1203 (Lucero. J, dissenting) (citing *Cotton Petroleum*, 490 U.S. at 177, 182, 184-186), Pet. App. 53a.

[44] Pet. App. 67a, 92a, 94a (Findings 28, 245, 248, 264).

endeavors and, in fact, prohibits New Mexico officials from engaging in environmental actions, such as plugging wells, on the New Mexico Lands.[45] These uncontested findings led Judge Parker to conclude that the sovereign and economic interests of the Tribe and the State's interests, as reflected by the *de minimis* services it provides, required a finding that New Mexico's taxes are preempted on the Tribe's Reservation.

The Dissent explains how the Majority inexplicably substitutes its own fact-finding for that of the District Court's: ". . . the Majority seems to have elevated an undisputed fact found by a New Mexico trial court over twenty years ago to a principle of law that binds all tribes indirectly burdened by state taxation. I would leave such fact-finding to the trial courts."[46] After "finding facts" that are not in the record, the Majority fails to accurately consider the required *Cotton Petroleum* factors, thereby misapplying this Court's time-tested federal preemption analysis as articulated in *Bracker* and later cases. The result is a new preemption analysis, based on what amounts to a rewrite of the District Court's uncontested record that veers impermissibly from what this Court requires in such cases.

The Majority improperly displaces numerous findings of fact by the District Court without a showing that such findings were clearly erroneous. Despite the Majority's acknowledgement that an analysis of whether the State taxes in this case are preempted must be flexible and must be sensitive to

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[45] Pet. App. 72a (Finding 68).

[46] 660 F.3d at 1205 (Lucero, J. dissenting), Pet. App. 57a.

the particular facts,[47] the Majority rejects many of the District Court's key findings and limits its own focus to questions of law, resulting in a conclusion entirely different than Judge Parker's. The District Court carefully delineated its findings of fact derived from three days of trial, and although none of the findings has been contested by the parties, the Majority, without explaining how any of the findings constituted clear error, reversed findings dispositive to the case.

Specifically, the Majority rejects Judge Parker's findings of fact that: (1) the federal regulations are exclusive;[48] (2) the New Mexico taxes impose an economic burden on the Tribe;[49] and (3) the State's on-reservation services are *de minimis*.[50] Instead, the Majority concludes that New Mexico may impose taxes on non-Indian lessees extracting oil and gas from the Reservation, based on the court's finding that "the burden of the tax falls on the non-Indian operators,"[51] that the role of the State energy department is "not entirely nonexistent when it comes to oil and gas operations on the Reservation,"[52] and that "off-reservation infrastructure substantially

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[47] 660 F.3d. at 1186 (citing *Bracker,* 448 U.S. at 144-145 (1980)), Pet. App. 16a.

[48] 660 F.3d at 1196, n.28, ("Even if we were to review the 'exclusivity' determination under a deferential standard, this conclusion . . . would *likely* be erroneous." (emphasis added)), Pet. App. 37a; and 1199 (finding, despite district court's conclusion of only theoretical offering of state services for *de minimis* benefit, that *Cotton* requires a "complete abdication or noninvolvement of the State in the on-reservation activity" for federal regulation to be exclusive), Pet. App. 44a-45a.

[49] *Id.* at 1197-1198, Pet. App. 40a-42a.

[50] *Id.* at 1187, 1196, Pet. App. 37a, 40a.

[51] *Id.* at 1201, Pet. App. 47a-48a.

[52] *Id.* at 1199, Pet. App. 43a-44a.

benefits the on-reservation activity."[53] In each instance, the Majority jettisons the facts found by Judge Parker, on which his preemption analysis was based, in favor of an almost entirely *different* set of facts before a New Mexico trial court decades ago in the early proceedings of *Cotton Petroleum*. The Dissent recognizes this error and notes that fact-finding is the province of the trial courts.[54]

The Dissent is strongly supported by precedents of both this Court and the Tenth Circuit. The clearly erroneous standard of review is a deferential standard, and if the District Court's account of the evidence is plausible in light of the record, the Majority may not reverse it.[55] The Majority fails to identify any evidence from the record that supports a conclusion that Judge Parker made any clear error. Indeed, the central disputes the Majority had with the District Court – but which the Dissent would properly leave alone – are entirely factual, namely the Tribe's sovereign and economic interests and New Mexico's interest based on the *de minimis* services it provides. Those determinations, made following the lengthy trial held by Judge Parker, should have been left undisturbed by the

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[53] *Id.* at 1202, Pet. App. 51a.

[54] *Id.* at 1205 (Lucero, J. dissenting), Pet. App. 57a.

[55] *See Amedeo v. Zant*, 486 U.S. 214, 223 (1988) (appellate court must give due regard to trial court's evaluation of the credibility of witnesses and assignment of weight to evidence); *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855-856 (1982) (appellate court is bound by 'clearly erroneous' standard when reviewing trial court's findings); *see also Hodgson v. Okada,* 472 F.2d 965, 969 (10th Cir. 1973) (not the function of the court of appeals to infer material facts, nor may it make controlling inferences which the trial court did not make).

Majority absent any showing of clear error by the trial judge.

In addition to improperly inserting itself into Judge Parker's shoes, the Majority's new economic burden test improperly restricts judicial evaluation of a contested tax to the narrow question of whether the Tribe directly pays the tax or reimburses the non-Indian operator. This conflicts with the economic burden test set forth by this Court in the *Bracker* line of cases. This Court has clearly stated that an Indian tribe suffers the economic burden from state taxation, even when the tribe does not directly or ultimately pay the state tax at issue, if such taxes create a disincentive to further reservation mineral development.[56]

In *Montana*, this Court affirmed the Ninth Circuit's explicit rejection of an argument that tribal reimbursement of state taxes paid by non-Indian entities was required for a finding of preemption.[57] Contrary to this authority, the Majority attempts to divine too much from the fact patterns in *Bracker*, *Ramah*, and *Cotton Petroleum* and improperly narrows the test applied in *Montana* to whether the

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[56] *See, e.g., Ramah,* 458 U.S. at 839, 844 n.8 (declining adopt the "legal incidence" test and, instead, prohibiting the state to impose taxes "even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation"); *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988) *summarily aff'g* 819 F.2d 895, 899 (9th Cir. 1987); *Warren Trading Post Co.*, 380 U.S. 685, 691 (1965).

[57] *Crow Tribe of Indians v. Montana*, 819 F.2d at 899 (9th Cir. 1987). The Ninth Circuit rejected the legal incidence test and, instead, considered "the economic aspects and the practical effects" of the state taxation, including, among others, the impacts of state taxes on the cost of production, the royalty to the tribe, and the demand for the goods produced.

Tribe reimbursed non-Indian operators for the tax liability.[58] Mired in details not adduced from the evidence before the District Court, the Majority does not even acknowledge Judge Parker's proper consideration – under *Montana* and *Cotton Petroleum* – of the significant evidence presented by the Tribe of "economic aspects and practical effects" that result in economic harm to the Tribe from New Mexico's taxes.[59]

Moreover, the Tenth Circuit's new preemption analysis establishes an improper regime under which a state may essentially always impede the sovereignty of an Indian tribe. According to the Tenth Circuit's analysis, by engaging in any off-reservation regulation of any activity that provides some value to an industry, a state may tax that same activity on an Indian reservation without providing any on-reservation services. If allowed to stand, the Majority's decision could be read to countenance state targeting of production not only on other Indian reservations, but in other *states*, for taxation, thereby exporting impermissible taxation without representation to other jurisdictions.

No Tribal members reside on the New Mexico Lands and no Tribal members resident on the Reservation and dependent upon the Tribe for governmental services vote in New Mexico elections. New Mexico provides no on-Reservation services to the Tribe's non-Indian lessees. The Tenth Circuit has created an entirely new test allowing for consideration of off-reservation services in the

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[58] *Rodriguez*, 660 F.3d at 1197, Pet. App. 32a-33a; and *id.* at 1205-1206 (Lucero, J. dissenting), Pet. App. 55a-56a.
[59] *Rodriguez*, 660 F.3d at 1195, Pet. App. 35a-36a; *Homans*, 775 F. Supp. 2d at 1287-1288, Pet. App. 126a-127a.

preemption analysis *so long as the services add economic value to the on-reservation taxed activity.*[60] This distinction, which contravenes *Ramah* and all later cases, is meaningless and open-ended. Any off-reservation services potentially add value to the on-reservation taxed activity. The same reasoning incidentally supports taxation not only on other Indian reservations, but states beyond New Mexico's borders. Oil and natural gas produced, say, in Texas or Colorado, gas might not in some instances get to market without New Mexico's regulation and infrastructure. Extending the Majority's reasoning, such production would be taxable. According to the Majority, taxation without representation is justified when extraterritorial services potentially add value to taxed activities within another's sovereign's boundaries.

Taken at face value, there is no limiting principle to the Majority's analysis. It turns fundamental tax law on its head and exposes oil and gas producers to potentially massive new taxes from various sovereigns, state and tribal alike, seeking to fund their governments. The new test articulated by the Majority drastically alters the *Bracker* preemption analysis by requiring tribes to show that they are economic islands, with natural resource extraction, refining, marketing, and sales entirely contained within a reservation, to avoid the economic burden visited by state taxation predicated on state provision of *de minimis* off-reservation services provided far down the stream of commerce and financed by other taxation of off-reservation activity.[61] This is impossible as a practical matter

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[60] *Rodriguez*, 660 F.3d at 1197, Pet. App. 45a.

[61] Indeed, oil and gas producers pay more than $1 billion in taxes annually to New Mexico for the off-Reservation services

and opens the door for New Mexico to advance the same argument as to activities in other states.[62] Furthermore, it allows a state's mere offer of services to justify any amount of taxation.[63] By failing to articulate any limiting principle with its new rule, the Tenth Circuit has invited folly whereby state taxmen could foreseeably encroach upon the tax base of any other sovereign by arguing that services in their state support the revenue-generating activity in another. This despite nearly two centuries of precedent from this Court that *only* "[t]he people of a State [may] give to their Government a right of taxing themselves and their property."[64]

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provided by New Mexico. *See State and Local Revenue from Oil and Gas*, NEW MEXICO OIL AND GAS ASSOCIATION, available at www.nmoga.org/state-and-local-revenue-from-oil-and-gas (viewed Dec. 9, 2011).

[62] New Mexico routinely seeks to assert regulatory and taxing authority over a broad range of activities. For example, on the same day the Tribe presented its case to the Tenth Circuit, New Mexico argued another case before the same panel, seeking approval under the New Mexico Liquor Control Act , N.M. Stat. §§ 60-3A-1 to -8A-19, to regulate the alcoholic beverage service that airlines provide to passengers on flights to New Mexico originating anywhere in the world. *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010).

[63] The District Court found that "although the [New Mexico Oil Conservation Division] offered services such as plugging abandoned wells, NMOCD has not plugged wells on the New Mexico lands." Additionally, the District Court found that the Tribe not only disallows NMOCD officials to plug wells on the New Mexico Lands, but also had its own services and systems in place to manage environmental problems without NMOCD's assistance. *Homans*, 775 F. Supp. 2d at 1264, 1273, Pet. App. 72a, 93a.

[64] *McCulloch*, 17 U.S. (4 Wheat.) at 428.

Instead, this Court's previous conclusion that geography matters when it comes to taxation applies with equal force here.[65] New Mexico's taxes are imposed on the production of Tribal minerals on the Tribe's Reservation where New Mexico provides no services. Liberation from the yoke of New Mexico's erroneous and oppressive taxation would allow the Tribe to either: (a) replace New Mexico's severance tax scheme with an equivalent tax that captures the entire revenue stream that previously went to New Mexico, thereby enabling the Tribe to increase governmental services to members or cash distributions to them by at least $650 per year – monies that would be a dramatic difference to a community crippled by poverty; or (b) impose a Tribal tax with an effective rate lower than the current combined Tribal-State tax, which would, in turn reasonably be expected to enhance the competitiveness of oil and gas development on the Reservation as compared to other Indian lands elsewhere in New Mexico where dual taxation applies. Judge Parker explained that "[o]il and gas operators could seek to increase production on the New Mexico lands, by drilling infill wells on existing pools, or by bringing back into production wells that are not profitable under the current taxes."[66] This, in turn, could increase revenue to the Tribe from taxes and royalty payments. In short, absent New Mexico's invasion of the Tribe's sovereignty, the Tribe could

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[65] *See Wagnon v. Prairie Band Potowatomi Nation*, 546 U.S. 95, 112 (2005) (reflecting that the Court's Indian tax jurisprudence relies "heavily on the doctrine of tribal sovereignty ... which historically gave state law 'no role to play' within a tribe's territorial boundaries") (citing *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-124 (1993) and *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 168 (1973)).

[66] *Homans*, 775 F. Supp. 2d at 1275, Pet. App. 99a.

create a tax haven to encourage oil and gas development within its borders.

Either way, New Mexico's imposition of the five taxes currently interferes substantially and impermissibly with the Tribe's ability to provide basic governmental services, with absolutely no offsetting benefit from a State that is, again given the undisputed facts in the record, politically unaccountable to the Tribe and its members.

II. The New Rule Crafted by the Tenth Circuit Eviscerates This Court's Precedents and Creates a Circuit Split.

A writ of certiorari is necessary to apply the proper standard of review of the District Court determinations of fact and to conform with the binding precedent of this Court. Indeed, if the exception identified in *Cotton Petroleum* is not to be read out of the law, as it is by the Tenth Circuit Majority, it *must* be applied given the facts of this case. Allowing the Majority Decision to stand would reinvent the federal preemption standard for other cases in the Tenth Circuit and potentially beyond resulting in economic turmoil for other Indian nations and potentially other state governments.

A. The Majority Concocts a New Categorical Federal Preemption Analysis for Disputes Involving State Taxation of Non-Indian, On-Reservation Activities That Sits in Direct Conflict with the Particularized Inquiry Developed by This Court.

In *Bracker*, this Court formulated a flexible and particularized interest-balancing test to address

"the difficult question that arises when a State asserts authority over the conduct of non-Indians engaging in activity on the reservation."[67] The *Bracker* test required a particularized inquiry into the nature of the federal, tribal, and state interests at stake.[68] When determining whether the State of Arizona could impose a motor carrier license tax and excise fuel tax on a non-Indian company participating in the development of timber resources on the Fort Apache Reservation, the *Bracker* Court found that the tribal timber development was governed by comprehensive federal regulations, the economic burden of the state tax would interfere with the federal objective of providing the tribe with the benefits of its resources, and that Arizona provided no regulatory function or service to the timber production of the White Mountain Apache Tribe. Therefore, despite the diminutive economic burden of Arizona's one percent tax, the Court held that the balance of the interests favored federal preemption of its imposition.

This particularized inquiry was further expanded and clarified in *Ramah*. The Court, relying on the analysis in *Bracker*, employed a particularized inquiry that balanced the federal interests in promoting Indian education, the tribal interests in controlling Indian education, and the State interest in regulating and taxing federally-funded schools.[69] The *Ramah* Court rejected New Mexico's argument that the services it provided to the construction company off the reservation and other unrelated services it provided to the Navajo Nation justified the

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[67] *Wagnon*, 546 U.S. at 110 (citing *Bracker*, 448 U.S. at 144-145).
[68] *Bracker*, 448 U.S. at 144-45.
[69] *Ramah*, 458 U.S. at 838.

imposition of the tax. Instead, the Court noted that "Congress expressly recognized that 'parental and community control of the education process is of crucial importance to the Indian people.'"[70] With that important notion of self-determination in mind, the Court held that, because the federal regulation of Indian education facilities was extensive and New Mexico's only interest in the school construction was a general desire to raise revenue, the tax was preempted.[71]

Finally, in *Cotton Petroleum*, the Court applied the particularized interest-balancing analysis formulated in *Bracker* and further developed in *Ramah*, to five New Mexico taxes on oil and gas production on the Jicarilla Apache Reservation challenged by a non-Indian oil and gas producer.[72] The *Cotton Petroleum* Court analyzed the extent of the federal regulatory scheme, the economic burden on the tribe, and the services and functions justifying the state tax and found that: (a) the federal regulatory scheme was "extensive" but not "exclusive" because the State regulated the spacing and mechanical integrity of the wells located on the reservation; (b) the five taxes were paid by Cotton Petroleum, were not passed on to the tribe, and Cotton Petroleum had presented no evidence that any other economic burden fell on the tribe; and (c) the State had a valid interest in imposing the tax because it "provide[d] substantial services to both the Jicarilla Tribe and Cotton," at a rate of approximately $3 million per year.[73]

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[70] *Id.* at 840 (citing 88 Stat. 2203, as set forth in 25 U.S.C. § 450(b)(3)).
[71] *See id.* at 844-845, n.9, n.10.
[72] 490 U.S. 163.
[73] *Id.* at 171.

The same five New Mexico taxes at issue in *Cotton Petroleum* are challenged in the instant case. Consequently, the Tenth Circuit accepted the particularized, interest-balancing inquiry of the *Cotton Petroleum* Court as its own, despite differing tribes, land bases, procedural postures and findings of fact made following the presentation of different evidence. In comparing the instant case to the facts of *Cotton Petroleum*, the Majority found that the New Mexico taxes and regulatory scheme were "largely" the same for both cases and, most importantly, the BLM often still efficiently borrowed the State's well-spacing and setback standards rather than generating new standards whole-cloth. Therefore, the Majority concluded, federal regulations governing oil and gas operations on the Reservation were "extensive" but not "exclusive" and New Mexico's taxes were not preempted.[74] In so concluding, the Tenth Circuit supplanted the *Bracker* interest-balancing test with a new, quasi-categorical approach to federal preemption. Under the new analysis established by the Majority, a presumption exists to allow state taxation of non-Indian, on-reservation activities unless the Tribe can present evidence of express federal preemption, complete state abrogation, or absolute tribal control over all financial and operational aspects of an activity.

What the Tenth Circuit failed to appreciate by allowing such a presumption to infiltrate its analysis is that the instant case involves a vastly different interplay of interests than those presented in *Cotton Petroleum*. As outlined in Judge Lucero's dissenting opinion, the factual differences are significant: the reservation in question was established by treaty and

[74] *Rodriguez*, 660 F.3d at 1196, Pet. App. 37a.

statute, not executive order; the Tribe here is the Plaintiff in the suit and was involved in the trial and fact-finding portions of the case; the District Court heard evidence, and resultantly found, that the New Mexico taxes imposed a substantial economic burden on the Tribe and neither the Tribe nor the private oil and gas companies receive any on-Reservation economic benefit from the State; and, since *Cotton Petroleum*, new federal regulations and Congressional policy statements have been developed to increase tribal self-determination over on-reservation resource development.[75] However, instead of engaging in an analysis of the contrasting factual landscape, the Majority focused on the main similarity – i.e., the identity of the State taxes in question and the shared well-spacing and mechanical standards in federal and state regulation – to circumvent the type or quality of particularized inquiry required under *Bracker, Ramah*, and *Cotton Petroleum*.

As a result of the Majority's overly broad application of *Cotton Petroleum*, the prior federal preemption interest-balancing inquiry is overruled. Ordinarily, state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.[76] But now, the Majority's Decision

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[75] *Id.* at 1203 (Lucero, J. dissenting), Pet. App. 53a.

[76] *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995)("[I]f the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favor the State, and federal law is not to the contrary").

engorges the federal preemption analysis to require absolute incompatibility. Under the Tenth Circuit's new analysis, if federal jurisdiction is merely informed by state regulation, even if complete federal authority is retained, the state interest is sufficient and no balancing is required.[77] The Tribe respectfully submits that this Court should grant this Petition to resolve the growing conflict and settle the appropriate analysis for federal preemption of state taxes on non-Indian, on-reservation activities.

B. The Majority's Rigid Application of *Cotton Petroleum* Fails to Recognize Recent Congressional Support for Increased Tribal Control Over Minerals Development.

To support its departure from settled precedent, the Majority notes the shift in general federal preemption analysis, as discussed in *Cotton Petroleum*.[78] However, this focus is misplaced. The appropriate inquiry is based on whether state jurisdiction "interferes or is incompatible with federal and tribal interests reflected in federal law."[79] Accordingly, the analysis should focus on Congressional, not judicial, action to ascertain what federal and tribal interests are reflected in federal law. While common law doctrines of the authority of tribes over their resource bases have narrowed, Congressional support for tribal self-determination

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[77] *Rodriguez*, 660 F.3d at 1196, Pet. App. 37a.

[78] *Id.* at 1186 ("Supreme Court jurisprudence . . . has varied over the course of the past century . . . . more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress"), Pet. App. 17a.

[79] *Mescalero Apache Tribe*, 462 U.S. at 334.

over development of their resources has increased.[80] Since *Cotton Petroleum* in 1989, enhanced federal regulations have focused on strengthening tribal self-reliance and sovereignty in resource development, both in the form of particular regulations promulgated by the BIA and more general, sweeping policy pronouncements like those expressed in the Indian Tribal Energy Development and Self-Determination Act of 2005.[81] However, by narrowly focusing on the evolution of the judicial doctrine of intergovernmental immunity, the Tenth Circuit lends support to its new, limited analysis: preemption must be express or implied through absolute federal authority and regulation, regardless of the particularized interests.

Despite myriad intervening advancements in regulations and various acts of Congress demonstrating strong federal support for increased tribal self-determination and control over resource development, the Majority froze itself in time and wrongfully overwrote Judge Parker's modern findings of fact with the historical and factual analysis in *Cotton Petroleum*. The effect of the Majority's holding, practically speaking, is that unless state involvement is completely abdicated or Congress has expressly preempted it, states may always impose taxes on non-Indian extraction of on-reservation

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[80] *See* Judith Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065 (Winter 2008).

[81] Energy Policy Act of 2005, P.L. 109-58, 119 Stat. 770, Title V (August 8, 2005) (providing, among other things, mechanism for tribes to enter into leases or business agreements for development of mineral resources without review or approval by the Secretary of the Interior).

minerals. This categorical approach is in direct conflict with the balancing test established in *Bracker*, *Ramah*, and *Cotton Petroleum*.

C. The Tenth Circuit's Analysis Regarding Federal Interest Is Improperly Narrow and Requires Clarification.

In *Bracker* and *Ramah*, this Court found that the federal schemes were so pervasive as to preclude the additional burdens of state regulation.[82] In so holding, this Court utilized an analysis of the specific regulations that applied to the non-Indian companies in question and the general, overarching federal presence in the field. The *Bracker* Court pointed to the scope and variety of federal regulations, the routine involvement of the BIA, and the federal and tribal control of the transportation of product on the reservation.[83] Similarly, the *Ramah* Court found that the general federal preference for tribal regulation and federal supervision of the construction and financing of Indian education institutions to be sufficiently "comprehensive and pervasive."[84]

Importantly, neither case required a finding of complete abdication of state regulatory involvement nor the absolute presence of the federal regulatory scheme. And while it is very likely that at some point and in some way state laws informed the laws applied on the reservation, neither court addressed

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[82] *Bracker*, 448 U.S. at 147-48; *Ramah*, 458 U.S. at 839-840.

[83] *Bracker*, 448 U.S. at 147-48 (discussing the wide range of applicable regulations; the daily supervision of the BIA with respect to timber management and construction, administration and maintenance of roads by the federal government, the Indian tribe, and tribal contractors).

[84] *Ramah*, 458 U.S. at 839.

whether the on-reservation speed limits or building code corresponded with state law. In fact, the *Ramah* Court expressly rejected the proposition that the federal Indian education scheme was not comprehensive because it did not specifically regulate school construction, which was the taxed activity.[85] The *Ramah* majority instead stated that the precedent established in *Bracker* was one addressing the comprehensive federal regulation of the general activity not the specific activity being taxed.[86] The New Mexico tax was held to be precluded by the federal interest in the construction of autonomous Indian educational institutions.

Alternatively, the Majority applied an improperly focused analysis to the comprehensiveness of the federal regulatory oil and gas scheme. Unlike the analysis in *Bracker*, *Ramah*, and *Cotton Petroleum*, in which the Court engaged in a particularized inquiry into the federal interest, the Majority limited its analysis to the findings in *Cotton Petroleum* and held that, because the federal regulations were still informed by State well-spacing and setback standards, the federal regulations governing oil and gas operations on the Reservation were "extensive" but not "exclusive."[87] The Majority erroneously set aside the District Court's findings regarding the pervasiveness of the federal regulatory scheme and the sovereign actions of the Tribe to

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[85] *Ramah*, 458 U.S. at 842 n.5.

[86] *Id.* ("[In *Bracker*], we struck down Arizona's fuel tax and motor carrier license tax, not because of any specific federal interest in gasoline, licenses, or highways, but because the imposition of the state taxes on a non-Indian contractor doing work on the reservation was preempted by the comprehensive regulation of the harvesting and sale of timber").

[87] *Rodriquez*, 660 F.3d at 1194, Pet. App. 36a.

exclude the State. The District court found that the federal regulatory authority over oil and gas operations was overwhelming – including complete regulatory authority over approvals of all aspects of an Application for Permit to Drill, well-spacing and setbacks, produced water disposal, and the plugging and abandoning of wells. The District Court also found that the Tribe exerted sovereign authority over the environmental regulation and programs on the New Mexico Lands to the express exclusion of the State. The numerous and all-encompassing federal regulations and the sovereign efforts of the Tribe to exert control over its resource base, are in complete alignment with the Congressional interest in tribal self-determination over the development of on-reservation resources.[88] Nevertheless, the Majority chose to ignore these facts in order to imprudently apply *Cotton Petroleum.*

The unrestrained application of *Cotton Petroleum* to the instant, and contrasting, facts resulted in an outcome overtly straying from the rule of law established in *Bracker, Ramah,* and *Cotton Petroleum.*

D. The Tenth Circuit's New Rule Invites Confusion Among Courts Applying Federal Preemption Analysis.

The effect of *Cotton Petroleum*, as stated by the Tenth Circuit's decision, is to overrule this

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[88] *Response Brief of Appellee Ute Mountain Ute Tribe* at 26-30 (discussing new regulations including the first set of regulations implementing the IMDA, new oil and gas leasing regulations promulgated by the BIA, and the Indian Tribal Energy Development and Self-Determination Act of 2005 and related regulations), Pet. App. 186a-190a.

Court's previous analysis of federal preemption. The Majority cites *Cotton Petroleum* for the new proposition that Congressional intent to allow state taxation is found in *any* harmonization between state and federal regulation. To put it another way, a prohibition of state taxation on non-Indian, on-reservation oil and gas operations cannot be implied from Congressional intent to increase the self-determination of tribes or enhanced federal regulations over resource development. Instead, preemption may be found in the Tenth Circuit only where state and federal regulations are in complete disaccord or where Congress has taken express action. The Tenth Circuit's decision has, in practical terms, accepted the very proposition rejected in *Bracker* "that in order to find a particular state law to have been preempted by operation of federal law, an express Congressional statement to that effect is required."[89]

Like the Tenth Circuit, state appellate courts are also applying a categorical analysis, instead of the particularized *Bracker* inquiry, based on the holding in *Cotton Petroleum.* In *Oklahoma Tax Commission v. City Vending of Muskogee*, the Supreme Court of Oklahoma held that a tribally-owned cigarette wholesaler had the burden to show Congressional intent to exempt tribal sales from state taxes.[90] The Oklahoma court applied *Cotton Petroleum* as holding that the general decline and repudiation of the doctrine of intergovernmental tax immunity meant that oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to preempt the state taxes.

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[89] *Bracker*, 448 U.S. at 144.

[90] 835 P.2d 97 (Okla. 1992), *cert denied*, 506 U.S. 1001 (1992).

Citing *Cotton Petroleum* and without undertaking any particularized *Bracker* inquiry, the Oklahoma court held that, because Congress had not expressly or impliedly acted to preempt state taxation, the State of Oklahoma could impose "a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, *even though the financial burden of the tax may fall on the United States or the tribe*."[91]

Similarly, the Utah Supreme Court upheld the imposition of state and local taxes on oil and gas production within the Navajo Nation based solely on the holding of *Cotton Petroleum* and without any particularized inquiry into the nature of the state, federal and tribal interests at stake. In *Texaco, Inc. v. San Juan County*, the Utah Supreme Court held that under post-1938 case law, Congress's silence as to a question of state taxation of revenues from on-reservation mineral leases is to be construed as permitting taxation.[92] Relying heavily on the holding in *Cotton Petroleum*, the Utah Supreme Court affirmed the trial court's finding that because the act in question did not preclude the state's taxation of revenues from leases on the reservation, the state taxes were not preempted.

In contrast, in the Ninth Circuit, *Hoopa Valley Tribe v. Nevins*[93] still disallows federal trial and

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[91] 835 P.2d at 108-109 (citing *Cotton Petroleum*, 490 U.S. at 175-177) (emphasis in original).
[92] 869 P.2d 942, 945 (Utah 1994) (citing *Cotton Petroleum*, 490 at 175).
[93] 881 F.2d 657, 660-661 (9th Cir. 1989), *cert denied*, 494 U.S. 1055 (1990) (cited with approval by Judge Parker in *Homans*, 775 F. Supp. 2d at 1285).

appeals courts from considering alleged off-reservation state benefits.

These cases illustrate the need for this Court's clarification of its prior rulings to prevent the overreaching results obtained from lower courts' misinterpretation of *Cotton Petroleum* and to address the circuit split between *Rodriguez* and *Hoopa Valley Tribe*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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