No. 14-351

IN THE

Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE, and MARSHALL STRANBURG, as Interim Executive Director and Deputy Executive Director,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

As set forth in its Petition for Certiorari, Petitioner Seminole Tribe of Florida is a federally recognized American Indian tribe. It is not a corporation; it does not issue any stock; and it has no parent corporation.

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INTRODUCTION

This case concerns the power of federal courts to hear an Indian tribe's challenge to the constitutionality of a state tax. The decision below effectively ceded control of that power to Florida's legislature. That grave mistake, which Judge Jordan in dissent observed created a circuit split, demands this Court's review.

Respondents cast the unprecedented ruling in this case as a "straightforward application of settled Eleventh Amendment principles." Op. 1. But the court of appeals turned the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), on its head. This Court long ago established that *Ex parte Young* permits relief from the future enforcement of unconstitutional

state taxes. *See Greene* v. *Louisville & I.R. R.R.*, 244 U.S. 499 (1917). Yet the Eleventh Circuit barred the Tribe from seeking precisely that relief here.

This break with settled precedent rested on the dubious premise that, because Florida pre-collects the tax at issue here from third parties, even prospective relief would require impermissibly retrospective refunds from the state treasury. But this tortured fixation on form is contrary to this Court's holding that *Ex parte Young* depends on the *substance* of the relief sought, *not* its form. *Papasan* v. *Allain*, 478 U.S. 265, 278-279 (1986); *Edelman* v. *Jordan*, 415 U.S. 651, 666 (1974). And it runs headlong into another well-established line of this Court's precedent clearly "permit[ting] federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a *direct and substantial impact on the state treasury*." *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (emphasis added); *see Edelman*, 415 U.S. at 667-668; *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).

These flagrant departures from precedent are reason enough to grant review. But the decision also creates two circuit splits: First, unlike the Eleventh Circuit, other circuits do not consider the manner in which state taxes are collected when allowing Indian tribes' *Ex parte Young* suits to proceed. Second, also unlike the Eleventh Circuit, lower courts following *Edelman* have not hesitated to grant injunctive relief even when it has the effect of mandating future disgorgements from state coffers. Respondents' attempt to distinguish this contrary precedent falls flat.

Unable to defend the indefensible, Respondents spend half of their brief attacking the Tribe's case on

the merits. But because the Eleventh Circuit's holding is jurisdictional, these arguments are entirely beside the point. Whether the Tribe can win on remand (which it can) does not bear on the question of whether the judicial power extends to suits challenging state taxation of Indian tribes.

This Court has long understood the need to review appellate decisions that result in "doubtful determination[s] of the important question of state power over Indian affairs." *Williams* v. *Lee*, 358 U.S. 217, 217-218 (1959). And it has repeatedly granted certiorari to resolve questions over the constitutionality of state taxes on tribes and tribe members. *E.g.*, *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 101, 103 (2005); *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 (1995); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 148 (1980). It should do so again in this case. In the alternative, the Court may consider summarily reversing the opinion below to correct the Eleventh Circuit's inexcusable departure from settled law.

ARGUMENT

I. The Eleventh Circuit's Decision Breaks From This Court's Settled *Ex parte Young* Precedent.

Respondents do not dispute what this Court has recognized for nearly a century: *Ex parte Young* allows federal courts to enjoin state officials from the prospective enforcement of unconstitutional state taxes. *Greene*, 244 U.S. at 506. Instead, Respondents strain to defend the Eleventh Circuit's unprece-

dented creation of a "pre-collection" exception to *Ex parte Young*. That exception effectively insulates from federal litigation *any* state tax that is pre-collected from a third party on the theory that relief from such a tax could take the form of refunds paid out of pre-collected revenue—something the majority reasoned would be the "functional equivalent" of an impermissible award of money damages against the state. Pet. App. 14a.

As the Petition demonstrated, this novel contortion of *Ex parte Young* cannot be squared with this Court's cases. Pet. 19-26. Respondents do nothing to refute that conclusion.

1. On the most basic level, the Eleventh Circuit's reasoning conflicts with this Court's instruction that *Ex parte Young* depends on the "substance rather than * * * the form of the relief sought" *Papasan*, 478 U.S. at 278-279; *see also Edelman*, 415 U.S. at 666. Respondents do not dispute this threshold principle.

The "substance" of this case is indistinguishable from a traditional *Ex parte Young* challenge to the prospective imposition of an unconstitutional state tax. The *sole* distinction here is purely formal: Florida pre-collects its fuel tax from distributors, even though the legal incidence of the tax falls on the consumer. *See* Fla. Stat. § 206.41(h)(4)(a).

2. The Eleventh Circuit concluded that this formal distinction barred the Tribe's suit because an injunction might require the state to "award the Tribe money from the State coffers." Pet. App. 15a. But there is no question that *Ex parte Young* relief may "require[] payment of state funds * * * as a necessary consequence of compliance in the future with a sub-

stantive federal-question determination."[1] *Edelman*, 415 U.S. at 668; *see also, e.g.*, *Milliken*, 433 U.S. at 289; *Quern*, 440 U.S. at 337.

Respondents insist that the pre-collection exception is consistent with *Edelman* and its progeny because those cases refer to "ancillary" effects on state coffers. Op. 8-9 & n. 6 (quoting Pet. App. 15a). They claim that the state expenditure here is, by contrast, the "goal in itself" of the Tribe's suit. *Id.* (quoting Pet. App. 15a). But that argument assumes that federal courts cannot enter injunctions that directly result in payouts to individual litigants. Not so. *Edelman* itself approved of injunctions enforcing entitlement programs, even though they had the effect of requiring benefits payments to individuals. *See* 415 U.S. at 667-68. The Court's use of the word "ancillary" means only that the expenditure must be ancillary to the injunction's purpose. So long as the injunction addresses a continuing violation of federal law, *Ex parte Young* permits even injunctions with "a *direct and substantial impact* on the state treasury." *Milliken*, 433 U.S. at 289 (emphasis added).

3. Respondents do not even attempt to defend the Eleventh Circuit's two other dramatic departures from this Court's precedent. First, the majority asserted that *Edelman* bars this suit because requiring refunds of taxes collected in the future "is equivalent

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[1] As the Petition and the dissent below note, there are in fact many options open to Respondents in the event a court determines that the Tribe is exempt from the fuel tax. Pet. 21, Pet. App. 25a-28a. The Tribe is entirely agnostic as to how Respondents should comply with their constitutional obligations. Respondents' protests that the Tribe seeks a "substantial intrusion" on Florida's sovereignty are therefore inapt. Op. 10.

to a 'retroactive award.'" Pet. App. 13a (quoting *Edelman*, 415 U.S. at 677). But relief is "retroactive" for *Ex parte Young* purposes only when it seeks to redress a *pre-litigation* breach of legal duty. *See Edelman*, 415 U.S. at 667-668; *Papasan*, 478 U.S. at 278. *Edelman* is no bar to payments made to redress a *continuing* violation of federal law. Indeed that is the very type of relief *Edelman* endorsed. 415 U.S. at 668; *see also* Pet. 22-23.

Second, the Eleventh Circuit suggested that this Court's decision in *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945), allows states to "legislate their way around *Ex parte Young*." Pet. App. 16a. But nothing in *Ford* supports that claim, as the Petition explained at length. Pet. 24-26.

Respondents' failure even to address these distortions shows how far afield the majority's opinion ranged. For reasons we explain in Part III, *infra*, leaving this precedent on the books would threaten the balance between State and Tribal sovereignty.

4. Finally, abandoning the Eleventh Circuit's reasoning, Respondents wrongly contend that the decision below is consistent with this Court's comity precedent. Op. 20-22 (citing *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413 (2010)). But federal courts routinely hear tribal challenges to state taxation, *see* Pet. 13-14, and Respondents identify no case rejecting such a suit on comity grounds. Moreover, this Court has made clear that comity must be balanced with the general principle that "[w]here Congress has determined that there are 'strong policies favoring a federal forum to vindicate deprivations of federal rights,' as in the context of litigation brought by

Indian tribes, federal courts should exercise their lawful jurisdiction."[2] *Mashantucket Pequot Tribe* v. *Town of Ledyard*, 722 F.3d 457, 466 (2d Cir. 2013) (alteration omitted) (quoting *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary,* 454 U.S. 100, 119 (1981) (Brennan, *J.,* concurring)).

II. The Eleventh Circuit's Decision Creates Two Circuit Splits.

As the Petition explained, the Eleventh Circuit's decision splits from its sister circuits in two key respects: First, the courts of appeals consistently hear tribal challenges to state tax schemes under *Ex parte Young*, without regard to how those taxes are administered. Second, two circuits have explicitly held that *Ex parte Young* permits prospective relief that entails reimbursements from state coffers. Respondents' attempts to dispel these splits are unavailing.

1. Respondents point to no case, apart from the decision below, suggesting that the *Ex parte Young* fiction depends on how a tax is collected. Nor have they identified a single case endorsing an exception based on the structure of a state's tax code. The Eleventh Circuit's "pre-collection" exception is therefore *sui generis* and conflicts with settled practice. *See* Pet. 13-14 (collecting cases).

Respondents dismiss this conflict, arguing that no other circuit has considered a tax precisely like this

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[2] Although comity considerations survived the passage of the Tax Injunction Act, *Levin*, 560 U.S. at 423, Congress' decision to relieve tribes from the Act's limitations suggests a strong policy favoring a federal forum, *see Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473 (1976).

one. But that is not the question. Every circuit split involves some variation in facts between the conflicting opinions. The question is whether there is any indication that the other circuits would reach the same conclusion if they *did* consider the same facts. The answer is clearly no. As Respondents themselves concede, the other circuits "do not address the nature of the taxing framework" when assessing the relief sought in challenges to state taxes. Op. 13. They conduct only what this Court has termed a " 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Muscogee (Creek) Nation* v. *Pruitt,* 669 F.3d 1159, 1167 (10th Cir. 2012) (quoting *Verizon Md.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). By adding additional steps to this inquiry, the Eleventh Circuit created a split.

Respondents also assert that the decision below is consistent with *CSX Transportation*, *Inc.* v. *Board of Public Works of West Virginia*, 138 F.3d 537 (4th Cir. 1998). Respondents contend that *CSX* concluded that a party may not use *Ex parte Young* to recoup taxes collected before it filed suit. Op. 14, 16 n.9. But *CSX* actually approved relief that mirrors what the Tribe seeks here: a decree enjoining *further* enforcement of an unconstitutional tax. *See* Pet. 14. That is precisely why Judge Jordan, in his dissent, noted that the majority split with *CSX*.

2. Respondents' efforts to disguise the second split are equally futile. The Petition showed how the Eleventh Circuit broke with several other circuits in holding that *Ex parte Young* bars relief requiring future reimbursements from state coffers. Pet. 15-17. Respondents do not dispute that other circuits have

granted such relief. They attempt instead to distinguish these cases on their facts, without explaining why the factual distinctions make any difference. They do not.

The Seventh Circuit's decision in *Ameritech Corporation* v. *McCann*, 297 F.3d 582 (7th Cir. 2002), presents a clear split. The *Ameritech* court upheld a party's right to sue under *Ex parte Young* for declaratory relief prospectively requiring a state official to abide by a federal statute that entitled telecommunications providers to reimbursements for certain costs.[3] The court easily concluded the relief was proper, "and the fact that the federal statute at issue creates a right to reimbursement *does not alter the analysis*." *Id.* at 588 (emphasis added). It is impossible to reconcile that statement with the Eleventh Circuit's holding.

Respondents nevertheless attempt the impossible by asserting that "[u]nlike the case here, nothing in the relief sought by Ameritech would impermissibly insert the federal courts into management of the state's fiscal affairs." Op. 14 (internal quotation marks omitted). But prospective refunds necessary to alleviate an unconstitutional burden are no more intrusive than the relief the Seventh Circuit approved.

Unable to reconcile the conflict, Respondents try to confine *Ameritech*'s reasoning by citing a subsequent Seventh Circuit decision, which rejected a Contracts Clause challenge to a pay freeze on unionized state

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[3] The case did not, as Respondents suggest, involve a "federal program[ ]" in which the state had elected to participate. Op. 15.

employees. Op. 15 (citing *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO* v. *Quinn*, 680 F.3d 875, 882 (7th Cir. 2012)). But that decision says nothing about whether relief characterized as a "refund" or "reimbursement" is categorically impermissible.

The conflict between the Eleventh Circuit's opinion and *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367 (2d Cir. 2005), is similarly square. In that case, a litigant used *Ex parte Young* to challenge Kentucky's rejection of a debtor's claim for reimbursement of environmental cleanup costs as untimely. Relying on a tolling provision of the Bankruptcy Code, the debtor obtained an order compelling the state to accept the claim. The Second Circuit affirmed, rejecting the state's Eleventh Amendment defense. *Id.* at 376. Although the court of appeals recognized that the ultimate effect of compliance might be an administrative decision to reimburse the debtor, that possibility did not transform the prospective injunction into a claim for retrospective damages. *Id.*

Indeed, as illustrated by the First, Second, Fourth, Ninth, and D.C. Circuit cases discussed in the Petition, courts routinely order prospective relief with the effect of instituting or increasing state obligations to pay private parties. Pet. 17-18. Respondents would distinguish the First, Fourth and D.C. Circuit precedents on the grounds that those cases involved federal programs, in which the states' participation was voluntary. Op. 15 n.8. But they make no effort to connect that argument to any reasoning in the decisions themselves.

In short, Respondents cannot explain how the Eleventh Circuit's decision can be squared with the decisions of its sister circuits, either with respect to tribal suits regarding state taxes in particular, or to the availability of *Ex parte Young* relief in general. The resulting circuit splits plainly warrant review.

III. This Court's Review is Necessary to Preserve the Balance Between State and Tribal Sovereignty that *Ex parte Young* Protects.

Unable to justify the Eleventh Circuit's departure from settled law, Respondents change the subject. They offer several alternative grounds for affirmance. But the decision below rested on the jurisdictional conclusion that *Ex parte Young* did not apply. Respondents' merits arguments are therefore irrelevant to whether certiorari is warranted. *See, e.g.*, *Whitman* v. *Department of Transp.*, 547 U.S. 512, 515 (2006) (per curiam) (reversing jurisdictional ruling and remanding for consideration of "issues raised before this Court, but not decided below").

In any event, Respondents significantly oversell their arguments. The parties vigorously contested the issue of *res judicata* below, but neither the district court nor the appellate court even considered it. On the merits, as the Petition explained, the key question in this case is whether a state may tax fuel purchased off-reservation for use in essential public services on Tribal lands, where state law specifies that the Tribe bears the legal incidence of the tax. Pet. 2-3. Suffice it to say, the Tribe does not agree that the statutory definition of the word "use" resolves that issue or this case. *See* Op. 19-20.

What *is* relevant is that the Eleventh Circuit inexcusably split from settled law in an opinion that will do grave damage if left in place. The lower court's holding disrupts an avenue for relief from unlawful taxation on which Indian tribes have long relied. And both Congress and this Court have recognized the importance of tribes' access to a federal forum in their disputes with states.[4] That is why, for example, Congress has granted tribes authority to litigate in federal court that is "at least in some respects, as broad as that of the United States suing as the tribe's trustee." *Moe*, 425 U.S. at 473 (discussing 28 U.S.C. § 1362); *see also Arizona* v. *San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 577 (1983) (Stevens, J., dissenting) (commenting that § 1362's grant of access to "a neutral federal forum" is "a guarantee whose importance should not be underestimated").

Allowing the Eleventh Circuit's error to go unreviewed would not only permit a "pre-collection" exception to the *Ex parte Young* doctrine, but Respondents' own brief confirms that it would incentivize states to restructure their tax regimes to avoid federal litigation. *See* Op. 24 (arguing that relief would be futile because the state could rearrange its tax structure in order to evade any injunction).

The decision below breaks with this Court's precedent, creates two circuit splits, weakens the doctrine

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[4] Respondents contend that a federal forum is not necessary here because Florida's courts can hear the Tribe's claims. Op. 23-24. That consideration is irrelevant to the question of whether the Eleventh Circuit may privilege form over substance to deny litigants their right to a federal forum.

of *Ex parte Young*, and threatens tribal sovereignty. Certiorari is clearly warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the petition for certiorari should be granted.

Respectfully submitted,

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