

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 12-1727 / 12-1735 (consolidated)

Caption [use short title]

Motion for: Leave to File Brief of Amici CuriaeMashantucket Pequot Tribe v. Town of Ledyard, et al.

Set forth below precise, complete statement of relief sought:

Leave to file the attached Brief of Amici Curiae inSupport of Plaintiff-Appellee's Petition for PanelRehearing and Rehearing En BancMOVING PARTY: Seminole Tribe of Florida, et al.OPPOSING PARTY: Town of Ledyard, et al.☐ Plaintiff☐ Defendant☐ Appellant/Petitioner☐ Appellee/RespondentMOVING ATTORNEY: Kristen M. FioreOPPOSING ATTORNEY: Benjamin Sharp, et al (see attach.

[name of attorney, with firm, address, phone number and e-mail]

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Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes☐ No (explain):

Has request for relief been made below?

☐ Yes☐ No

Has this relief been previously sought in this Court?

☐ Yes☐ No

Requested return date and explanation of emergency:

Opposing counsel's position on motion:

☒ Unopposed☐ Opposed☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes☐ No☒ Don't Know

Is oral argument on motion requested?

☐ Yes☒ No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☒ Yes☐ NoIf yes, enter date: Appeal was decided on July 15, 2013

Signature of Moving Attorney:

/s/ Kristen M. FioreDate: 8/28/13Service by: ☒ CM/ECF☒ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

Attachment to Motion Information Statement

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12-1727

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-1727 and 12-1735
(CONSOLIDATED)

MASHANTUCKET PEQUOT TRIBE,

Plaintiff-Appellee,

v.

**TOWN OF LEDYARD, PAUL HOPKINS, TAX ASSESSOR OF THE TOWN
OF LEDYARD, AND JOAN CARROLL, TAX COLLECTOR OF THE TOWN
OF LEDYARD,**

Defendant-Appellants,

STATE OF CONNECTICUT,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
For the District of Connecticut

Unopposed Motion for Leave to File Brief of *Amici Curiae* in Support of Appellee's
Petition for Panel Rehearing and Rehearing *En Banc*

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ATTORNEYS FOR *AMICI CURIAE*

The Seminole Tribe of Florida, the Confederated Tribes of the Umatilla Indian Reservation, and the Coquille Indian Tribe (the "*Amici*") file this Unopposed Motion for Leave to File Brief of *Amici Curiae* in Support of Appellee's Petition for Panel Rehearing and Rehearing *En Banc* pursuant to Federal Rules of Appellate Procedure 29(b), and state:

1. *Amici* are federally-recognized Indian tribes occupying land reservations granted to them by the United States. Non-Indians own property and engage in activities on their reservations which, prior to this decision, were exempt from state taxation. *Amici* will bear the economic burden of the state taxes that will be imposed under this decision. As such, this Court's decision in *Mashantucket Pequot Tribe v. Town of Ledyard*, 2013 WL 3491285 (2d Cir. July 15, 2013), concerning taxation of those activities and property, is of exceptional importance to *Amici*.

2. The *Amici's* brief supports Appellee's Petition for Panel Rehearing and Rehearing *En Banc* in the above-styled case. Appellee's petition for rehearing argues this Court's decision conflicts with Supreme Court precedent defining the scope of states' authorities to tax non-Indians in their dealings with Indians on Indian land. The petition contends "the decision fundamentally skews the balance the Congress and the Supreme Court have calibrated between federal, tribal, and

state interests, and introduces uncertainty into an area where stability is vital to protect the interests of both tribes and states." [Doc. 161 at 1.]

3. *Amici* have a substantial interest in the proper interpretation of this precedent because such interpretation has a direct impact on the taxation of the on-reservation property and activities of non-Indians. The Court's decision fundamentally changes the rules governing state taxation of property and activities of non-Indians in Indian country by removing limitations that have existed since the inception of the United States. It distinguishes activities and property that are integral to exempt activities and presumes that Congress intended to authorize state taxation of any property or activities of non-Indians that it did not expressly and specifically prohibit. It violates the clear directives of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and more than three decades of its progeny. The implications of this decision extend far beyond personal property tax on slot machines. *Amici* believe their *amici curiae* brief will provide this Court with the broader perspective of other Indian tribes to assist this Court in evaluating the issues on rehearing. *Amici's* perspective is distinct from that of the Appellee.

4. Certificate of Consultation. The undersigned has consulted with counsel for both Appellants and Appellee, who have authorized the undersigned to represent that Appellants and Appellee consent to the relief sought in this motion.

WHEREFORE, *Amici* respectfully request that this Court grant this motion for leave to file the attached *amici curiae* brief in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Motion for Leave to File Brief of *Amici Curiae* in Support of Appellee's Petition for Panel Rehearing and Rehearing *En Banc*, and attached Brief of *Amici Curiae* in Support of Appellee's Petition for Panel Rehearing and Rehearing *En Banc*, were filed electronically and served by first class mail, postage prepaid, by the undersigned on this 28th day of August 2013 to the Clerk of this Court and the following counsel of record:

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Brief of *Amici Curiae* the Seminole Tribe of Florida, the Confederated Tribes of the
Umatilla Indian Reservation, and the Coquille Indian Tribe in Support of Appellee's
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STATEMENT OF INTEREST¹

Amici Curiae the Seminole Tribe of Florida, the Confederated Tribes of the Umatilla Indian Reservation, and the Coquille Indian Tribe (collectively, the "*Amici*") join in this brief—the filing of which is unopposed by all parties—in support of Appellee's Petition for Panel Rehearing and Rehearing *En Banc* of this Court's decision in *Mashantucket Pequot Tribe v. Town of Ledyard*, 2013 WL 3491285 (2d Cir. July 15, 2013).

Amici are federally-recognized Indian tribes occupying land reservations granted to them by the United States. Non-Indians own property and engage in activities on their reservations which, prior to this decision, were exempt from state taxation. *Amici* will bear the economic burden of the state taxes that will be imposed by reason of this decision. As such, this Court's decision concerning taxation of those activities and property is of exceptional importance to *Amici*.

SUMMARY OF THE ARGUMENT

The Court's decision fundamentally changes the rules governing state taxation of property and activities of non-Indians in Indian country by removing limitations that have existed since the inception of the United States. It distinguishes activities and property that are integral to exempt activities and

¹ Per Second Circuit Local R. 29.1(b), *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *Amici*, their members, or their counsel contributed monetarily to the preparation or submission of this brief. All parties consent to the filing of this brief.

presumes that Congress intended to authorize state taxation of any activities or property of non-Indians that it did not expressly and specifically prohibit. It violates the clear directives of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and more than three decades of its progeny. The implications of this decision extend far beyond personal property tax on slot machines.

The decision incorrectly holds, *inter alia*, that: (1) the state tax exemption expressly applicable to Indian gaming activities under the Indian Gaming Regulatory Act ("IGRA")² does not extend to essential instrumentalities of those activities; (2) IGRA does not preempt state taxation of essential instrumentalities of Indian gaming; and (3) federal law can never preempt generally-applicable state taxes because those taxes do not "target" the "governance" of a federally-regulated activity.

Under this decision, the validity of a state tax will depend entirely on whether it "unlawfully infringes upon the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 143. The decision ensures that no generally-applicable state tax will ever fail that test. In balancing the federal, state, and tribal interests, the decision holds that a state's interest in

² This discussion is limited to the exemption from state taxation under IGRA, 25 U.S.C. § 2701 *et seq.*, but state tax on slot machines is also exempted or preempted by the Indian trader statutes, 25 U.S.C. § 261, *et seq.*

applying its tax uniformly to both on- and off-reservation property and activities outweighs the Indian tribe's interest in exercising sovereignty over its own land.

ARGUMENT

I. The decision incorrectly holds that IGRA's express exemption of Indian gaming does not extend to slot machines used in Indian gaming.

The decision acknowledges that IGRA expressly prohibits state taxation of Indian gaming. *Mashantucket*, 2013 WL 3491285, at *10. However, it distinguishes between Indian gaming and ownership of slot machines used in Indian gaming,³ *id.* at *11, and holds that the exemption of the former does not extend to the latter. It is well settled that exemptions of regulated activities extend to integrally related property and activities. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), for example, the Court held that the exemption applicable to Indian land under 25 U.S.C. § 465 extends to state use tax on materials used to build improvements on Indian land because they were "so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." *Mescalero*, 411 So. 2d at 158. The explicit exemption of Indian gaming must be

³ The decision characterizes leases of slot machines as "merely peripherally associated" with Indian gaming and holds that they not regulated by IGRA. *Mashantucket*, 2013 WL 3491285, at *10 (citation omitted).

construed to encompass an exemption of the essential instrumentalities of that activity, including slot machines.⁴

II. The decision incorrectly holds IGRA does not preempt state taxation of slot machines used in Indian gaming.

The decision acknowledges that IGRA preempts state regulation of Indian gaming. *Mashantucket*, 2013 WL 3491285, at *10. However, it holds that IGRA does not preempt the tax on slot machines used in Indian gaming "expressly or by plain implication", *id.* at *8 (citation omitted), or any other state tax that does not "target" the "governance" of that federally-regulated activity. *Id.* at *10-11. These conclusions are contrary to *Bracker* and its progeny.

Where Congress has not addressed state taxation of particular on-reservation activities or property of non-Indians, *Bracker* instructs courts to examine relevant statutory language "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." 448 U.S. at 145. It further requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* There are "two independent but related barriers to the assertion

⁴ See also *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 2013 WL 3888429 (9th Cir. July 30, 2013) (where the Court held that the express exemption of Indian land extends to leasehold improvements owned by non-Indians).

of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 143 (citations and internal quotation marks omitted). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.*

If the federal regulatory scheme is "so pervasive as to preclude the additional burdens sought to be imposed", *id.* at 148, the state tax "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." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*, 448 U.S. at 145).⁵ However, the state's "generalized interest in raising revenues in this context is insufficient to permit its

⁵ Whether a state tax is preempted under *Bracker* does not depend on the amount of the tax. The tax is preempted if it is incompatible with the federal policies underlying the federal regulation. The generally-applicable state motor vehicle license fees and fuel taxes in *Bracker* were insignificant in relation to the income the tribe derived from its timber harvesting activities. However, they were preempted because they were incompatible with the federal policy underlying the federal regulation of timber harvesting—ensuring that "the Indians may receive from their own property . . . the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform". *Bracker*, 448 U.S. at 147; *see also Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982).

proposed intrusion into the federal regulatory scheme." *Bracker*, 448 U.S. at 150; *New Mexico*, 462 U.S. at 343. Where, as here, the activity is pervasively regulated by federal law, only state taxes that are "narrowly tailored" to compensate the state for services it specifically provides in connection with that particular activity are valid. *See, e.g., Crow Tribe of Indians v. Mont.*, 650 F.2d 1104, 1114 (9th Cir. 1981), *amended*, 665 F.2d 1390 (1982) (holding state taxes on coal miners were justified only if "narrowly tailored" to fund additional government services required by coal miners or to treat pollution and solid waste that attend coal production); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (holding a state tax fails the "narrowly tailored" requirement where revenues from the tax are allocated to the state's general fund, or are used to fund services, such as law enforcement, the state provides to its residents in general).

Since IGRA preempts state regulation of Indian gaming, any state tax which burdens that activity⁶ is invalid unless it is narrowly tailored to compensate the

⁶ A state tax burdens a regulated activity where, as here, it diminishes the proceeds of that activity that are available to the Indian tribe. Here, the tribe bears the tax's economic burden on slot machines because it is contractually obligated to reimburse the non-Indian lessor for any state taxes assessed on such machines and substantially all of its income is derived from Indian gaming. However, even in the absence of a reimbursement obligation, the tax would adversely affect the lessor's pricing under the lease which, in turn, would diminish the proceeds available to the tribe from its gaming activities. This would obstruct the federal policy of supporting the tribe's economic development and self-determination.

state for services it specifically provides in connection with Indian gaming. A generally-applicable state tax, such as personal property tax, is not such a tax.⁷

This decision holds that only state taxes which "target" the "governance" of an activity can ever be preempted. *Mashantucket*, 2013 WL 3491285, at *10-11. Generally-applicable state taxes, such as personal property taxes, never "target" the "governance" of an activity. Their sole function is to raise revenue. The limitation created by this decision violates settled law. The generally-applicable state motor vehicle license fees and fuel tax in *Bracker* did not "target" the "governance" of timber harvesting, and the state's generally-applicable gross receipts tax in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), did not "target" the "governance" of Indian educational institutions. These taxes were preempted because they were inconsistent with the objectives of the federal policies underlying the pervasive federal regulation of those activities.

Neither *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008), nor *Casino Resource Corporation v. Harrah's Entertainment, Inc.*, 243 F.3d

⁷ Correct application of *Bracker* is explained in the preamble to the federal regulations governing the leasing of Indian land, 25 C.F.R. Part 162. The Secretary of the Interior explains how state taxation of non-Indian lessees' leasehold improvements is preempted because it would obstruct the policies underlying the pervasive federal regulation of Indian leasing by making it more difficult for Indian tribes to lease their land. *See also Marty Indian Sch. Bd., Inc. v. S.D.*, 824 F.2d 684 (8th Cir. 1987) (holding state taxation of fuel used for educational purposes is preempted by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.*, because it impedes the policies underlying that federal law).

435 (8th Cir. 2001), support the conclusion that slot machines are so peripheral to Indian gaming that IGRA does not preempt state taxation of them. The issue in *Barona* was whether state taxation of construction materials purchased by a non-Indian contractor for the expansion of the Indian tribe's casino under a "lump-sum" contract was preempted by IGRA. The court held it was not because "California's tax is not on Indian gaming activity or profits, but rather on construction materials . . . which could be used for a multitude of purposes unrelated to gaming[.]" *Id.* at 1192. Unlike the generic construction materials in *Barona*, slot machines are essential instrumentalities of Indian gaming. A tax on slot machines is a tax on the Indian gaming in which they are used. *Bracker* made it clear that state taxation of property and activities integral to a pervasively regulated activity is preempted. Although fuel consumption and Indian timber harvesting are separate activities, state taxation of fuel consumed in Indian timber harvesting is preempted because fuel is integral to that activity. Since slot machines are integral to Indian gaming, state taxation of slot machines used in Indian gaming is preempted.

The extent to which IGRA preempts separate but integrally related property and activities is illustrated in *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004), *rev'd. on other grounds*, *Wagon v. Prairie Band of*

Potawatomi, 546 U.S. 95 (2005).⁸ The court held the Kansas tax on motor fuel supplied by a non-Indian distributor to on-reservation fueling stations was preempted by IGRA because fuel sales were an integral part of the Tribe's on-reservation gaming enterprise. *Prairie*, 379 F.3d at 983-87. The court held there was sufficient nexus of the fuel sales to the gaming activities to apply IGRA because 73% of the fuel patrons were casino patrons or employees. *Id.* at 985 (citing *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), *superseded in part by statute on other grounds as stated in U.S. v. E.C. Invs., Inc.*, 77 F.3d 327 (9th Cir. 1996)).

This decision results in many previously exempt on-reservation property and activities of non-Indians now being taxable, all to the detriment of Indian tribes. For example, Indian tribes typically engage non-Indian contractors to assist in the provision of on-reservation governmental services, such as police and fire protection, emergency medical services, education, public transportation, and road construction. The provision of these services is pervasively regulated by federal law, including the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.* Under *Bracker* and *Ramah*, state taxation of the fuel, public

⁸ Under the Kansas fuel tax scheme, the legal incidence of the tax rests with the fuel distributor. However, the court in *Prairie Band* determined that the taxable event occurred on-reservation and was therefore preempted under *Bracker*. In *Wagnon*, the Court reversed after holding that the taxable event of this fuel tax scheme was the non-Indian distributor's off-reservation purchase of the fuel.

utilities, and equipment used by the non-Indian contractors in performing these services is prohibited. Under this decision, state taxation of those items would be permitted. Such generally-applicable taxes would not be preempted because they do not "target" the "governance" of those activities. Their validity would be determined under a balancing test (discussed below) which ensures that they will be upheld.

III. The decision incorrectly presumes Congress authorized any state tax it has not expressly and specifically prohibited.

The decision ignores "the general presumption that state laws do not apply within Indian country". *Indian Country, U.S.A., v. Okla.*, 829 F.2d 967, 985 (10th Cir. 1987). It distinguishes activities and property of non-Indians that are integral to an exempt activity and presumes that Congress has authorized state taxation of each of those activities and property that it has not expressly and specifically prohibited. Under this decision, broad exemptions are not possible. Congress would have to anticipate every conceivable form of state tax that could possibly affect a federally-regulated activity and expressly prohibit each one separately. This violates settled law.

Historically, questions of Congressional intent have been resolved liberally in favor of exemption. "Ambiguities in federal law have been construed generously [in favor of Indian tribes] in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal

independence." *Bracker*, 448 U.S. at 143-44. The "claim that [the state] may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary . . . is simply not the law." *Id.* at 150-51 (citations omitted). "In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject". *Id.* "We have . . . rejected the proposition 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." *Id.* at 144.

Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989), does not support a presumption in favor of state taxation where Congress has not expressly prohibited it. *Cotton Petroleum* addressed whether the state could impose its severance tax on oil and gas extracted from Indian land by non-Indian lessees. Because oil and gas extraction is regulated by the Indian Mineral Leasing Act of 1938 (the "1938 Act"), 25 U.S.C. § 461 *et seq.*, which is silent on the issue of state taxation, the Court examined the statute's historical context. The 1938 Act was the successor to the Indian Oil Leasing Act of 1924, 43 Stat. 244, and the Indian Oil Act of 1927, 44 Stat. (part 2) 1347, 25 U.S.C. § 398a, both of which expressly authorized state taxation of oil extracted from Indian reservations by non-Indian lessees. In those circumstances, the Supreme Court concluded that

Congress's failure to address state taxation in the 1938 Act evidenced its intent to maintain the status quo, rather than to create an entirely new exemption. *Cotton Petroleum*, 490 U.S. at 182. The Court reasoned, if Congress intended to effect a change in existing law, it would have done so expressly. *Id.* Since state taxation of Indian gaming has never been authorized, Congress's silence on state taxation of slot machines used in Indian gaming cannot be construed as authority to tax them.

IV. The decision incorrectly balances federal, state, and tribal interests.

This Court need not balance federal, state, and tribal interests to conclude that state taxation of slot machines used in Indian gaming is invalid because (1) IGRA's express exemption of Indian gaming extends to its essential instrumentalities, and (2) IGRA preempts state taxation of all property and activities that are integral to Indian gaming. Having reached contrary conclusions on both points, this decision incorrectly requires that the federal, state and tribal interests be balanced to determine whether the state tax "unlawfully infringes upon the right of reservation Indians to make their own laws and be ruled by them." *Bracker*, 448 U.S. at 143. Moreover, it balances those interests in a manner which ensures that no generally-applicable state tax will ever fail that test. It holds that a state's interest in applying its tax uniformly to both on- and off-reservation property and activities outweighs the Indian tribe's interest in exercising sovereignty over its own land. *Mashantucket*, 2013 WL 3491285, at *15-17.

In balancing the federal, state and tribal interests, the decision applied the tests used in cigarette tax cases, such as *Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), where the state tax was applied to a product whose value was created entirely off-reservation by non-Indians. In those circumstances, the interests of the state are at their strongest and the interests of the Indian tribe are at their weakest. Here, the "product" is entertainment that is created entirely by the Indian tribe on its reservation. In those circumstances, the interests of the Indian tribe are at their strongest, and the interests of the state are at their weakest. *See, e.g., Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1410 (9th Cir. 1992) (noting "[t]hat a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference."); *Salt River Pima-Maricopa Indian Cmty. v. Ariz.*, 50 F.3d 734 (9th Cir. 1995); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("[h]ere ... the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians."). The manner in which federal, state and tribal interests are balanced in cigarette tax cases is wholly inappropriate where, as here, the tax burdens goods and services whose value is derived entirely from on-reservation activities of an Indian tribe.

Here, the state provides some on-reservation services, such as educating Indian children, but, as the decision acknowledges, there must be "a nexus between the taxed activity and the governmental function provided". *Mashantucket*, 2013 WL 3491285, at *14-15. There is no nexus between the governmental services provided by the state in this case and the Indian gaming activity that bears the economic burden of the tax, other than the services for which the state is separately compensated under the state/tribal compact (\$56.8 million from 2003 – 2011). Those services should be ignored for these purposes. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994) ("The State's asserted interest is weakened . . . because IGRA establishes a mechanism—the compacts—by which [the Indian tribe] can reimburse the State for regulatory costs, outside of the State tax structure").⁹

In *Cotton Petroleum* there was a nexus between the governmental services and the on-reservation oil and gas activities to which state severance tax applied because the state regulated the spacing and mechanical integrity of the on-reservation oil and gas wells – services for which the state was not compensated outside its tax structure. "This is not a case in which the State has nothing to do

⁹ The only other state services purporting to have any connection with Indian gaming involve maintenance of the state roads leading to the reservation. This connection is based on the theory that well-maintained roads make it easier for customers to come to the reservation to engage in Indian gaming. If that were sufficient justification for the state tax, no on-reservation property or activity of a non-Indian would ever be exempt from state taxation.

with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186. This, on the other hand, is a case in which the state has nothing to do with Indian gaming, save tax it.

This decision results in previously exempt on-reservation goods and services being taxable. Any states that impose a sales tax whose legal incidence rests with the purchaser¹⁰ would be allowed to tax goods manufactured and sold, and services provided, by Indian tribes on their reservations in the same manner that they are now allowed to tax cigarettes and other goods that are manufactured by non-Indians off-reservation. This disregards the very narrow scope of the exception for on-reservation sales of cigarettes recognized in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Oklahoma v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991). It specifically violates *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which limits the cigarette tax cases to their specific facts.

CONCLUSION

For the reasons stated hereinabove, *Amici* respectfully urge this Court to grant Appellee's Petition for Panel Rehearing and Rehearing *En Banc*.

¹⁰ This includes any state in which the state legislature has not expressly placed it on the seller and the seller is required to collect the tax from the purchaser. See, e.g., *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FRAP 29(d) and the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 3,861 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point New Times Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Brief of *Amici Curiae* in Support of Appellee's Petition for Panel Rehearing and Rehearing *En Banc* were filed electronically and served by first class mail, postage prepaid, by the undersigned on this 28th day of August 2013 to the Clerk of this Court and the following counsel of record:

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