

# 12-1727

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

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**MASHANTUCKET PEQUOT TRIBE,**

*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.*

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

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Petition for Panel Rehearing and Rehearing *En Banc*  
Of Mashantucket Pequot Tribe

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**RULE 35(b) STATEMENT**

The Panel's decision squarely conflicts with Supreme Court precedent defining the scope of state power to tax non-Indians' transactions with Indians occurring in Indian country. In two distinct respects, the decision fundamentally skews the balance that 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.

First, the Panel's determination that the federal Indian Trader Statutes ("Trader Statutes") do not preempt the State's tax is in direct conflict with the Supreme Court's decisions in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), and *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), marking a novel, unworkable, and unjustified break from that precedent prohibiting the type of direct taxes on Indian traders that the Town has imposed here.

Second, the Panel's failure to find preemption despite the federal interests and comprehensive regulatory scheme prescribed by the Indian Gaming Regulatory Act ("IGRA") rested on a rule of legal analysis that directly conflicts with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("Bracker"), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). By failing to give dispositive weight in *Bracker*'s balancing to

both the comprehensiveness of IGRA's regulation in this area *and* the direct economic burden the State's tax imposes on the Tribe, the Panel reconfigured the test in a way that conflicts with every relevant Supreme Court decision, as well as decisions of the Ninth and Tenth Circuits, all of which have found those two factors sufficient to trigger preemption. The Panel's decision not only eliminated the weight accorded those interests by other courts, but gave controlling weight to the State's general interests in revenue and uniform tax administration – interests that the Supreme Court has expressly excluded from the *Bracker* analysis.<sup>1</sup>

If not re-examined, the Panel's decision will upend the established analytical framework governing preemption of state taxing power in Indian country in a manner that leaves Second Circuit law in direct conflict with that of the Supreme Court and other circuits. The Court accordingly should grant rehearing.

### **REASONS FOR GRANTING THE PETITION**

#### **I. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT GOVERNING PREEMPTION UNDER THE INDIAN TRADER STATUTES.**

The Panel erroneously diluted the preemptive force of the Indian Trader Statutes to a balancing test even though this case involves a direct tax on Indian traders, which the Supreme Court has held is preempted without any balancing of

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<sup>1</sup> Until now, the *Bracker* balancing test was only applied to determine whether federal law preempts state regulatory authority (including authority to tax non-Indians) in Indian country in the absence of direct preemption by a federal statute or treaty. See *Ramah*, 458 U.S. at 837.

interests. The Trader Statutes establish a scheme of “comprehensive federal regulation of Indian traders,” *Warren Trading*, 380 U.S. at 688, that applies to “[a]ny person desiring to trade with the Indians on any Indian reservation,” 25 U.S.C. § 262. The Panel’s holding that the Trader Statutes only preempt state law based on an *ad hoc* weighing of the state taxing interest contravenes two binding Supreme Court decisions.

In *Warren Trading*, the Supreme Court held that the Trader Statutes categorically preempted a state tax on a resident Indian trader for sales made to reservation Indians, explaining that the Statutes’ comprehensive regulatory scheme left “no room . . . for state laws imposing additional burdens upon traders.” 380 U.S. at 690.

The Supreme Court extended that rule in *Central Machinery*, holding that the Trader Statutes preempted a state tax even when imposed on an unlicensed, off-reservation seller trading with a tribe on its reservation. Such an off-reservation seller, the Court ruled, was still an “Indian trader” and thus the tax was preempted. 448 U.S. at 165-66. Crucially, the Court did *not* conduct a balancing analysis, even though the circumstances implicated state interests inherently different from those in *Warren Trading*. Instead, the Court concluded, as in *Warren Trading*, that Congress had already struck the proper balance in the Trader Statutes, and that judgment overrode all competing interests. *Id.* at 166.

The Panel cited *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), as supporting its balancing test, but that case actually says the opposite. In *Milhelm*, the Supreme Court upheld state regulations imposed on Indian traders to assist the collection of concededly valid taxes imposed on non-Indian consumers. In doing so, the Court stressed that the regulations “stand[] on a markedly different footing from *a tax imposed directly on Indian traders*,” *id.* at 73 (emphasis added), and reaffirmed that the Trader Statutes preempt “*a tax directly ‘imposed upon Indian traders for trading with Indians,’*” *id.* at 74 (quoting *Warren Trading*, 380 U.S. at 691) (emphasis added).

The Panel’s reasoning is also in substantial tension with the Ninth Circuit’s recent decision in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, No. 10-35642, 2013 WL 3888429, at \*5 (9th Cir. July 30, 2013), which ruled that the *Bracker* balancing test cannot be applied to a state tax on improvements on tribal trust land, instead holding the taxes categorically preempted by 25 U.S.C. § 465.

## **II. THE PANEL’S MISAPPLICATION OF *BRACKER* CREATES DISUNIFORMITY IN THE LAW OF PREEMPTION IN INDIAN COUNTRY.**

The Panel misstepped in a second way: the analytical model it adopted for *Bracker* preemption conflicts with the law of the Supreme Court and other circuits by denigrating the vital federal and tribal interests embodied in IGRA and elevating state interests in a way that empties the test of practical meaning.

**A. The Law in the Supreme Court and Other Circuits Under *Bracker* Supports Preemption of this Direct Gaming Tax.**

Where the *Bracker* balancing test applies, it requires “a particularized examination of the relevant state, federal, and tribal interests,” informed by “the traditional notion of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development.” *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982). “[A]mbiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.” *Id.* Ultimately, a state tax “is preempted . . . 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).

As the Supreme Court and other circuits have applied *Bracker*, two particular federal and tribal interests consistently strike the balance in favor of preemption – when (1) the tax imposes a direct economic burden on the Indian tribe, and (2) the activity taxed is subject to comprehensive federal regulation.

For example, *Ramah* held that a state tax imposed on a non-Indian contractor was preempted because “[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive,” 458 U.S. at

839, leaving “no room for the additional burden [of state] taxation,” which would ultimately fall on the tribe, *id.* at 842. The Ninth and Tenth Circuits have similarly held state taxation preempted where it directly burdened a tribe economically and applied to an activity subject to comprehensive federal regulation. *See Indian Country, U.S.A, Inc. v. Oklahoma*, 829 F.2d 967, 985-86 (10th Cir. 1987) (gaming), *cert. denied*, 487 U.S. 1218 (1988); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659-60 (9th Cir. 1989) (timber harvesting), *cert. denied*, 494 U.S. 1055 (1990); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-34 (9th Cir. 1994) (gaming), *cert. denied*, 524 U.S. 926 (1998). The Panel’s decision parts company with that law in two ways that will lead to divergent state taxing authority based on circuit geography rather than congressional design.<sup>2</sup>

**1. *The Panel Departed from Other Courts by Discounting the Legal Import of a Direct Economic Burden on the Tribe.***

Every Supreme Court decision addressing state taxation of non-Indians in Indian country has found the tax preempted where it imposed a direct economic burden on the tribe or tribal members. *See Warren Trading*, 380 U.S. at 691-92; *Central Machinery*, 448 U.S. at 162, 166; *Bracker*, 448 U.S. at 151; *Ramah*, 458

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<sup>2</sup> In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008), the Ninth Circuit held a state tax imposed on sales to non-Indian contractors was not preempted, but that tax was imposed on non-Indian-to-non-Indian sales the court viewed as occurring outside Indian country. *See id.* at 1191 (noting this factor “factually distinguishes [this] case from the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land.”).

U.S. at 842; *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (“The present case is . . . unlike *Bracker* and *Ramah* . . . in that . . . no economic burden falls on the tribe.”) (quotation marks and alteration omitted). Courts of appeals have uniformly adhered to that principle. *See Cabazon*, 37 F.3d at 434; *Hoopa*, 881 F.2d at 660; *Indian Country*, 829 F.2d at 986. At least until now.

The Panel departed from this unbroken line of authority when it deemed the direct economic burden on the Tribe “minimal” and gave it no material weight in the *Bracker* analysis. July 15, 2013 Order and Opinion (Doc. #138-1) (“Slip op.”) 35. In *Bracker*, 448 U.S. at 148, and *Ramah*, 458 U.S. at 842, the simple fact of an economic burden on a tribe established weighty, and ultimately dispositive, federal and tribal interests because it constituted an encroachment upon an exclusive zone of federal and tribal authority. The relevant consideration weighed by *Bracker* is whether the state has intruded its tax burden into the federal government’s domain over Indian country, not how far it has intruded into that forbidden regulatory territory. *See Ramah*, 458 U.S. at 838. The crossing of that line of federal authority carries great weight under *Bracker*.

Indeed, in *Bracker*, the Court struck down a mere 1% tax because the “comprehensive federal regulatory scheme” applicable to tribal timber harvesting precluded *any* “additional burdens” on the tribe; there was “no room for [the state] taxes” regardless of their amount. 448 U.S. at 148. In reaching that conclusion,

the Court paid no heed to the dissent's contention that the "relatively trivial" taxes would not disrupt the federal scheme. *Id.* at 159 (Stevens, J., dissenting). The Panel now has made legally critical what the Supreme Court deemed irrelevant.

The Supreme Court reaffirmed in *Ramah* that it is the fact of an economic burden, not its severity, that tips the *Bracker* scales: "[I]n [*Bracker*], we concluded that [the state] taxes impeded the federal interest in 'guaranteeing Indians that they will receive the benefit of whatever profit the forest is capable of yielding,' despite the dissent's argument that the taxes amounted to less than 1% of the annual profits produced by the logging operation." 458 U.S. at 841 n.5 (quoting *Bracker*, 448 U.S. at 149) (internal quotation marks and alterations omitted); see *Warren Trading*, 380 U.S. at 685-86 (2% tax struck down). Likewise, in *Indian Country*, the Tenth Circuit held that "preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax." 829 F.2d at 986 n.9.

Thus, until the Panel's decision here, the fact of an economic burden alone established significant, and commonly dispositive, federal and tribal interests in the *Bracker* balance. The Panel's decision introduces a new and unworkable regime in which preemption turns on unknown and often unknowable increments of burden. The Court should grant rehearing to conform the law in this Circuit with the decisions of the Supreme Court and the Ninth and Tenth Circuits.

**2. *The Panel Departed from Established Law by Legally Discounting the Substantial Federal Interests Embodied in IGRA.***

A second vital component of the *Bracker* analysis has always been whether the state tax targets an on-reservation activity of substantial federal interest as reflected in a comprehensive regulatory scheme. In *Bracker*, for example, federal regulations governing the harvesting of Indian timber preempted the state tax. 448 U.S. at 145. In *Ramah*, “pervasive” regulation of “construction and financing of Indian educational institutions” left no room for state taxation. 458 U.S. at 839.

The Ninth and Tenth Circuits have followed suit, ruling that the federal government’s regulation and promotion of Indian gaming evidences an overriding federal interest that preempts state taxation of on-reservation gaming activities, especially where, as here, the tax directly burdens a tribe. In *Indian Country*, the Tenth Circuit held that a state sales tax could not apply to on-reservation bingo activities because of the “particularly strong” federal interests established by the federal government’s “heav[y] involve[ment] in promoting and assisting in the development of tribal bingo enterprises.” 829 F.2d at 986. Similarly, in *Cabazon*, the Ninth Circuit held that IGRA’s policies of “promot[ing] tribal economic development, self-sufficiency, and strong tribal governments” and “ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation,” “when combined with the Bands’ interests,” preempted state licensing fees imposed on a non-Indian organization that broadcasted live horse races and handled wagering at

tribal off-track facilities. 37 F.3d at 433, 435 (quoting 25 U.S.C. §§ 2701(1) & (2)) (emphasis omitted).

Just as federal law preempted a state tax on bingo games in *Indian Country*, it would preempt a tax on bingo cards – the equivalent of the tax on gaming machines at issue here. And just as federal law preempted a license fee imposed on off-track betting in *Cabazon*, it would preempt a tax imposed on the equipment for wagering – again, the equivalent of the tax at issue here. The rule applied by the Panel thus cannot be reconciled with the law of the Ninth and Tenth Circuits.

The Panel dismissed the federal interests embodied in IGRA because it deemed the amount of tax to be “minimal.” Slip op. 39. But that gets the law backwards: the relevant federal interest is in uniform enforcement of a comprehensive regulatory scheme promoting tribal development through gaming, and that interest in uniformity and preserving the balance Congress struck does not ebb and flow based on the dollar amount of state or local governmental encroachment. The Supremacy Clause forbids intrusions large and small, even assuming the burden here was not mistakenly described as “minimal.”<sup>3</sup>

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<sup>3</sup> Worse still, taking account of the relative economic burden on the parties invites subjective value judgments to displace Congress’s line-drawing. Here, there was scant information in the record regarding the relative economic situations of the Tribe and the Town, precisely because the district court correctly recognized this issue is irrelevant to the *Bracker* analysis and prohibited discovery on this issue. JA0109-10.

The Panel improperly disregarded the very same federal interests that the Ninth and Tenth Circuits have found preemptive because it erroneously assumed that only a direct conflict between the federal regulatory scheme and the state tax triggers preemption. That is incorrect. It is the *existence* of a pervasive federal regulatory scheme governing the area of on-reservation activity at issue – not a direct conflict with a specific federal regulation – that establishes an overriding federal interest in the *Bracker* balance. In *Ramah*, for example, the Court focused on the comprehensive coverage of the federal regulatory scheme to conclude that federal interests displaced the state’s taxation authority, *Ramah*, 458 U.S. at 841, rejecting the dissent’s protest that the federal scheme did not specifically “regulate the construction activity which the State seeks to tax.” *Id.* at 852 (Rehnquist, J., dissenting). The Court explained that its decision was consistent with *Bracker*, in which the Court “struck down Arizona’s use fuel tax and motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways, but because the imposition of these state taxes on a non-Indian contractor doing work on the reservation was preempted by the ‘comprehensive regulation of the harvesting and sale of tribal timber.’” *Id.* at 841 n.5 (quoting *Bracker*, 448 U.S. at 151).

Similarly, the Tenth Circuit in *Indian Country* found federal interests paramount, even though the federal government’s established policies did “not directly address the issue of state taxation.” 829 F.2d at 967. And in *Cabazon*, the

Ninth Circuit found state taxes preempted in light of IGRA's broad purposes of promoting tribal economic development and ensuring that tribes are the primary beneficiaries of gaming. 37 F.3d at 433.

The Panel's focus on the supposed lack of direct conflict between the State's tax and IGRA also cannot be reconciled with the Supreme Court's repeated instruction that *Bracker* preemption is different from – and broader than – “familiar principles of preemption” applicable in other contexts. *Mescalero*, 462 U.S. at 334. The Supreme Court has “rejected a narrow focus on congressional intent to preempt State law as the sole touchstone” of preemption in Indian country. *Id*; see also *Cabazon*, 37 F.3d at 433. Yet the Panel here unraveled that law, denying preemption because it concluded that “[n]othing within IGRA reveals congressional *intent* to exempt non-Indian suppliers of gaming equipment from generally applicable state taxes.” Slip op. 38 (emphasis added). The two rules of law cannot be reconciled.

**B. The Panel Considered Generalized State Interests Squarely Foreclosed by Supreme Court Precedent.**

Having disregarded the weighty federal and tribal interests that have been dispositive in every previous case, the Panel emptied *Bracker* of any meaningful balance by giving dispositive weight to generalized financial and administrative interests of the State and Town in collecting revenue – interests that necessarily

exist in every tax case and that the Supreme Court accordingly has held do not suffice to permit state or local taxation.

The Supreme Court has ruled time and again that only “specific interest[s]” of the State or local government that are directly “related to” the tax at issue can support state authority to tax under *Bracker*. *Ramah*, 458 U.S. at 845 n.10; *see Mescalero*, 462 U.S. at 336 (state tax “must ordinarily be justified by functions or services performed by the State *in connection with the on-reservation activity*”) (emphasis added); *Bracker*, 448 U.S. at 150 (emphasizing that state tax was not assessed “in return for governmental functions [performed] for those on whom the taxes fall”).

Contrary to those controlling precedents, the Panel gave critical weight to the Town’s general “economic interest in imposing the tax,” citing the “dependency of state budgets on the receipt of local tax revenues,” slip op. 44 (quotation marks and citation omitted). The Supreme Court, however, has specifically held that a state’s “generalized interest in raising revenue” is not sufficient to justify taxation. *Bracker*, 448 U.S. at 151. Over and over the courts have reaffirmed this rule. *See, e.g., Ramah*, 458 U.S. at 845; *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1199 (10th Cir. 2011); *Cabazon*, 37 F.3d at 435. The Panel’s decision here puts Second Circuit law at odds with that of the Supreme Court and other circuits.

The Panel also pointed to the “generalized governmental functions performed by the Town,” concluding that the “Town’s economic interest in the generally applicable tax is . . . connected, in some respect, to the generally available services that it provides.” Slip op. 45. Again, the Supreme Court has held otherwise, ruling that such general services – including those connected to “activities *off the reservation*” – are “not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.” *Ramah*, 458 U.S. at 844 (emphasis in original); *see also Hoopa*, 881 F.2d at 661 (Ninth Circuit holds that “[s]howing that the tax . . . rais[es] revenues for services used by tribal residents and others, is not enough.”).<sup>4</sup>

The Panel went further astray by relying on the State’s generalized interests in applying state law uniformly, reasoning that “a ruling favorable to the Tribe could invite other non-Indian owners of personal property on the reservation to initiate similar actions.” Slip op. 44. The Panel also gave weight to the State’s “interest in ensuring compliance with lawful taxes that might easily be evaded.” *Id.* at 46 (quotation marks and citation omitted). But those interests are little more than synonyms for the State’s generalized interests in raising revenue, interests that

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<sup>4</sup> The Panel wrongly said that the Town maintains roads to the reservation. Slip op. 45. Even the Town concedes that the “majority” of the Tribe’s “patrons, suppliers, and contractors . . . use State roads to access the casino.” JA0157, at ¶ 77. “[P]robably the high 90 percentile” of people who do business with the Tribe “come in through state roads,” JA0229 (Butler Dep. 171:23-25), and the Tribe has paid more than \$88.5 million for improvements to nearby State roads. JA1928 ¶ 2.

the Supreme Court said in *Bracker* cannot tip the balance. Such interests are present in every case and, if considered, would always tip the balance in favor of state authority. Moreover, the contention assumes the validity of the very tax the Tribe challenges – the State’s and Town’s interests in collecting “lawful taxes” and avoiding legal challenges by other taxpayers are irrelevant where, as here, the legality of the taxes is the fundamental question in dispute.

In short, the Panel’s decision denied preemption by overhauling the *Bracker* analysis in a way that contravenes binding precedent and the law of other circuits, and that will have significant repercussions for future cases. That potential sea change in circuit precedent should first be considered by the Court en banc.

### **CONCLUSION**

For the foregoing reasons, the petition for rehearing and rehearing en banc should be granted.

Dated: August 21, 2013

Respectfully submitted,

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ADDENDUM

July 15, 2013

Order and Opinion

12-1727-cv(L)

*Mashantucket Pequot Tribe v. Town of Ledyard*

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
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5 August Term, 2012  
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7 (Argued: March 18, 2013 Decided: July 15, 2013)  
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9 Docket Nos. 12-1727-cv(L), 12-1735-cv(CON)  
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12 MASHANTUCKET PEQUOT TRIBE,  
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14 *Plaintiff-Appellee,*  
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16 -v.-  
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18 TOWN OF LEDYARD; PAUL HOPKINS, Tax Assessor, Town of  
19 Ledyard; JOAN CARROLL, Tax Collector, Town of Ledyard,  
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21 *Defendants-Appellants,*  
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23 STATE OF CONNECTICUT,  
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25 *Intervenor-Defendant-Appellant.\**  
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28  
29 Before:

30 JACOBS, *Chief Circuit Judge*, CABRANES AND WESLEY, *Circuit Judges*.  
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35 The Town of Ledyard and State of Connecticut appeal from the  
36 judgment of the United States District Court for the  
37 District of Connecticut (Warren W. Eginton, *Judge*), holding  
38 that (1) nothing barred the court from exercising

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\* The Clerk of the Court is directed to amend the caption as listed above.

jurisdiction and (2) Connecticut's personal property tax, as applied to vendors leasing slot machines to the Mashantucket Pequot Tribe for use at Foxwoods casino, was barred by the Indian Trader Statutes, Indian Gaming and Regulatory Act, and pursuant to the balancing test enunciated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). We hold that the district court (1) appropriately reached the merits of the case but (2) erred by finding the tax to be preempted.

REVERSED and REMANDED.

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WESLEY, Circuit Judge:

The Mashantucket Pequot Tribe (the "Tribe") challenges the Town of Ledyard's (the "Town") imposition of the State of Connecticut's (the "State") personal property tax on the lessors of slot machines used by the Tribe at Foxwoods

1 Resort Casino and MGM Grand at Foxwoods (collectively  
2 "Foxwoods"), located in Ledyard, Connecticut. See Conn.  
3 Gen. Stat. §§ 12-40 *et seq.* (the "tax"). The Tribe filed  
4 complaints in August 2006 and September 2008 on behalf of  
5 two vendors who lease slot machines to the Tribe for use at  
6 Foxwoods. The Town and the State appeal from a ruling of  
7 the United States District Court for the District of  
8 Connecticut (Warren W. Eginton, *Judge*) denying their motions  
9 for summary judgment, granting summary judgment to the  
10 Tribe, and affording the Tribe injunctive and declaratory  
11 relief.

12 As a threshold matter, the Town and State assert that  
13 (1) the Tribe lacks standing; (2) the Tax Injunction Act, 28  
14 U.S.C. § 1341, strips federal courts of jurisdiction over  
15 this action; and (3) principles of comity bar federal courts  
16 from deciding this action. On the merits, the Tribe defends  
17 the district court's order to invalidate the State's  
18 personal property tax as applied to the vendors, asserting  
19 that the tax is preempted (1) by the Indian Trader Statutes,  
20 25 U.S.C. §§ 261-64; (2) by the Indian Gaming Regulatory Act  
21 ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*; and (3) pursuant to the  
22 balancing test enunciated in *White Mountain Apache Tribe v.*  
23 *Bracker*, 448 U.S. 136 (1980).

We hold that: the district court properly exercised jurisdiction, and the Tribe has standing to pursue this claim; neither IGRA nor the Indian Trader Statutes expressly bar the tax; and, under the *Bracker* test, federal law does not implicitly bar the tax because State and Town interests in the integrity and uniform application of their tax system outweigh the federal and tribal interests reflected in IGRA. The district court erred in granting summary judgment for the Tribe and in denying summary judgment for the Town and State.

## **Background**

### **I. The Tax**

Connecticut imposes a generally-applicable personal property tax for the purpose of revenue collection for the municipalities that assess and collect the tax. State law requires nonresident owners of personal property, which includes slot machines, to file declarations spelling out the value of their property with the towns where their property is located. The towns apply a formula to the value of that property and bill the owners accordingly. Conn. Gen. Stat. § 12-43. To collect the tax, the Town relies

1 heavily on "the willingness of taxpayers to comply with  
2 State law and file personal property declarations." Hopkins  
3 Decl. ¶ 8. This tax does not apply to Tribal property  
4 located on-reservation.

5 Connecticut's towns use these tax proceeds "to fund the  
6 operation of municipal government." *Id.* ¶ 5. The services  
7 provided by the Town include, *inter alia*, police and  
8 emergency-services functions, road maintenance, education,  
9 and trash collection. The Town maintains roads to and  
10 throughout the Indian reservation, provides emergency  
11 services to the Tribe, buses children living on-reservation  
12 to schools, and pays for the education of Tribal children  
13 on-reservation. The annual cost to the Town of educating  
14 Tribal children is at least \$236,258.<sup>1</sup>

## 15 **II. The Gaming Procedures**

16 The Mashantucket Pequot Gaming Enterprise (the  
17 "Enterprise") operates Foxwoods, the self-described largest  
18 casino and resort in the United States. The Enterprise  
19 employs 10,000 people, of whom approximately 150 are Tribal  
20 members. Although the Tribe has other sources of income,

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<sup>1</sup> The Town actually spends approximately \$652,158 per annum, but it receives approximately \$415,900 in federal aid, leaving the Town with \$236,258 in non-reimbursed costs.

1 including at least four types of taxes it imposes on on-  
2 reservation activities, the majority of the Tribe's revenue  
3 comes from the Enterprise. Slot machines are among the most  
4 popular Enterprise games.

5 IGRA defines slot machines as Class III games. See 25  
6 C.F.R. § 502.4. The Final Mashantucket Pequot Gaming  
7 Procedures, promulgated by the Secretary of the Interior,  
8 governs the Tribe's use of Class III games. See Dist. Ct.  
9 Doc. No. 221-13, 56 Fed. Reg. 24996 (1991), 56 Fed. Reg.  
10 15746-01 (1991) ("Gaming Procedures"). Under the Gaming  
11 Procedures, the State licenses gaming employees, requires  
12 enterprises to register before providing gaming, and  
13 collects compensation from the Tribe. Gaming Procedures at  
14 §§ 5-6. The Enterprise pays twenty-five percent of all  
15 proceeds from video facsimile games<sup>2</sup> to the State. These  
16 payments exceeded \$1.5 billion from 2003 to 2011. The  
17 Enterprise also "reimburse[s] the State for law enforcement  
18 and regulatory services related to [] gaming;" this payment  
19 was, in total, approximately \$56.8 million from 2003-2011.

### 20 **III. The Lease Agreements and Modifications**

21 The Enterprise obtains slot machines from different  
22 vendors, including Atlantic City Coin & Slot Company ("AC

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<sup>2</sup> Slot machines are included among "video facsimile games."

Coin")<sup>3</sup> and WMS Gaming Incorporated ("WMS") (collectively the "vendors"). AC Coin is incorporated and based in New Jersey; WMS is a Delaware corporation with headquarters in Illinois. AC Coin and WMS sell some of their slot machines, but they offer some of their most popular proprietary games by lease only.<sup>4</sup>

AC Coin began leasing slot machines to the Tribe in 1997-98. These leases provided that "[t]axes and any license fees applicable to the use and operation of the [machines] shall be paid by [the] [c]asino." AC Coin Lease 10/11/2000. The agreements further provided that the Tribe: agrees to defend, indemnify, and hold harmless A.C. Coin, its agents, employees, officers, and directors from and against any and all liabilities, obligations, losses, damages, injuries, claims, demands, penalties, costs and expenses . . . of whatsoever kind or nature . . . arising out of the use, operation and possession of the [machines], provided such liabilities are not the direct result of the negligent or intentional conduct of A.C. Coin or its agents, officers, and directors.

*Id.* "AC Coin has used, and continues to use, this standard form tax and indemnification language . . . in leases for

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<sup>3</sup> On June 27, 2013, the Tribe notified the Court that AC Coin would cease operations on June 30, 2013. This does not affect any of the legal analysis in this case.

<sup>4</sup> As of October 2009, AC Coin began to make its proprietary games available for purchase. See Tribe Brief at 12.

both its tribal and non-tribal lessees." McCormick Aff. 2. AC Coin has paid Connecticut's personal property tax on slot machines leased to the tribes that operate both Foxwoods and Mohegan Sun, another Connecticut-based, Indian-run casino. Despite the permissive language in its leases, AC Coin has not sought or received reimbursement for the taxes that it has paid on gaming equipment leased to other casinos and had not sought reimbursement from the Tribe prior to this lawsuit.

WMS also leased slot machines to the Tribe pursuant to standard form leases, beginning in 1998. A 1998 lease with the Tribe contained standard language requiring that:

[t]axes, licenses and permit fees applicable to the installation or operation of the [machines] shall be paid by the [Tribe]. [The Tribe] shall indemnify and defend WMS from and against any penalty, liability and expense . . . arising from [the Tribe's] failure to remit such taxes or from any delinquency with respect to such remittance.

WMS Lease Agreement 10/15/98. Like AC Coin, WMS "has not sought reimbursement nor has it ever been reimbursed for personal property taxes it has paid on gaming equipment leased to casinos by any casino or Indian tribe, including the . . . Enterprise and the Mohegan Sun casino." Town Rule 56(a)(1) Statement 7. Similarly, WMS "does not change the

1 pricing, or lease rate, of leased slot machines because of  
2 personal property tax; the tax is not a factor in lease  
3 pricing." *Id.*

4 In the late 1990s, the Tribe decided that its vendors  
5 should not be subject to the tax. Despite the vendors'  
6 initial reluctance, the Tribe persuaded the vendors to  
7 modify the lease agreements to reflect this decision. The  
8 modified AC Coin lease indicated:

9 Foxwoods represents that it is not subject to any  
10 state or local taxes for any services or sales or  
11 leases occurring at Foxwoods' premises and . . . AC  
12 Coin agrees not to file with the local towns or any  
13 other applicable jurisdiction, including specifically  
14 the Town of Ledyard, a list of property or equipment  
15 provided under the Agreement or to pay such tax with  
16 respect to such equipment except in the event that AC  
17 Coin is legally obligated to do so. In the event  
18 [that] AC Coin becomes legally obligated to file  
19 and/or pay taxes, AC Coin agrees to immediately  
20 notify Foxwoods of such obligation and to reasonably  
21 cooperate with Foxwoods in contesting such tax filing  
22 and/or payment if so requested by Foxwoods . . . .  
23 Foxwoods agrees to hold harmless and/or reimburse AC  
24 Coin within thirty (30) days for any taxes or any  
25 related cost or expense paid in accordance with this  
26 provision.

27  
28 Town Rule 56(a)(1) Statement 4-5.

29 The modified language in the WMS lease agreement was  
30 substantially identical. *See id.* Despite the  
31 modifications, WMS and AC Coin continued to pay personal  
32 property taxes until the Tribe pressured them to stop.

1       **IV.           Court Actions among the Parties**

2           In 2006, AC Coin pursued and lost an administrative  
3       appeal of the tax to the Town's Board of Assessment Appeals.  
4       In August 2006, the Tribe and AC Coin filed the complaint in  
5       this action in the United States District Court for the  
6       District of Connecticut.

7           In July 2008, the Town filed suit in Connecticut  
8       Superior Court to collect unpaid property taxes from WMS.  
9       In September 2008, the Tribe sued in federal court to enjoin  
10      the enforcement of the tax against WMS. The district court  
11      consolidated the two federal actions. The Superior Court  
12      has stayed Connecticut's action against WMS pending  
13      resolution of this case. *Town of Ledyard v. WMS Gaming,*  
14      KNL-cv08-5007839 (Conn. Sup. Ct.). The State intervened as  
15      a defendant in both federal cases. As relevant here, the  
16      parties filed cross-motions for summary judgment, which the  
17      district court resolved in favor of the Tribe.

18  
19                               **Discussion**

20           The Town and State offer three independent reasons to  
21      dismiss this case for lack of jurisdiction: (1) standing,  
22      (2) the Tax Injunction Act ("TIA"), and (3) comity. The

1 Tribe argues that jurisdiction was proper and that we should  
2 affirm the district court's opinion that the tax is  
3 preempted by (1) the Indian Trader Statutes, (2) IGRA, and  
4 (3) the *Bracker* balancing test. We find that (1) the  
5 district court properly reached the merits of the case, and  
6 (2) the district court erred in holding that the tax was  
7 preempted.

#### 8 **I. The District Court Properly Exercised Jurisdiction**

9 The district court concluded that none of the  
10 Appellants' challenges to its jurisdiction were persuasive.  
11 *See Mashantucket Pequot Tribe v. Town of Ledyard*, No. 06-cv-  
12 1212(WWE), 2007 WL 1238338, \*1-2 (D. Conn. Apr. 25, 2007)  
13 ("*Pequot I*") (denying motion to dismiss based on the TIA and  
14 comity); *Mashantucket Pequot Tribe v. Town of Ledyard*, No.  
15 06-cv-1212(WWE), 2012 WL 1069342, \*5-6 (D. Conn. Mar. 27,  
16 2012) ("*Pequot II*") (denying motion to dismiss based on the  
17 TIA and lack of standing). We affirm that conclusion.

#### 18 **A. The Tribe Has Standing to Pursue Its Claim**

19 The Town alleges that the Tribe lacks standing to bring  
20 this claim. "To establish Article III standing, an injury  
21 must be 'concrete, particularized, and actual or imminent;  
22 fairly traceable to the challenged action; and redressable

1 by a favorable ruling.'" *Clapper v. Amnesty Intern. USA*, --  
2 U.S. --, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co.*  
3 *v. Geertson Seed Farms*, 561 U.S. --, 130 S. Ct. 2743, 2752  
4 (2010)). Only the existence of a concrete, particularized  
5 injury is at issue in this case.

6 The Tribe argues, *inter alia*, that it has suffered an  
7 injury-in-fact because the tax infringes upon Tribal  
8 sovereignty. We agree that the Tribe's allegations are  
9 sufficient to confer standing.

10 Although Article III's standing requirement is not  
11 satisfied by mere assertions of trespass to tribal  
12 sovereignty, actual infringements on a tribe's sovereignty  
13 constitute a concrete injury sufficient to confer standing.  
14 This injury, distinct "from the monetary injury asserted by"  
15 the taxed parties, implicates "the substantive interest  
16 which Congress has sought to protect [in] tribal self-  
17 government." *Moe v. Confederated Salish and Kootenai Tribes*  
18 *of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976)  
19 (addressing state taxes imposed on on-reservation Indians  
20 directly implicating the tribe's relationship with its  
21 members). This rule exists because tribes, like states, are  
22 afforded "special solicitude in our standing analysis."  
23 *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

1           “The Supreme Court has consistently recognized that a  
2     tribe has an interest in protecting tribal self-government  
3     from the assertion by a state that it has regulatory or  
4     taxing authority over Indians and non-Indians conducting  
5     business on tribal reservations.” *Miccosukee Tribe of*  
6     *Indians of Fla. v. Fla. State Athletic Comm’n*, 226 F.3d  
7     1226, 1230 (11th Cir. 2000) (citing *White Mountain Apache*  
8     *Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo Sch.*  
9     *Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 845 (1982)).  
10    In *Miccosukee*, the Eleventh Circuit held that a tax imposed  
11    on revenues gained by a non-Indian boxing promoter from an  
12    on-reservation match constituted an affront to sovereignty  
13    sufficient to confer standing. *Id.* at 1230-31 (collecting  
14    cases in which the Supreme Court reached the merits of  
15    similar actions).

16           The Town relies on *Reich v. Mashantucket Sand & Gravel*,  
17    95 F.3d 174 (2d Cir. 1996), in which this Court held  
18    (without discussing standing) that some statutory  
19    interference with tribal sovereignty was permissible, to  
20    argue that the alleged infringement of sovereignty at issue  
21    here does not confer standing. However, we must avoid  
22    “conflat[ing] the requirement for an injury-in-fact with the

1 . . . validity of [the Tribe's] claim." *Dean v. Blumenthal*,  
2 577 F.3d 60, 66 n.4 (2d Cir. 2009) (*per curiam*). The  
3 standing inquiry only requires that the Tribe establish "an  
4 invasion of a legally protected interest which is (a)  
5 concrete and particularized, and (b) actual or imminent, not  
6 conjectural or hypothetical." *Lujan v. Defenders of*  
7 *Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and  
8 citations omitted).

9 Here, the imposition of state taxes on slot machines  
10 operated only by the Tribe's casino and stored solely on-  
11 reservation impinges upon the Tribe's ability to regulate  
12 its affairs and to be the sole governmental organ  
13 influencing activities, including possession of property, on  
14 its reservation. The injury in this case is neither  
15 speculative nor generalized; there is a real tax with  
16 measurable interference in the Tribe's sovereignty on its  
17 reservation. *Miccossukee*, 226 F.3d at 1230, 1234. The Tribe  
18 has standing to vindicate these interests.

19 **B. The TIA Does Not Bar This Action**

20 The State alleges that the Tribe's suit is barred by  
21 the TIA, which provides that "district courts shall not  
22 enjoin, suspend or restrain the assessment, levy or

1 collection of any tax under State law where a plain, speedy  
2 and efficient remedy may be had in the courts of such  
3 State." 28 U.S.C. § 1341. The Tribe counters that a tribal  
4 exception recognized in *Moe*, 425 U.S. at 470-74, undercuts  
5 the TIA's seemingly sweeping language. We agree with the  
6 Tribe.

7 Federal courts "have original jurisdiction of all  
8 [federal claims] brought by any Indian tribe or band with a  
9 governing body duly recognized by the Secretary of the  
10 Interior." 28 U.S.C. § 1362. In *Moe*, the Supreme Court  
11 permitted a Tribe to challenge, *inter alia*, the imposition  
12 of a state personal property tax imposed on-reservation.  
13 425 U.S. at 469. The *Moe* Court held that tribes are  
14 entitled to "treatment similar to that of the United States  
15 had it sued on their behalf." *Id.* at 474. The Court  
16 further noted that the United States could sue to vindicate  
17 Indian interests that it had sought to protect through  
18 federal legislation and federal programs. *Id.* at 473  
19 (citing *Heckman v. United States*, 224 U.S. 413 (1912), and  
20 *United States v. Rickert*, 188 U.S. 432 (1903)). The tribe  
21 was therefore permitted to sue to dispute imposition of  
22 state personal property taxes and sales taxes as applied to  
23 on-reservation Indians. *Id.* at 474-75.

1           If the Tribe were suing to enjoin enforcement of a  
2   state tax imposed directly on the Tribe, the action would  
3   not be barred by the TIA. *Moe*, 425 U.S. at 472-74; *see also*  
4   *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 571-  
5   72 (10th Cir. 2000). However, otherwise exempt parties are  
6   subject to the TIA when they sue on behalf of non-exempt  
7   institutions. *FDIC v. New York*, 928 F.2d 56, 59 (2d Cir.  
8   1991). Insofar as the Tribe is suing on behalf of the  
9   third-party vendors who are the taxed parties, its suit  
10  (like theirs) is barred by the TIA.

11          Here, the Tribe is suing to defend against the Town's  
12  and State's alleged encroachment upon aspects of tribal  
13  sovereignty protected by the Indian Trader Statutes and  
14  IGRA. Courts "'embrace[] the recognition of the interest of  
15  the United States in securing immunity to the Indians from  
16  taxation conflicting with the measures it had adopted for  
17  their protection.'" *Moe*, 425 U.S. at 473 (quoting *Heckman*,  
18  224 U.S. at 441). Since we are required to decide whether  
19  the state tax at issue conflicts with the federal measures  
20  enacted for the Tribe's protection, we have undoubted  
21  jurisdiction - notwithstanding the TIA - to perform that  
22  task. Recognizing this requirement, Congress bestowed on

1 the federal courts original jurisdiction over "all" federal  
2 claims brought by tribes. 28 U.S.C. § 1362. The TIA does  
3 not preclude jurisdiction over a tribe's suit to enjoin  
4 purportedly preempted state taxation of non-Indians on the  
5 reservation. *See, e.g., Barona Band of Mission Indians v.*  
6 *Yee*, 528 F.3d 1184, 1186 n.1 (9th Cir. 2008).<sup>5</sup>

### 7 C. Comity Does Not Preclude Federal Jurisdiction

8 The State alleges that the district court abused its  
9 discretion in failing to dismiss this case under principles  
10 of comity. The Tribe asserts that the State forfeited this  
11 claim. We reject both arguments: the State adequately  
12 preserved its comity objection, but the district court was  
13 within its discretion in denying the motion to dismiss. *See*  
14 *Joseph v. Hyman*, 659 F.3d 215, 218 n.1 (2d Cir. 2011)  
15 ("where, as here, a district court dismisses the action  
16 based on comity, we review the decision for abuse of  
17 discretion").

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<sup>5</sup> The State's reliance on *United States v. Jicarilla Apache Nation*, -- U.S. --, 131 S. Ct. 2313 (2011), is misplaced. *Jicarilla* addresses the fiduciary exception to the attorney-client privilege as related to the United States in its trustee relationship with Indian tribes. The opinion relies on analysis of the evidentiary privilege and the relationship between the United States and Indian tribes; neither is directly at issue here. *Id.*

1           The Tribe points to cases in which courts have held  
2   that arguments raised in the complaint were waived unless  
3   reiterated in opposition to motions for summary judgment.  
4   Tribe Br. 41 (citing, *inter alia*, *Rocafort v. IBM Corp.*, 334  
5   F.3d 115, 121 (1st Cir. 2003)). These cases are  
6   unpersuasive in the context of "comity and federalism[,  
7   which] bear on the relations between court systems,  
8   [because] those relations will be affected whether or not  
9   the litigants have raised the issue themselves." *Washington*  
10   *v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993). Moreover, the  
11   district court considered and rejected the comity challenge  
12   prior to the motion for summary judgment. "After [the]  
13   final order, the district court's earlier denial of the  
14   motion to remand for lack of subject matter jurisdiction  
15   also is reviewable." *Capitol Hill Grp. v. Pillsbury*,  
16   *Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 488 (D.C. Cir.  
17   2009) (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H.  
18   COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3740 (3d. ed. 1998)). "To  
19   require [the State] to re-raise [its] objections would be an  
20   overly formalistic application of waiver." *Dexia Credit*  
21   *Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010).

1 "More embractive than the TIA, the comity doctrine  
2 applicable in state taxation cases restrains federal courts  
3 from entertaining claims for relief that risk disrupting  
4 state tax administration." *Levin v. Commerce Energy, Inc.*,  
5 560 U.S. 413, 130 S. Ct. 2323, 2328 (2010). The practical  
6 reasons for the stringent application of comity in the  
7 context of state tax law were explained by Justice Brennan:

8 The special reasons justifying the policy of federal  
9 non-interference with state tax collection are  
10 obvious. . . . If federal declaratory relief were  
11 available to test state tax assessments, state tax  
12 administration might be thrown into disarray, and  
13 taxpayers might escape the ordinary procedural  
14 requirements imposed by state law. During the  
15 pendency of the federal suit the collection of  
16 revenue under the challenged law might be obstructed,  
17 with consequent damage to the State's budget, and  
18 perhaps a shift to the State of the risk of taxpayer  
19 insolvency. Moreover, federal constitutional issues  
20 are likely to turn on questions of state tax law,  
21 which, like issues of state regulatory law, are more  
22 properly heard in the state courts.

23  
24 *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (concurring  
25 in part and dissenting in part). Recognizing the competence  
26 of the state courts to adjudicate federal issues "is  
27 essential to 'Our Federalism,' particularly in the area of  
28 state taxation." *Fair Assessment in Real Estate Ass'n v.*  
29 *McNary*, 454 U.S. 100, 103 (1981).

1           There is little precedent for applying the comity  
2 doctrine in cases brought by Indian tribes. *Cf. Kiowa Tribe*  
3 *of Oklahoma v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985)  
4 (affirming the dismissal, on res judicata grounds, of an  
5 issue that had already been litigated and appealed through  
6 the entire Kansas state court system). The Sixth Circuit  
7 has upheld the dismissal on comity grounds of a lawsuit  
8 brought by a private Indian enterprise. *Chippewa Trading*  
9 *Co. v. Cox*, 365 F.3d 538, 544-46 (6th Cir. 2004). However,  
10 in so holding, the court explicitly relied on the fact that  
11 the plaintiff "[wa]s not an 'Indian tribe or band,' as the  
12 statutory exception [to the TIA] requires." *Id.* at 545.  
13 *Cf. Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291,  
14 1301 (D. Kan. 2004).

15           Two factors counsel against dismissing due to comity in  
16 this case, brought by an actual Indian tribe and not yet  
17 litigated in state court.<sup>6</sup> First, there are strong federal  
18 interests in determining the contours of the Indian Trader  
19 Statutes and IGRA, two federal regulatory regimes that  
20 entirely occupy (and preclude state legislation in) fields

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<sup>6</sup> If the Town had brought suit in state court to collect unpaid taxes prior to – instead of two years after – commencement of this action, the argument for federal deference to the pending state action would be stronger.

1 of indeterminate size. Where Congress has determined that  
2 there are "strong policies . . . favoring a federal forum to  
3 vindicate deprivations of federal rights," as in the context  
4 of litigation brought by Indian tribes, federal courts  
5 should exercise their lawful jurisdiction. *McNary*, 454 U.S.  
6 at 119 (Brennan, J., concurring). Second, federal courts  
7 have regularly entertained Indian tribes' challenges to  
8 state taxes. See, e.g., *Washington v. Confederated Tribes*  
9 *of Colville Indian Reservation*, 447 U.S. 134, 138 (1980);  
10 *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).  
11 Seeing no reason to depart from this precedent, we affirm  
12 the denial of the motion to dismiss on comity grounds.<sup>7</sup>

13 **II. The State Tax Has Not Been Preempted**

14 On reaching the merits, the district court held that  
15 the tax was preempted by the Indian Trader Statutes, by  
16 IGRA, and pursuant to the *Bracker* balancing test. *Pequot*  
17 *II*, 2012 WL 1069342, at \*7-12. We conclude that neither the  
18 Indian Trader Statute nor IGRA preempts the tax "expressly  
19 or by plain implication," *Cotton Petroleum Corp. v. New*

---

<sup>7</sup>The State views the district court's decision not to dismiss due to comity as an abuse of discretion, despite the fact that such a decision would have made it the first federal court to dismiss an Indian tribe's challenge of a state tax on comity grounds.

1 Mexico, 490 U.S. 163, 175-76 (1989), and that the Town and  
2 State interests in the tax, as applied to the vendors,  
3 outweigh the Tribe and federal interests. The tax is not  
4 preempted.

5       "``In determining whether federal law preempts a state's  
6 authority to regulate activities on tribal lands, courts  
7 must apply standards different from those applied in other  
8 areas of federal preemption.'" *Confederated Tribes of*  
9 *Siletz Indians of Or. v. Oregon*, 143 F.3d 481, 486 (9th Cir.  
10 1998) (quoting *Cabazon Band of Mission Indians v. Wilson*, 37  
11 F.3d 430, 433 (9th Cir. 1994)). "Although a State will  
12 certainly be without jurisdiction if its authority is  
13 preempted under familiar principles of preemption, we  
14 . . . d[o] not limit preemption of State laws affecting  
15 Indian tribes to only those circumstances." *New Mexico v.*  
16 *Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

17       When examining whether a state tax is permissible, "the  
18 initial and frequently dispositive question in Indian tax  
19 cases is who bears the legal incidence of the tax, [as] the  
20 States are categorically barred from placing the legal  
21 incidence of an excise tax on a tribe or on tribal members  
22 for sales made inside Indian country without congressional

1 authorization." *Wagnon v. Prairie Band Potawatomi Nation*,  
2 546 U.S. 95, 101 (2005) (internal quotation, alterations,  
3 and emphasis omitted). But here, the parties stipulate that  
4 the legal incidence of the tax falls on the vendors. The  
5 Supreme Court in *White Mountain Apache Tribe v. Bracker* laid  
6 out a mode of analysis for courts to use "where, as here, a  
7 State asserts authority over the conduct of non-Indians  
8 engaging in activity on the reservation." 448 U.S. 136, 145  
9 (1980); see also *Wagnon*, 546 U.S. at 102. Under *Bracker*, a  
10 state tax may be invalid because it is "pre-empted by  
11 federal law," or because it "unlawfully infringe[s] on the  
12 right of reservation Indians to make their own laws and be  
13 ruled by them." *Id.* at 143 (internal quotation marks  
14 omitted).

15 In our view, neither the Indian Trader Statutes nor  
16 IGRA indicates congressional intent to bar the tax, and  
17 subjecting the "tax scheme over on-reservation, non-member  
18 activities to 'a particularized inquiry into the nature of  
19 the state, federal, and tribal interests at stake'" leads us  
20 to conclude that the tax is a valid exercise of State  
21 authority. *Oneida Nation*, 645 F.3d at 165 (quoting *Bracker*,  
22 448 U.S. at 145).

1           **A.    The Indian Trader Statutes Do Not Bar This Tax**

2           The Tribe argues that the Indian Trader Statutes, 25  
 3 U.S.C. §§ 261 *et seq.*, bar any state regulation in "the  
 4 field of transactions with Indians occurring on  
 5 reservations." *Central Machinery Co. v. Ariz. State Tax*  
 6 *Comm'n*, 448 U.S. 160, 165 (1980). Adopting a broad view of  
 7 the Indian Trader Statutes, the district court held that  
 8 "the state tax that is imposed upon the non-Indian entities  
 9 for the . . . leased equipment is preempted by the Indian  
 10 Trader Statutes." *Pequot II*, 2012 WL 1069342, at \*7. We  
 11 disagree.<sup>8</sup>

12           "Throughout this Nation's history, Congress has  
 13 authorized 'sweeping' and 'comprehensive federal regulation'  
 14 over persons who wish to trade with Indians and Indian  
 15 tribes." *Dep't of Taxation and Fin. of N.Y. v. Milhelm*  
 16 *Attea & Bros., Inc.*, 512 U.S. 61, 70 (1994) (quoting *Warren*  
 17 *Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685,

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<sup>8</sup> The State and Town argue that IGRA has displaced the Indian Trader Statutes with respect to gaming operations. While this argument has some force, given that IGRA does provide "room" for state regulatory authority over gaming, *cf. Central Machinery*, 448 U.S. 166 ("no room" for state regulation under Indian Trader Statutes), we need not address that argument here. Assuming *arguendo* that the Indian Trader Statutes apply, they do not preempt this generally applicable property tax assessed on non-Indian property.

1 687-89 (1965)). This regulation includes the Indian Trader  
2 Statutes, passed in 1834<sup>9</sup> "to protect Indians from becoming  
3 victims of fraud in dealings with persons selling goods."  
4 *Central Machinery*, 448 U.S. at 165. These regulations grant  
5 the federal government "sole power and authority . . . to  
6 make such rules and regulations as [it] may deem just and  
7 proper specifying the kind and quantity of goods and the  
8 prices at which such goods shall be sold to the Indians."  
9 25 U.S.C. § 261. They also prohibit unrecognized traders  
10 (such as AC Coin and WMS)<sup>10</sup> from trading with Indians and  
11 require "[t]hat no white person shall be employed as a clerk  
12 by any Indian trader . . . unless first licensed so to do by  
13 the Commissioner of Indian Affairs." 25 U.S.C. § 264.

14 The Supreme Court initially interpreted these statutes  
15 very broadly. See *Milhelm Attea*, 512 U.S. at 75; *Warren*  
16 *Trading Post*, 380 U.S. 685. The district court relied on  
17 this interpretation, holding that wherever a product is  
18 bought, sold, or leased by a tribe on-reservation, state

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<sup>9</sup> For a detailed discussion of the history of the Indian Trader Statutes and related statutes and laws, see *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. at 687-90.

<sup>10</sup> Although invited to do so by the parties, we decline to examine whether AC Coin and WMS are in criminal violation of the Indian Trader Statutes by virtue of the leases at issue.

1 taxes may not be applied. *Pequot II*, 2012 WL 1069342, at  
2 \*7. However, in *Milhelm Attea*, the Supreme Court backed away  
3 from this all-encompassing interpretation: "[a]lthough  
4 language in *Warren Trading Post* suggests that no state  
5 regulation of Indian traders can be valid, our subsequent  
6 decisions have undermined that proposition." 512 U.S. at 71  
7 (internal alteration and quotation marks omitted); see also  
8 *Cotton Petroleum*, 490 U.S. at 175. "Indian traders are not  
9 wholly immune from state regulation that is reasonably  
10 necessary to the assessment or collection of lawful state  
11 taxes." *Milhelm Attea*, 512 U.S. at 75.

12 Instead of "depend[ing] on 'rigid rules' or on  
13 'mechanical or absolute conceptions of state or tribal  
14 sovereignty,'" preemption under the Indian Trader Statutes  
15 involves "'a particularized inquiry into the nature of the  
16 state, federal, and tribal interests at stake . . . to  
17 determine whether, in the specific context, the exercise of  
18 state authority would violate federal law.'" *Milhelm Attea*,  
19 512 U.S. at 73 (quoting *Bracker*, 448 U.S. at 142, 145)  
20 (alteration omitted). Thus where they are implicated, the  
21 Indian Trader Statutes require the *Bracker* balancing  
22 analysis.

1       The ability of a state to apply generally-applicable  
2 taxes to non-Indians performing otherwise-taxable functions  
3 on an Indian reservation is well established. *Oneida*  
4 *Nation*, 645 F.3d at 167; *Milhelm Attea*, 512 U.S. at 73;  
5 *Cotton Petroleum*, 490 U.S. at 191. Neither the Tribe's  
6 interests in economic development and fair dealing nor the  
7 federal interests in protecting the Tribe by monitoring and  
8 regulating its commercial partners are implicated by  
9 Connecticut's generally-applicable personal property tax.  
10 See *Colville*, 447 U.S. at 156-57. That is particularly true  
11 here, where the incidence of the generally applicable tax  
12 falls on the non-Indian's *ownership of property*, rather than  
13 on the *transaction* between the Tribe and the non-Indian.  
14 Cf. *Central Machinery*, 448 U.S. at 165 (Indian trader law  
15 "pre-empts the field of *transactions* with Indians" (emphasis  
16 added)). As a result, the Indian Trader Statutes do not  
17 preempt the personal property tax "expressly or by plain  
18 implication." *Cotton Petroleum*, 490 U.S. at 175-76.

19       **B. IGRA Does Not Bar the Tax**

20       The district court also determined that IGRA preempts  
21 the tax. *Pegot II*, 2012 WL 1069342, at \*7-9. The Tribe is  
22 of the view that IGRA completely preempts all state

1 legislation affecting the field of gaming. While the Tribe  
2 is correct that IGRA preempts certain state regulations  
3 affecting the governance of gaming, the tax at issue here  
4 does not affect the Tribe's "governance of gaming" on its  
5 reservation, *see, e.g., Barona Band*, 528 F.3d at 1192.  
6 Therefore, we conclude that IGRA does not preempt the tax.

7 **1. The Plain Text of IGRA Does Not Bar the Tax**

8 The plain text of IGRA does not bar the tax. IGRA  
9 insists that "nothing in this section shall be interpreted  
10 as conferring upon a State or any of its political  
11 subdivisions authority to impose any tax, fee, charge, or  
12 other assessment upon an Indian tribe or upon any other  
13 person or entity authorized by an Indian tribe to engage in  
14 a class III activity." 25 U.S.C. § 2710(d)(4). IGRA does  
15 confer the authority, however, for states and tribes to  
16 include provisions in the Gaming Procedures, "relating to  
17 . . . assessment[s] by the State of . . . amounts []  
18 necessary to defray the costs of regulating [Class III]  
19 activity." 25 U.S.C. § 2710(d)(3)(C)(iii).

20 In this case, the Gaming Procedures are silent as to  
21 the legality of Connecticut's generally-applicable personal  
22 property tax. Neither the State nor the Tribe sought to

1 include language relating to the personal property tax in  
2 the Gaming Procedures. As a result, neither the Gaming  
3 Procedures nor, by extension, IGRA explicitly forbids (or  
4 permits) the State to apply its personal property tax to the  
5 vendors.

## 6 2. IGRA Does Not Bar the Tax by Plain Implication

7 IGRA does not explicitly bar the tax, but the Tribe  
8 asserts that the provisions of IGRA demonstrate  
9 congressional intent to exempt non-Indian lessors of gaming  
10 equipment from a generally-applicable state property tax  
11 levied on property located within a reservation even though  
12 that tax does not produce acute economic effects that  
13 interfere with the relevant gaming practices. IGRA, passed  
14 in 1988 in response to the Supreme Court's decision in  
15 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202  
16 (1987),<sup>11</sup> was "intended to expressly preempt the field in  
17 the governance of gaming activities on Indian lands.  
18 Consequently, Federal courts should not balance competing

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<sup>11</sup> Although the *Cabazon* decision is frequently cited as the immediate cause of IGRA, Congress had been weighing similar bills for four years prior. All of these bills were designed to "establish a federal scheme that would pre-empt state regulation of Indian gaming." Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 FED. LAWYER 35, 36 (Apr. 2013).

1 Federal, State, and tribal interests to determine the extent  
2 to which various gaming activities are allowed.'" *Gaming*  
3 *Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir.  
4 1996) (quoting S. Rep. No. 446, 100th Cong., 2d Sess. 6  
5 (1988)). However, "[n]ot every contract that is merely  
6 peripherally associated with tribal gaming is subject to  
7 IGRA's constraints." *Casino Res. Corp. v. Harrah's Entm't,*  
8 *Inc.*, 243 F.3d 435, 439 (8th Cir. 2001).

9 In determining whether a state tax imposed on a third  
10 party is preempted by IGRA's occupation of the "governance  
11 of gaming" field, courts have been quick to dismiss  
12 challenges to generally-applicable laws with *de minimis*  
13 effects on a tribe's ability to regulate its gambling  
14 operations. For example, courts have held that IGRA's  
15 preemptive scope is not implicated in cases involving gaming  
16 management and service contracts with a tribe, *id.* at 438-  
17 39; contracts to acquire materials to build a casino, *Barona*  
18 *Band*, 528 F.3d at 1192; and release of detailed  
19 investigative reports on the management of gaming, *Siletz*,  
20 143 F.3d at 487. Similarly, we conclude that any preemption  
21 of the "field" of gaming regulations is not at issue here,  
22 where the state tax on property is not targeted at gaming.

1 Instead, we apply the *Bracker* framework to determine whether  
2 the particular application of this tax conflicts with  
3 federal law. See *Barona Band*, 528 F.3d at 1193 ("If we were  
4 to accept the Tribe's argument that IGRA itself preempts the  
5 state taxation of non-Indian contractors working on tribal  
6 territory, we would effectively ignore *Bracker* and its  
7 progeny." ).

8 The Tribe contends that, in order to assure the  
9 legality of a tax of general application, the State was  
10 required to include language in the Gaming Procedures  
11 reserving the right to apply the property tax to slot  
12 machine vendors. "[U]nder [IGRA], the only method by which  
13 a state can apply its general civil laws to gaming is  
14 through a tribal-state compact." *Gaming Corp.*, 88 F.3d at  
15 546. But under IGRA, mere ownership of slot machines by the  
16 vendors does not qualify as gaming, and taxing such  
17 ownership therefore does not interfere with the "governance  
18 of gaming."

19 Although the Gaming Procedures outline the Tribe's use  
20 of gaming services, nothing in the Gaming Procedures  
21 indicates that it delineates all of the rights and  
22 responsibilities of vendors engaged in gaming services.

1 "Gaming services" in the Gaming Procedures is defined as  
2 "the providing of any goods or services to the Tribe  
3 directly in connection with the operation of Class III  
4 gaming in a gaming facility, including . . . manufacture,  
5 distribution, maintenance or repair of gaming equipment."  
6 Gaming Procedures § 2(m).<sup>12</sup> While the Gaming Procedures  
7 prohibit State taxation of "any Tribal gaming operation"  
8 other than those explicitly permitted, Gaming Procedures  
9 § 17(f), they are silent as to taxes imposed on a third  
10 party's ownership of slot machines on the Tribe's land,  
11 which, as explained above, is not "gaming."

12 Absent the Gaming Procedures, IGRA would not preempt  
13 the tax. With the Gaming Procedures, which are silent on  
14 the question of state taxation of the vendors' property, the  
15 analysis is unchanged.

16 IGRA does not directly preempt, by its text or by plain  
17 implication, the imposition of Connecticut's generally-  
18 applicable personal property tax. It also does not

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<sup>12</sup> "Gaming equipment" is separately defined to mean "any machine or device which is specially designed or manufactured for use in the operation of any Class III gaming activity." Gaming Procedures § 2(i). The "Gaming services" definition therefore includes the services of the vendors, who provide slot machines to the Tribe to be used as class III gaming devices.

1 explicitly authorize the tax; the *Bracker* balancing test is  
2 therefore in play.

3 **C. The Tax Is Not Barred under *Bracker***

4 Even when a state law is not barred by the text or  
5 plain implication of a federal statute, "it may unlawfully  
6 infringe 'on the right of reservation Indians to make their  
7 own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142  
8 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)); see  
9 also *Wilson*, 37 F.3d at 433. It may also unlawfully impinge  
10 upon the objectives of federal legislation. See *Bracker*,  
11 448 U.S. at 149. Such a tax is impermissible if "the  
12 imposition of the tax fails to satisfy the *Bracker* interest-  
13 balancing test." *Wagoner*, 546 U.S. at 102.

14 The *Bracker* test is "a flexible pre-emption analysis  
15 sensitive to the particular facts and legislation involved."  
16 *Cotton Petroleum*, 490 U.S. at 176. We examine "federal  
17 statutes and treaties . . . in light of 'the broad policies  
18 that underlie them and the notions of sovereignty that have  
19 developed from historical traditions of tribal  
20 independence.'" *Ramah*, 458 U.S. at 838 (quoting *Bracker*, 448  
21 U.S. at 144-45). We then weigh the "'independent but  
22 related' barriers" of (1) possible pre-emption under federal

1 statutes, and (2) "interfere[nce] with [a] tribe's ability  
2 to exercise its sovereign functions." *Id.* at 837 (quoting  
3 *Bracker*, 448 U.S. at 142). Finally, "[t]he State's interest  
4 in exercising its regulatory authority over the activity in  
5 question must be examined and given appropriate weight."  
6 *Id.* at 838. In balancing interests, "ambiguities in federal  
7 law should be construed generously, and federal pre-emption  
8 is not limited to those situations where Congress has  
9 explicitly announced an intention to pre-empt state  
10 activity." *Id.*

11 The Town and State contend that the balancing test does  
12 not apply and, in the alternative, that the Town and State  
13 interests at issue are more significant than the Tribal and  
14 federal interests at play. We find, first, that the *Bracker*  
15 test applies, and second, that it balances in favor of the  
16 Town and State.

### 17 1. The *Bracker* Test Applies

18 The Town makes two arguments in support of its claim  
19 that the *Bracker* test does not apply: (1) the taxed  
20 "transaction" takes place off of the reservation, and (2)  
21 any needed balancing has already been conducted by the  
22 Supreme Court in *Thomas v. Gay*, 169 U.S. 264 (1898).  
23 Neither argument is persuasive.

1 First, "[t]he *Bracker* interest-balancing test has never  
2 been applied where . . . the State asserts its taxing  
3 authority over non-Indians off the reservation." *Wagnon*,  
4 546 U.S. at 110. In *Wagnon*, the Supreme Court held that a  
5 fuel tax imposed on distributors who received fuel off-  
6 reservation and delivered it to the Prairie Band Potawatomi  
7 Nation on-reservation was imposed on off-reservation  
8 transactions not subject to *Bracker*. *Id.* at 101-110. The  
9 tax at issue in *Wagnon* applied regardless of the disposition  
10 of the fuel because it was triggered by the off-reservation  
11 receipt of fuel. Here, no relevant transaction occurs off-  
12 reservation. Instead, the tax is levied upon slot machines  
13 because they are located in the State of Connecticut - here,  
14 on the Tribe's reservation. Conn. Gen. Stat. § 12-43.

15 Second, the Town points to several late nineteenth-  
16 century cases ("Non-Indian Lessee Cases") in which the  
17 Supreme Court upheld taxes on property of non-Indians who  
18 resided on Indian reservations. In *Thomas*,<sup>13</sup> the Court  
19 upheld "a tax put upon the cattle of the [non-Indian]  
20 lessees [as] too remote and indirect to be deemed a tax upon

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<sup>13</sup> In other cases cited by the parties, the fact patterns and analysis mirror *Thomas*. See *Wagoner v. Evans*, 170 U.S. 588 (1898); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885); *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60 (9th Cir. 1896).

1 the lands or privileges of the Indians." 169 U.S. at 273.  
2 Expressly setting aside the argument that "the value of the  
3 lands for such purposes would fluctuate or be destroyed  
4 altogether" by the tax, *id.*, the Court declined to engage in  
5 a structured analysis or to weigh the tribal against the  
6 State interests.

7 *Thomas* and the Non-Indian Lessee Cases are similar to  
8 this case insofar as the Court addressed state taxation with  
9 the incidence of the tax falling within Indian land despite  
10 the absence of a direct tax on the Indians. *Cf. Colville*,  
11 447 U.S. at 183-86 (Rehnquist, *J.*, concurring). However,  
12 the law has changed since the 1890s; the Supreme Court has  
13 clarified the ways in which courts should evaluate  
14 assertions of preemption of state taxes. *Bracker*, 448 U.S.  
15 at 145. "Each case 'requires a particularized examination  
16 of the relevant state, federal, and tribal interests.'"  
17 *Cotton Petroleum*, 490 U.S. at 176 (quoting *Ramah*, 458 U.S.  
18 at 838). Moreover, Congress has established the importance  
19 of the specific federal interests at issue by enacting  
20 protective legislation such as IGRA. *Cf. Thomas*, 169 U.S.  
21 at 274-75 (conceding "[t]he unlimited power of [C]ongress to  
22 deal with the Indians" but noting that the tax at issue

would not "be an interference with congressional power"). Although *Thomas* informs our inquiry, we cannot forgo *Bracker's* fact-specific analysis because the Supreme Court decided a related question 115 years ago.

## 2. The State and Town Interests Outweigh the Federal and Tribal Interests

### i. The Federal Interest

For the purposes of the *Bracker* test, determining relevant federal interests "is primarily an exercise in examining congressional intent, [and] the history of tribal sovereignty serves as a necessary 'backdrop' to that process." *Cotton Petroleum*, 490 U.S. at 176. IGRA,<sup>14</sup> described at times as Congress's "strongest and most explicit statement in favor of tribal economic development," Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 146 (2006), "is intended to promote tribal [economic] development, prevent criminal activity related to gambling, and ensure that gaming activities are conducted fairly." *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*,

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<sup>14</sup> Because the tax in no way implicates the federal interest in ensuring that Tribes are not swindled in unfair transactions, the federal interests reflected in the Indian Trader Statutes are irrelevant. We therefore focus our inquiry on the federal interests reflected in IGRA.

1 602 F.3d 1019, 1034 (9th Cir. 2010), and also to "ensure  
2 that the Indian tribe is the primary beneficiary of the  
3 gaming operation." 25 U.S.C. § 2702(1)-(2). Nothing within  
4 IGRA reveals congressional intent to exempt non-Indian  
5 suppliers of gaming equipment from generally applicable  
6 state taxes that would apply in the absence of the  
7 legislation. IGRA addresses state taxation, 25 U.S.C.  
8 § 2710(d)(4),<sup>15</sup> without prohibiting taxes like this personal  
9 property tax. *See, e.g., Container Corp. of Am. v.*  
10 *Franchise Tax Bd.*, 463 U.S. 159, 196-97 (1983) (holding that  
11 if federal legislation speaks to a particular tax without  
12 prohibiting it, this undermines a claim that the tax is  
13 preempted).

14 The tax, imposed on non-Indian vendors, is likely to  
15 have a minimal effect on the Tribe's economic development.  
16 While IGRA seeks to limit criminal activity at the casinos,  
17 nothing in Connecticut's tax makes it likely that Michael  
18 Corleone will arrive to take over the Tribe's operations.

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<sup>15</sup> Section 2710(d)(4) provides in relevant part that

nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

Moreover, IGRA presented an opportunity for Congress to preempt taxes exactly like this one; Congress chose to limit the scope of IGRA's preemptive effect to the "governance of gaming." *Gaming Corp.*, 88 F.3d at 550. As imposed on the owners of vending machines leased by the Tribe, the tax entitles the State to a tangential benefit from the Tribe's gaming operation, but it does not prevent "the Indian tribe [from being] the *primary* beneficiary of the gaming operation." 25 U.S.C. § 2702(2) (emphasis added). The tax therefore has only a minimal effect on federal interests.

#### **ii. The Tribal Interest**

The tax implicates two Tribal interests - economic development and sovereignty over the reservation - but the parties dispute the magnitude of the tax's impact on each.

The economic effect of the tax on the Tribe is minimal.<sup>16</sup> From 2004 to 2011, AC Coin had paid \$69,894 in

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<sup>16</sup> Both parties claim that we should disregard the magnitude of the tax in evaluating its economic effect on the Tribe, albeit for different reasons.

The Tribe asserts that any tax, regardless of its size, is impermissible. The Tenth Circuit has held that, under some circumstances, preemption analysis "cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax." *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 986 n.9 (10th Cir. 1987). In *Indian Country*, the State taxed Indian sales of bingo tickets; the court held that IGRA's regulation of gaming itself is sufficiently comprehensive to prevent any tax on casino sales not accounted for in the

1 personal property tax. After several years, at the Tribe's  
 2 urging, AC Coin permitted the Tribe to reimburse it for this  
 3 tax while this lawsuit was pending. Assuming comparable  
 4 taxes on WMS,<sup>17</sup> this leads to an approximate total tax of

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compact. *Id.* In *Bracker*, the state sought to impose a motor carrier license tax and a use fuel tax on a subcontractor of a tribe's timber operations. 448 U.S. at 139. The taxes burdened contracts for the sale of timber that were often "drafted by employees of the Federal Government," and the federal scheme Indian timber regulations were "so pervasive" that there was "no room for the[] taxes in the comprehensive federal regulatory scheme." *Id.* at 147, 148. While IGRA may prevent any tax on gaming itself, a tax on personal property possessed by a non-Indian on the reservation does not fall within IGRA's pervasive reach. *Cf. Casino Res. Corp.*, 243 F.3d at 439; *Barona Band*, 528 F.3d at 1192.

The Town and the State assert that the tax has no actual economic effect on the Tribe. Indeed, the record reflects that "the tax is not a factor in lease pricing" and that the vendors do not seek reimbursement from Tribal lessees. Tribe Rule 56(a)(2) Statement 12-14. Insofar as the Tribe challenges this assessment, it would constitute a "genuine dispute as to [a] material fact," Fed. R. Civ. P. 56(a); however, we construe the record as devoid of genuine dispute on this question, insofar as any effect on the Tribe is minimal compared to the other relevant interests. Nevertheless, the Tribe did, pursuant to industry standard lease agreements, assume contractual *liability* for the taxes incurred by the vendors. Deane Decl. 3-4. The extent of the legal liability that the Tribe theoretically incurred is relevant, though not particularly weighty, to the calculation of the Tribe's interest, even if the Tribe's *actual* cost associated with the tax hinged upon the vendors' decision to seek the reimbursement to which they were lawfully entitled. See *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (listing "run[ning] the risk of being assessed a [cost]" as a cognizable injury, even if it is not clear that the debtor will seek repayment).

<sup>17</sup> The actual amounts owed by WMS appear to vary substantially from year to year, but average approximately \$10,000 for the years on record.

1 \$20,000 per annum.<sup>18</sup> Although this is a substantial sum, it  
2 constitutes less than two tenths of one percent of the  
3 \$2,300,000 (AC Coin) and \$12,900,000 (WMS) in revenue per  
4 annum that the vendors anticipate from their dealings with  
5 the Tribe.

6 As of September 2011, the Tribe had invested over \$1.42  
7 billion in its gaming operations at Foxwoods. Many of the  
8 vendors' most popular games are available by lease only, and  
9 the Tribe has elected to pursue leases of a significant  
10 duration; however, the challenged tax does not significantly  
11 compromise the profitability of these leases. The Tribe's  
12 payments to the State of twenty-five percent of its gross  
13 operating revenues from video facsimile games have exceeded  
14 \$1.5 billion since 2003. Even if the Tribe were forced to  
15 reimburse the vendors, \$20,000 per year would not pose a  
16 substantial threat to the revenue the Tribe derives from the  
17 vendors' games, and it does not make the State the "primary  
18 beneficiary" of even this part of the Tribe's gaming  
19 operation. The tax's economic effect on the Tribe is less  
20 than minimal.

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<sup>18</sup> The record also reflects that other slot machine vendors, including International Gaming Technology and Bally Technologies, regularly pay personal property taxes in Ledyard, but does not suggest how much they pay.

1       The tax has a moderate effect on tribal sovereignty.  
2       "A tribe's power to exclude nonmembers entirely or to  
3       condition their presence on the reservation is . . . well  
4       established." *Mescalero Apache*, 462 U.S. at 333. However,  
5       "[w]e long ago departed from the 'conceptual clarity of Mr.  
6       Chief Justice Marshall's view in *Worcester* [v. *Georgia*, 31  
7       U.S. 515 (1832)]," "that Indian tribes were wholly distinct  
8       nations within whose boundaries 'the laws of a State can  
9       have no force.'" *Id.* at 331 (quoting *Worcester*, 31 U.S. at  
10      561) (alterations omitted). The State's personal property  
11     tax, as imposed on the slot machines located entirely on-  
12     reservation, overlaps with the Tribe's ability to set the  
13     restrictions to property rights in its sovereign territory.  
14     "[U]nder some circumstances a State may exercise concurrent  
15     jurisdiction over non-Indians acting on tribal  
16     reservations." *Id.* at 333 (citations omitted). Still, this  
17     encroachment into an area of tribal sovereignty, however  
18     modest, is a recognized injury that must be considered in a  
19     *Bracker* balancing.

### 20                   **iii. The State and Town Interests**

21       In evaluating a State's economic interests for the  
22     purpose of *Bracker* balancing, we look for "a nexus between

1 the taxed activity and the government function  
2 provided. . . ." *Barona Band*, 528 F.3d at 1193; see also  
3 *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1201  
4 (10th Cir. 2011). In *Mescalero*, the challenged state  
5 regulation targeted hunting in particular; the Supreme Court  
6 considered State interests to be weaker because the State  
7 did not contribute to hunting or wildlife on the  
8 reservation. 462 U.S. at 341. Similarly, in *Ute Tribe*, the  
9 Tenth Circuit noted that the state taxes relating to  
10 extraction of oil and gas would be more defensible if the  
11 state used the tax's proceeds to provide related services to  
12 the Tribe. 660 F.3d at 1201.

13 "There is nothing unique in the nature of a [generally-  
14 applicable] tax . . . that requires a different analysis."  
15 *Ramah*, 458 U.S. at 843. However, for a generally-applicable  
16 tax, a court may credit the services provided by the State  
17 to the Tribe more generally as "related" to the tax. In  
18 *Cotton Petroleum*, 490 U.S. at 185, 189-91, the Supreme Court  
19 permitted application of a generalized tax on oil and gas  
20 production to on-reservation production, despite "evidence  
21 that tax payments by reservation lessees far exceed[ed] the  
22 value of services provided by the State to the lessees, or

1 more generally, to the reservation as a whole." *Id.* at 189.  
2 The Court reasoned that the State could point to "[t]he  
3 intangible value of citizenship in an organized society  
4 [that] is not easily measured in dollars and cents." *Id.*  
5 It also pointed out the "nightmarish administrative burdens"  
6 that would arise from requiring parity between state taxes  
7 and state services. *Id.* at 185 n.15.

8 In this case, the Town has a cognizable economic  
9 interest in imposing the tax. The Supreme Court has  
10 recognized "the dependency of state budgets on the receipt  
11 of local tax revenues" and "appreciate[s] the difficulties  
12 encountered by [local governments] should a substantial  
13 portion of [their] rightful tax revenue be tied up in"  
14 litigation. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503,  
15 527-28 (1981). The Town's economic interest therefore  
16 exceeds the value of the taxes on slot machines, insofar as  
17 a ruling favorable to the Tribe could invite other non-  
18 Indian owners of personal property on the reservation to  
19 initiate similar actions. According to the Town, the  
20 anticipated litigation from such an event would tie up  
21 hundreds of thousands of dollars per year. Hopkins Decl.  
22 ¶ 16. Moreover, if the legality of the tax hinges upon the

1 extent to which the taxed property is used by the Tribe in  
2 connection with Class III gaming - or other gaming at  
3 Foxwoods - the Town would need to take careful account of  
4 the use to which property owned by non-Indians on the  
5 reservation was put. This additional level of analysis  
6 would further frustrate the Town's revenue collection and  
7 would render the State's tax more difficult and expensive to  
8 administer.

9 There is a nexus between the tax and the services that  
10 the Town provides. The Town funds "the education and  
11 bussing [sic] of the Tribe's children" and "[t]he  
12 maintenance of the roads to the Reservation," *inter alia*.  
13 *Pequot II*, 2012 WL 1069342, at \*12. A well-maintained road  
14 system that brings in the customers is the lifeblood of the  
15 Tribe's gaming activities. That the Tribe benefits from  
16 generalized governmental functions performed by the Town  
17 reinforces the validity of generalized taxes imposed by the  
18 Town on third parties with whom the Tribe elects to do  
19 business. *Cotton Petroleum*, 490 U.S. at 189. The Town's  
20 economic interest in the generally applicable tax is  
21 therefore connected, in some respect, to the generally  
22 available services that it provides.

1           The State has an interest in the uniform application of  
2   its tax code. Requiring the State to consider additional  
3   factors to determine the code's applicability would make it  
4   less predictable and more difficult to administer.  
5   Furthermore, "'states have a valid interest in ensuring  
6   compliance with lawful taxes that might easily be evaded.'" *Oneida Nation*, 645 F.3d at 165 (alteration omitted) (quoting  
7   *Milhelm Attea*, 512 U.S. at 73). The Tribe's decision to  
8   contractually obligate the vendors not to comply with any  
9   future personal property tax assessments required by State  
10   law undermines the State's sovereignty in a meaningful way.  
11   The likelihood of additional affronts to State sovereignty  
12   increases as the tax's application becomes more contingent  
13   upon the use to which non-Indian third parties put on-  
14   reservation property. The tax system already relies upon  
15   the honor code; refusal to pay taxes "erodes the public's  
16   perception of the equity of the system and has the potential  
17   of resulting in non-compliance with the reporting  
18   requirement." Hopkins Decl. ¶ 10.

20           Finally, a State has a separate sovereign interest in  
21   being in control of, and able to apply, its laws throughout  
22   its territory. *Cotton Petroleum*, 490 U.S. at 188. That

1 interest is diminished where, as here, the sole application  
2 of the state law at issue is on the Tribe's reservation,  
3 which occupies a unique status within the State. Finally,  
4 if there is evidence of arbitrage or Tribal efforts to  
5 structure deals so as to avoid the State tax, the State's  
6 interests are stronger. See *Barona Band*, 528 F.3d at 1193-  
7 94.

#### 8 iv. Analysis

9 The Town and State have more at stake than the Tribe.  
10 The economic effect of the tax on the Tribe is negligible;  
11 its economic value to the Town is not. The Tribe's  
12 sovereign interest in being able to exercise sole taxing  
13 authority over possession of property is insufficient to  
14 outweigh the State's interest in the uniform application of  
15 its generally-applicable tax, particularly where, as here,  
16 there is room for both State and Tribal taxation of the same  
17 activity. See *Cotton Petroleum*, 490 U.S. at 188-89.  
18 Ultimately, applying a tax that covers all property in the  
19 State to non-Indian property located on-reservation is  
20 minimally intrusive. We find the Supreme Court's holding in  
21 *Cotton Petroleum* to be highly instructive. As in that case,  
22 [t]his is not a case in which the State has had  
23 nothing to do with the on-reservation activity, save

1 tax it. Nor is this a case in which an unusually  
2 large state tax has imposed a substantial burden on  
3 the Tribe. It is, of course, reasonable to infer  
4 that the [State] taxes have at least a marginal  
5 effect on the [price of] on-reservation  
6 leases . . . . Any impairment to the federal policy  
7 favoring the [supremacy of the Tribe's role in  
8 gaming] that might be caused by these effects,  
9 however, is simply too indirect and too insubstantial  
10 to support [the Tribe's] claim of pre-emption. To  
11 find pre-emption of state taxation in such indirect  
12 burdens on this broad congressional purpose, absent  
13 some special factor such as those present in *Bracker*  
14 and *Ramah Navajo School Bd.*, would be to return to  
15 the pre-1937 doctrine of intergovernmental tax  
16 immunity. Any adverse effect on the Tribe's finances  
17 caused by the taxation of a private party contracting  
18 with the Tribe would be ground to strike the tax.  
19 Absent more explicit guidance from Congress, we  
20 decline to return to this long-discarded and  
21 thoroughly repudiated doctrine.

22  
23 490 U.S. at 186-87.

24 We recognize that this is arguably a close case.  
25 However, the Tribe's generalized interests in sovereignty  
26 and economic development are not significantly impeded by  
27 the State's generally-applicable tax; neither are the  
28 federal interests protected in IGRA. The Town has moderate  
29 economic and administrative interests at stake, and the  
30 affront to the State's sovereignty on one hand approximates  
31 the affront to the Tribe's sovereignty on the other. The  
32 balance of equities here favors the Town and State.

### 3. Tribal Sovereignty Does Not Bar the Tax

The Tribe alleges that, independent of all else, tribal sovereignty poses another hurdle to the imposition of the tax. The Tribe relies on two categories of cases: the *Bracker* line, and the *Worcester* line. However, *Bracker* and its progeny only cite tribal sovereignty among the interests in a balancing test where the incidence of a tax does not fall on the Tribe. See, e.g., *Bracker*, 448 U.S. at 142-45; see also *Wagon*, 546 U.S. at 101-02. Furthermore, cases such as *Worcester*, 31 U.S. 515, contain exactly the sort of "mechanical or absolute conceptions of state or tribal sovereignty" repudiated by *Bracker*. 448 U.S. at 145; see also *Mescalero Apache*, 462 U.S. at 331. Neither supports the Tribe's claim. Tribal sovereignty is an important consideration for a court weighing interests in the *Bracker* test, but it is insufficient in itself to bar the State's generally applicable tax imposed on non-Indians' ownership of on-reservation personal property.

1 **Conclusion**

2 The district court was not barred – by Article III, the  
3 TIA, or comity doctrines – from reaching the merits of this  
4 case. However, the district court erred in determining that  
5 Connecticut’s generally-applicable personal property tax was  
6 barred by the Indian Trader Statutes, by IGRA, and pursuant  
7 to the *Bracker* balancing test.

8 For the foregoing reasons, the opinion and order of the  
9 district court is **REVERSED** and the case is **REMANDED** with  
10 instructions to enter summary judgment in favor of  
11 Appellants.

A True Copy

Catherine O’Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O’Hagan Wolfe

10

**CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing Petition for Panel Rehearing and Rehearing *En Banc* for the Mashantucket Pequot Tribe were filed electronically and served by first class mail, postage prepaid, by the undersigned on this 21st day in August, 2013, to the Clerk of this Court and the following counsel of record:

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