18-1271

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized Indian tribe,

Plaintiff-Appellee,

v.

ANDY GERLACH, Secretary of the State of South Dakota Department of Revenue; and DENNIS DAUGAARD, Governor of the State of South Dakota,

Defendants-Appellants.

Appeal from the United States District Court for the District of South Dakota
Case No. 4:14-cv-04171-LLP

BRIEF OF APPELLEE FLANDREAU SANTEE SIOUX TRIBE

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New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) ("*Mescalero*")

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

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SDCL 35-2-24

The Tribe requests 30 minutes of oral argument.

STATEMENT OF THE CASE

This action challenges the State of South Dakota's efforts to siphon tax revenues from the Flandreau Santee Sioux Tribe's Royal River Casino & Hotel ("Casino"), which the Tribe owns and operates on the Flandreau Indian Reservation, where the sovereignty of the Tribal government is paramount and State authority is sharply limited. The State desires to reach into the Tribe's sovereign territory and into its government-run commerce to impose State use tax on the gaming-related Casino amenities the Tribe sells to nonmember Casino guests. The State's legal obstacle is that, in order to protect tribal sovereignty within Indian country and to promote the self-sufficiency of tribal governments, the Supreme Court has generally permitted only very limited state taxing authority over tribal commerce in Indian country, and Congress has specifically preempted states' authority to tax tribal casinos unless the tribe agrees to the tax. The State's arguments on appeal merit skepticism, as they are founded on misstatements of both fundamental federal Indian law and the legislation that governs this case.

I. Factual background.

The federally-recognized Flandreau Santee Sioux Tribe is situated on the Flandreau Indian Reservation in Moody County, South Dakota. JA501(1-2),[1]

[1] Citations to pages in the Joint Appendix (with paragraph numbers in parentheses, where applicable) are identified with "JA." The State's Addendum is cited as

JA502(4), JA425-426(1-3); *see* Proclamation, Flandreau Indian Reservation, 1 Fed. Reg. 1226, 1226 (Aug. 27, 1936). The Tribe owns and operates the Casino on the Reservation. JA502(6), JA525(27), JA426(4).

The Casino includes a gaming floor and amenities to gaming, including a hotel, restaurant, bar, gift shop, snack bar, and a live entertainment venue, all within the casino building, as well as an RV park occupying part of the casino parking lot. JA502(6), JA525(28), JA426-427(5-6). The Tribe paid for the Casino's construction, and continues to fund ongoing renovation and maintenance, with Tribal government funds, largely made up of gaming revenues. JA616-618(206-212), JA609-611(188-192).

Under Tribal law (approved by the U.S. Department of the Interior), Casino revenues are distributed to Tribal members and the Tribal government. JA609-611(188-192), JA622(224). In addition to receiving Casino revenues, the Tribe imposes a general 6% sales tax on sales within the Reservation, including at the Casino. JA611-613(194-197). Tribal sales tax revenues are around $350,000 annually, about 90% of which is generated by Casino transactions. JA615(203, 205).

"ADD." Record citations are to the district court's docket ("Doc.") number and page.

Both the Tribal sales tax revenues and the casino revenues distributed to the Tribe fund the Tribal government, through which the Tribe enforces its comprehensive laws governing the conduct of all persons on the reservation and delivers an array of governmental services. JA598-630(174-264), JA467(125) (citing Doc. 80-6). Some Tribal governmental services are provided exclusively to Tribal members, but many are provided to nonmembers, including non-Indians. JA620(219), JA468(128). The Tribe provides social services, including discounted meals for elderly people in the community, energy assistance, emergency housing, domestic violence victim assistance, and family services. JA619-628(217-252). The Tribe operates a police department and as a court system comprised of a trial court and a court of appeals, handling criminal, family law and civil actions. JA620(220), JA623(226-227), JA628-630(253-264). It operates a health clinic serving Native Americans in two counties, at an annual cost to the Tribe exceeding $1 million, and for which the Tribe recently built an expanded facility at a cost of about $16 million. JA624-626(231-240). The Tribe funds educational, cultural and social services provided on and off the Reservation and provides funding to other local governments for emergency and law enforcement services. JA626(243), JA674-679(319-320, 322-324, 331-333). It funds road construction and maintenance on and off the Reservation. JA674-677(321, 325-327).

The Casino not only supports the Tribal government and Reservation economy, but it also benefits the broader South Dakota economy through employment of more than 400 people, the Casino's expenditures with local suppliers, and "induced" activities, such as Casino employees spending their salaries. JA669(309), JA671(313-315); *see also* JA664-668(301-308). Furthermore, the Tribal government's support of tribal members decreases members' reliance on State welfare programs. JA672(316-317).

The Tribe is the primary provider of governmental services on the Reservation. The State, in contrast, has a minimal role within the Reservation's boundaries. The State government's reach generally extends onto the Reservation only indirectly, as State services are delivered to off-Reservation individuals and activities. The few government services the State provides on the Reservation are sporadic and insignificant, and unconnected to either the transactions or the tax at issue. JA638-659(281-295).

The Tribe operates the Casino pursuant to a gaming compact between the Tribe and the State. JA502(6); *see* Doc. 119-34. The gaming compact does not contain any provisions addressing the imposition of State taxes at the Casino.[2]

[2] The 2016 gaming compact found at Doc. 119-34 superseded the 2011 gaming compact attached to the complaint, JA74-91. Neither compact addresses State taxation.

The State use tax at issue here is "generally imposed on the consumer at the time [and place] of purchase when the goods and services are received if sales tax has not been collected." Doc. 79 at 2, 63.

The Tribe possesses State-issued alcoholic beverage licenses for the Casino and the First American Mart ("Mart"), a Tribally-owned convenience store and gas station located on the Reservation next to the Casino building. JA450(79).[3] Under State law, the licenses are conditioned on the Tribe remitting to the State "all use tax incurred by nonmembers as a result of the operation of the licensed premises, and any other state tax[.]" SDCL 35-2-24. The State has denied the Tribe's annual applications for reissuance of the alcohol licenses (though it has held the denials in abeyance), citing the Tribe's failure to remit State use taxes on nonmember purchases at the Casino and Mart. JA451(83-84).

II. Procedural history.

The Tribe commenced the district court action on November 18, 2014, and filed the first amended complaint on December 31, 2014. JA1-91. In interlocutory orders, the district court rejected the State's affirmative defenses and held that the State's counterclaims were barred by tribal sovereign immunity. JA118-163.

[3] The State and the record sometimes refer to three "licensed premises." *E.g.*, Opening Br. at 1, fn.1. One of them, the Royal River Family Entertainment Center, closed in July of 2015, and is not a subject of the judgment. *See* JA708, fn.5.

After completing discovery, the Tribe moved for summary judgment based on three of its claims, while the State asked for summary judgment on all claims. JA164, 193.

Granting the Tribe's motion in part, the court ruled that the Indian Gaming Regulatory Act ("IGRA") preempts the State use tax "on nonmember purchases of goods and services as to the Casino's slots, table games, food and beverage services, hotel, RV park, live entertainment events, and gift shop[.]" JA732(1.a); *see* JA735(1). The court denied the State's motion on the same claim. JA733(4.a). Denying the State's motion with respect to two other claims, the court ruled that "[t]he State cannot condition renewal of the Tribe's beverage license on the collection and remittance of a use tax on nonmember consumer purchases," and entered judgment accordingly. JA733(4.b); *see* JA746(3). The judgment enjoins State officials from imposing the invalid taxes or enforcing the collection and remittance condition on the Tribe's alcoholic beverage licenses. JA746(5). The State appealed these aspects of the judgment.[4]

[4] The court also held that neither IGRA nor general principles of federal Indian law preempt the State use tax imposed on nonmember purchases at the Mart. JA745(2). It also issued a declaratory judgment regarding the release of disputed tax payments previously deposited in an escrow account. JA746(4). Finally, the court granted judgment for the Tribe on the State's counterclaim. JA746(6).

SUMMARY OF THE ARGUMENT

Federal law preempts the imposition of State use tax on the gaming amenities purchased by nonmembers at the Tribe's Casino. Because of the strong federal policies favoring Indian tribes' right of self-government and tribal economic development, states generally possess only limited taxing authority within Indian country. To advance these policies, IGRA preempts the field of tribal gaming, prohibiting state regulation and taxation of tribal casinos except as agreed to in a valid, federally-approved tribal-state gaming compact. IGRA prohibits the State from imposing its use tax on Casino gaming amenities, 25 U.S.C. § 2710(d)(4), and generally requires that any State regulation or taxation of the Casino gaming amenities must be authorized by a valid compact provision, 25 U.S.C. § 2710(d)(3)(C). If IGRA does not preempt the tax, then it is preempted because the State lacks the relevant interests necessary to justify the interference with important federal and Tribal interests.

Additionally, the State's limited, federally-delegated power to regulate alcoholic beverages on the Tribe's Reservation, concurrently with the Tribe, does not authorize the State to use liquor license reissuance as a means to enforce the Tribe's collection and remittance of general taxes, not related to the regulation of alcohol, imposed on the Tribe's customers.

ARGUMENT

I. Imposing the State tax on gaming amenities purchased at the Casino is preempted by federal law because it infringes on the Tribe's sovereignty and interferes with federal law and policy.

Under decades of Supreme Court precedent, a nonmember engaged in commerce with an Indian tribe on the tribe's reservation is not subject to state taxation unless the state shows that its intrusion into Indian commerce is justified by legitimate state interests that outweigh the interference with established federal and tribal interests. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110-11 (2005); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("*Mescalero*"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) ("*Bracker*"). With respect to Indian gaming activities regulated by IGRA, Congress already weighed the competing interests and enacted the resulting framework for allocating regulatory and taxing authority among federal, state and tribal governments. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546-47 (8th Cir. 1996). Under IGRA's framework, except for certain limited taxes agreed to in a tribal-state gaming compact, the State cannot tax the Tribal Casino or its guests. 25 U.S.C. § 2710(d)(4). Where IGRA prohibits state taxation, the result is ordained by Congress and no new balancing of interests is permitted. *Gaming Corp.* at 547.

A. Principles of federal preemption of state taxes imposed within Indian country.

The State misinforms the Court when it says, "Generally, a state may tax nonmembers' on-reservation activities." Opening Br. at 12. That is not the law. Instead, only "under certain circumstances" may a state "validly assert authority over the activities of nonmembers on a reservation." *Mescalero*, 462 U.S. at 331. "[S]uch authority may be asserted only if not preempted by the operation of federal law." *Id.* at 333.

"Preemption" in this context is applied in a "special sense," founded on the "'unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination[.]" *Mescalero* at 333-34 (quoting *Bracker* at 143). These considerations "make it treacherous to import notions of preemption that are properly applied to other contexts." *Id.* at 334 (internal quotation marks and alteration omitted). "The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of preemption developed in other areas." *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982). "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry." *Id.*

"In a number of cases [the Supreme Court has] held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." *Bracker*, 448 U.S. at 151; *see also Ramah*, 458 U.S. at 838. Rather, "vague or ambiguous federal enactments must always be measured" against the "right of tribal self-government … deeply engrained in our jurisprudence[.]" *Bracker* at 143.

The State's reliance on cases not involving preemption in Indian country is therefore misplaced. *See* Opening Br. at 16 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005)); Opening Br. at 20, 21 (citing *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008)). These cases speak of a presumption against preemption, "[b]ut the opposite presumption prevails in Indian law because the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history, a policy continuously recognized in the Supreme Court's Indian law jurisprudence, beginning with *Worcester v. Georgia*." Cohen's Handbook of Federal Indian Law § 6.03[2][a], at 519 (Newton, ed., 2012) ("Cohen") (footnotes and internal quotation marks omitted).

"Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country[.]" *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993). "The presumption of preemption derives from the rule against construing legislation to repeal by

implication some aspect of tribal self-government." *Rice v. Rehner*, 463 U.S. 713, 726 (1983); *see Indian Country, U.S.A., Inc. v. State of Okla.*, 829 F.2d 967, 976 (10th Cir. 1987). Contrary to *Altria*'s general rule that "the purpose of Congress is the ultimate touchstone in every pre-emption case," 555 U.S. at 76 (*see* Opening Br. at 21), *Mescalero* held that "[b]y resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt State law as the sole touchstone." *Mescalero* 462 U.S. at 334.

Bracker observed that Congress' broad constitutional power to regulate tribal affairs and the position of Indian tribes as "a separate people" "have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. … Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker* at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959).) Either of the two barriers "can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation[.]" *Id.* at 143. A state's lack of authority to impose taxes in Indian country persists unless it can overcome these two "barriers." *Id.* at 142.

The dual barriers to state authority embody the "basic policy of *Worcester*," that the "laws of [the state] can have no force" in Indian country. *Williams*, 358 U.S. at 219 (citing *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)); *see* Cohen § 6.03[2][a], at 518 & 2015 Supp. at 19. *Williams* explained that over the years, the Court had "modified" *Worcester*'s broad principles "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," and it distinguished that type of case from circumstances where Indian rights *would* be jeopardized. *Williams* at 219-20.

Congress, too, has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," encouraging stronger tribal governments and permitting willing States to assume jurisdiction over reservation Indians only when that could be done "without disadvantage to them." *Williams* at 220-21. "Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* … had denied." *Id.* at 221.

When a state tax falls on a non-Indian in Indian country and Congress has not expressly allowed (or prohibited) the tax, the Court uses "*Bracker* balancing" to determine whether the state can overcome the presumption by demonstrating that the taxation advances the state's legitimate interests while not unduly burdening those of the tribe and the federal government. *Bracker*, 448 U.S. at 150-

51. It is a "particularized inquiry into the nature of the state, federal, and tribal interests at stake[.]" *Id.* at 145. The inquiry examines "relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-45. It also gives weight to "any applicable regulatory interest of the State," *id.* at 144, identified in *Bracker* as "government functions [the state] performs for those on whom the taxes fall," or "a legitimate regulatory interest served by the taxes [the state] seek[s] to impose," *id.* at 150. A "general desire to raise revenue" alone is insufficient. *Id.*

In *Bracker*, the Court struck down a state "motor carrier license tax" and a state "use fuel tax" imposed on a non-Indian logging company working on-reservation for a tribal business enterprise. *Bracker* at 137-40. Two years later, in *Ramah*, the Court held that federal law preempted a state gross receipts tax imposed on a non-Indian construction company for its construction of a tribal school on the Navajo Reservation. *Ramah* at 834.

The Supreme Court has also balanced the federal, tribal and state interests in non-tax cases. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that state regulation of a tribal casino and its non-Indian customers was preempted "by the operation of federal law," viewed "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-

government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216. In *Mescalero*, the Court noted that "when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose." 462 U.S. at 336.

The Eighth Circuit has applied the balancing test to hold that South Dakota's motor fuel tax on fuel purchased by a tribal school board is preempted by federal law. *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987). The Eighth Circuit has also relied on the competing governmental interests balanced in the *Bracker* line of decisions, especially *Cabazon*, to find that IGRA has the "extraordinary preemptive force" necessary to convert a state law claim into a federal cause of action. *Gaming Corp.*, 88 F.3d at 546-48.

1. Relevant federal and tribal interests.

"Certain broad considerations guide [the] assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial 'backdrop,' … against which any assertion of State authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Mescalero* at 334-35 (quoting *Bracker* at 143). The tribal and federal interests further the "overriding goal of encouraging 'tribal self-sufficiency and

economic development.'" *Id.* at 335 (quoting *Bracker* at 143). *See also*, *e.g.*, *Cabazon*, 480 U.S. at 216-17.

The "Federal Government's longstanding policy of encouraging tribal self-government … operates even in areas where state control has not been affirmatively pre-empted by federal statute." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). It is therefore unnecessary to locate an exact match between the federal laws and the activity sought to be taxed. In *Bracker*, federal regulation of timber harvesting and sales, and of reservation roads, supported the preemption of a state's use fuel tax and motor carrier license tax, even absent relevant regulation of fuel, licensing, or taxation. *Bracker* at 145-48; *see Ramah* at 841 fn.5 (describing *Bracker*). In *Ramah*, federal regulation of Indian education and school construction agreements supported preemption of a state gross receipts tax on a construction company, even absent regulation of the taxed activity, the construction itself. *Ramah* at 839-42. The Eighth Circuit held that federal regulation of Indian education supported preemption of a South Dakota fuel tax imposed on a reservation school, despite no regulation of the fuel, the vehicles using the fuel, or the particular uses to which those vehicles were put. *Marty*, 824 F.2d at 687-88. Federal involvement "in promoting and assisting in the development of tribal bingo enterprises," federal management agreement approval, and a Secretarial "position 'strongly opposing' the imposition of state gambling

regulations on Indian bingo" supported the preemption of state sales taxes on casino bingo, food services, and other sales, despite no federal regulation of bingo itself, or associated food sales, or the taxes that might be imposed on either. *Indian Country*, 829 F.2d at 985-86. In all of these decisions, the federal government did not regulate the specific activity taxed or the taxation of that activity. Yet in all of them, the state tax interfered with and frustrated the comprehensive regulatory scheme and the federal and tribal interests.

"Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose." *Mescalero* at 336. Furthermore, tribes have exceptionally strong economic and governmental interests in being free from state taxes upon the value the tribes generate on their reservations through activities in which they have a substantial interest. *Cabazon* at 219-20; *Mescalero* at 341.

The "broad federal commitment" to tribal self-government necessarily implicates tribal "power to manage the use of its territory and resources by both members and nonmembers, … to undertake and regulate economic activity within the reservation, … and to defray the cost of governmental services by levying taxes." *Mescalero* at 335-36. That is, the Tribe has an important interest in acting as a functioning government, with the authority and responsibilities of a sovereign

over its territory and the people within it. As the Senate Indian Affairs Committee noted in its report on IGRA,

> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.

S.Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

The State attempts to minimize the importance of tribal self-government because the tax falls upon nonmembers. Opening Br. at 45-46. As the Supreme Court noted, however, "It must be remembered that cases applying the *Williams* test [now incorporated into the *Bracker* analysis] have dealt principally with situations involving non-Indians." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 179 (1973). A key point of *Williams* is the Court's recognition that the "exercise of state jurisdiction … would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," even though one of the parties to the dispute was not an Indian. *Williams* at 223. "It is immaterial that respondent is not an Indian," the Court stated. *Id.* "He was on the Reservation and the transaction with an Indian took place there." *Id.* "[T]he authority of Indian governments over their reservations" includes authority over interactions between tribal members and nonmembers. *Id.*

Colville did not "signal[]" otherwise. *See* Opening Br. at 46 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*")). *Colville* merely held that nonmember Indian residents "stand on the same footing as non-Indians resident on the reservation." *Colville* at 161. What *Colville* "confirmed," Opening Br. at 46, was that a "fundamental attribute of sovereignty" possessed by Indian tribes is their "civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the Indians have a significant interest," including the "power to tax non-Indians entering the reservation to engage in economic activity." *Colville* at 152-53.[5] Every *Bracker* balancing case arises "where 'a State asserts authority over the conduct of *non-Indians* engaging in activity on the reservation.'" *Wagnon*, 546 U.S. at 99 (quoting *Bracker* at 144) (emphasis added). The tribal interests are no less important in this case than in any other *Bracker* balancing case.

2. Relevant state interests.

As for the State's interest, "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State *in connection with the on-reservation activity*. … Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues."

[5] *Colville*'s other relevant holdings are discussed below.

Mescalero at 336 (emphasis added). The State's reliance on *all* the conceivable services it makes available to nonmember Casino guests, whether on or off the Reservation, and whether related to their Casino patronage or not, is contrary to the law. *See* Opening Br. at 56-59.

Ramah explained that the "relevant" state interest was "[t]he State's interest in exercising its regulatory authority over the activity in question[.]" *Id.* at 837-38. *Ramah* held that New Mexico's interests were insufficient because the state did "not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax." *Ramah* at 843. When it referred to "those who must bear the burden," the Court meant the tribal organization, which bore the ultimate economic burden of the tax. *Id.* at 843-44 & fn.7&8. The Court expressly distinguished state functions and services provided off-reservation to the non-Indian contractor, and presumed that "the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke." *Id.* at 843-44 & fn.9.

Accordingly, this Court later found that South Dakota's interests did not justify imposing fuel tax on a tribal school's reservation fuel purchases, where revenues from the state tax were not used directly for the benefit of the students or to promote tribal self-sufficiency. *Marty*, 824 F.2d at 688. The State's off-reservation "construction and maintenance of roads in the reservation area" was

funded by off-reservation sources, including off-reservation fuel taxes the school paid. *Id.*

Similarly, in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), the Ninth Circuit held that general state services provided to "residents of the reservation and the surrounding area," none of them "connected with the timber activities directly affected by the tax," were insufficient to justify the state's timber yield tax. *Id.* at 661. "To be valid, the California tax must bear some relationship to the activity being taxed. … Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." *Id.*

The Eleventh Circuit held that even the state services provided on-reservation did not justify a state rental tax, because "none of these services are tied to the business of renting commercial property on Indian land." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341-42 (11th Cir. 2015). *Stranburg* explained that state governmental services may justify an on-reservation tax only where "the tax was clearly and critically connected to the services rendered." *Id.* at 1342.

3. Decisions that permit state taxation are factually distinguishable from this case.

Absent an act of Congress authorizing the state tax, the only cases in which the Supreme Court has approved state taxation of nonmembers for on-reservation

commerce are those involving the unique business model of high-volume tax-free retail cigarette sales. *Dep't of Tax. and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-74 (1994) ("*Milhelm Attea*"); *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985); *Colville*, 447 U.S. at 155-57; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-82 (1976). In these cases, the Court concluded that the tribal cigarette sellers were in business *only* because they offered off-reservation customers "an exemption from state taxation." *Colville* at 155; *see Moe* at 482. The state tax in these cases was "directed at off-reservation value," i.e., the sales which the Court found "would otherwise" have occurred outside of Indian country. *Colville* at 157. The Court permits states to tax these transactions because their value arises off-reservation, where states have nearly unfettered taxing power. *Wagnon*, 546 U.S. at 99.

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), another distinguishable decision, the Court permitted New Mexico to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production, in part because the Court deduced that Congress had first expressly permitted such state taxation, then, without repealing the earlier express permission, intended to continue to allow such taxation even as its new legislation did not contain express permission. *Cotton* at 180-83. *Cotton* sketched the rise and fall of the

intergovernmental tax immunity doctrine[6] (*id.* at 173-76), then analyzed a succession of federal acts governing mineral leases on Indian reservations in light of that history (*id.* at 177-183). The Court then deployed a truncated interest-balancing analysis to determine whether the balance of interests was inconsistent with the otherwise evident congressional "intent to permit state taxation." *See id.* at 183-87. Notably, this analysis did not mention reservation-generated value (which had been important just two years earlier in *Cabazon*, 480 U.S. at 219-20), or refer to any tribal and federal interests in Indian self-government or self-sufficiency, because the Court had determined the typical "backdrop" of "traditional notions of Indian self-government," *Bracker* at 143, was replaced in this case with a backdrop of *no* independence from state taxation, since "state taxation of nonmember oil and gas lessees was the norm from the very start." *Cotton* at 182; *id.* at 187 (distinguishing *Bracker* and *Ramah*).

In *Cotton*, the state provided "substantial services to both the Jicarilla Tribe and Cotton, costing the State approximately $3 million per year." *Cotton* at 185

[6] This doctrine, which requires affirmative preemption of state taxes imposed on private entities doing business with the United States, has been kept distinct from the Indian tax immunity doctrine, in which preemption is presumed. *McClanahan*, 411 U.S. at 169-73 & fn.5. The Court has rejected efforts to apply it in Indian contexts, including argument by dissenting Justices. *Ramah*, 458 U.S. at 855-57 & fn.6 (Rehnquist, J., dissenting); *Bracker* 448 U.S. at 158-59 (Stevens, J., dissenting); *Colville*, 447 U.S. at 185-86 & fn.9 & 11 (Rehnquist, J., concurring and dissenting).

(internal quotation marks omitted). These were on-reservation services, including regulation directly connected to the taxed commerce. *Id.* at 171 fn.7, 185-86. Further, the lower court had found that "no economic burden falls on the tribe by virtue of the state taxes, … and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development." *Id.* at 185 (internal quotation marks omitted). Given these facts, the balance of interests did not undermine the Court's conclusion that Congress intended to permit state taxation.

Contrary to the State's argument (Opening Br. at 52, 56), *Cotton* did not signal a departure from decisions like *Bracker*. Three months after *Cotton*, the Ninth Circuit wrote that the decision "reaffirmed the basic principles of [*Bracker*] and *Ramah*." *Hoopa Valley*, 881 F.2d at 660. The Supreme Court itself subsequently reaffirmed these principles in *Milhelm Attea*, 512 U.S. at 73, and *Wagnon*, 546 U.S. at 99. For "on-reservation transactions between a nontribal entity and a tribe or tribal member," the Court continues to analyze questions of preemption using its "unique Indian tax immunity jurisprudence," relying on the "backdrop" of tribal sovereignty and "revers[ing] the general rule that exemptions from tax laws should be clearly expressed." *Wagnon* at 112 (internal quotation marks and Court's alterations omitted).

B. IGRA preemptively governs the field of Indian gaming, including matters related to Indian gaming and State taxation of such matters.

In section 11 of IGRA, the heart of the framework of tripartite division of jurisdiction between the three sovereigns, Congress expressly barred states from imposing "any tax, fee, charge, or other assessment," except in limited circumstances that do not exist here. 25 U.S.C. § 2710(d)(4). Congress created its gaming compact framework expressly relying on "the lack of authority" in the states to impose such a tax. *Id.* An examination of IGRA's stated purposes (25 U.S.C. § 2702), and the subjects over which IGRA allows states to acquire authority by compact (25 U.S.C. § 2710(d)(3)(C)), against the backdrop of the federal policy to protect and promote tribal self-government and tribal casino gaming operations, demonstrates that IGRA prohibits the State from imposing use tax on Casino amenities.

1. Congress enacted IGRA to establish and protect tribal casinos as a source of tribal government revenue.

The Supreme Court held in 1987 that Indian tribes had the right to conduct gaming in Indian country without State regulation of the tribes or their non-Indian customers. *Cabazon*, 480 U.S. at 216-22. Shortly afterward (and before Congress enacted IGRA), the Tenth Circuit applied *Cabazon* to state taxation of tribal gaming, concluding that "the state's interest in taxing [tribal] bingo and related

activities is minimal, and is incompatible with and outweighed by federal and tribal interests." *Indian Country*, 829 F.2d at 985.

Against this backdrop, Congress enacted IGRA in October 1988. "Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("*Bay Mills*"). IGRA "grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). It "extends to the States a power withheld from them by the Constitution." *Id.*

As the Eighth Circuit has stated, IGRA represents "the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." *Gaming Corp.*, 88 F.3d at 546. "[R]ather than directing the federal courts to perform the balancing of interests between the state on the one side and the tribe and federal government on the other, Congress conducted the balancing itself." *Id.*; *see also Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). Congress "created a fixed division of jurisdiction," under which courts "are not to conduct a *Cabazon* balancing analysis," and which "left the states without a significant role under IGRA unless one is negotiated through a compact." *Gaming Corp.* at 547.

IGRA "should be construed as an explicit preemption of the field of gaming in Indian country." S.Rep. No. 100-446 at 36. "Congress intended [IGRA to] completely preempt state law. There is a comprehensive treatment of issues affecting the regulation of Indian gaming." *Gaming Corp.*, 88 F.3d at 544; *see Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995). "The Indians' long-standing rights and interests in controlling activities on their tribal lands, and the States' correspondingly limited power to regulate activities on tribal lands except as authorized by Congress, are core principles underlying the IGRA that necessarily frame the scope of its preemptive force." *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999).

As this Court explained, IGRA's express goal is to promote tribal autonomy and self-sufficiency by improving the financial position of tribal governments with revenue generated by tribal casinos. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015) (citing 25 U.S.C. §§ 2701(4) and 2702(1), (2) & (3)). "Congress has noted that for tribes, gaming income 'often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.'" *Id.* (quoting S.Rep. No. 100-446 at 3); *see also Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) (noting that "Congress

enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states").

In pursuit of these interests, IGRA regulates tribal casinos. Hundreds of detailed federal regulations promulgated pursuant to IGRA govern tribal casinos. 25 C.F.R. §§ 501.1-585.7; 290.1-293.16. IGRA's fundamental and most pervasive form of regulatory control, though, is the tripartite jurisdictional framework, which assigns most aspects of tribal gaming operations to tribal authority, allows for state authority with respect to gaming-related subjects through a negotiated compact, and provides federal oversight over the entire field. *See* 25 U.S.C. § 2710; *Gaming Corp.*, 88 F.3d at 546. The framework functions as intended only because it is erected in a field emptied of underlying state authority, both by judicial decisions founded on the tribal right to self-government, and by Congress itself.

2. IGRA prohibits states from taxing tribal gaming-related matters unless such authority is acquired through a tribal-state gaming compact.

"Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." *Gaming Corp.*, 88 F.3d at 546. "Congress did not intend to transfer any jurisdictional or

regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact." *Id.* at 545.

A gaming compact "may include provisions relating to" the subjects listed in 25 U.S.C. § 2710(d)(3)(C). "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes[.]" *Rincon*, 602 F.3d at 1028-29 (footnotes omitted). The list of subjects is *permissive* in that a compact is not required to address every subject listed, but it is *mandatory* in that, if a tribe requests negotiation on any of those subjects, the state "shall" negotiate in good faith on the requested subjects. 25 U.S.C. § 2710(d)(3)(A); *see Rincon* at 1030. Further, if a state wishes to have authority over any gaming-related subject, it is *mandatory* that such authority be found in a valid gaming compact. *Gaming Corp.* at 544-47.

Contrary to the State's assertion (*see* Opening Br. at 23), in these compacting provisions, Congress incorporated into IGRA the issue of state taxation. IGRA expressly allows State taxation at tribal casinos, subject to specific limitations, and prohibits states from imposing any other such taxes. Gaming compacts may include provisions relating to "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). IGRA further provides:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, 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. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4).

Thus, under IGRA the Tribe and State may require one another to negotiate for State taxes on gaming activities only as necessary to defray the State's regulatory costs, and otherwise the State has no authority to "impose" taxes on the Tribe or any person the Tribe authorizes to engage in gaming, including the Tribe's patrons – not through a gaming compact, because IGRA expressly prohibits that, and not otherwise, because IGRA channels all possible state authority over tribal gaming operations through gaming compacts. *See Gaming Corp.*, 88 F.3d at 547.[7]

The two Department of the Interior letters the State relies on (*see* Opening Br. at 18) show that the Department views § 2710(d)(4) as *expressly prohibiting*

[7] Construing § 2710(d)(4) to include Casino patrons is consistent with § 2702(2), which states that a statutory purpose is "to assure that gaming is conducted fairly and honestly by both the operator and players[.]" If gaming is considered to be "*conducted*" by both the operator and the casino's customers, then it is reasonable to understand the customers as being among those who are "authorized by an Indian tribe to *engage in* a class III activity." It is also consistent with *Cabazon*, which held that states lack authority to regulate tribal casinos or their customers. *Cabazon*, 480 U.S. at 216.

virtually all state taxation, rather than merely stating the more limited proposition that § 2710 does not confer authority to impose such taxes. Doc. 125-17 at 3 ("IGRA expressly prohibits the imposition of a tax…") The agency's interpretation of § 2710(d)(4) is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

This interpretation is consistent with the obligation to construe IGRA liberally in favor of tribal interests and the Act's express purposes, and in light of the background against which it was enacted. *See McClanahan*, 411 U.S. at 177 ("it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event"); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-59 (9th Cir. 1975) (a federal statute, "by defining the limits of the jurisdiction granted …, necessarily preempts and reserves to the Federal government or the tribe jurisdiction not so granted").

The Ninth Circuit's view of § 2710(d)(4) was to the contrary in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994); *see* Opening Br. at 16. In a superficial statutory construction, *Wilson* stated that "the failure to confer authority to tax" was not "a prohibition to tax." *Wilson* at 433. Contrary to usual rules of statutory construction, *Wilson* interpreted the first sentence of § 2710(d)(4) in isolation, separated from its immediate statutory context, both the

balance of § 2710, to which the sentence refers, and the second sentence of the provision, which expressly refers to "*the lack of authority* in such State … to impose such a tax, fee, charge or other assessment." 25 U.S.C. § 2710(d)(4) (emphasis added). *Wilson*'s interpretation was also divorced from the broader context of IGRA and from Indian law construction and preemption principles. *Wilson* failed to perceive, as the Eighth Circuit later did, how the *lack* of authorization functions within the tripartite allocation of jurisdiction provided in § 2710, where states have "no regulatory role over gaming except as expressly authorized by IGRA," and then only "through a tribal-state compact." *See Gaming Corp.* 88 F.3d at 546. It also failed to perceive what the Eighth Circuit later held, based on the legislative history's "strong statement about IGRA's preemptive force," that when IGRA governs, the courts are not to conduct a balancing analysis. *Gaming Corp.* at 544, 546-47; *see* S.Rep. No. 100-446 at 3, 6. *Wilson*'s construction of § 2710(d)(4) is also contrary to the Ninth Circuit's subsequent construction in the revenue sharing context. *Rincon*, 602 F.3d at 1036 ("We have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where 'meaningful concessions' are offered in return.") (emphasis in original). None of these detract from the persuasiveness of *Wilson*'s interest-balancing analysis, however, because although *Wilson* held § 2710(d)(4) was not an express

prohibition on state taxation, it went on to analyze the provision in view of the broader factors of *Bracker* balancing, and concluded that "[t]he express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee." *Wilson* at 435.

The State misconstrues § 2710(d)(4) and reads it too narrowly. The State claims the provision "specifies the activity the state cannot tax: 'a class III gaming activity[.]'" Opening Brief at 17. But § 2710(d)(4) does not specify *the activity* that is not to be taxed, it specifies *who* the State lacks authority to impose any tax upon: (1) "upon an Indian tribe" and (2) "upon any other person or entity authorized by an Indian tribe to engage in a class III activity." The phrase "a class III activity" is part of describing the second group upon whom the State cannot impose a tax under § 2710, by reference to what those in the group are authorized to do. Additionally, Congress chose to use language in § 2710(d)(4), describing states' general lack of taxing authority, different from the language it used in § 2710(d)(3)(C)(iii), describing the specific limited taxing authority granted the states. The change in phrasing signifies a change in scope.

No "duty" to read the statute narrowly applies here. *See* Opening Br. at 16. Instead, any ambiguity as to the scope of IGRA's express provision which guards against states using taxation to erect impediments to tribal gaming operations must be construed broadly in favor of the Tribe. *See Montana v. Blackfeet Tribe of*

Indians, 471 U.S. 759, 766 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). "Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Blackfeet* at 766 fn.4 (quoting *Choate v. Trapp*, 224 U.S. 665, 675 (1912)). Statutory language relevant to Indian tax exemptions are not to be given "an especially crabbed or restrictive meaning." *McClanahan*, 411 U.S. at 176.

Neither *Bay Mills* nor the other authorities the State relies upon establish that IGRA's scope, and that of § 2710(d)(4), is so restricted that it does not encompass the Casino's gaming-related activities. *Bay Mills* focused on the definition of "class III gaming activity," because IGRA "authorizes a state to sue a tribe to 'enjoin a class III gaming activity…,'" and that statutory abrogation of tribal immunity was the central issue. 134 S.Ct. at 2032. Section 2710(d)(3), (4), and (5), however, speak to gaming compacts, and gaming compacts can address more than just the "roll of the dice and spin of the wheel" that is the class III gaming activity itself. *Bay Mills* at 2032.

In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008), *see* Opening Br. at 17-18, the court held that "IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct the gaming

facilities." *Barona* is factually distinguishable. It involved state sales tax imposed on a non-Indian subcontractor's off-reservation purchases of construction materials from non-Indian sellers. *See id.* at 1187-88. Although construction agreements designated the subcontractor as the tribe's "purchasing agent" for the materials, the court refused to give any legal effect to the attempted "end-run" around the sales tax and analyzed the case as if the Tribe were not a party to the taxed transaction. *Id.* at 1190. As the taxed activity did not involve the tribe and occurred on reservation (if at all) "for the sole purpose of receiving preferential tax treatment," *id.* at 1191, IGRA's tax prohibition did not affect it.[8]

Rather than showing narrow agency interpretation, the observation in the State's two Interior Department letters that "the state has offered meaningful concessions to the tribe," was significant because it meant the revenue sharing obligations were not unlawfully "imposed" in violation of § 2710(d)(4); if they were not considered taxes, that is because they were "exchanges of cash for significant economic value[.]" Cohen § 12.05[2], p. 891; *see* Doc. 125-18 at 2-3; *cf.* Rincon at 1039. Further, the letters focus on state taxes imposed "on Indian

[8] *Barona* also gratuitously ignored IGRA's purposes of "promoting tribal economic development, self-sufficiency, and strong tribal government," and "generating tribal revenue," 25 U.S.C. § 2702(1), (3), declaring instead that its "core objective" was fair and honest gaming. *Barona* at 1193 (citing 25 U.S.C. § 2702(2)); *compare Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d at 1108.

gaming" (not gaming-related activities) only because Interior was addressing compact provisions that called for "sharing" of revenues from actual game play. Doc. 125-17 at 2; Doc. 125-18 at 1-2.

The "absurd result" the State fears is a red herring. *See* Opening Br. at 19. Section 2710(d)(4) prohibits taxation at the Casino because it must be read in light of IGRA and the purposes the Act serves. Taxes incompatible with those purposes are preempted. *See Rincon*, 602 F.3d at 1034-35. This built-in limiting factor allows courts to weed out attempts to "rig a state tax exemption," where the taxed activity is unrelated to tribal gaming.

The State's citation to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978), *see* Opening Br. at 19, cannot assist it, since IGRA does not "seek to promote dual objectives in a single statute," one of which would be "disserve[d]" by requiring the State to negotiate for an appropriate gaming compact provision if it wishes to charge use tax at the Casino. There is no legislative purpose in IGRA that favors the State tax. *See Rincon*, 602 F.3d at 1034 (observing that "none of the purposes outlined in § 2702 includes the State's general economic interests").[9]

[9] It is insignificant that if the State use tax were imposed, the Tribe would, in one sense, remain the "primary beneficiary of the gaming operation[.]" 25 U.S.C. § 2702(2); *see* Opening Br. at 24. Even if the tax provides the State less revenue than the total of the Tribe's revenue, the State nevertheless makes itself a "primary" beneficiary simply by taxing the Casino business, in the sense that it is a "direct" beneficiary or "first in order of time of time or development." *See*

The State posits that if the Tribe has not requested compact negotiations on a compactible matter, then that matter is none of IGRA's concern. Opening Br. at 28-29. This is not so. The district court aptly described the rule: "[I]f the state wishes to have authority over any of the listed subjects, it is mandatory that such authority be found in a valid gaming compact." JA722; *see Gaming Corp.*, 88 F.3d at 546-47.

The Kevin Washburn article the State relies on, *see* Opening Br. at 30-32, ADD 88-96, explains that, by placing limits on what a state can demand to include in a gaming compact, IGRA expressly maintains the barriers that prevent state intrusion into federally-protected tribal commerce.[10] Washburn rhetorically asks, "Why would Congress limit the subjects to be included in a Class III gaming compact? A clear message that comes through in the legislative history is that Congress sought to prevent a state from using its right to compact negotiation to extend state authority beyond gaming." ADD 92. The State fails to acknowledge

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Merriam-Webster, https://www.merriam-webster.com/dictionary/primary, 1, 3. Furthermore, Congress did not intend to allow states to siphon money from reservations on the single condition that the tribe is left with a majority of the operation's overall benefit. *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. 09-cv-2668(SRN/LIB), 2015 WL 4545302, *5 (July 28, 2015).

[10] Washburn's law review article does not speak for the Department of the Interior, although the State conflates them. *E.g.*, Opening Br. at 38 (Washburn quotations attributed to "Interior").

that restricting compact subjects in order to protect tribes from states acquiring authority over the non-compactible subjects is itself is an expression of federal preemption. The State is mistaken to suggest that the result of Congress' restriction of state authority is unconstrained state authority over those non-compactible subjects.

3. The Casino amenities are directly related to the operation of gaming activities.

The district court correctly determined that the State is attempting to impose use tax on amenities that are "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). This the State cannot do without a valid provision in the gaming compact permitting it.

To determine whether the taxed amenities in this case have a direct relationship to the operation of gaming activities, the district court adopted the test developed in *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote Valley II*"). There, the court addressed claims that California had failed to negotiate a gaming compact in good faith, based on the state's insistence on three compact provisions, including one which required tribes to adopt a labor relations ordinance that met requirements set out in the compact, providing rights to workers at the tribal casino and any "related facility," which the compact defined as a facility "for which the only significant purpose is to facilitate patronage of the class III gaming operations." *Coyote Valley II* at 1105-06 &

fn.15. The court found that the subjects of all three provisions were directly related to the operation of gaming activities. The labor relations provision was permissible because, besides being consistent with IGRA's purposes and the state having granted concessions in exchange for it, the court found that "[w]ithout the 'operation of gaming activities,' the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs." *Id.* at 1116.

Using *Coyote Valley II*'s two-fold inquiry, the district court held that the Casino transactions the State seeks to tax "are not merely tangentially related to tribal gaming, but would not exist but for the Tribe's operation of a casino," or in other words, the taxed amenities' "only significant purpose … is to facilitate gaming." JA719. Second, "[n]or could the Casino operate without the existence of these amenities." JA720.

To the first point, the facts show that, like the amenities offered at all "Las Vegas-style" casinos, the Casino's amenities are "complements" to the gaming, and federal regulators, tribal regulators, and Casino management all act in accordance with this principle.[11] *See* JA543-598(71-173); *see generally* JA525-528(27-35) (identifying and detailing the amenities offered).

[11] In economic terms, if the cost of an amenity increases (such as because of an added State use tax), the familiar law of supply and demand tells us demand for

It is industry standard practice to recognize and take advantage of the connection between gaming and in-house amenities. Royal River Casino's competitors recognize the connection, and therefore they offer the same types of amenities found at Royal River. JA551-555(77-83). Moreover, the practice did not begin with Indian casinos, but was a well-known standard part of the casino business when Congress enacted IGRA and sanctioned tribal casino gaming as a means to advance tribal self-sufficiency and self-government. The National Indian Gaming Commission ("NIGC") wrote regulations in express recognition of the fact that a variety of gaming amenities are offered jointly with game playing to increase gaming revenues, stating, "Complimentary items are gaming related because they are used to attract new patrons, retain existing patrons and reward frequent patrons. Complimentary items affect gaming revenues directly or indirectly[.]"

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that amenity is likely to decrease. When demand decreases for an amenity, demand will also decrease for its complement – gaming. *See* Expert Report of Jonathan B. Taylor § III, pp. 9-13 (Doc. 118-1). Aside from the behavior of the Casino, its competitors, and gaming regulators, a variety of evidence shows that casino amenities are complements to gaming. JA543-598(71-173). A textbook dedicated to casino marketing emphasizes the importance of amenities to attract customers, especially in a competitive casino marketplace. JA545(74). Empirical research backs up the textbook. JA547-548(75). One study, for instance, shows how increased demand for a restaurant amenity produces increased demand for gaming – indicating a complementary relationship, and one that flows from the non-gaming amenity to the gaming activity. JA547(75.d-e). Casino trade publications report similar facts. JA549(76). Regarding use of the words *complementary* and *complimentary*, see Taylor Report, Doc. 118-1, at 5-6, fn.1.

JA575(138); *see* Minimum Internal Control Standards, 64 Fed. Reg. 590, 596 (Jan. 5, 1999). Both federal and Tribal gaming regulators have detailed and comprehensive regulatory control over "comps" – the Casino's complimentary giveaways and discounts on gaming amenities. JA573-579(136-143). All gaming amenities provided to guests as comps – which can include everything offered for sale throughout the Casino property – are subject to federal reporting standards and NIGC audit. JA533-534(45-46); *see* 25 C.F.R. §§ 542.17 (applicable to class III gaming); 543.13 (applicable to class II gaming).[12]

The Casino's amenities are tightly woven into its business, from the unified corporate structure of the enterprise, to the integrated infrastructure, to the plethora of evidence in the record that Tribal regulators and Casino management oversee and operate the Casino on the data-backed theory that when they offer gaming amenities at a low price, or provide them at a discount or free to gaming patrons, the Casino attracts more patrons, who engage in more gaming. JA556-573(84-135), JA579-598(144-173). Imposing additional costs on the amenities not only reduces demand for the amenities, negatively affecting Tribal revenues from the

[12] Although the NIGC's class III MICS are not mandatory, the Tribe's gaming regulators have expressly incorporated the federal class III MICS into the Tribal gaming regulations, and the Casino has implemented them in its written operating procedures. *See* JA581-582(146-148). Tribal officials testified that the NIGC enforces those standards, JA530-535(38-48), including auditing the Casino's compliance with comping standards, JA533-534(45-46).

casino enterprise, but also, because of the complementary relationship, reduces demand for gaming itself. *See* JA679-698(334-363). These are the sort of gaming amenities expected at a "Las Vegas-style casino" for which IGRA creates a legal framework, and which its stated purposes promote. *See Pauma Band of Luiseño Mission Indians v. California*, 813 F.3d 1155, 1161-62 (9th Cir. 2015) (contrasting "Las Vegas-style casino" with less desirable "tent facility"). Without them, the Tribe could not operate a casino that fulfills the purposes Congress intended.

None of the State's arguments to the contrary are founded in the facts. While "some patrons of the [Casino] do not participate in the games," Opening Br. at 38, the evidence does not show that there are enough non-gaming patrons to sustain the gaming amenities. To the contrary, these gaming amenities operate at a loss and are not self-sustaining, precisely because their purpose is to increase gaming by patrons. JA565-569(104-114). The fact that the Casino contains the only hotel in town does not reasonably suggest that the hotel would do well on its own; rather, it shows there is no market in Flandreau for a stand-alone hotel. Casino guests earn points and rewards only for gaming, but they can use their points and rewards for any gaming amenity, which demonstrates how Casino management leverages gaming amenities to increase gaming revenues. JA569-573(115-135). The State highlights the Casino positions for which a Tribal gaming

license is not required, *see* Opening Br. at 39-40, but the inference to be drawn is merely that these are not "gaming" positions; rather, they are gaming related.

The State relies on distinguishable cases in which the activities at issue were only tangentially related to tribal gaming. As discussed above, in *Barona*, 528 F.3d 1184, the taxed transaction had a far more attenuated connection to the tribal casino business, and the court analyzed preemption in the context of an activity to which the tribe was merely a bystander. The court emphasized the fact that the transaction, "which otherwise would occur on non-Indian territory," was simply "rigged to trigger a tax exemption," and held that this "factually distinguishes the present case from the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land." *Id.* at 1191, 1192. In *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the state personal property tax fell "on the non-Indian's *ownership of property*, rather than on the *transaction* between the Tribe and the non-Indian." *Id.* at 469 (emphasis in original). The court found that "under IGRA, *mere ownership* of slot machines by the vendors does not qualify as gaming[.]" *Id.* at 470 (emphasis in original). Like *Barona*, the subject of the tax featured no Indian involvement whatsoever. Similarly, *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435 (8th Cir. 2001), involved "a dispute between a non-tribal general contractor and non-tribal sub-contractor." *Id.* at 438-39. Here, in contrast, the use

tax arises from transactions between the Tribal Casino and the guests; in the State's view, the tax is effectively on the transaction itself. *See* Doc. 79 at 2-3.

Confederated Tribes of Siletz Indians v. Oregon, 143 F.3d 481 (9th Cir. 1998), held that the parties' gaming compact allowed the state to publicly release a state investigative report on the tribal casino in accordance with state public records laws. *Siletz* at 484-85. IGRA did not preempt the state laws because the compact itself provided for their application, which the Court found to be "fully consistent" with the IGRA goal of "fair and honest gaming." *Id.* at 487. In rejecting the tribe's argument and relying on the compact, *Siletz* effectively held that the state's public records laws were "directly related" to gaming. *Id.* at 484.

Rincon does not assist the State. *See* Opening Br. at 40-41. The State is correct that the tax revenue's "use" was important in *Rincon*, but fails to see the big picture. *Use* of the tax revenue, standing alone, does not decide whether a given tax provision may be included in a gaming compact. *Rincon* held that California's revenue sharing demand constituted a demand for "direct taxation of the Indian tribe," and was therefore evidence of bad faith negotiations. *Rincon*, 602 F.3d at 1029-30. The demand was also a tax imposed on the Tribe ("imposed" because it was not bargained for in exchange for a "meaningful concession") in violation of § 2710(d)(4). *Id.* at 1030-31, 1036-37. The additional fact that the revenue sharing provision was to "put tribal money into the pocket of the State,"

rather than dedicate it to a purpose such as the "fair distribution of gaming opportunities" or "compensation for the negative externalities caused by gaming," supported the further holdings that the State's demand was "not an authorized subject of negotiation," *id.* at 1033-34, and that the "pursuit of state general economic interests" was not "consistent with IGRA's purposes," *id.* at 1035, and therefore that, under IGRA, it was bad faith for the state to *insist* that the tribe either accept such "nonbeneficial provisions *outside the permissible scope of §§ 2710(d)(3)(C) and 2710(d)(4)*, or go without a compact," *Rincon* at 1039 (emphasis in original). Some gaming compacts, however, do contain provisions for general-fund revenue sharing, *if* the tribe agrees to such a provision in exchange for meaningful concessions. *See Rincon* at 1036; Doc. 125-17 at 2-4; Doc. 125-18 at 1-3. Furthermore, if the State's use tax were outright non-compactible, then the result would be that the State could not impose the tax on the Casino's gaming amenities. *See Rincon* at 1042; *Wilson* at 435. Without a gaming compact giving the State authority to tax the gaming amenities, it does not have that authority. *Gaming Corp.* at 547.

4. The district court did not hold that IGRA repealed 18 U.S.C. § 1161.

Contrary to the State's premise, *see* Opening Br. at 41-44, the district court did not hold that IGRA repealed 18 U.S.C. § 1161. Following concessions by the State during litigation, the Tribe's claim regarding IGRA's effect on § 1161 no

longer presented a case or controversy, and the Tribe withdrew the claim as moot. *See* Doc. 130 at 58-59. Because the claim was not at issue, the court did not address it. Moreover, far from holding that IGRA repealed § 1161, the district court interpreted and applied § 1161, as discussed in Section II below, to determine that the State's liquor license condition exceeded the limits of the authority delegated by § 1161. As discussed in Section II, § 1161 is not the source of the State's authority to impose its general use tax, so the holding that the State lacks authority to impose such a tax does not implicate § 1161.

C. The tax is preempted because insufficient State interests exist to justify the burden on the Tribal and federal interests.

Because IGRA prohibits the State use tax on Casino gaming amenities, "courts are not to interfere with [Congress'] balancing of interests, they are not to conduct a *Cabazon* balancing analysis." *Gaming Corp.* at 547. However, even if IGRA were completely inapplicable, and therefore balancing were indicated, no cognizable State interests would justify the additional burdens on the Tribe's enterprise, primarily because the State performs no significant functions or services connected to the Casino or the taxed transactions, leaving only a "general interest in raising revenues." *Mescalero*, 462 U.S. at 336; *see Cotton*, 171 fn.7 & 185-86 (state provided $3 million in on-reservation services, including regulation of the taxed mineral extraction); *Stranburg*, 799 F.3d at 1342 (noting that *Cotton*

"affirmed the general principle that services rendered must be connected to the tax"); *Tulalip Tribes v. Washington*, No. 2:15-cv-00940-BJR, 2017 WL 58836, *7-8 (W.D.Wash. Jan. 5, 2017) ("close nexus" required between state services and taxed activity, where tribe is a direct party to taxed transaction and value of taxed activity is generated on reservation by tribe); *see also Ramah* at 843-44 & fn.7 & 9; *Indian Country*, 829 F.2d at 987; *Hoopa Valley*, 881 F.2d at 661, *Marty*, 824 F.2d at 688.

The State relies on services "that are available to, or may benefit, the patrons while at the [Casino]," or as they "travel to and from" the Casino, which are indistinguishable from the general services unconnected to the taxed activity rejected in cases like *Ramah*, *Marty*, *Hoopa Valley*, and *Stranburg*. Opening Br. at 57, *see* JA638-659(281-295).

The State's general desire to raise revenue for services that do not directly benefit the Tribe or its enterprise is inadequate when weighed against the important Tribal and federal interests in economic development and Tribal self-government. *See Bracker* at 149-151; *Ramah* at 842-44 & fn.8. "Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of [gaming] activity, and it is a valid interest weighing in favor of preemption in the final balance." *Stranburg* at 1340 (discussing "regulation of leasing activity"); *see City of Duluth*, 785 F.3d at 1211.

The State's imposition of use tax would subject nonmember Casino patrons to double taxation, increasing the price of Casino gaming amenities, driving down demand not only for the gaming amenities but also for their complement, the game play, and at the same time reducing the Tribe's sales tax collections. JA679-683(334-340), JA685-688(342-346), JA696-697(360-361). The only alternative available to the Tribe would be to amend its own tax code to reduce or eliminate the Tribal sales tax for sales to nonmember Casino patrons, allowing the State to shift Reservation tax revenue from the Tribal government to the State. JA688(347), JA694(356). Reduced revenues would mean reduced services. JA598-633(174-267), JA692-693(352-355), JA697(362-363); *see* JA690(350), JA672-679(316-333).

The Tribe's "interest in raising revenues for essential government programs" is strengthened because "the revenues are derived from value generated on the reservation by activities involving the Tribe[] and … the taxpayer is the recipient of tribal services." *Colville* at 156-57; *see Milhelm Attea*, 512 U.S. at 73. *Colville*'s "value" inquiry is a dichotomy: either tribes are "marketing their tax exemption to nonmembers who do not receive significant tribal services" or they are marketing tribally-created value. *Colville* at 157. The Tribe has "made a substantial investment" in the Casino enterprise whose property and services the State desires to tax. *Wilson*, 37 F.3d at 435. It invests financial, human and

physical resources. *See* JA616-619(206-215). It provides governmental services to the Casino's patrons. JA619-633(217-267). Like the tribal casinos in *Cabazon* and *Indian Country*¸ here the Tribe has "built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservation[], make purchases and depart, but spend extended periods of time there enjoying the services the Tribe[] provide[s]." *Cabazon*, 480 U.S. at 219; *see Indian Country*, 829 F.2d at 986. Furthermore, because the Casino collects Tribal sales tax, which is set at a higher rate than the State's sales and use tax, there is *no tax advantage* to the customer in comparison with an off-reservation Casino that collects State sales tax. JA611-613(194-196). The Tribe is not marketing an exemption from state taxation. JA619(216); *cf. Colville* at 155.

II. Conditioning the Tribe's liquor licenses on the collection and remittance of general taxes exceeds the limits of the State's delegated authority to regulate alcohol and is not reasonably necessary to collect taxes validly imposed.

The final issue is whether the State can validly condition the reissuance of a liquor license on the remittance of taxes wholly unrelated to alcohol regulation. *See* SDCL 35-2-24, ADD 98. Notably, the State statute requires the remittance of *all* state taxes ("any other state tax"), not just use tax, and not just taxes arising at the licensed premises. The State's alcohol-specific taxes are imposed and collected from the Tribe on all alcohol it buys from its wholesale vendors; alcohol taxes are not at issue. *See* SDCL 35-5-2 (imposing tax on manufacturers and

wholesalers for all alcoholic beverages purchased for sale to a retailer), 35-5-6.1 (imposing additional tax on alcohol wholesalers).

The State relies on its power to regulate alcohol on the Reservation under 18 U.S.C. § 1161 and *Rice v. Rehner*. *See* Opening Br. at 60. There is no Supreme Court decision, however (nor any decision by any other court, to the Tribe's knowledge), upholding state enforcement of a tribal retailer's obligation to collect and remit the general use taxes imposed upon its nonmember customers by denying the tribe's alcohol licensure. In fact, the Supreme Court has not found a tribal obligation to collect and remit state taxes owed by nonmember customers in any case other than in the context of tax-free bulk cigarette sales (where the tribes were selling tax avoidance to non-Indians and where there was no congressional support for the enterprise). Even then, states cannot enforce the obligation directly. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("*Potawatomi*").

Section 1161 delegated exclusive federal authority "to regulate the use and distribution of alcoholic beverages in Indian country" concurrently to the tribes and the states. *Rice* at 715; *see United States v. Mazurie*, 419 U.S. 544, 557 (1975).[13] This delegation is a limited one. *Rice* found that tribal and state interests with

[13] Because the authority is concurrent, State liquor laws apply on-Reservation only because Tribal law authorizes alcohol.

respect to alcohol were "qualitatively different" from those related to taxation, allowing state authority over alcohol where the state's general taxing authority is prohibited. *Rice* at 722-24. The unique state interest that justified *Rice*'s construction of § 1161 and "necessitate[d] State intervention" was the "interest in the liquor traffic that occurs within [the state's] borders," specifically the "'spillover' effect" of liquor sold on-reservation that "find[s] its way out of the reservation[.]" *Id.* at 724. *Rice*'s rationale for allowing states to exercise this authority over reservation Indians is rooted in "the narrow context of the regulation of liquor," and the federal delegation of authority found in § 1161 is limited accordingly. *Id.* at 723.

To the extent § 1161's delegation of regulatory authority thereby gives the State authority to *tax* alcohol in Indian country, that power is subject to the limitations of the delegation – the tax must be primarily in support of the State's liquor control regulations, not a general tax unrelated to alcohol, primarily intended to generate revenue. *See Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 (9th Cir. 1986). The State's generally-applicable use tax, whose revenue feeds only the State's general fund, is insufficiently related to alcohol regulation.

The cases the State relies on do not establish that its "police powers regarding the regulation of alcoholic beverages" include the power to compel Indian tribes to collect and remit general taxes. *See* Opening Br. at 62-63. While

the State points to its desire to ensure "that licensees are desirable and law-abiding citizens," the licensee is not a citizen of the State, but a Tribal government, which was equally delegated power under § 1161 to co-regulate alcohol within its territory. Furthermore, the State's authorities do not draw any connection between the "moral character" required of a liquor license holder and the payment of taxes, or the collection and remittance of taxes imposed upon a third party.

Moreover, the State would seemingly base its determination of the Tribe's "moral character" on the Tribe disagreeing with the State about the validity of its taxes. During the State administrative process that resulted in the State's final liquor license non-renewal decision (*see* JA54-72), the State refused to engage in the process ordinarily expected of any tax assessment or collection proceeding, declining to identify any single transaction or category of sales on which any tax was owed or not owed, and declining to state the amount that would satisfy the Tribe's obligation. *See* JA64. Only during this federal litigation did the State disclaim its intent to base its license denials upon any alleged tax delinquencies other than use tax, *see* Doc. 119-36 at 6 (admission 7), or upon any tax that would be invalidly imposed, *see* Doc. 46 at 15-16, or upon a tax on the Casino game play itself, *see* Doc. 46 at 7. The State's administrative decision, however, like SDCL 35-2-24, does not acknowledge any limitation of any kind. JA69(VI). A fundamental problem with the State's use of SDCL 35-2-24 is that the license

renewal process is missing the basic due process necessary to inform the licensee what taxes the State contends are owed, so the licensee knows what is required to retain the license.

The State insists it "may regulate alcohol" in any manner, Opening Br. at 61, but the State's tax remittance condition is not a regulation of alcohol.[14] It is, as the State says, "the State's legal framework for requiring the Tribe to collect and remit [use] tax." Opening Br. at 7. Below, the State characterized SDCL 35-2-24 as "the State's statutory mechanism for tax collection" and "an 'alternative remedy' available to state tax collectors." Doc. 79 at 66 (quoting *Milhelm Attea* at 72, alteration omitted). It now protests that the district court erred in relying on *Milhelm Attea*. Opening Br. at 60.[15] "Alternative remedies" are discussed because tribal sovereign immunity prevents states from suing tribes to enforce tribal "obligations to assist in the collection" of valid state taxes on cigarettes, owed by non-Indians. *Potawatomi*, 498 U.S. at 512. *Potawatomi* suggested five "adequate alternative[]" methods the state could employ to collect lawful cigarette taxes:

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[14] *Rice*'s reluctance to distinguish between "substantive and regulatory laws" is irrelevant here because, in *Rice*, both types of laws controlled alcohol, either substantively (e.g., standards regarding sales to minors, *Rice* at 741 (Blackmun, J., dissenting)) or in regulatory fashion, i.e., by requiring a license.

[15] The State also argued below that its decision not to reissue the Tribe's liquor licenses was made "to *sanction* the Tribe … due to the Tribe's failure to remit use tax[.]" Doc. 38 at 13 (emphasis added). The State license proceeding, in the State's view, "was akin to a criminal prosecution[.]" *Id.*

damages actions against individual tribal agents or officers, collection from wholesalers, off-reservation seizure of unstamped cigarettes, entering into tribal-state agreements, and seeking congressional legislation. *Potawatomi* at 514. *Milhelm Attea* later approved one such alternative, a system requiring wholesalers to "precollect" state taxes on taxable cigarettes to be retailed by tribes in Indian country. *Milhelm Attea* at 67, 72-73. As the district court observed, "the Supreme Court did not recommend imposing conditions on licensing requirements, liquor or otherwise." JA731.

The Supreme Court allows states to impose "minimal burdens" upon Indian tribal retailers "to assist enforcement of valid state taxes." *Milhelm Attea* at 73-74; *see Potawatomi* at 512. These burdens must be "reasonably tailored" and "reasonably necessary" to the State's collection of such taxes. *Milhelm Attea* at 73, 75. They must not "frustrate[] tribal self-government" or "run[] afoul of any congressional enactment dealing with the affairs of reservation Indians." *Moe*, 425 U.S. at 483.

Section 35-2-24 imposes a burden on the Tribe that conflicts with the system of concurrent alcohol regulation established by Congress. It exceeds the authority delegated to the State because the tax remittance condition is not reasonably related to the State's interests in controlling the impacts of alcohol within its borders. It diminishes the authority delegated to the Tribe because liquor control

on the Reservation, already subject to the more restrictive of the State and Tribal liquor laws, is now also subject to general State tax remittance requirements. As the district court suggested, Tribal alcohol sales could be subject to whatever additional measurements of moral fitness the State might apply to the Tribe, including not only compliance with "any other state tax," SDCL 35-2-24, but indeed with any other state law only "superficially connect[ed]" to alcohol control. JA731. Section 35-2-24 is not "reasonably tailored," in light of the poor fit of the means and the ends. Given the "adequate alternatives" suggested in *Potawatomi*, as well as the possibility of directly collecting from the consumer, *see* SDCL 10-46-33, 10-46-34, it cannot be said that § 35-2-24 is "reasonably necessary."

CONCLUSION

The State's tax violates the Tribe's federally-protected right to self-government and the strong federal interest in Tribal self-sufficiency by diverting Casino revenues to the State. Both IGRA and *Bracker* balancing preempt such taxation. The Tribe respectfully requests that the Court affirm the judgment of the district court.

Respectfully submitted,

Dated: April 19, 2018 by: /s/ Shannon R. Falon

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