IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NO. 1 CA-TX 20-0004

Arizona Tax Court Nos. TX2013-000522, TX2014-000451, TX2015-000850, TX2016-001228, TX2017-001744, TX2018-000019, TX2019-000086

SOUTH POINT ENERGY CENTER LLC,

Plaintiff-Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* FORT MOJAVE INDIAN TRIBE, THE NAVAJO NATION, THE GILA RIVER INDIAN COMMUNITY, GILA RIVER TELECOMMUNICATIONS, INC., GILA RIVER INDIAN COMMUNITY UTILITY AUTHORITY, THE INTER-TRIBAL ASSOCIATION OF ARIZONA, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS (FILED WITH WRITTEN CONSENT)

JENNER AND BLOCK LLP
Charles W. Galbraith
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com
(202) 639-6089

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma
Christopher Love
700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com
chris@vtklaw.com
(480) 428-4590

Attorneys for Amici Curiae *Fort Mojave Indian Tribe, the Navajo Nation, the Gila River Indian Community, Gila River Telecommunications, Inc., Gila River Indian Community Utility Authority, the Inter-Tribal Association of Arizona, and the National Congress of American Indians*

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INTERESTS OF *AMICI CURIAE*

Amicus Curiae Fort Mojave Indian Tribe (the "Tribe") is a federally recognized Indian tribe with a reservation in the tri-state area of Arizona, California, and Nevada. The United States holds title to the reservation lands in trust for the Tribe. The Tribe has a significant interest in this case because it involves the Tribe's sovereign authority over permanent improvements on tribal trust lands. In 1999, the Tribe leased roughly 320 acres of reservation land to South Point Energy Center LLC's ("South Point") predecessor to build and operate a power plant, with an initial lease term of fifty years from the date the facility began commercial operations. This case concerns the validity of a state tax as applied to this permanent facility on tribal trust lands. By taxing the power plant, Arizona and Mohave County (the "State" or "Arizona") improperly abrogate the Tribe's inherent sovereignty, by obstructing the Tribe's power to regulate land use on its reservation, and jeopardize the Tribe's economic self-sufficiency.

Amicus Curiae the Navajo Nation is a federally recognized Indian tribe with a formal reservation that encompasses approximately 17,627,262 acres of sovereign territory in northwestern New Mexico, northeastern Arizona, and southeastern Utah. The Navajo Nation also owns almost 30,000 acres of

land in Colorado. The Navajo Nation is a sovereign government with strong interests in managing its lands, including protecting the use of its environment in the Navajo way and ensuring that its lands may serve as a permanent homeland for Navajo people.

Amicus Curiae the Gila River Indian Community ("the Community") is a sovereign Indian nation composed of members of the Pima and Maricopa Tribes, traditionally known as the Akimel O'otham and Pee-Posh. The Gila River Indian Reservation consists of 584 square miles south of Phoenix. The Community has established rigorous environmental regulations governing facilities within the Community and is strongly committed to the protection of its lands.

Amicus Curiae Gila River Telecommunications, Inc. ("GRTI"), is wholly owned and operated by the Gila River Indian Community. GRTI was established in 1988 for the purpose of providing the Community with telephone service and other telecommunications services. Today, GRTI provides telephone and high-speed internet service to residential and business customers.

Amicus Curiae Gila River Indian Community Utility Authority ("GRICUA") was formed in the late 1990s to manage the electrical and

energy needs of the Gila River Indian Community and provide reliable, competitively priced electrical service to the Community. GRICUA's goals include operating the Community's electrical distribution system, overseeing the operation of electrical transmission systems for the Community, and exploring electrical generation opportunities within the Community.

Amicus Curiae the Inter-Tribal Association of Arizona ("ITAA") is comprised of 21 federally recognized Indian tribes with lands located primarily in Arizona, as well as California, New Mexico, and Nevada. Since 1952, ITAA's Member Tribes have advocated together on common issues and concerns, including on matters impacting tribal sovereignty and self-determination.

Amicus Curiae the National Congress of American Indians ("NCAI"), founded in 1944, is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their citizens. NCAI represents these governments' collective interests and serves as a consensus-based forum for policy development among its member tribes from each region of Indian Country. NCAI's mission is to inform the public and all

branches of the federal government about tribal self-government, treaty rights, and federal policy issues affecting tribal governments.

This case involves an issue of critical importance for tribal self-government and self-sufficiency: the extent to which states may tax permanent improvements on tribal trust lands. *Amici* submit this brief to offer the Court their perspective on the tribal interests threatened by the imposition of such taxes, and to protect those interests from being severely undercut in this case and others by state taxation.

No person or entity other than the *amici curiae* identified herein provided financial resources for the preparation of this brief.

INTRODUCTION

When "a State asserts authority over the conduct of non-Indians engaging in activity on [a] reservation," courts do not apply ordinary preemption principles or a presumption against preemption. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). Instead, courts generally apply the *Bracker* balancing test, which demands "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. Here, the tax court upheld, under *Bracker*, Arizona's tax on permanent improvements on land that the United States holds in trust for the Fort Mojave Indian Tribe. *Amici* submit that this holding was wrong. *Amici* also write to address Arizona's assertion that the Fort Mojave Indian Tribe has "determined" that the tax "does not implicate any of its … interests." Answering Br. 42 & n.10. Nothing could be further from the truth.

Taxes on permanent improvements strike at the core of Indian tribes' sovereignty over their land. Such taxes do not just deprive tribes of revenue, but—in effect—oust tribes' regulatory control over their land and substitute the state's. *Amici* in this brief focus on the tax court's error in discounting these significant tribal interests. At a minimum, the tribal interests in

preempting such taxes must weigh heavily in the *Bracker* balancing analysis. Indeed, these interests also support the categorical rule that South Point advocates. This case is not genuinely about regulating "the conduct of non-Indians … on [a] reservation"—the sphere where state interests can, in some circumstances, overcome the tribal and federal interests favoring preemption. *Cf. Bracker*, 448 U.S. at 144. It is about control over the land itself. It is difficult to imagine a situation where state interests could outweigh tribal and federal interests when it comes to controlling reservation lands and the permanent improvements affixed to them.

Amici begin by describing how central tribal interests are to preemption. Next, *amici* describe two weighty tribal interests threatened by taxes on permanent improvements on tribal trust land.

First, these taxes jeopardize tribes' core sovereignty interests in shaping the future of their own lands. Any tax on permanent improvements reflects a suite of policy choices regarding how land should be developed. Indeed, as Chief Justice Marshall recognized more than 200 years ago, the power to tax is the "power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 426-27, 431 (1819). On tribal trust lands, it is the *tribe* that must be permitted to make the critical choices, and not any other sovereign. Allowing states to

make or influence these choices allows states to oust tribes' power to develop and manage their own lands.

Second, the taxes threaten tribal self-governance by depriving tribes of a potentially vital source of tax revenue. Where the state is allowed to tax, the tribe's ability to tax effectively is severely undercut if not completely eliminated—to the obvious detriment of tribal communities.

Finally, *amici* explain that recognizing these overriding tribal interests aligns with the strong federal interest reflected in the Indian Reorganization Act, the Department of the Interior's leasing regulations, and general preemption principles. *Amici* conclude by discussing the significance of these tribal interests for both the *Bracker* balancing analysis and a categorical preemption rule.

ARGUMENT

I. Tribal Interests Are Central to Federal Preemption on Indian Reservations.

In any case arising on an Indian reservation, tribal interests weigh heavily in determining whether state law is preempted. The "broad … congressional authority" over Indian affairs and the "'semi-independent position' of Indian tribes have given rise to two independent but related

barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. "First, the exercise of such authority may be pre-empted by federal law," *id*., under what has come to be known as the *Bracker* balancing test. Second, an assertion of state authority "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (citation omitted). But while these "two barriers are independent" in that "either, standing alone, can be a sufficient basis for holding state law inapplicable," they are "related [in] … important ways." *Id.* at 143. In particular, "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop'" for interpreting federal enactments. *Id.* (citation omitted).

To the extent Arizona suggests that "South Point cannot assert" tribal rights that bear on the *Bracker* inquiry because a tribal-sovereignty interference claim "is a state taxation bar independent of the *Bracker* analysis," that argument is flat wrong. Answering Br. 44 n.11. To the contrary, tribal interests are core to *Bracker* balancing—even as interference with tribal sovereignty independently supports preemption. "[B]oth the tribes and the Federal Government are firmly committed to the goal of

promoting tribal self-government." *New Mexico v. Mescalero Apache*, 462 U.S. 324, 334 (1983). Congress has expressed this aim through numerous enactments, *see id.* at 334-35, 335 n.17; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982), which the Supreme Court has "consistently admonished" must be "construed generously" to align with "traditional notions of [Indian] sovereignty" and "the federal policy of encouraging tribal independence," *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) (quoting *Bracker*, 448 U.S. at 144). Tribal interests are thus indispensable to the *Bracker* inquiry because federal law "reflects ... related federal *and tribal* interests." *Id.* at 837-38 (emphasis added); *see also, e.g., id.* at 838 ("[T]raditional notions of tribal sovereignty ... inform the pre-emption analysis"); *New Mexico*, 462 U.S. at 333-34.

When a state asserts authority over tribal lands or members, tribal interests thus weigh heavily in the balance.

II. State Taxation of Permanent Improvements on Tribal Trust Lands Threatens Weighty Tribal Interests.

A. Governing Trust Lands, Including Permanent Improvements on Trust Lands, Is Essential to Tribal Sovereignty.

Nowhere are tribal interests stronger than in land. Over the centuries, many tribes have suffered grave injustices from the loss of their lands. By

the same token, preserving and restoring tribal lands is uniquely important to tribal sovereignty today.

"Before the coming of the Europeans, the tribes were self-governing sovereign political communities." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). For tribes, land is not just about ownership or resources. Ancestral lands are a source of identity, culture, and history. The arrival of non-Indians in North America began a new era, which inflicted on numerous tribes forced acquisitions and relocations, mass dispossession, and broken promises. *See* Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J. L. Prop. & Soc'y 1, 11-33 (2020); *see also, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("Congress has since broken more than a few of its promises to the [Creek] Tribe").

The United States forced tribes onto reservations only to, in the allotment era, divest tribes of their lands entirely by allotting lands in severalty to members and selling supposedly "surplus" lands to nonmembers—with the '"avowed purpose of … the ultimate destruction of tribal government,'" *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (citation omitted), and the "assimilation" of Indians into "American society," *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984).

These "policies proved to be a disastrous failure," leading to the loss of 86 million acres of Indian lands and leaving hundreds of thousands of Indians "totally landless." *Hagen v. Utah*, 510 U.S. 399, 425 & n.5, 426 (1994) (citation omitted). When Congress "formally repudiated" its allotment policies "with the passage of the Indian Reorganization Act in 1934," land remained the focus—with Congress prohibiting further allotments and authorizing the Department of the Interior to take land into "trust" to rebuild at least part of the land base that many tribes had lost. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 339 (1998); Indian Reorganization Act of 1934, Pub. L. No. 73-383, §§ 1, 5, 48 Stat. 984, 985 (1934). Even so, most tribes today control only a fraction of the acreage that once comprised their ancestral homelands, with most of the remaining tribal lands—about 56 million acres—being held in trust by the United States.[1] Land has thus been at the center of the attempts to tear down tribal sovereignty, as well as the efforts by tribes to preserve and rebuild that sovereignty.

[1]U.S. Dep't of the Interior, *Native American ownership and governance of natural resources*, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/.

United States courts acknowledged the bond between land and tribal sovereignty as early as 1832, when Chief Justice Marshall described Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Although federal courts' approaches to Indian sovereignty have changed over the centuries, right down to today, courts continue to recognize that sovereignty "centers *on the land held by the tribe* and on tribal members within the reservation," *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (emphasis added), and that "there is a significant geographical component to tribal sovereignty." *Bracker*, 448 U.S. at 151.

Indian tribes' sovereign interest in their lands extends not just to the soil itself but to those things that, having become affixed to the soil, have become inseparable from it. Land includes "such tangible, visible things as are attached thereto or found therein." 73 C.J.S. Property § 21 n.1 (2020). In *United States v. Rickert*, 188 U.S. 432 (1903), the Supreme Court barred state taxes on "permanent improvements" to Indian lands precisely because such "improvements … are essentially a part of the lands," and this protection was "necessary to effectuate the policy of the United States" to protect the

land itself. *Id.* at 442. Likewise, the Department of the Interior reaffirmed the same principle a few years ago, when it explained that because "[p]ermanent improvements are, by their very definition, affixed to the land," taxation of "the improvements burdens the land" itself. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2012) [hereinafter "Leases on Indian Land"]; *see also* 42 C.J.S. Improvements § 2 (2020) ("improvements become part of the land to which they are affixed").

The inextricable link between land and permanent improvements is evident in cases regarding tribes' power to regulate the character of their lands—including permanent improvements on those lands—through zoning. In *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193 (2004), the Supreme Court explained that "[c]ivil authority" even over non-Indians "may … be present in areas such as zoning" because zoning concerns "property ownership within the reservation" and the control over land that zoning provides "is vital to the maintenance of tribal integrity and self-determination." *Id.* at 688. Likewise, Justice O'Connor explained in *Brendale* that a tribe's "power to exclude nonmembers from a defined geographical

area obviously includes the lesser power to define the character of that area." 492 U.S. at 434 (O'Connor, J., announcing the judgment in part and concurring in part).

So strong is this sovereign authority that courts have even upheld tribes' zoning authority over certain reservation lands held in *fee*, rather than in trust. *E.g.*, *Gobin v. Snohomish Cnty.*, 304 F.3d 909, 918 (9th Cir. 2002) (rejecting county's assertion of jurisdiction over a building project on reservation land held in fee because such jurisdiction would "threaten[] to supplant the Tribe's ... attempt at self-government"). In short, it "is beyond question that land use regulation is within the Tribe's legitimate sovereign authority"—precisely because such regulation is inseparable from sovereignty over the land itself. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987).

This case highlights how critical permanent improvements are to sovereignty over land itself. The Fort Mojave Indian Tribe has an overwhelming interest in shaping the "character" of the land on which the South Point Energy Center sits. *Brendale*, 492 U.S. at 434 (O'Connor, J.). Should those trust lands be developed or remain undeveloped? If those lands are to become developed, should they be used for residential, retail,

agricultural, or industrial purposes? If the lands are developed into electricity plants that can power the local economy or the reservation itself, what *kind* of plants should those plants be—coal-fired, gas-fired, or solar? These are core choices that sovereigns make. And these choices are particularly salient for Indian tribes, whose sovereignty "centers on" their lands and their members. *See Plains Com. Bank*, 554 U.S. at 327.

B. State Taxes on Permanent Improvements Oust Tribes' Regulatory Authority over Land.

State taxes on permanent improvements do not just jeopardize tribes' power to raise revenue—though, as *amici* explain in the next section, they do that too—but also strike at the heart of tribes' regulatory authority over land. As Chief Justice Marshall recognized more than 200 years ago, the power to tax is the "power to destroy." *M'Culloch*, 17 U.S. at 426-27, 431. The power to tax is also the power to regulate. Indeed, "[e]very tax is in some measure regulatory." *Sonzinsky v. United States*, 300 U.S. 506, 512–14 (1937). When a state taxes permanent improvements on tribal trust lands, it necessarily supplants the tribe's regulatory choices with those of the state.

The power to tax is an indispensable regulatory tool for Indian tribes, as it is for other sovereigns. The taxation power "is an essential attribute of

Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137, 139; *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("*Colville*") (describing the power to tax as a "fundamental attribute of sovereignty"). On Indian lands, as elsewhere, tax policies often "seek[] to shape decisions," such as by encouraging or deterring conduct that the sovereign deems desirable or undesirable. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567, 572 (2012). For example, a sovereign may, "if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions," or it may opt to "tax real estate and personal property in a different manner." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). These decisions and others like them are "discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries." *Id.* In short, "taxes that seek to influence conduct are nothing new." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 567.

This principle applies powerfully to permanent improvements on land. For decades, researchers have known that "taxes ... affect the timing, intensity, and nature of land use." Barry A. Currier, *Exploring the Role of*

Taxation in the Land Use Planning Process, 51 Ind. L. J. 27, 30 (1975). Taxes shape what land *becomes*. *See, e.g.*, Maksym Polyakov & Daowei Zhang, *Property Tax Policy and Land-Use Change*, 84 Land Economics 396, 406 (2008) ("[P]roperty taxes have [a] significant effect on the changes between agricultural and forestry lands."). For instance, "green" property taxes that increase the costs of certain societally undesirable land uses "make[] it more costly for landowners to pursue specific forms of development" and thus ensure that "such development will occur less frequently." OECD, *The Governance of Land Use in OECD Countries: Policy Analysis and Recommendations* 103 (2017); *see also id.* at 110 (describing fiscal instruments to manage development). Again—developed or not? Residential, retail, agricultural, or industrial? Tax policies "play a crucial role" in these land-use decisions "because they influence both costs and benefits of land use." *Id.* at 18.

Indian tribes thus forge the character of their lands by determining what should be taxed, what tax rate should apply, and what developments should trigger tax credits or deductions. These fundamental regulatory choices will shape—and often determine—whether and what permanent improvements will be built on land. By contrast, when a state taxes

permanent improvements on tribal trust lands, it supplants the tribe's rightful ability to assign its own regulatory choices to those improvements and often acts as a disincentive to development on reservation trust lands — particularly, as discussed below, where a tribe implements its own tax. In short, as the Department of the Interior acknowledged, "[s]tate and local taxation of improvements undermine Federal and tribal regulation of improvements." Leases on Indian Land, 77 Fed. Reg. at 72,448.

This case illustrates the point. Arizona assessed the South Point station using a methodology specifically developed for "electric generation facilities." A.R.S. §§ 42-14151(A)(4), 42-14156. Arizona introduced this valuation method in 2000 expressly as a policy choice made in response to "the changing business environment of electric generation," which Arizona believed warranted "recogni[tion] that these electric generation facilities are similar to other commercial and industrial properties with real and personal property."[2] Arizona's methodology implicates myriad policy decisions, from whether to distinguish electric *generating* businesses from electric

[2]H.R. 2657, 48th Leg., 1st Reg. Sess. (Az. 2007), https://www.azleg.gov/legtext/48leg/1r/summary/h.hb2657_05-07-07_astransmittedtogovernor.doc.htm.

transmission and distribution businesses, to when a plant under construction should begin to be valued.[3] Arizona also chose to classify certain electric generation facilities as *renewable* energy equipment subject to a distinct valuation methodology. *See* A.R.S. § 42-14155. Policymakers, including Arizona legislators, often employ tax incentives "to support renewable energy deployment."[4] They "grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds," *Cal. Pub. Utilities Comm'n*, 133 FERC ¶ 61,059, at *61,268 n.62 (Oct. 21, 2010), and they "subsidize certain types of generation, for instance wind, or other renewables, through, e.g., *tax credits*," *SoCal Edison Co.*, 71 FERC ¶ 61,269, at *62,080 (June 2, 1995).

Arizona's policy choices may be good, or bad. But for present purposes, the key point is that they are *Arizona's* choices. If tribal self-determination means anything, it means that the Fort Mojave Indian Tribe's

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[3] *See* H.R. 2324, 44th Leg., 2d Reg. Sess. (Az. 2000), https://www.azleg.gov/legtext/44leg/2r/summary/h.hb2324_4-13-00_aspassedthehouse.doc.htm; H.R. 2348, 46th Leg., 1st Reg. Sess. (Az. 2003), https://www.azleg.gov/legtext/46leg/1r/summary/h.hb2348_03-13-03_aspassedthehouse.doc.htm.

[4] *See* Eric Lantz & Elizabeth Doris, Nat'l Renewable Energy Laboratory, *State Clean Energy Policies Analysis (SCEPA): State Tax Incentives*, at iv (Oct. 2009), https://www.nrel.gov/docs/fy10osti/46567.pdf.

policy judgments—not Arizona's—should shape the permanent improvements built on tribal trust land.

C. State Taxes on Permanent Improvements Jeopardize Tribes' Interests in Economic Self-Sufficiency.

State taxes on permanent improvements also interfere with tribal sovereignty in another respect: These taxes undermine tribes' ability to raise revenue. Taxes not only serve tribes' regulatory purposes, as described above, but also further tribes' "interest in raising revenues for essential governmental programs." *Colville*, 447 U.S. at 156. That "interest is strongest" where, as here, "the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Id.* at 156-57. Given how central permanent improvements are to tribes' sovereignty over their land, tribes are necessarily "involved" in those permanent improvements—and here, as South Point has shown, it continues to receive tribal services in spades. *See* Opening Br. at 19-20 (explaining that the Tribe provides police protection, fire protection, and other emergency-response services to the facility, that tribal entities provide all utilities to the facility, and that the water used at the facility derives from the Tribe's water allocation and is delivered via

pipes owned by the Tribe). When states are permitted to impose taxes on permanent improvements, tribes effectively cannot: The resulting double taxation would chill the economic activity on which the vitality of reservation economies depend.

Indian tribes already face "extreme difficulty in raising revenue" because many "have virtually no tax base." Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 771 & n.84 (2004). Tribal members are often unemployed or economically disadvantaged, so Indian income taxes are not practical for raising significant revenues. *See id.* at 771, 773-74 & nn.93-94. Indeed, on almost any measure, economic conditions in Indian country fall far below the national average. Thus, "[w]hile tribal governments operate many of the same public services as other levels of government, they must operate without the usual tax revenue other levels of government rely on." Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country, Part 2: Tribal Governments* at 4 (2017) (emphasis omitted).

In practice, a tribe's ability "to tax [a] non-Indian [lessee] is inversely related to the state's power to tax that entity." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal*

Indian Law, 107 Harv. L. Rev. 381, 437 (1993). If both a state and a tribe were to exercise the power to tax, "the resulting double taxation would discourage economic growth." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 811 (2014) (Sotomayor, J., concurring); *see also* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pittsburgh Tax Rev. 93, 95 (2005).

For instance, when the Navajo Nation entered into a lease with the Department of Water and Power of the City of Los Angeles and other entities for the Navajo Generating Station, the parties explicitly contracted to avoid double taxation. The parties agreed that the Navajo Nation generally would not tax the lessees' property and associated activity. *Indenture of Lease: Navajo Units 1, 2 and 3* § 7(e) (Sept. 29, 1969). However, "if at any time during the term of th[e] Lease" the State of Arizona and its political subdivisions declined to levy or impose property taxes or a court determined that those entities lacked such taxing power, then the lessees *would* become subject to tribal taxation "to the extent of the amount of taxes which would have otherwise been paid to the State of Arizona and its political subdivisions[.]" *Id.* § 7(f). The parties agreed that their "basic purpose and intent" was that

the lessees "not be subject to double taxation and/or contributions in lieu of taxation in whatever form." *Id*. State taxation thus came at a direct cost to the Navajo Nation.

The Interior Department has recognized this economic reality, stating that double taxation "decrease[s] the funds available to the lessee to make rental payments to the Indian landowner" and "can impede a tribe's ability to attract non-Indian investment to Indian lands." Leases on Indian Land, 77 Fed. Reg. at 72,448. State taxation puts tribes in a lose/lose position: Tribes must either forego potentially crucial tax revenues, or risk depressing investment in projects key to the vitality of tribal communities.

Given the devastating impact of double taxation on tribal treasuries, it is especially important to prevent states from imposing taxes that touch and concern tribal *trust* lands. As to lands held in fee—even when owned by Indians—the Supreme Court has held that state and local governments generally have the power to impose their own taxes. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253, 270 (1992). That rule means, for the same reasons just explained, that Indian tribes *cannot* tax fee lands within their reservations.

The tax treatment of fee lands makes it all the more important to continue to recognize the overriding tribal interests in taxes that touch and concern the tribal *trust* lands that are at the core of Indian tribes' sovereign domain. Nor does the intrusion on tribal interests from state taxes on trust lands become less severe simply because the *legal* incidence happens to fall on a non-Indian lessee. *See Ramah Navajo*, 458 U.S. at 844 n.8 (refusing to adopt a "legal incidence" test for economic burdens on tribes, and reasoning that a burden could be unacceptable even if "imposed indirectly"); *Bracker*, 448 U.S. at 151 & n.15 (finding it relevant to the preemption analysis, though not dispositive, that an economic burden fell on the tribe). In assessing the strength of tribal interests, the critical point is that state taxes will operate to deprive tribes of the revenues on which their governments, and their citizenry, depend.

* * *

State taxes on permanent improvements thus implicate core tribal interests: the ability of tribes to regulate their trust lands, including permanent improvements on those lands, and to derive economic benefit from those lands. These interests weigh heavily in the *Bracker* analysis and

strongly support preemption in every case in which a state taxes permanent improvements on tribal trust lands.

III. The Indian Reorganization Act, the Department of the Interior's Leasing Regulations, and General Preemption Principles Uniformly Recognize These Significant Tribal Interests.

Giving appropriate weight to the overriding tribal interests in the taxation of permanent improvements on tribal trust lands also aligns with the Indian Reorganization Act, the Department of the Interior's leasing regulations, and general principles of preemption.

The Indian Reorganization Act. First, the Indian Reorganization Act clearly prioritizes the tribal interest in taxing trust lands by ousting state taxes from these lands and from associated rights in these lands. Section 5 of the Indian Reorganization Act, originally codified as section 465 of the U.S. Code's Indian title, authorizes the Secretary of the Interior to take lands into trust for Indian tribes and expressly exempts from taxation "lands or rights" taken into trust. *See* 25 U.S.C. § 5108.[5] This exclusion applies to

[5] When the Secretary considers whether to take land into trust for a tribe, state and local governments have an opportunity to provide written comments to the Secretary as to the potential impact of the proposed acquisition, including on "real property taxes." *See* 25 C.F.R. §§ 151.10, 151.11(d). The potential tax consequences of each land-into-trust decision thus receive a full airing at the time of acquisition. Indeed, the Secretary's

permanent improvements because such improvements are "essentially a part of the lands," and "[e]very reason that can be urged to show that the land [is] not subject to local taxation applies to the assessment and taxation of the permanent improvements." *Rickert*, 188 U.S. at 442. Hence, the Supreme Court stated in *Mescalero* that "permanent improvements" on tax-exempt land "would certainly be immune from [a] State's ad valorem property tax." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). Indeed, *Mescalero* held that Section 5 even barred a compensating *use* tax associated with permanent improvements because the "use of permanent improvements upon land is so intimately connected with use of the land itself." *Id.*

Mescalero shows that a tax on permanent improvements is equivalent to a tax on land and is prohibited by Section 5. Hence, as the Ninth Circuit recognized in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, "[w]here a state or local government assesses a tax on land *or improvements* covered by § 465, [courts] are bound by § 465 and *Mescalero* to invalidate such taxes." 724 F.3d 1153, 1158 n.7 (9th Cir. 2013)

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decision to place land into trust *despite* these consequences underscores that federal and tribal interests *both* support preemption of state taxes.

(emphasis added). The Eleventh Circuit has reached a similar conclusion, interpreting Section 5 and *Mescalero* to preempt a tax "on land rights that are so connected to the land that the tax amounts to a tax on the land itself." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1329 (11th Cir. 2015). Section 5 and the cases interpreting that provision reflect and reinforce the weighty tribal interests described above and support a finding of both categorical preemption and preemption under *Bracker*.

Interior Department Leasing Regulations. Second, recognizing the weighty tribal interests at stake accords with the Department of the Interior's leasing regulations. Those regulations provide that, "[s]ubject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(a). This rule follows naturally from the Department's conclusion that state taxation of permanent improvements on trust lands threatens tribal interests both in regulating the land and in achieving economic development. *See* Leases on Indian Land, 77 Fed. Reg. at 72,448.

Indeed, in the preamble to this regulation, the Department explained that any tax on permanent improvements "undermine[s] Federal and tribal regulation of improvements" and necessarily "burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement." *Id.* As South Point's brief explains, Arizona treats taxes on permanent improvements as creating a lien on the *land* as well as the improvements. *See* A.R.S. § 42-17154(B) ("Taxes that are imposed on improvements to real estate and that are assessed to a person who is not the owner of the real estate are a lien *on the land and improvements*." (emphasis added)); Reply Br. at 11. Federal policy, as set forth by the Department of the Interior, thus strongly reinforces the tribal interests in preempting taxes like Arizona's.

General Preemption Principles. Third, recognizing the tribal interests here accords with general preemption principles in this area. Even on tribal land, states often can regulate certain *activities* of non-Indians. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) ("the *Bracker* interest-balancing test applies ... where 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation'") (citation omitted). But this principle does not apply to regulating tribal *land*. *See Plains Com. Bank*,

554 U.S. at 327 (explaining that tribal sovereignty "centers *on the land held by the tribe*" (emphasis added)). Permanent improvements on land are akin to the land itself, not to activities that happen to occur on tribal land but that could just as easily have happened elsewhere. Just as "land use regulation is within the Tribe's legitimate sovereign authority over its lands," so too is taxing the permanent improvements on those lands. *Segundo*, 813 F.2d at 1393.

IV. These Strong Tribal Interests Support Preemption Under the *Bracker* Analysis as Well as a Categorical Preemption Rule.

The weighty tribal interests described above are implicated in every case where a state or other entity seeks to apply its tax to permanent improvements on tribal trust lands. These taxes sap tribes of their core sovereign authority by supplanting the *tribes*' choices as to the future of their tribal trust lands with those of another sovereign. The taxes also deprive tribes of potentially vital sources of tax revenue derived from tribal lands.

At minimum, these tribal interests must weigh heavily in the *Bracker* balancing analysis of "the nature of the state, federal, and tribal interests at stake"—and should be dispositive in that analysis. *Bracker*, 448 U.S. at 145. It is hard to imagine a scenario where a state could have the greater interest

in taxing—and therefore regulating—permanent improvements on tribal trust lands than the tribe itself.

For just that reason, these tribal interests also support the categorical rule South Point advocates. *See* Opening Br. at 30-45. Taxes on permanent improvements do not regulate "the conduct of non-Indians … on [a] reservation"—the sphere where state interests can, in some circumstances, overcome the tribal and federal interests favoring preemption. *See Bracker*, 448 U.S. at 144. To the contrary, because "improvements … are essentially a part of the lands," *Rickert*, 188 U.S. at 442, these taxes instead are about control over the land *itself*. As such, these taxes are preempted. *See* 25 U.S.C. § 5108; *Confederated Tribes of Chehalis Reservation*, 724 F.3d at 1158 n.7.

CONCLUSION

For the foregoing reasons, the Court should reverse the tax court's judgment.

DATED this 7th day of December, 2020.

/s/ Verrin T. Kewenvoyouma

JENNER AND BLOCK LLP
Charles W. Galbraith
1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma
Christopher Love
700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com

(202) 639-6089 chris@vtklaw.com
(480) 428-4590

Attorneys for Amici Curiae *Fort Mojave Indian Tribe, the Navajo Nation, the Gila River Indian Community, Gila River Telecommunications, Inc., Gila River Indian Community Utility Authority, the Inter-Tribal Association of Arizona, and the National Congress of American Indians*

IN THE
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DIVISION ONE

NO. 1 CA-TX 20-0004

Arizona Tax Court Nos. TX2013-000522,
TX2014-000451, TX2015-000850, TX2016-001228,
TX2017-001744, TX2018-000019, TX2019-000086

SOUTH POINT ENERGY CENTER LLC,

Plaintiff-Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,

Defendants-Appellees.

CERTIFICATE OF COMPLIANCE

JENNER AND BLOCK LLP
Charles W. Galbraith
1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com
(202) 639-6089

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma
Christopher Love
700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com
chris@vtklaw.com
(480) 428-4590

Attorneys for Amici Curiae *Fort Mojave Indian Tribe, the Navajo Nation, the Gila River Indian Community, Gila River Telecommunications, Inc., Gila River Indian Community Utility Authority, the Inter-Tribal Association of Arizona, and the National Congress of American Indians*

This certificate of compliance concerns a brief and is submitted under ARCAP 16(b)(4). Undersigned counsel certifies that the *Amici Curiae* Brief that this certificate accompanies uses a proportionately spaced typeface of at least 14 points, is double-spaced, and contains 5,893 words. The brief does not exceed the 12,000-word limit that is set forth by ARCAP 14(a)(4).

Dated this 7th day of December, 2020.

/s/ Verrin T. Kewenvoyouma

JENNER AND BLOCK LLP
Charles W. Galbraith
1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com
(202) 639-6089

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma
Christopher Love
700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com
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CERTIFICATE OF SERVICE

JENNER AND BLOCK LLP
Charles W. Galbraith
1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com
(202) 639-6089

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma
Christopher Love
700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com
chris@vtklaw.com
(480) 428-4590

Attorneys for Amici Curiae *Fort Mojave Indian Tribe, the Navajo Nation, the Gila River Indian Community, Gila River Telecommunications, Inc., Gila River Indian Community Utility Authority, the Inter-Tribal Association of Arizona, and the National Congress of American Indians*

On this date, the *Amici Curiae* Brief, the Certificate of Compliance, and this Certificate of Service were served by AZTurboCourt on the parties or their counsel as follows:

Kimberly Cygan
Jerry A. Fries
ARIZONA ATTORNEY GENERAL'S OFFICE
1275 West Washington Street
Phoenix, AZ 85007-2997
kim.cygan@azag.gov
jerry.fries@azag.gov
tax@azag.gov
Attorneys for Defendants-Appellees

Bennett Evan Cooper
Vail C. Cloar
DICKINSON WRIGHT PLLC
1850 N. Central Avenue, Suite 1850
Phoenix, AZ 85004
bcooper@dickinsonwright.com

Pat Derdenger
Karen Lowell
LEWIS ROCA ROTHGERBER CHRISTIE LLP
201 E. Washington Street, Suite 12000
Phoenix, AZ 85004
pderdenger@lrrc.com

Attorneys for Plaintiff-Appellant South Point Energy Center LLC

Dated this 7th day of December, 2020.

/s/ Verrin T. Kewenvoyouma

JENNER AND BLOCK LLP
Charles W. Galbraith

KEWENVOYOUMA LAW, PLLC
Verrin T. Kewenvoyouma

1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001
cgalbraith@jenner.com
(202) 639-6089

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700 E. Baseline Road, Suite C1
Tempe, Arizona 85283
verrin@vtklaw.com
chris@vtklaw.com
(480) 428-4590