No. 19-1298

In The Supreme Court of the United States

ROGERS COUNTY BOARD OF TAX ROLL CORRECTIONS, a political subdivision; CATHY PINKERTON BAKER, Rogers County Treasurer, in her official capacity; and SCOTT MARSH, Rogers County Assessor, in his official capacity,

Petitioners,

v.

VIDEO GAMING TECHNOLOGIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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August 21, 2020

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The *Bracker*-balancing test is "nebulous" and "mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting).

The Court has recognized that Indian gaming has exploded around the nation. *Michigan v. Bay Mills*, 572 U.S. 782, 799-900 (2014). Oklahoma, alone, has over 100 tribal owned casinos. In light of the significant conflict in case law created by the Oklahoma Supreme Court's decision, state and local governments need clarity on the nature and scope of their authority with respect to non-Indians under the IGRA and *Bracker*.

A. A Direct Conflict Exists in Case Law

VGT, Inc. first argues that no true conflict exists in case law. This argument is without merit.

In *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the defendant-town sought to impose a personal property tax on the lessors of slot machines used by a tribe at a casino located in Connecticut. The tax was used to fund the operation of municipal government. The tribe was a party to that case, insofar as it had agreed to reimburse the lessors for any taxes that might be due. *Id.* at 462. The Second Circuit held that the property tax was not expressly or impliedly preempted by the Indian Gaming Regulatory

Act (IGRA), or by the Court's *Bracker*-balancing test. *Id.* at 469-477. The Court rejected "field preemption," and found that mere ownership of slot machines by the lessors did not qualify as "gaming" and that taxing such ownership did not interfere with the "governance of gaming" – i.e., the issue with which the IGRA is concerned. *Id.* at 470. *Bracker* did not bar the tax.

In the present case, Petitioners sought to impose an *ad valorem* tax on VGT, Inc., who leased its slot machines to the Cherokee Nation's business entity for use in a casino located in Oklahoma. The *ad valorem* tax is used to fund local government operations in Rogers County (where the casino is located). The tribe was not a party to this case, and it apparently did not agree to reimburse VGT, Inc. for any taxes that might be due. Rejecting *Mashantucket*, the Oklahoma Supreme Court found that the IGRA "occupies the field with respect to *ad valorem* taxes imposed on gaming equipment" and that there was no distinction between "owning" gaming equipment and "engaging in gaming activity." Pet. App. 23, 26. *Bracker* barred the tax.

VGT, Inc. claims that additional "percolation" is necessary, but it is hard to imagine how additional "percolation" would change the situation confronting the Court: a direct conflict in the interpretation of the IGRA and the Court's *Bracker* balancing test in the context of a nominal *ad valorem* tax on gaming equipment.

B. Respondent's Attempts to Distinguish *Mashantucket* are Without Merit

While avoiding an extended discussion of the IGRA and *Mashantucket*, VGT, Inc. identifies five issues that allegedly distinguish this case from *Mashantucket*. Petitioners address each:

1. VGT, Inc. claims that Oklahoma law is different because it involves the possible "highly invasive non-payment remedy of seizing the property subject to the tax." (Opposition Brief at 10). This is not a difference, as Connecticut has a similar law. Conn. Gen. Stat. Ann. §12-162. VGT, Inc. claims that the "seizure" remedy was not addressed in *Mashantucket*, but that is because it was not at issue there, just as it is not at issue here. This is a straw-man argument used to support a theoretical invasion of "tribal sovereignty" in a case where a tribe is not even a party. Pet. App. 24, ¶37.

   Petitioners never threatened to seize the property. VGT, Inc. does not contend otherwise. And to reiterate, there is a "difference between a right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998).

2. VGT, Inc. claims that Oklahoma law is different because it contemplates a variety of "use" exemptions, whereas in

Mashantucket, the Second Circuit held that the Connecticut property tax was "generally-applicable" and based solely on ownership, not use. Again, this is not an accurate summary. The property taxes in both cases are based on property ownership, and not use. And Oklahoma and Connecticut both have statutes that provide for a variety of use exemptions. 68 Okla. Stat. §2887; Conn. Gen. Stat. Ann. §12-81. These are not "markedly different state-law scenarios," as claimed by VGT, Inc.; they are identical state law scenarios.

And *Mashantucket*'s holding on this issue is particularly persuasive: adding a judicially-created use exemption for non-Indians would "render the State's tax more difficult and expensive to administer." 722 F.3d at 475; *cf. McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting). The Oklahoma Supreme Court found exactly to the contrary: a judicially-created use exemption "is not an unfair burden on" the "enforcement of tax laws." Pet. App. 26, ¶40. This is another disparity justifying review.

3. VGT, Inc. claims that there is no support in the record for the assertion that the *ad valorem* tax is important for local schools, law enforcement, health services, or other government services. However, the Oklahoma Supreme Court's opinion recognized that the tax was used for these

very purposes. Pet. App. 7, ¶10. The Court simply rejected these justifications for the tax. Pet. App. 24-25. Petitioners claim this was error. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989) (state interests "must" be given weight).

The Oklahoma Supreme Court's decision will cause real and measurable harm to county governments all throughout Oklahoma. *Ad valorem* taxation is codified in Oklahoma's Constitution – a fact VGT, Inc. fails to address – and serves as a lifeblood for local governments. OKLAHOMA CONSTITUTION, art. 10, §§8, 10.[1] And, *Mashantucket* found that, under *Bracker*, a generally applicable property tax is properly connected to the general services that the town provides, such as education services and maintenance of roads. 722 F.3d at 475. *Cotton* noted the "nightmarish administrative burdens" that would arise from requiring parity between state taxes and state services. *Cotton*, 490 U.S. at 185 n.15.

4. VGT, Inc. claims that *Mashantucket* did not consider whether a *de minimus* tax would defeat preemption. This is not entirely accurate. *Mashantucket* held that the extent of tax liability that might

[1] Indeed, the *ad valorem* tax supports county governments in Oklahoma in numerous important ways. *See generally* Brief of Amicus Curiae Tulsa County Assessor John A. Wright in Support of Petitioners (discussing OKLAHOMA CONSTITUTION, art. 10, §§9, 10, 26; 19 Okla. Stat. §§890, 902.15, 902.16, 901.19).

be passed onto a tribe is relevant to "the Tribe's interest" under *Bracker*, but that "any effect on the Tribe is minimal compared to the other relevant interests." 722 F.3d at 473 n.16.

In the present case, there was *no evidence* submitted that the *ad valorem* tax burdened "gaming" or any sovereignty interest of the Cherokee Nation. And in reality, the size of the tax was immaterial to the Oklahoma Supreme Court, since its "field preemption" holding meant that the state had no room to regulate *at all*, regardless of the size of the tax. Pet. App. 26, ¶41.

5. VGT, Inc. claims that *Mashantucket* did not consider this Court's recent decision in *Michigan v. Bay Mills Indian Country*, 572 U.S. 782 (2014). VGT, Inc. implies that *certiorari* review is unnecessary because the Oklahoma Supreme Court properly applied *Bay Mills*. (Opposition Brief at 13-14) (arguing *Bay Mills* "casts important light on the IGRA's scope and purposes.").

   Bay Mills is inapposite: it dealt with tribal sovereign immunity. A tribe is not a party to the present case. To the extent *Bay Mills* is relevant, that Court noted that the IGRA creates a "framework for regulating gaming on Indian lands" and that "gaming activity" refers to "what goes on in a casino – each roll of the dice

> and spin of the wheel." *Bay Mills*, 572 U.S. at 785, 792. The Oklahoma Supreme Court itself noted that *Bay Mills* "focused on the action rather than the equipment." Pet. App. 21, ¶32.
>
> The *ad valorem* tax at issue here, just like the one in *Mashantucket*, is not targeted at the "action" – i.e., "each roll of the dice and spin of the wheel." *Bay Mills*, 572 U.S. at 792. It is based on property ownership by a non-Indian corporate entity. 68 Okla. Stat. §2837.
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> Likewise, *Bracker* preemption is not directed at whether gaming machines are "inextricably intertwined" with gaming activities, Opposition Brief at 13, but whether the state tax imposed on the non-Indian interferes with the objectives of federal legislation or with tribal sovereignty. *Bracker*, 448 U.S. at 149. The tax at issue here, just as the one in *Mashantucket*, does neither.
>
> Hence, the fact that the Oklahoma Supreme Court considered *Bay Mills*, and *Mashantucket* did not, is immaterial.

In short, the decision of the Oklahoma Supreme Court in the present case is in direct conflict with *Mashantucket*. The disparate outcome resulting from this Court's balancing test strongly militates in favor of review by this Court.

C. Other Cases Support Review

Other cases show that this Court's guidance is needed concerning the preemptive reach of the IGRA with respect to state regulation imposed on non-Indians, particularly in the tribal gaming environment. For instance, other courts have held that the IGRA and *Bracker* do not preempt taxes imposed on contractors related to the construction or expansion of gaming casinos, *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008); *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019); do not preempt a business and occupational tax imposed on a corporation who provides cash access services *inside* the casinos, *Everi Payments, Inc. v. Washington*, 432 P.3d 411 (Wis. Ct. App. 2018); and do not preempt a claim related to termination of a management contract for casino operations, *Casino Res. Corp. v. Harrah's Entertainment*, 243 F.3d 435, 439 (8th Cir. 2001).

On the other hand, one Court held that the IGRA does not expressly preempt a use tax on nonmember purchases of amenities at a casino, but that the tax failed the *Bracker* test because it interfered with the economic success of Class III gaming. *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), *cert. denied*, Case No. 19-1056 (2020).

These cases show that the Oklahoma Supreme Court's opinion is an outlier regarding the preemptive reach of the IGRA and that *certiorari* review is appropriate.

D. The *Bracker* Preemption Issue is Properly Before the Court

VGT, Inc. claims that the issue of "whether a *de minimis* tax on Indian gaming is preempted" is not before the Court. (Opposition Brief at 15). This argument is off-the-mark for several reasons. First, the nominal *ad valorem* tax was not imposed on "Indian gaming."

Second, the nominal nature of the tax is relevant to the *Bracker* analysis – the very issue raised by Petitioners here. That is, the size or nature of the tax is relevant to whether the tax improperly infringes upon the objectives of federal regulation and/or tribal sovereignty. *Cotton*, 490 U.S. at 186-187 (discounting "indirect" or "insubstantial" effects of taxes under *Bracker*); *Haeder*, 938 F.3d at 946-947 (noting gross receipts tax related to construction of casino had only *de minimis* impact on federal/tribal interests); *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011) (analyzing the "economic burden of the tax"). Because these issues are incidental to analysis of the *Bracker* test, they are properly before the Court. *Rorick v. Devon Syndicate*, 307 U.S. 299, 303 (1939) (noting Court may consider issues "urged in the petition for certiorari and incidental to their determination").

And, frankly, this is an important issue, and was addressed in response to VGT, Inc.'s quest for summary judgment. In the briefing, Petitioners pointed out that the amount of the tax was miniscule when compared to the gaming operations, and that no evidence was

submitted indicating that the taxes were actually passed on to the Tribe. This issue is even referenced in the Oklahoma Supreme Court's opinion. Pet. App. 4, ¶5.

VGT, Inc. had the burden of showing that the *ad valorem* tax interfered with interests protected by the IGRA. The IGRA was intended to preempt the field of the "governance of gaming activities" and to ensure that the "tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §2702. VGT, Inc. presented no evidence that the tax interfered with gaming operations. And the Oklahoma Court found that the "passed on cost will not threaten the purpose of Nation being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37. The nominal nature of a tax imposed on a non-party – VGT, Inc. – supports Petitioners' argument that the tax does not interfere with any federal regulatory interest or tribal sovereignty issue.

E. Respondent Has Ignored Important Aspects of the *Bracker* Preemption Issue and the Oklahoma Supreme Court's Analysis of the Same

Field preemption. Petitioners pointed out that the Oklahoma Supreme Court found that the IGRA "occupies the field" with respect to *ad valorem* taxation of gaming equipment. Pet. App. 26, ¶41. Respondent responds in a footnote, claiming that the holding "does not sweep any further than the specific facts and circumstances considered in this case" and compares it

to the Court's holding in *Bracker*. (Opposition Brief at 19 n.6). In *Bracker*, the Court held that there was "no room" for the taxes "in the comprehensive federal regulatory scheme" at issue. 448 U.S. at 148.

But, the IGRA is different. It does not preclude all state regulation. Indeed, the purpose of the IGRA was to rectify "*Cabazon*'s ouster of state authority" related to regulation of gaming on Indian lands. *Bay Mills*, 572 U.S. at 794-795. For that reason, "field preemption" was inappropriately imported into this case, and VGT, Inc. does not adequately address this problem.[2]

To be sure, the IGRA says nothing about *ad valorem* taxation of gaming equipment owned by non-Indians. Ironically, the Oklahoma Supreme Court recognized as much: it noted that the "specific tax in question does not infringe on a purpose of the IGRA," and that "ownership of gaming equipment does not automatically subject [VGT] to IGRA." Pet. App. 22-23, ¶¶33, 35.

But, the Court held that the tax nevertheless interfered with interests protected by the IGRA. Pet. App. 21-23. However as discussed previously, (1) the tax does not interfere with the "governance of gaming"; (2) the tax does not interfere with tribal sovereignty; (3) the tax does not interfere with any "prevention of corruption" goals of the IGRA; and (4) the "seizure"

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[2] Most courts have rejected "field preemption" in the IGRA context. *E.g.*, *Barona*, 528 F.3d at 1193; *Mashantucket*, 722 F.3d at 470; *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1237 (10th Cir. 2017).

remedy cited by the Oklahoma Supreme Court and VGT, Inc. is simply not at issue in this case.[3]

Tribal Interests. VGT, Inc. claims that the tax interferes with "tribal interests" because the cost of the tax will "increase the overall costs of providing the gaming machines" to the Tribe. (Opposition Brief at 20-21). But, the Oklahoma Supreme Court held that the "passed on cost" will not threaten "the purpose of Nation being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37.

Indeed, the most that can be said is that the "passed on cost" would "impact the consideration of the overall costs" of providing the machines to the Nation. This is an insufficient basis for any Court to conclude that the nominal tax interferes with any federal interest recognized by the IGRA, or any tribal sovereignty interest. *E.g.*, *Cotton*, 490 U.S. at 179 (noting that, per the Indian Mineral Leasing Act, Congress did not intend to "remove all state-imposed obstacles to profitability").

State Interests. Finally, like the Oklahoma Supreme Court, VGT, Inc. discounts any interest Petitioners have in the *ad valorem* tax. (Opposition Brief at 22-23). VGT, Inc. does not address whether Petitioners have a sovereign interest in being in

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[3] VGT, Inc.'s references to alleged "grave" invasions to tribal sovereignty are slightly disingenuous. As in *Cotton*, a Tribe is not a party to this case, and VGT, Inc. simply latches onto this interest in support of its quest to avoid paying property taxes throughout the State of Oklahoma.

control of, and able to apply, its laws throughout its territory. VGT, Inc. does not address the fact that it is a user of state services, insofar as it conducts business all throughout Oklahoma, and has filed at least seven (7) other lawsuits to avoid paying *ad valorem* taxes in Oklahoma, and that Petitioners have an interest in uniform application of the *ad valorem* tax code.

VGT, Inc. does not address the fact that raising revenue to provide for general government services is a legitimate state interest. *Ad valorem* taxation supports local government services, including schools, law enforcement, health services, and roads. Pet. App. 7, ¶10. These are valid state interests deserving of consideration. *E.g.*, *Ute Mountain*, 660 F.3d at 1199 (analyzing state services under *Bracker* including "off-reservation infrastructure"). "[T]here is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018).

CONCLUSION

The Court's *Bracker*-balancing test was never designed to shield a corporation from a generally applicable property tax, where the tax does not interfere with any federal regulatory interest or tribal sovereignty interest, and where the tax is otherwise a valid exercise of state taxing authority. The IGRA was intended to preempt the field of the "governance of gaming activities" and to ensure that the tribe is the primary beneficiary of the gaming operation. The nominal tax imposed on VGT, Inc. a non-Indian corporate entity, does not interfere with these purposes.

The Court should grant the Petition for Writ of *Certiorari* and reverse the decision of the Oklahoma Supreme Court.

DATED: August 21, 2020

Respectfully submitted,

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