No. 24-952

IN THE
Supreme Court of the United States

SOUTH POINT ENERGY CENTER, LLC,
Petitioner,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF FORT MOJAVE INDIAN TRIBE, INTER TRIBAL COUNCIL OF ARIZONA, NAVAJO NATION, GILA RIVER INDIAN COMMUNITY, MORONGO BAND OF MISSION INDIANS, NATIONAL CONGRESS OF AMERICAN INDIANS, UNITED SOUTH AND EASTERN TRIBES, AND INDIAN GAMING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

For more than a century, the Fort Mojave Indian Tribe and its members have inhabited a reservation that lies at the tripoint of the States of Arizona, California, and Nevada. With over 1,400 members, many of whom reside on its reservation, the Tribe relies largely on revenues from leases with non-Indians to support its pursuit of meaningful self-determination through effective self-government. Toward that end, and consistent with authorization by Congress and a comprehensive regulatory scheme promulgated by the Department of the Interior ("Interior") and administered by the Bureau of Indian Affairs ("BIA"), the Tribe in 1999 executed a fifty-year lease with petitioner South Point Energy Center, LLC ("South Point") for petitioner to construct and maintain a natural-gas-powered plant on 320 acres of the Fort Mojave Reservation in Arizona held in trust by the United States.

Arizona now claims the authority to tax Petitioner for its entirely on-reservation conduct. The decisions of the Arizona courts fundamentally misconstrue the Indian Reorganization Act and drastically discount the strong tribal and federal interests at stake while according primacy to the State's general, nondescript

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[1] This *amici* brief is filed with timely notice to all parties. S. Ct. R. 37.2. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

interests in raising revenue. In so doing, those decisions put the Tribe to an impossible choice—step aside and abdicate its own regulatory authority, or forego non-Indian development on tribal lands altogether. No sovereign should be put to that choice. The decisions below thus subjugate tribal sovereignty and curtail the ability of all tribes to pursue self-sufficiency consistent with their sovereign prerogatives. In addition to the Mojave Indian Tribe, *amici* are federally recognized Indian tribes and coalitions thereof that share the Tribe's cardinal interests in vindicating the promise of tribal self-determination and safeguarding the core attributes of tribal sovereignty that Arizona's tax erodes.

SUMMARY OF ARGUMENT

Nearly a century ago, Congress enacted the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 5101 *et seq.*, which expressly provided that lands and rights held in trust by the United States for federally recognized Indian tribes "shall be exempt from State and local taxation." 25 U.S.C. § 5108. The BIA has promulgated thorough regulations that not only guide the Secretary of the Interior's discretion to take land into trust under the IRA, *see* 25 C.F.R. pt. 151, but also govern leasing of tribal lands to non-Indian lessees, *see* 25 C.F.R. pt. 162. Consistent with that authority, and with the approval of the Secretary of the Interior, the Tribe in 1999 negotiated and entered into a fifty-year lease with South Point under which South Point would construct and maintain a natural-gas-powered plant (the "Facility"). After more than a decade of litigation, the Arizona courts have concluded that the State may impose ad

valorem taxes against non-Indian lessees operating on tribal lands.

That conclusion is wrong and warrants Supreme Court review. The Arizona Supreme Court held that the IRA does not expressly preempt the operation of state law in this context. But that conclusion defies the IRA's plain language, creates a demonstrable circuit split, and leads to untenable results that Congress could not possibly have intended. The Arizona Court of Appeals further held that state law is not impliedly preempted under the balancing test first announced by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). That conclusion discounted the strong, concrete tribal and federal interests at stake while improperly prioritizing the State's generalized interest.

ARGUMENT

I. The Arizona Courts Misconstrued the IRA.

A. The IRA Is Part of a Comprehensive Federal Scheme.

For more than a century, Congress has devoted close attention to the subject of leasing on Indian lands. Congress's comprehensive framework leaves no room for states to interject their tax laws.

Congress enacted the IRA to "acknowledge[] the failure of its policy" of assimilation that marred the preceding half-century. *Hodel v. Irving*, 481 U.S. 704, 708 (1978). That policy, implemented in part through the General Allotment Act of 1887, "sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual

tribe members," made such lands "(eventually) freely alienable," and opened unassigned lands to settlement by non-Indians. *McGirt v. Oklahoma*, 591 U.S. 894, 904 (2020); *see* Charles F. Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 43 (2005).

The results of allotment were "devastating." *Land Acquisitions*, 88 Fed. Reg. 86,222, 86,234 (Dec. 12, 2023). Theodore Roosevelt described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass." Theodore Roosevelt, *First Annual Message*, The Am. Presidency Project (Dec. 3, 1901), https://www.presidency.ucsb.edu/node/206187. Under that Act, Indian tribes collectively lost 90 million of the 140 million acres of land that they once possessed. *See* S. Rep. No. 91-501, at 12 (1969). And "[t]he resulting pattern of land ownership generated a complicated 'checkerboard' pattern of federal, state, and tribal jurisdiction that plagues much of Indian country even today." Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 Ariz. St. L.J. 779, 787 (2014). Apart from pervasive checkerboarding, the "ownership of allotments became increasingly fractionated" "as allottees passed their interests on to multiple heirs," and this "problem proliferated with each succeeding generation." *Babbitt v. Youpee*, 519 U.S. 234, 237–38 (1997).

The IRA "marked a significant" shift "in federal policy in favor of Native autonomy," and "was the first comprehensive federal Indian affairs legislation since the" General Allotment Act. *Cohen's Handbook of Federal Indian Law* § 2.09[2] (Nell Jessup Newton & Kevin K. Washburn, eds., 2024). As part of that

legislation, Congress delegated to the Secretary of the Interior authority "to acquire" land or rights into trust for Indian tribes "for the purpose of providing land for Indians" and provided that such "lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 5108.

Tribes also have the authority to lease tribal lands. Congress has legislated leasing on tribal lands since 1891. *See* Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795. Congress adopted the current leasing statute in 1955, which "permits leasing for a wide range of purposes," including South Point's activities in connection with the Facility. *Id.*; *see* Act of Aug. 9, 1955, ch. 615, 69 Stat. 539 (codified at 25 U.S.C. § 415) ("1955 Leasing Statute"). Under the 1955 Leasing Statute, lease periods may be "up to 25 years, with an option to renew for another 25-year period." Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1062 (1974).

"Subsequent to 1955," Congress has repeatedly amended Section 415 and enacted other statutes "to extend 99-year leasing authority to" a number of tribes. *Id.* Congress in 1963 effectuated such an extension to the Tribe. *See* Act of Nov. 4, 1963, Pub L. No. 88-167, 77 Stat. 301. All told, Congress has amended the 1955 Leasing Statute fifty times since enactment, most recently in 2023. *See* Act of Jan. 5, 2023, Pub. L. No. 117-346, 136 Stat. 6198.

As yet another example of Congress's comprehensive approach towards leasing on tribal lands, in 1983, Congress enacted the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, tit. II,

96 Stat. 2517 (1983) (codified at 25 U.S.C. § 2201 *et seq.*), to provide a mechanism through which "fractional interests would escheat to the tribe." *Youpee*, 519 U.S. at 239. Congress has also amended the ILCA on several occasions, as recently as 2008. *See* Albuquerque Indian School Act, Pub. L. No. 110-453, tit. II, § 207(a), 122 Stat. 5030 (2008).

Interior's history of regulating tribal land leases with non-Indian lessees is similarly robust. The Commissioner of Indian Affairs promulgated the first regulations governing tribal land leasing in 1904 in an effort "to protect against indiscriminate leasing of allotments." Chambers & Price, *supra*, at 1073. For much of the twentieth century, Interior housed those regulations at 25 C.F.R. Part 131, *see*, *e.g.*, *id.* at 1076 & n.75, but transferred them to 25 C.F.R. Part 162 by the mid-1980s. *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073 & n.1 (9th Cir. 1983). In addition to these amendments throughout the twentieth century, Interior again revised these regulations in 2001 and 2012. *See Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust*, 66 Fed. Reg. 7,068 (Jan. 22, 2001); *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

The historical and current regulations impose myriad rules and requirements governing leases between tribes and non-Indian lessees of tribal trust lands by which both parties must abide, subject to approval and ongoing oversight by Interior. *See* 25 C.F.R. § 162.401–162.474. As particularly relevant here, the regulations provide, "Subject *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." *Id.* § 162.017(a) (emphases added). In promulgating these regulations, the BIA emphasized that "no improvements on leased Indian land are subject to State taxation, regardless of who owns the improvements," as "State and local taxation of improvements undermine Federal and tribal regulation of improvements." *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. at 72,449, 72,448.

B. The Tribe Relies on Revenue from Non-Indian Lessees.

For decades, the Tribe has developed and maintained collaborative relationships with non-Indian lessees operating on the Tribe's lands. Those relationships are the cornerstone of the Tribe's pursuit of self-determination and self-governance through economic development. The Arizona courts' decisions will not only undermine those existing partnerships, including the Tribe's and South Point's, but it will stifle the Tribe's ability to develop new ones. These inevitable consequences will erode the Tribe's capacity to provide crucial government services to its citizens and will appropriate the Tribe's sovereign authority to make meaningful choices about the uses to which its lands are put.

The Tribe and its members have inhabited and exercised sovereignty over the lands comprising the Fort Mojave Reservation since time immemorial. The

United States established a military base on these lands in 1858 prior to President Grant proclaiming the Reservation as a military reservation on March 30, 1870, and the U.S. Department of War declaring its boundaries on August 4, 1870. *See* U.S. Comm'r of Indian Affs., *Sixty-First Annual Report of the Commissioner of Indian Affairs*, at 879 (1892); John C. Kelton, Assistant Adjutant Gen., Headquarters, Mil. Div. of the Pac., U.S. Dep't of War, General Orders No. 19 (Aug. 4, 1870). President Harrison issued an Executive Order on September 19, 1880, causing the Department of War to transfer superintendence over the Reservation to Interior to facilitate the establishment of an Indian boarding school. *See* Exec. Order of Sept. 19, 1880, *reprinted in* U.S. Dep't of the Interior, Executive Orders Relating to Indian Reservations: May 14, 1855 to July 1, 1912 ("Executive Orders"), at 12–13 (1912). President Taft subsequently expanded the Reservation through Executive Orders on December 1, 1910, and February 2, 1911. *See* Exec. Order of Dec. 19, 1910, *reprinted in* Executive Orders at 13; Exec. Order of Feb. 2, 1911, *reprinted in* Executive Orders at 13–14; *see Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 420 n.1 (1991).

The Reservation today comprises more than 34,000 acres located at the tripoint of the States of Arizona, California, and Nevada. The Reservation relies heavily on water from the adjacent Colorado River. *See* Ten Tribes P'ship, Bureau of Reclamation, U.S. Dep't of the Interior, *Colorado River Basin Ten Tribes Partnership Tribal Water Study*, fig. 5.6-2 (2018), https://tent

ribespartnership.org/wp-content/uploads/2019/12/WaterStudy.pdf.

The Tribe adopted a constitution pursuant to the IRA on March 16, 1957, which Interior approved on May 6, 1957. *See generally Fort Mojave Indian Tribe Const.*, https://nptao.arizona.edu/sites/default/files/constitution_and_bylaws_fort_mojave_0.pdf. Recognizing the reality that "[w]ater" in the Colorado River "has long been scarce, and the problem is getting worse," *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023), the Tribe in the twentieth century launched "a plan for the economic development of the[] [R]eservation" that relies on "leases with non-Indian lessees." *Fort Mojave Tribe v. San Bernadino Cnty.*, 543 F.2d 1253, 1255 (9th Cir. 1976).

The Tribe quickly developed a "need for increased energy supplies" as "a direct result of [its] aggressive and successful economic development projects." ERCC Analytics LLC, *Fort Mojave Renewable Energy Feasibility Final Report*, at 5 (2016), https://www.energy.gov/sites/default/files/2016/02/f30/fortmojave03final.pdf. Accordingly, the Tribe entered into the lease at issue in this litigation with the predecessor of South Point in 1999. Pet. App. 23a. The lease provided 320 acres of undeveloped reservation land set aside by the Executive Orders located within the State of Arizona to the predecessor to construct and operate an electric power plant. Pet. App. 23a–24a.

The plant would require significant amounts of water to operate, but the Tribe "has perfected water rights to Colorado River water in quantities adequate to meet the estimated 4,000 acre feet per year consumptive use

requirements of the proposed power plant." Dep't of Interior, *Final Environmental Impact Statement: Southpoint Power Plant* ("FEIS"), S-5 (Jan. 1999), https://www.energy.gov/sites/prod/files/2015/04/f22/EIS-0308-FEIS.pdf. This Court had previously affirmed those rights on the heels of extensive litigation and consistent with the purposes of the Reservation as embodied in the Executive Orders establishing it. *See Arizona v. California*, 373 U.S. 546, 600–01 (1963).

Pursuant to the regulations, the Secretary of the Interior reviewed and approved BIA Lease No. B-1778-FM on August 19, 1999. Pet. App. 83a. As part of that process, the BIA prepared a comprehensive Environmental Impact Statement ("EIS") consistent with the directives of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, which requires such statements for any major federal action, that is, "an action that … is subject to substantial Federal control and responsibility." 42 U.S.C. § 4336e(10)(A); *see also* 40 C.F.R. § 1508.1(w). In the EIS, the BIA emphasized that "Congress has not delegated any authority to state or local jurisdictions which would apply to the proposed [Facility]." FEIS at 3.

While the Tribe indisputably has authority to assess tribal taxes against South Point in relation to the Facility, *see, e.g.*, 25 C.F.R. § 162.017(a), it frequently allows non-Indian lessees to make lump-sum payments in lieu of annually assessed taxes. Pet. App. 134a–135a. In accordance with that sovereign prerogative, the Tribe and South Point agreed that South Point would pay the Tribe $2 million per year. Pet. App. 86a, 152a. The parties made this and several other modifications to

the lease, *see* Pet. App. 83a–89a, each of which required review by and the approval of the BIA, *see* 25 C.F.R. § 162.445(c). Additionally, the Tribe must regulate South Point's emergency preparedness and particular emissions consistent with various federal environmental statutes. *See* Pet. App. 102a–104a.

South Point was also required to comply with applicable tribal laws, which necessitated that South Point acquire water use permits, building permits, certificates of occupancy, and make associated payments. *E.g.*, Pet. App. 87a, 119a. Pursuant to the terms of the lease, South Point and the Tribe also entered into an agreement requiring South Point to adhere to tribal employment preferences at the Facility. *E.g.*, Pet. App. 109a.

Reciprocally, the Tribe provides the Facility and South Point with the full panoply of government services, including law enforcement, sewer, telephone, internet, and back-up power. *E.g.*, Pet. App. 81a–82a, 128a–131a, 148a. The Tribe also facilitates fire and emergency-response services through an agreement between the Tribe and the Mohave Valley Fire Department. *E.g.*, Pet. App. 126a–127a.

This Tribe's partnership with South Point has benefitted the Tribe tremendously. The lump sum payments enabled the Tribe to eliminate by its debt by 2017. Pet. App. 133a, 201a. The Tribe had incurred that debt through costs of tribal government operations and services to tribal members, as well as the development of physical and institutional infrastructure. The debt elimination thus enabled the Tribe to accord greater focus on the needs of the community. To take just one

example, the Tribe successfully constructed and now operates a 2.3 megawatt solar field that generates hundreds of thousands of dollars in clean energy on an annual basis and promotes the Tribe's self-sufficiency in meeting energy needs across the Reservation. *See generally* Aha Macav Power Serv., *Fort Mojave Indian Tribe AhA Macav Power Service Renewable Energy Project Final Report* (2022), https://www.energy.gov/sites/default/files/2022-04/04-12-2022-final-report-fort-mojave-aha-macav.pdf. This example is just one of many within a single industry; the Tribe has achieved and is actively pursuing development in at least ten other industries, including agriculture, telecommunications, education, healthcare, and housing, to name a few. These efforts have created unprecedented economic opportunity within Mohave County and have enabled numerous tribal members living off-Reservation to return home and participate fully in and contribute effectively to the tribal community. The lease has thus proven instrumental in the Tribe's pursuit of meaningful self-determination through effective self-governance, just as Congress intended when it enacted the IRA.

Conversely, the Arizona courts' decisions have negated the benefits to South Point, which paid more than $20 million to Arizona as a result of the ad valorem taxes at issue. By increasing costs and diminishing benefits in mandating compliance with a state taxation scheme in addition to the tribal and federal regulatory regimes with which those lessees must already comply, Arizona effectively punishes those who choose to do business with the Tribe on tribal lands. It also punishes

the Tribe, which is already required to leverage its own resources to create strategic opportunities to pursue economic development through participation in industry across numerous state and local jurisdictions.

Arizona's ability to impose these disincentives is incompatible with foundational principles of tribal sovereignty and federal Indian law. And it is inconsistent with the federal government's comprehensive statutory and regulatory landscape governing leasing on Indian lands, including the IRA.

C. The Arizona Supreme Court Erred in Its Express Preemption Analysis.

The Arizona Supreme Court fundamentally misinterpreted the IRA in holding that 25 U.S.C. § 5108 does not expressly preempt Arizona's taxation authority over South Point's on-Reservation conduct as a non-Indian lessee. That conclusion is antithetical to IRA's plain text, to this Court's jurisprudence, to basic principles of tribal sovereignty, and to the precepts of property law that underpin the tribal land leasing framework. It further creates a demonstrable split that subjects the Tribe not only to inconsistent state and federal court jurisprudence, but also to the potentially divergent taxation schemes of three different states.

Beginning with the text, Section 5108 provides that "lands or rights" held in trust by the federal government for Indian tribes "shall be exempt from State and local taxation." The IRA thus frames the exemption in terms of the lands or rights themselves, not the identity of the entity occupying the lands or exercising those rights. And it is beyond dispute that "all [R]eservation land is

held in trust for the Fort Mojave Tribe" by the federal government. *Fort Mojave Tribe*, 543 F.2d at 1255. Because the IRA exempts that Reservation land and the Tribe's rights therein from State taxation, and because South Point is exercising those rights in that land pursuant to the lease, Arizona cannot levy a tax against South Point based on the value of those leased lands, full stop. That conclusion accords with Congress' "intent and purpose" in enacting the IRA, which "was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, at 6 (1934)).

That text also reflects this Court's recognition that uses of land that are "so intimately connected with use of the land itself," such as the "use of permanent improvements," require that "relieving the [land] of state tax burdens must be construed to encompass an exemption for the [uses]." *Id.* at 158–59. For this reason, this Court has emphasized that improvements "would certainly be immune from [a] [s]tate's ad valorem property tax" because "[i]t has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and … a tax upon 'use' is a tax upon the property itself." *Id.* at 158 (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937)). And consistent with that recognition, this Court has acknowledged that states cannot assess ad valorem taxes on tribal lands where those lands are held in trust by the federal government. *See Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110–11,

114–15 (1998). These cases confirm the IRA's text's focus on the lands and rights themselves rather than on the identity of the entity occupying and exercising them.

The IRA's language and this Court's cases further reflect that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management" that "derives not from its power to exclude, but from its power to govern." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138, 144 (1982); *see Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (emphasizing that tribal sovereignty "centers on the land held by the tribe"). Indeed, Chief Justice Marshall recognized long ago that the power "to tax, without limit or control, is essentially a power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 391 (1819).

For this reason, "[e]very tax is in some measure regulatory," and taxes often seek "to influence private conduct." *CIC Servs., LLC v. IRS*, 593 U.S. 209, 224 (2021) (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567 (2012). Scholars have shared this understanding for decades, recognizing 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). As a result, "the [T]ribe's practical ability to tax the non-Indian [lessee] is inversely related to the [S]tate'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); *see Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. at 72,448.

This inverse relationship illustrates the manner in which Arizona's taxation of South Point supplants the Tribe's regulatory choices. But "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (quoting *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980)); *see also Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) ("'[V]irtually all authority over Indian commerce and Indian tribes' lies with the Federal Government." (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996))); *see also In re Kansas Indians*, 72 U.S. 737, 757 (1866). Beyond its inconsistency with the text of the IRA, Arizona's tax thus defies centuries of this Court's jurisprudence.

The IRA's text further accords with principles of property law. This Court has characterized a lease as representing "a present vested right—'a freehold interest'—in the premises" that would otherwise belong to the lessor. *Guffey v. Smith*, 237 U.S. 101, 113 (1915). Consistent with that characterization, the Arizona Supreme Court has described "a lease as a conveyance" of property. *Found. Dev. Corp. v. Loehmann's, Inc.*, 788 P.2d 1189, 1193 (Ariz. 1990). It thus necessarily and unequivocally follows that South Point is exercising the Tribe's rights in the leased lands, and it is beyond dispute that Arizona cannot levy a tax predicated on the exercise of tribal rights on tribal lands. South Point's tribal water use permit, which South Point purchased

from the Tribe in order to exercise the Tribe's water rights in the Colorado River to support the Facility's operation, only bolsters this conclusion.

Altogether, these legal principles illustrate the myriad reasons why the IRA preempts Arizona's tax. The Arizona Supreme Court's contrary conclusion rests principally on its attempt to distinguish improvements owned by tribes and those owned by non-Indians. *See* Pet. App. 39a. But, as illustrated above, this is a distinction without a difference—the IRA speaks to "lands or rights," not to the identity of the entity occupying or exercising them. In addition to ignoring that text and the related principles of federal Indian law and property law, the Arizona Supreme Court's interpretation creates a clear split of authority between the Arizona Supreme Court, on the one hand, and the Ninth and the Eleventh Circuits, on the other.

The Ninth Circuit has expressly held that preemption under 25 U.S.C. § 5108 applies "without regard to the ownership of the improvements." *Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1159 (9th Cir. 2013). And the Eleventh Circuit has held that the IRA "barred Florida from assessing its Rental Tax against the non-Indian lessees of the Tribe's reservation land." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1329 (11th Cir. 2015). The split between the Arizona Supreme Court and the Ninth Circuit is especially poignant, as the Tribe's Reservation is within both jurisdictions, thereby subjecting the Tribe to inconsistent legal rules resulting from divergent interpretations of the same statute. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A

principal purpose for which we use our certiorari jurisdiction, … is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Moreover, the Tribe's Reservation is located in three States. Under the Arizona Supreme Court's interpretation, the Tribe would be required to familiarize itself with three potentially divergent sets of State tax law and further orient its economic development strategies accordingly. These added complexities both exacerbate the "serious jurisdiction[al] and management problems" inherent in the Tribe's Reservation, Harold Shepherd, *Conflict Comes to Roost[:] The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 Envtl. L. 901, 906 (2001), and further interferes with the IRA's "design[] to encourage tribal enterprises 'to enter the white world on a footing of equal competition.'" *Mescalero Apache Tribe*, 411 U.S. at 157 (quoting 78 Cong. Rec. 11,732).

Simply put, Arizona's tax intolerably appropriates tribal regulatory authority and cannot be squared with the IRA or the legal landscape in which it operates. The Court should grant the petition to reaffirm the axiom that "the 'power to tax is *not* the power to destroy *while this Court sits*.'" *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 573 (emphases added) (quoting *Okla. Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364 (1949)).

II. The Arizona Court of Appeals Misapplied *Bracker*.

On remand from the Arizona Supreme Court, the Arizona Court of Appeals rejected South Point's alternative preemption argument based on *Bracker*. In holding that Arizona's interests outweighed those of the Tribe and the federal government, the Arizona Court of Appeals turned *Bracker* on its head. This Court's review is warranted to correct the Court of Appeals' fundamental misinterpretation of this Court's core precedent.

The Court of Appeals opened by erroneously stating "that Congress does not intend to pre-empt areas of traditional state regulation, and … the State retains its historic power to regulate." Pet. App. 16a (internal quotation marks and citation omitted). But this Court has directed that "questions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.'" *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (quoting *Bracker*, 448 U.S. at 145). By proceeding from a faulty premise, the Court of Appeals further ignored *Bracker*'s command—consistent with the principles discussed above—that "[a]mbiguities" in this context are "construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 143–44.

Next, the Court of Appeals improperly relied on the fact that "South Point is the actual taxpayer and bears the tax's legal incidence." Pet. App. 18a. This Court has

repeatedly "decline[d] to allow the State to impose additional burdens on … significant federal interest[s] in fostering" tribal development, "even if those burdens are imposed indirectly through a tax on a non-Indian … for work done on the reservation." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 844 n.8 (1982); *see Bracker*, 448 U.S. at 151 (emphasizing that "the economic burden of the asserted taxes will ultimately fall on the Tribe"). The Court of Appeals paid no mind to the practical effects of the State's tax on the Tribe's ability to meaningfully regulate and derive revenues from its land, as also discussed above.

Beyond these threshold errors, the Arizona Court of Appeals disregarded this Court's directives by endorsing the State's justifications for imposing the tax, which "amount[] to nothing more than a general desire to increase revenues." *Ramah*, 458 U.S. at 845. Instead, the Court of Appeals emphasized that the tax "supports the local school districts," "helps Mohave County maintain roads," and "supports numerous other state and County services," only "some of which aid the [R]eservation." Pet. App. 20a. It is difficult to imagine a more generalized interest.

On the other side of the equation, the Arizona Court of Appeals grossly underestimated the strength of the federal interests at stake. Although it mentioned the BIA's regulations, Pet. App. 15a, the Court of Appeals failed to consider the "clearly expressed federal interest" reflected in those extensive regulations, let alone the federal interests encapsulated by the comprehensive statutory framework authorizing their promulgation.

Ramah, 458 U.S. at 842. But this Court has understood *Bracker* to require that "[r]elevant federal statutes … must be examined," especially "in light of 'the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.'" *Id.* at 838 (quoting *Bracker*, 448 U.S. at 144–45); *see Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999) (emphasizing "the special federal interest in protecting the welfare of Native Americans").

Bracker itself, for example, discerned "a firm federal policy of promoting tribal self-sufficiency and economic development" not only from the IRA, but also from the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, and its stated purpose "to help develop and utilize … resources … to a point where Indians will fully exercise responsibility for the management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 448 U.S. at 143 & n.10 (quoting 25 U.S.C. § 1451). The Court of Appeals here did not consider the IRA, the Indian Financing Act, or any statute for that matter. But these and other statutes like the ILCA and the 1955 Leasing Statute bespeak a paramount federal interest in promoting tribal self-determination by facilitating tribal economic development through tribal land use.

Indeed, the predecessor to the 1955 Leasing Statute was first enacted in 1891, *see* Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795, and amended several times between 1891 and 1910, *see* Chambers & Price, *supra*, at

1073. And, as discussed above, Interior has maintained regulations pursuant to that statutory authority since 1904. Congress thus situated the 1934 IRA within a substantial, preexisting federal framework governing tribal land leasing, which illustrates the continuity of this paramount federal interest for more than a century.

Beyond eliding the strength of the federal government's interests, the Court of Appeals outright ignored the Tribe's. This Court has emphasized that tribal interests "in raising revenues for essential government programs" are "strongest when 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." *Colville*, 447 U.S. at 156–57. Conversely, the state taxation interests are "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 157. The Court of Appeals acknowledged that "South Point demands few direct services from the state or Mohave County," Pet. App. 19a, yet prioritized to Arizona's interests regardless. And the Court of Appeals entirely failed to consider the extensive government services provided by the Tribe to South Point or the demonstrable and various benefits that the Tribe's development efforts provide to Mohave County at large.

The Court of Appeals further overlooked that tribal "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987). But if states remain able to assess taxes on non-Indian lessees like South Point, and "if Tribes

were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 811 (2014) (Sotomayor, J., concurring). The very prospect of double taxation would cause "[m]any businesses" to "find it easier to avoid doing business on … reservations" altogether. *Id.* (quoting *Enterprise Zones: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong. 234 (1991) (statement of Peterson Zah, President of the Navajo Nation)).

This reality puts the Tribe—and all federally recognized Indian tribes—to an impossible choice. The Tribe can either reduce or eliminate the revenue that non-Indian lease activities on Reservation lands would otherwise generate, or they can forego leasing their lands altogether. Either outcome is irreconcilable with the Tribe's pursuit of meaningful self-determination through effective self-governance, and with the extensive federal statutory and regulatory schemes expressly designed to promote these ends.

At bottom, this case is on all fours with *Bracker*: "[T]he Federal Government has undertaken comprehensive regulation of the [Tribe's leasing activities], … a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and … respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue[.]" 448 U.S. at 151. There, as here, the "exercise of state authority is impermissible" because it is flatly incompatible with basic notions of tribal

sovereignty. *Id.* And even if the legal incidence of the State's tax falls on South Point, it cannot seriously be disputed that "the economic burden … will ultimately fall on the Tribe." *Id.* Proper balancing of the relevant sovereign interests compels the conclusion that Arizona's tax is impliedly preempted, and only Supreme Court review can correct the course.

CONCLUSION

For the above reasons, *amici curiae* respectfully urge this Court to grant the petition and reverse the decisions of the Arizona courts, to hold that the IRA expressly preempts the State's tax, and to recognize that the tax is impliedly preempted in view of the strong tribal and federal interests at stake.

Respectfully submitted,

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