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 A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

REPLY BRIEF OF PETITIONER

BENNETT EVAN COOPER
VAIL C. CLOAR
DICKINSON WRIGHT PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, AZ 85004
(602) 285-5000

PATRICK DERDENGER
KAREN M. LOWELL
WOMBLE BOND DICKINSON (US) LLP
201 E. Washington Street, #1200
Phoenix, AZ 85004
(602) 262-5311

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ROHIT P. ASIRVATHAM
R. SHANE ROBERTS, JR.
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Attorneys for Petitioner South Point Energy Center, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes and Regulations:

Other Authority:

In the Supreme Court of the United States

No. 24-952

SOUTH POINT ENERGY CENTER, LLC,
PETITIONER,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

REPLY BRIEF OF PETITIONER

The conflict on express preemption is crystal clear. The Arizona Supreme Court held that 25 U.S.C. § 5108 does not expressly preempt Arizona's tax on South Point's Facility because South Point "is a non-Indian." Pet.App.42a. Yet non-Indian ownership is irrelevant in the Ninth and Eleventh Circuits. In those circuits, § 5108 would expressly preempt this tax.

The resulting state-federal split within the Ninth Circuit is intolerable. The decision below created a Janus-like preemption rule that lingers over the 22 federally recognized tribes with land in Arizona, making it difficult for tribes to attract and retain non-Indian business partners. Arizona's answer to all this is that the Ninth Circuit did not mean what it said, and that Arizona's sister States that

have taken the Ninth Circuit's ruling at face value are wrong. When the response to a certiorari petition is that everyone else is wrong, the case for this Court's review is clear.

The unrebutted significance of the decisions below independently calls out for this Court's review. The Fort Mojave Indian Tribe considers non-Indian lessees like South Point the "cornerstone" of its plan for "economic development." Tribes' Amicus Br. 7. The decisions below threaten to "undermine" these partnerships, "erode the Tribe's capacity to provide crucial government services to its citizens," and "appropriate the Tribe's sovereign authority to make meaningful choices about the uses to which its lands are put." *Id.* Arizona disputes none of this.

On the merits of express preemption, Arizona defends the decision below by citing *implied* preemption cases. The cited cases do not analyze § 5108 or express preemption more generally. Arizona does not grapple with the statutory text, and it all but concedes that its interpretation of § 5108 conflicts with the BIA's. That conflict too warrants review.

Arizona's defense of the Arizona Court of Appeals' implied preemption decision doubles down on the decision's flaws. Arizona improperly demands a hyper-specific connection between a state tax and a federal interest, in conflict with the approach of federal courts of appeals. Arizona's argument that the Tribe does not bear the tax's economic burden blinks reality, as evidenced by the Tribe's account of the matter. And this Court's precedent prohibits Arizona's attempt to justify the tax by pointing to its general interest in revenue.

The Court should grant review.

I. The Arizona Supreme Court's Express Preemption Holding Demands Review

A. The Decision Below Creates an Intolerable Split

The outcome of this case would have been different in federal court.

1. The Ninth Circuit has held that § 5108 "preempts state and local taxes on permanent improvements built on" trust land "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). The Arizona Supreme Court held the opposite below—that § 5108 "does not preempt a state or locality from taxing [permanent] improvements" on trust land when the "lessee is a non-Indian." Pet.App.42a.

Arizona (at 17-18) paints the Ninth Circuit's clear rule as loose language. But no mistake occurred. The Ninth Circuit rejected the district court's *legal* conclusion that § 5108 was inapplicable because a non-Indian entity owned the Great Wolf Lodge. *See* Pet. 14-15. Rather than resolve the appeal by characterizing the Great Wolf Lodge as tribe-owned, the Ninth Circuit took the "purely legal question" head on and reasoned that § 5108 turns on *where* the improvement sits, not *who owns* the improvement. *See* Pet. 15; *Chehalis*, 724 F.3d at 1155, 1157.

The Ninth Circuit did not focus its analysis on the particular ownership or control structure of the Lodge. *Contra* BIO 17-18. Instead, the court went out of its way to clarify that the county could not "tax the Great Wolf Lodge *or other permanent improvements* on that land." *Chehalis*, 724 F.3d at 1157 (emphasis added). Arizona ignores this part of *Chehalis*. And the Ninth Circuit concluded that its rule came straight from § 5108's text, explaining that the BIA's regulation—which exempts

"permanent improvements" from state taxes, "without regard to ownership of those improvements," 25 C.F.R. § 162.017(a)—"confirms" what § 5108 "already conveys." 724 F.3d at 1157 n.6 (citation omitted).

Arizona does not dispute that the Eleventh Circuit, the Nevada Department of Taxation, and the Washington State Department of Revenue have read *Chehalis* to mean what it said. *See* Pet. 15-16. And Oregon's legislature plainly has too.[1] *Contra* BIO 19. Arizona's interpretation of *Chehalis* is the outlier.

2. This case would have come out differently in the Eleventh Circuit too. *See* Pet. 16 (citing *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015)). Arizona (at 18-19) points out that *Stranburg* involved a rental tax, rather than a tax on a permanent improvement. But the Eleventh Circuit held that § 5108 preempted the rental tax on non-Indians *because* § 5108 would preempt such a tax on permanent improvements. *See* Pet. 16. Like the Ninth Circuit, the Eleventh Circuit concluded that § 5108's preemption provision "attaches to the [trust] land and the rights in that land," rather than turning on ownership or the taxpayer's identity. 799 F.3d at 1331 n.8.

B. The Express Preemption Question Is Important and Squarely Presented

1. Arizona does not deny the colossal import of the express preemption question. For good reason: the tax status of non-Indian-owned permanent improvements to

---

[1] *See, e.g.,* Statement of Howard Arnett, Oregon Senate Committee on Finance & Revenue (Apr. 28, 2015), https://olis.oregonlegislature.gov/liz/2015R1/Downloads/CommitteeMeetingDocument/68957 (the bill is "based on a recent United States Ninth Circuit Court of Appeals ruling").

tribal trust lands is critical to tribal economic well-being and self-governance. *See* Pet. 17-20.

Take the Tribe's word for it. In an amicus brief joined by seven tribes and tribal coalitions, the Tribe explains that its plan for "economic development" turns on "leases with non-Indian lessees." Tribes' Br. 9 (citation omitted). Leasing trust land to non-Indians brings the Tribe essential capital that it reinvests in "the community." *Id.* at 11. The result has been "unprecedented economic opportunity" for the Tribe that has "enabled numerous tribal members living off-Reservation to return home." *Id.* at 12.

The decisions below upend this progress. By authorizing Arizona's tax, the decisions "increas[e] the costs and diminish[] the benefits" of doing business with the Tribe on *its* trust land. *Id.* Arizona's tax "punishes the Tribe" and "those who choose to do business with the Tribe on tribal lands." *Id.* at 12-13. The tax also "erode[s] the Tribe's capacity to provide crucial government services to its citizens," and undercuts "the Tribe's sovereign authority to make meaningful choices about the uses to which its lands are put." *Id.* at 7.

To make matters worse, the split on express preemption chills partnerships between Arizona tribes and non-Indian businesses. Dueling express preemption rules loom over Arizona's tribes. In federal court, § 5108 "preempts state and local taxes on permanent improvements built on" trust land, "without regard to the ownership of the improvements." *Chehalis*, 724 F.3d at 1159. In state court, § 5108 "does not preempt a state or locality from taxing the improvements" when the "lessee is a non-Indian." Pet.App.42a. Tribes and their business partners deserve better than a "which-court-will-we-get roulette" that "chill[s] … investment." Pet. 18 (citation omitted).

Arizona has no response at all to the petition's explanation of the significance of the questions presented. And Arizona entirely ignores the Tribes' brief. The undisputed importance of the decisions below alone demands review.

2. That leaves Arizona's vehicle argument. Arizona (at 3) asserts that "a question exists" about whether § 5108 applies to "the land underneath the improvements." But Arizona long ago waived any such argument. And, in any event, the argument fails on the merits: § 5108 unquestionably applies to the leased land.

Arizona waived any argument that § 5108 is inapplicable. Arizona expressly conceded in the Tax Court that (1) the Tribe "is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5144," (2) "[t]he U.S. Secretary of the Interior hold[s] title to all of the Reservation's land in trust for the benefit of the Tribe," and (3) the Facility is "located on the Fort Mojave Indian Reservation." Pet.App.143a-145a.

Given these concessions, it is little wonder that Arizona did not dispute in the Tax Court that § 5108 applies. Nor did it dispute in the Arizona Court of Appeals that § 5108 applies. The Court of Appeals ruled for South Point on express preemption without addressing this argument *because Arizona did not make it*. *See* Pet.App.44a-57a. Arizona first raised this argument in the Arizona Supreme Court, nearly a decade into the litigation. Pet.App.43a. This is why "the courts below did not reach" Arizona's waived argument. BIO 21; *see Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 869 n.9 (Ariz. 1995) ("We do not ordinarily consider issues not raised in the trial court or court of appeals.").

The question presented squarely determined the outcome in the Arizona Supreme Court, Pet.App.42a-43a, and merits this Court's review. The viability of Arizona's waived argument would, at most, be an issue for remand.

In any event, the argument fails on the merits. Arizona concedes that the land under the Facility is "land [held] in trust for the benefit of the Tribe" by the Secretary of the Interior. Pet.App.145a; *see also* Tribes' Br. 7-8. Even if the Secretary acquired title to that land before § 5108's enactment in 1934, this Court has construed § 5108—at the Solicitor General's suggestion—not to require "the United States … to convey title to itself" to trigger the preemption provision. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155 n.11 (1973). Arizona acknowledges this reality. BIO 20 n.2.

C. The Decision Below Incorrectly Interprets § 5108

The decision below is wrong: Section 5108 provides that trust "lands or rights shall be exempt from State or local taxation." The statutory text does not distinguish between Indians and non-Indians. Pet. 20-22. And this Court has held that taxes on permanent improvements to trust land are taxes on the land. *Mescalero*, 411 U.S. at 158. Accordingly, States cannot tax permanent improvements on trust land, regardless of who owns the permanent improvement. Pet. 20-22.

That makes sense, because, as the BIA has recognized, "a property tax on … permanent improvements burdens the land." 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2012). The BIA has thus construed § 5108 to mean that "permanent improvements on the leased land, *without regard to the ownership of those improvements*, are not subject to" State or local taxation. 25 C.F.R. § 162.017(a) (emphasis added). Arizona (at 14) implausibly claims that

the BIA's regulation says the opposite of its plain text because it contains the qualifier "[s]ubject only to applicable federal law." Arizona theorizes that "[a]pplicable federal law includes" this Court's decision in *Bracker* and § 5108 itself. But *Bracker* addressed implied preemption. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980). And § 5108's broad tax exemption for trust "lands or rights" displays no preference for Indian ownership. Pet. 20.

Arizona (at 12-13) next argues that *Mescalero* and this Court's pre-§ 5108 decision in *Rickert* "focused on the 'use' of the permanent improvements." Not so. *Mescalero* discussed "use" because the Court was analyzing a "compensating use tax on the property." 411 U.S. at 158. The Court analogized the compensating use tax to an ad valorem property tax, explaining that "permanent improvements … would certainly be immune from [an] ad valorem property tax." *Id.* Nor did *Rickert* turn on use: the Court held that permanent improvements could not be taxed because they are "essentially a part of the lands" and "could no more be sold for local taxes than could the land to which they belonged." *United States v. Rickert*, 188 U.S. 432, 442 (1903).

In any event, tribes *use* the land underlying non-Indian-owned permanent improvements by leasing, taxing, and regulating it. *See* Pet. 22. The Fort Mojave Indian Tribe, for example, "relies largely on revenues from leases with non-Indians to support its pursuit of meaningful self-determination." Tribes' Br. 1.

Arizona (at *i,* 1, 3, 4, 13, 15) asserts that this Court's cases establish a "tradition of permitting state or local taxation of non-Indian-owned property on Indian land." But none of those cases involved express preemption, let alone express preemption of taxes on trust land and affixed permanent improvements. Arizona provides no

reason to import implied preemption precedent into § 5108's express preemption provision. *See Mescalero*, 411 U.S. at 150-57 (distinguishing express from implied preemption). Take them one by one:

- *Utah & N. Ry. Co. v. Fischer*, 116 U.S. 28, 32 (1885) (cited at 3-4), concerned taxation of a railroad on land that was "withdrawn from the reservation."
- *Thomas v. Gay*, 169 U.S. 264, 274 (1898) (cited at 4), concerned implied preemption of a tax on personal property (cattle), and distinguished between "a tax on the cattle" and "a tax on the lands."
- *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1, 3 (1937) (cited at 4), concerned state taxation of property of an entity claiming to be a federal instrumentality.
- *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 365-67 (1949) (cited at 4, 13, 15), concerned implied preemption of state production and excise taxes on petroleum.
- *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980) (cited throughout), applied an interest-balancing implied preemption test to a motor carrier license tax and fuel tax.
- *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989) (cited at *i*, 3, 6, 27), concerned implied preemption of taxation of "oil production" activity, not land or permanent improvements.
- *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (cited at 15), concerned implied preemption of a motor fuels excise tax and income tax.

- *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (cited at 1, 15), concerned implied preemption of a state motor fuel tax.

Arizona provides no logical reason why § 5108 should treat Indian-owned and non-Indian-owned permanent improvements to trust land differently given that the *United States* owns the underlying land. Arizona (at *i*) concedes that § 5108 provides "express tax immunity … to Indians and Indian tribes." But if taxes on Indian-owned permanent improvements tax the United States' underlying trust land, then so too do taxes on non-Indian-owned permanent improvements. The decision below is wrong.

II. The Implied Preemption Question Also Merits Review

The implied preemption analysis "call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. The Arizona Court of Appeals deemed the federal government's interest immaterial, ignored the Tribe's interest, and elevated Arizona's general interest in revenue above all else. That methodology departs from this Court's precedents and other authority. Arizona has no convincing counter. This Court should grant review on both questions presented to give itself the broadest set of grounds to resolve this case.

1. Arizona (at 23) elides the conflict over the specificity required for a federal interest. The Court of Appeals categorically discounted the "pervasiveness of federal regulation of tribal leases … because no aspect of the lease" itself "is subject to tax." Pet.App.17a. The court thought only a hyper-specific federal interest in regulating "power plants on reservations" would suffice. Pet.App.17a. By demanding that the federal scheme directly regulate the object of a State's tax, the Court of Appeals aligned itself with the California Court of Appeal,

in conflict with the Eighth and Eleventh Circuits. Pet. 23-24.

Arizona declares that "the relevant question is … whether the regulations are pervasive with respect to the *subject of the tax*." BIO 23 (emphasis added). But in *Ramah*, this Court credited the federal "regulatory scheme governing … autonomous Indian educational facilities," even though that scheme did "not regulate school construction, which [was] the activity taxed." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 841 & n.5 (1982) (citation omitted). And in *Bracker*, this Court "struck down Arizona's use fuel tax and motor carrier license tax" because of the "comprehensive regulation of the harvesting and sale of tribal timber," "not because of any federal interest in gasoline, licenses, or highways." *Id.* at 841 n.5; *see also Bracker*, 448 U.S. at 151.

The Court of Appeals thus should have credited the federal government's "extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Stranburg*, 799 F.3d at 1341. In the Eighth Circuit, that the "Federal Government has blessed the Tribe's venture" would have indicated a "strong[]" federal interest. Pet. 24 (citing *HCI Distrib., Inc. v. Peterson*, 110 F.4th 1062, 1069 (8th Cir. 2024)).

2. As for the tribal interest, Arizona does not defend the Court of Appeals' erroneous "legal incidence" reasoning. Pet.App.18a; *see* Pet. 26; *Ramah*, 458 U.S. at 844 & n.8. Arizona (at 25) belittles the Tribe's interests, claiming "[t]he Tribe does not bear the Tax's economic burden." That assertion contradicts reality. The Tribe says that Arizona's tax portends "double taxation [that] discourage[s] economic growth." Tribes' Br. 22-23 (citation omitted); *see also* Pet. 19-20. To be sure, the Tribe brokered a tribal-tax arrangement with South Point, *see*

Pet. 9, but the Tribe should not have to arrange its taxes around the State's tax, period. Any interference with the Tribe's "power to tax" is an affront to its sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

3. Finally, with respect to the state interest, Arizona (at 29) claims that "the record here demonstrates more than just a generalized interest in raising revenue." But read the very next sentence: "The record shows that the Tax supports numerous services benefitting all County residents, including South Point, its employees, and the tribe." BIO 29. That is a "general desire to increase revenues." *Ramah*, 458 U.S. at 845. Arizona does not argue that its tax-funded services are "related to" South Point's Facility, *id.* at 845 n.10, leaving the decision below in conflict with the Eighth and Eleventh Circuits. Pet. 25-26.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BENNETT EVAN COOPER
VAIL C. CLOAR
DICKINSON WRIGHT PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, AZ 85004
(602) 285-5000

PATRICK DERDENGER
KAREN M. LOWELL
WOMBLE BOND DICKINSON (US) LLP
201 E. Washington Street, #1200
Phoenix, AZ 85004
(602) 262-5311

LISA S. BLATT
Counsel of Record
AMY MASON SAHARIA
ROHIT P. ASIRVATHAM
R. SHANE ROBERTS, JR.
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Attorneys for Petitioner South Point Energy Center, LLC

JUNE 10, 2025