12-1727-CV

12-1735-CV (CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MASHANTUCKET PEQUOT TRIBE,
***Plaintiff-Appellee*,**
v.
Town of Ledyard; Paul Hopkins, Tax Assessor, Town of Ledyard; Joan Carroll, Tax Collector, Town of Ledyard,
***Defendants-Appellants*,**
State of Connecticut,
***Intervenor-Defendant-Appellant*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF INTERVENOR-DEFENDANT-APPELLANT THE STATE OF CONNECTICUT WITH APPENDIX

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INTRODUCTION

The Tribe asks this Court to hold that the Tribe has the right to contract with non-Indians to require them to violate Connecticut law to hide *prima facie* taxable property and, when that fails because the non-Indians violate the contracts by mistake, to invoke a limited tribal exception to use the federal courts to challenge a state tax the Tribe has not paid and likely would never have to pay.

This Court should not grant the Tribe that right. Instead, it should police the boundaries between state and tribal sovereignty and order this state tax dispute back to the Connecticut's courts, where it should have been from the beginning.

Even if this Court could properly exercise jurisdiction, the Tribe's claim should fail. As the Tribe's Complaints show, the Indian Trader statutes do not apply here. The IGRA governs tribal gaming, but does not grant the Tribe and its business partners immunity from all state taxes that have some theoretical impact on their profits. Rather, the IGRA gives the State a major regulatory role under the Gaming Procedures without impacting state laws, like the tax at issue, that do not interfere with the Tribe's governance of its gaming operation.

The district court gave the Tribe's sovereignty talismanic effect while effectively disregarding the State's. The result was years of improper federal intrusion into the State's tax system that culminated in a grossly overbroad ruling contrary to both the law and principles of judicial restraint. This Court should reverse the district court's judgment or, at the very least, limit it to the issues that are necessary to the outcome of this case. *See, e.g.*, *United States v. Schultz*, 333 F.3d 393, 407 & n.8 (2d Cir. 2003).

I. THE TRIBE CANNOT USE THE TRIBAL EXCEPTION TO THE TAX INJUNCTION ACT TO CHALLENGE STATE TAXES ON THIRD PARTIES THAT HAVE NO REAL IMPACT ON THE TRIBE

The Tribe claims an unqualified right to ignore the Tax Injunction Act, 28 U.S.C. § 1341 ("the TIA"), and invoke federal jurisdiction to challenge state taxes simply because those taxes impact the Tribe's business partners. The United States does not have such a right. Nor do federal instrumentalities. The Tribe does not either.

Tribes are able to take advantage of a limited exception to the TIA, but it applies only "to the kind of claims that could have been brought by the United States as trustee." *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472 (1976). The Tribe bears the

burden of establishing that its claims come within the scope of the exception.

When the Tribe and AC Coin brought this suit (and when the federal courts' jurisdiction is measured), the Tribe had not paid a penny of the challenged tax and likely never would. The Tribe did not even assert below—let alone establish—that the United States could have used its trust authority to challenge a tax imposed on a non-Indian business that the business has never required the Tribe or any of its other customers to pay. That should have been fatal to the Tribe's attempt to invoke the tribal exception to the TIA.

Even now, the Tribe does not argue that the United States could have brought this suit as the Tribe's trustee. Instead, the Tribe argues that it need not identify any "specific statutory trust responsibility of the United States that is impacted by the challenged tax" to take advantage of the tribal exception. *Tribe's Br.*, p. 39.

The Supreme Court has said otherwise. In *Moe*, the Court said the tribal exception to the TIA is limited by the United States' trust responsibilities and in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), the Court traced the evolution of the federal

Government's trust relationship with Indian tribes. *Jicarilla* made clear that the federal Government is not a common law trustee. Rather, the trust relationship is an instrument of federal policy and "Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and Indian tribes." *Id*. at 2324. Therefore, a tribe claiming the federal Government has the authority to take an action as the tribe's trustee must identify a specific statute granting that authority because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id*. at 2325.

The Court held that identifying the specific statute at issue is important because "[i]n some cases, Congress established only a limited trust relationship to serve a narrow purpose." *Id*. at 2324-25. The State argued in its opening brief that the IGRA is such a limited statute and the Tribe has not argued otherwise.

The Tribe asks this Court to ignore the Supreme Court's limitations on the TIA's tribal exception. The Tribe argues that *Jicarilla* is distinguishable and asks this Court to follow the lead of lower courts that have applied *Moe* without analyzing the relevant

statutes to determine whether the United States could have brought the claim as a trustee. *Tribe's Br.*, pp. 38-40.

That was wrong when the district court did it and this Court should correct that error. Although *Jicarilla* involved a question of privilege, the nature of the United States' trust relationship was critical to the resolution of the privilege issue and the Supreme Court's analysis of that relationship binds this Court. *See, e.g.*, *Seminole Tribe v. Fla.*, 517 U.S. 44, 66-67 (1996) (all portions of opinion necessary to result are binding). None of the lower court decisions the Tribe relies on had the benefit of the Supreme Court's guidance in *Jicarilla*. As a result, those courts ignored the limitations on the United States' trustee role and, by extension, the tribal exception to the TIA.

The TIA generally forms a broad jurisdictional barrier to federal court challenges to state taxation that is critical to the federal-state balance. Given the TIA's importance, courts must narrowly construe exceptions to its bar. *See, e.g.*, *Cal. v. Grace Brethren Church*, 457 U.S. 393, 413 (1982).

This Court has recognized that duty and refused to rubber stamp efforts by a putatively exempt entity to avoid the TIA. Instead, it

looked beyond the case's caption to "the policies behind both the [TIA] and its exception" to determine whether the entity claiming an exemption could properly invoke it. *FDIC v. New York*, 928 F.2d 56, 59 (2d Cir. 1991).

In *FDIC*, the FDIC sought to invoke the federal instrumentality exception to bring a federal court challenge to state and local taxes imposed on a bank that was a party to a FDIC Assistance Agreement. *Id.* at 57. This Court assumed that the FDIC was a federal instrumentality generally entitled to invoke the exception, but could not "find that the purposes of the instrumentality exception would be served by allowing the FDIC to proceed with this action in federal court." *Id.* at 59.

Like the Tribe here, the FDIC claimed financial and sovereign interests in invoking the exception but this Court held that neither was sufficient. Although the FDIC had a financial interest in the banks it guaranteed and in recovering $1.7 million in city taxes pursuant to an assignment from the bank, *FDIC v. New York*, 718 F. Supp. 191, 193 (S.D.N.Y. 1989), *aff'd*, 928 F.2d 56 (2d Cir. 1991), this Court concluded that the resulting financial interest was insufficient to invoke the

exception because "the State and City's tax assessments against *banks* that have issued net worth certificates have at most a *de minimis* effect on the federal government." *FDIC*, 928 F.2d at 59 (emphasis in the original). The FDIC's "financial interest in the [bank's] refunds would be minimal and wholly derivative of the [bank's] rights." *Id.* at 60. Moreover, "to allow the FDIC, as [the bank's] assignee, to elude the [TIA] would be to confer upon the FDIC as assignee greater rights than the assignor possessed" in contravention of "the fundamental principle that an assignor acquires from the assignor only those rights that the assignor enjoyed." *Id.*

As to the FDIC's claimed sovereign interests, although the FDIC "surely has some interest in ensuring that federal banking laws are enforced" that interest would be "adequately protected if the suit, upon dismissal, is pursued in state court" and the FDIC could not show—based on either its claimed financial or sovereign interests—"that the sovereignty of the federal government will be compromised by prohibiting this suit from proceeding in federal court." *Id.* at 59, 60.

FDIC establishes that this Court will not allow entities putatively exempt from the TIA to invoke federal jurisdiction at their whim to

challenge state and local taxes imposed on third parties, where those taxes have only an indirect and *de minimis* impact on the entity claiming the exemption. That is true of federal instrumentalities and also true of the United States. *United States v. County of Nassau*, 79 F. Supp. 2d 190, 193 (E.D.N.Y. 2000). This Court should treat the Tribe no differently; the tribal exception provides only that "in certain respects tribes suing under [28 U.S.C. § 1362] were to be accorded treatment **similar to that of the United States had it sued on their behalf**." *Moe*, 425 U.S. at 474 (emphasis added).

This is not a case where a state has imposed a tax directly on an Indian tribe, its members or an entity the Tribe protects as a trustee. *Id.* at 469-75, 480. Rather, the Town levied a generally-applicable tax on property owned by non-Indians who have only a commercial relationship with the Tribe and who had not required the Tribe to pay the tax at the time the suit was brought. *FDIC*, 928 F.2d at 60 (noting that the FDIC had only a commercial relationship with the bank and was "not in any sense a 'trustee' of commercial banks").

Even when the Tribe voluntarily paid the tax years after this action was filed, the financial impact on the Tribe was "wholly

derivative" of the Lessors, impacted the Tribe only because the Tribe agreed to pay the tax and was *de minimis* (.0015% of video facsimile revenues during the relevant period[1]). *FDIC*, 928 F.2d at 59-60. There is no basis for a conclusion that state court remedies are not adequate to protect those minimal interests.

FDIC shows that this Court takes seriously its duty to "guard against interpretations of the [TIA] which might defeat its purpose and text." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 827 (1997). The Tribe ignores *FDIC*, apparently hoping that this Court will reflexively apply the tribal exception without considering whether the Tribe's attempt to take advantage of it in this case is consistent with "the policies behind both the Act and its exception." *FDIC*, 928 F.2d at 59.

This Court should not condone the Tribe's efforts to invoke the heavy machinery of federal court interference with the State's tax

[1] The Tribe has reimbursed AC Coin a total of $69,894 for AC Coin's tax payments for the years from 2004 through 2011. (JA 1855-56, ¶¶ 29 & 30; JA 623-27). The Tribe paid the State a total of $1,147,438,401 for fiscal years 2004/2005 through 2009/2010 (JA 1593), which reflects "25 percent of the gross operating revenues from [only] the Tribe's video facsimile games" during that time period. *Tribe's Br.*, p. 5. Because it is not entirely clear whether the Tribe's reimbursement included the 2010/2011 fiscal year, the State did not include that in the calculation to err on the side of caution.

system based on claimed harms that are non-existent or, at most, chimerical. "[T]he Tribe's exemption from the bar of the [TIA] is not intended for circumstances such as this." *Fort Mojave Indian Tribe v. Killian*, 2004 U.S. Dist. LEXIS 31215, at *31 (D. Ariz. Mar. 30, 2004) (RA 1). "The exemption is designed to allow an Indian tribe to bring a lawsuit to protect its own property from state taxation in federal court, not to allow an Indian tribe to bring a lawsuit to protect a private party's property, located on the Indian tribe's land, from taxation." *Id.*

II. COMITY BARS THIS ACTION TO THE EXTENT THE TIA DOES NOT

The State argued in its opening brief that if the TIA does not bar this action, the broader doctrine of comity does. That is because of the Tribe's unprecedented efforts to subvert the delicate balance of federal, tribal and state interests the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("the IGRA"), reflects by demanding that the Tribe's non-Indian Lessors contract to violate Connecticut law in an effort to hide *prima facie* taxable property to keep the Tribe's self-serving interpretation of the law from being tested in the courts. *State's Br.*, pp. 24-28.

In response, the Tribe makes no effort to defend its conduct as consistent with the comity due the State as a sovereign, under the IGRA or otherwise. *Tribe's Br.*, pp. 40-41. Instead, the Tribe argues that the State waived this issue and that the district court properly exercised its discretion to hear this case. *Id.* Neither argument has merit.

The State argued comity in its motion to dismiss and the district court rejected it as a matter of law, reasoning "that prior district courts have rejected comity as the basis of dismissal in the context of Indian tribes challenging state regulation." (SA 4). The State did not need to re-raise the issue at summary judgment to preserve it. This Court has said that comity implicates jurisdiction in this context, *e.g.*, *Fiedler v. New York*, 199 F.3d 1322, 1322 (2d Cir. 1999), and has held it can raise comity *sua sponte* because it "bear[s] on the relations between court systems, [which] . . . will be affected whether or not the litigants have raised the issue themselves." *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993). The district court addressed the State's comity argument and rejected it as a matter of law in its ruling denying

Defendants' motions to dismiss. No more was necessary to preserve the issue for this Court's review.

The district court concluded as a matter of law that the State ceases to be entitled to comity whenever an Indian tribe brings suit. (SA 4). That is incorrect. *See, e.g.*, *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985) (rejecting a tribe's request to overturn state court ruling in case involving Indian child because doing so would "upset the ordinary principles of federal-state comity embodied" in the Constitution and applicable statutes). "Comity . . . serves to ensure that 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, **always** endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.'" *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010) (emphasis added; quotation marks omitted).

Comity does not disappear whenever an Indian tribe brings suit and the district court erred as a matter of law in holding otherwise. "[A] court by definition abuses its discretion when it makes an error of

law." *Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (quotation marks omitted).

This is a case where comity requires the federal courts to allow state courts to determine the validity of the state tax. State courts are entitled to "the respect due them in a federal system." *Murray v. Carrier*, 477 U.S. 478, 517-518 (1986). That is reflected in the federal courts' general refusal to block state taxation out of comity. *Levin*, 130 S. Ct. at 2336. Although comity applies differently where an Indian tribe brings suit, the federal courts must consider whether "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states" requires that they decline to exercise jurisdiction under the circumstances. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522, 544 n.27 (1987).

Here, the Tribe demanded that non-Indian companies subject to Connecticut law expressly contract to violate Connecticut laws that imposed no obligation on the Tribe in order to hide *prima facie* taxable property from the Town. That was intended to insulate from judicial review the Tribe's legal objections to a tax imposed on non-Indians that

the Tribe had never had to pay. Federal-state comity requires that the federal courts not condone the Tribe's conduct, and order that this case be heard in state court where it should have been from the beginning.

III. THE INDIAN TRADER STATUTES DO NOT PREEMPT THE TAX

The Tribe did not cite the Indian Trader statutes in any of its Complaints. The Tribe still has not cited a single case holding that the Indian Trader statutes have preemptive effect in the gaming context and concedes that the only reference to gaming in the statutes and regulations says that "**[g]ambling, by dice, cards, or in any way whatever, is strictly prohibited** in any licensed trader's store or on the premises." 25 C.F.R. § 140.21 (SA 35) (emphasis added). The Tribe's Lessors operate in a heavily regulated industry and expressed concern with the consequences of complying with the Tribe's demand they contract to violate Connecticut law but freely admitted to not being licensed Indian Traders, even though that is a criminal offense if the statutes actually apply. The Indian Trader statutes simply do not apply here.

The IGRA is the federal statute that covers Indian gaming. The Indian Trader statutes are not. No court has given them pre-emptive

effect in the gaming context and their only reference to gaming is to prohibit it. 25 C.F.R. § 140.21 (SA 35). Even if that alone is not dispositive (which it should be), the IGRA makes clear that upon its enactment the Commissioner of Indian Affairs ("the Commissioner")—who administers the Indian Trader statutes under the Secretary of the Interior—would no longer have authority "relating to the supervision of Indian gaming." 25 U.S.C. § 2709 (SA 41); *State's Br.*, pp. 30-31. This Court recognized in a related context that "[t]he plain language of the [IGRA] shows a clear Congressional intent to transfer all gaming management vested in the Secretary . . . to the [NIGC] upon implementation of the IGRA." *United States v. President R.C. St. Regis Management Co.*, 451 F.3d 44, 53 (2d Cir. 2006). That reasoning applies with equal force here; the Secretary has no role in supervising Indian gaming.

The Tribe has no response to the IGRA's terms, so it tries to direct this Court's attention away from them. The Tribe ignores the IGRA's language and argues that "the preemptive effect of one federal statute cannot be avoided by identifying an *additional* federal regulatory scheme that applies." *Tribe's Br.*, p. 46 (emphasis in original). That, of

course, assumes that the Indian Trader statutes apply. The IGRA's clear language—enacted decades later—establishes that they do not.

So do the Gaming Procedures. The Commissioner has the "'the sole power and authority to appoint traders to the Indian tribes' and to specify 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians'" under the Indian Trader statutes. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 688-89 (1965)(quoting 25 U.S.C. § 261). He has had no involvement in the Tribe's relationship with the Lessors and the Tribe does not argue otherwise.

The State, by contrast, exercises direct oversight over the Lessors as part of its recognized "major regulatory role" under the IGRA-based Gaming Procedures. 56 FR 15746 (April 17, 1991). The State oversees the technical standards of the machines the Lessors lease to the Tribe (JA 294, ¶ 13(s), p. 348) and licenses the Lessors. (JA 291, ¶ 13(f), 338). In light of the State's recognized role under the IGRA, it would be impossible for the Commissioner to exercise "the sole power and authority" to appoint the Lessors or to specify the "kind" of slot machines they lease to the Tribe. *Warren Trading Post*, 380 U.S. at 688-

89. Those direct conflicts, among others, leave no room for separate federal oversight under the Indian Trader statutes, even if the IGRA's text did not preclude it.

The Tribe's conjuring of an Indian Trader argument that appears nowhere in its Complaints and has no basis in the reality of the Tribe's gaming enterprise shows that the Tribe lacks confidence in the IGRA argument it actually pled. That lack of confidence must be acute, given that the Tribe's Indian Trader statutes argument has exposed its business partners to criminal liability and cast doubt on their licenses.

The Tribe admits "that the Indian Trader statutes require Indian traders to obtain a federal license," that the "Vendors are Indian Traders" and that they "do not have BIA-issued licenses." *Tribe's Br.* at 42, 44. The Tribe also does not dispute that operating as an unlicensed Indian trader is ordinarily a criminal offense punishable by fines and forfeiture of all merchandise offered for sale to Indians and renders the Lessors' agreements with tribes unenforceable. *State's Br.*, p. 32.

The Tribe seeks to avoid the severe ramifications of its concessions for the Lessors by arguing that the Lessors are not engaged in criminal activity because the "Indian Trade [sic] statutes licensure requirement

is satisfied by the Vendors' being licensed to do business on the reservation." *Tribe's Br.*, p. 44. That has no support in authority.

The Tribe relies solely on a footnote from *United States ex. rel. Keith v. Sioux Nation Shopping Ctr.*, 634 F.2d 401, 403 n.8 (8th Cir. 1980), for the proposition that tribal licensure "substantially satisfies the licensure requirement in 25 U.S.C. § 264." *Tribe's Br.*, p. 44. But the Tribe grossly misrepresents *Keith*.

Keith involved "bureaucratic nonfeasance that ma[de] it impossible to obtain the federal trader's license required by section 264" on the reservation at issue. *Id.* at 403. The federal official responsible for issuing the license "abandoned his efforts" to issue the licenses and "his office did not even have any of the license forms available." *Id.*

"Under th[o]se circumstances," the Eighth Circuit held that the trader who lacked the federal "license that was impossible to obtain" but had a tribal license "must be deemed to be in substantial compliance with the legal requirements of the statute." *Id.* The court expressly "**limit[ed] [its] holding to the particular facts of this case, which disclose that the Government has failed to make a**

federal license available to traders." *Id.* at 403 n.8 (emphasis added).

The Tribe ignores the explicit limitations on *Keith*'s holding. There is no evidence that the Lessors even sought federal Indian trader licenses, let alone that such licenses would have been impossible to obtain.

The only reason Indian Trader licenses may have been unavailable is that the Indian Trader statutes do not apply here. The federal government has made no effort to apply them to the Tribe or the Tribe's vendors. Nor has it applied them to any of the hundreds of other tribes the Lessors do business with. The Supreme Court has made clear that the Indian Trader statutes' preemptive scope is limited to conduct governed by "[t]he Indian trader statutes and their implementing regulations." *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165 (1980). "[T]he transaction in the present case" is not "governed by the Indian trader statutes" and the statutes do not "pre-empt[] the state tax." *Id.*

That conclusion avoids the drastic implications that would follow for the Lessors if this Court were to affirm the district court's decision

holding the Lessors to be unlicensed Indian traders. If this Court has any question that the Indian Trader statutes may apply, the State respectfully submits that the Court should ensure the Lessors have notice of the argument and its implications and allow them to intervene to protect their interests. *State's Br.*, pp. 32-33. The State argued in its opening brief that it is not clear that the Lessors are aware of the issue and the Tribe notably declined to assuage those concerns despite having the opportunity to do so. *Id.*

Even if the Indian Trader statutes did somehow theoretically apply, there is no federal interest in their enforcement here. The Tribe relies heavily on *Central Machinery*, but its reliance is misplaced. In *Central Machinery*, "the Bureau of Indian Affairs had approved both the contract of sale for the tractors in question and the tribal budget, which allocated money for the purchase of this machinery." *Central Machinery*, 448 U.S. at 165 n.4. The Tribe concedes there was no such federal involvement here.

Central Machinery also raised concerns that "[o]ne of the fundamental purposes of the[Indian Trader] statutes and regulations—to protect Indians from becoming victims of fraud in dealings with

persons selling goods—would be easily circumvented" if the statutes did not apply to unlicensed traders. *Id.* at 165. Here, there is concededly no federal enforcement to circumvent. The Tribe's argument that its tribal licensing replaces federal licensing establishes that the tax poses no threat to any federal interest; the Tribe admits that it is fully capable of protecting itself and no federal oversight under the Indian Trader statutes is available—or necessary—to ensure the Tribe is not a victim of fraud in its dealings with the Lessors.

To the extent the Tribe needs protection at all, it is from its own Indian Trader statutes argument. If the Tribe succeeds on appeal and the Lessors are definitively held to be criminally operating as unlicensed Indian traders, the Lessors will seek indemnification from the Tribe for, among other things, the damages and legal costs resulting from complications with their licenses in Connecticut and other states, as well as attempts by other tribes to invalidate their agreements with the Lessors and seek penalties and forfeiture. *See, e.g.*, *United States ex rel. Keith* v. *Sioux Nation Shopping Center*, 488 F.Supp. 496, 497 (D. S. Dak.), *aff'd*, 634 F.2d 401 (8th Cir. 1980) (addressing *qui tam* action

"brought under 25 U.S.C. § 264 against 128 defendants"). Those costs could easily dwarf any associated with the challenged tax.

The Tribe's argument that the Indian Trader statutes have preemptive effect lacks any merit. The district court should have rejected it.

IV. THE IGRA DOES NOT PREEMPT THE TAX

The Tribe's arguments proceed from the premise that state taxation of non-Indians doing business on an Indian reservation is barred unless authorized by Congress, but the opposite is true. The Supreme Court long ago shifted from the view that taxes on non-Indians doing business with tribes are "invalid unless expressly authorized by Congress" to the view that such taxes must be "upheld unless expressly or impliedly prohibited by Congress." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173-74 (1989).

The IGRA is a unique statute that was enacted to expand the states' regulatory role in Indian gaming by "creating a cooperative federal-state-tribal scheme for regulation of gaming." *Tribe's Br.*, p. 48 (quotation marks omitted). To that end, the IGRA addresses state and local taxation and does not expressly prohibit it. 25 U.S.C. § 2710(d)(4)

(SA 47). Instead, it declines to confer additional taxation authority but does **not** strip state and local governments of their independent tax authority. *Id.*

"[T]he most rational inference to be drawn" from Congress' considered decision not to prohibit state and local taxation is that such taxation "is permitted." *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75 (1993). If Congress wanted to prohibit such taxation "it could easily have said so plainly and its failure so to do is very significant." *Fawcett v. Commissioner*, 149 F.2d 433, 435 (2d Cir. 1945); *Cf.* 25 U.S.C. § 465 (providing that land taken into trust on behalf of qualifying Indian tribes "shall be exempt from State and local taxation").

Congress' decision not to prohibit state and local taxation in the IGRA weighs against finding that the Act preempts such taxation. That, coupled with the absence of any conflict between the tax and the IGRA's purposes, leads to the conclusion that the IGRA does not preempt the tax.

The IGRA is not intended to preempt all barriers to the Tribe's maximization of its profits. By its terms, the IGRA seeks to promote

"tribal economic development" and "self-sufficiency" by "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2) (SA 37). The Tribe concedes, as it must, that the challenged tax does not threaten that purpose.

Without a financial ground for preemption, the Tribe is left to argue that the tax somehow interferes with the Tribe's ability to maintain a "strong tribal government[]." 25 U.S.C. § 2702(1) (SA 37). The Tribe argues that the tax does so—and the IGRA therefore preempts it—because it is imposed outside the parameters of the Gaming Procedures.

This Court should reject the Tribe's argument. As an initial matter, it relies heavily on *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996), a case involving jurisdictional complete preemption, "an exception to the well-pleaded complaint rule" that is "different from preemption used only as a defense." *Dorsey & Whitney*, 88 F.3d at 543. This Court has recognized that "[t]he complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption." *Sullivan v. Am. Airlines*, 424 F.3d 267, 272 (2d Cir. 2005); *see also Whitman v. Raley's Inc.*, 886 F.2d

1177, 1181 (9th Cir. 1989) (noting the distinction between the issues and that a district court finding complete preemption would then "proceed to rule on the substantive defense of preemption"). Indeed, the Tribe argued below that *Dorsey & Whitney* was "completely irrelevant to substantive questions of preemption" (DC No. 40-3, p. 15 n.22), before changing its position and focusing heavily on *Dorsey & Whitney* at summary judgment and on appeal.

Even if *Dorsey & Whitney*'s analysis were relevant, it does not help the Tribe. It holds that the IGRA's pre-emptive scope is limited to claims that "will interfere with tribal governance of gaming." *Dorsey & Whitney*, 88 F.3d at 549. The IGRA's history is instructive in determining what claims give rise to such interference.

The catalyst for the IGRA was *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987), which arose out of an attempt by California to prohibit Indian tribes from conducting bingo and poker games on reservation unless they complied with state laws directed at such gaming that required games "to be staffed by members of designated charitable organizations who may not be paid for their services," dictated the accounting and use of gaming profits and the

maximum prize for each game. In addition, a county sought to apply its ordinances regulating bingo and prohibiting poker. *Id.*

The Supreme Court applied the "prohibitory/regulatory distinction," which examines whether the state seeks to prohibit a given game—in which case state law generally applies—or seeks to regulate the game, in which case the state law is generally inapplicable. *Id.* at 210. The Court held that the state laws at issue were regulatory and that the balance of interests weighed in favor of the Tribe. *Id.* at 210-21. Therefore, the Court held that the state and county could not apply their laws under the circumstances. *Id.* at 221.

The IGRA responded to *Cabazon* by giving the states a role in regulating certain forms of on-reservation tribal gaming through the compacting process. It did so by "incorporat[ing] *Cabazon*'s distinction between prohibition and regulation" but "rather than directing the federal courts to perform the balancing of interests between the state on one side and federal government on the other, Congress conducted the balancing itself" through the classification of games as Class I, Class II or Class III. *Dorsey & Whitney*, 88 F.3d at 546. "'Consequently, Federal courts should not balance competing Federal, State and tribal interests

to determine the extent to which various gaming activities are allowed.'" *Id.* at 544 (quoting S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076).

The IGRA's legislative history makes clear that the IGRA preempts only the type of regulations that were at issue in *Cabazon*: laws that are directed at gaming activity, seek to prohibit certain types of games entirely or to control who can staff those games, the prizes available and what the profits from gaming will be used for. *Cabazon*, 480 U.S. at 205.

The challenged tax is fundamentally different. It is a generally-applicable property tax imposed on all qualifying property, regardless of the property's use. It is not directed at gaming. Nor does it in any way control the Tribe's operation of the slot machines or who can staff them. The tax does not "interfere with tribal governance of gaming" and therefore the IGRA does not pre-empt it. *Dorsey & Whitney*, 88 F.3d at 549.

For the same reasons, this Court should reject the Tribe's argument—not reached by the district court—that the tax unlawfully infringes on the Tribe's sovereignty. *Tribe's Br.*, pp. 72-76. "[F]ederal

preemption over the regulation of Indian tribes is closely related to federal recognition of tribal sovereignty" and the Tribe's claim that the Town's tax somehow infringes on the Tribe's ability to impose its own tax has consistently been rejected. *Oneida Nation v. Cuomo*, 645 F.3d 154, 170-71 (2d Cir. 2011); *see, e.g., Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 158 (1980) ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.").

The Tribe argues that "[i]f the State's authority were to encompass state taxation of slot gaming devices used exclusively in the Tribe's gaming operation, the Gaming Procedures would have to provide for it," but the IGRA says no such thing. *Tribe's Br.*, p. 56. Nor does its legislative history.

Even if such a concept could somehow be divined, its basis would fall far short of the sort of "clear statement in the text of [a] statute [that] ensures that Congress has specifically considered" the issue, *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011), or the kind of unambiguous statement the Supreme Court has required in the analogous Spending Clause context to ensure the states are able to

knowingly exercise their options, cognizant of the consequences of any given decision. *S.D. v. Dole*, 483 U.S. 203, 207 (1987). If Congress intended that states be foreclosed from ever imposing any tax not mentioned in a compact—even taxes on non-Indians—it needed to actually say so in order to give the states, and the tribes, the ability to negotiate accordingly.

The IGRA's pre-emptive scope is far narrower than the Tribe argues and the district court held. The challenged tax falls well outside it.

V. THE BALANCING OF INTERESTS WEIGHS IN FAVOR OF THE TAX

The Tribe continues to argue that the *Bracker* interest balancing is "separate and independent" from the rest of the preemption analysis but that is not correct. *Tribe's Br.*, p. 57. *Cotton Petroleum* makes clear that interest balancing is simply part of the over-arching "flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

The federal and tribal interests for purposes of balancing are determined by reference to the relevant federal law, and the foregoing

establishes that those interests are minimal, and approaching non-existent.

Apparently recognizing the weakness of the federal interests under the Indian Trader statutes and the IGRA, the Tribe attempts to shore up its federal interests with a footnote citing several other statutes and "[e]xecutive branch policies and programs" it claims provide additional support. *Tribe's Br.*, p. 59 n. 19. The Tribe's footnote is insufficient to preserve any argument and, in any event, the Indian Reorganization Act does not apply to the Tribe. *See City of Syracuse v. Onondaga County*, 464 F.3d 297, 308 (2d Cir. 2006) (argument raised in footnote deemed waived); *see also Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

The Tribe's other efforts to find a federal interest in the NIGC's "significant ongoing role in the regulation of tribal gaming" actually undermine the Tribe's argument. *Tribe's Br.*, p. 60. The State—not the NIGC—is the primary non-tribal regulator of the Tribe's gaming enterprise. The regulations the Tribe cites reinforce that principle, providing *inter alia* that if the NIGC's internal control standards conflict with those in a Tribal-State compact "then the internal control

standard established in a Tribal-State compact shall prevail." 25 C.F.R. § 542.4(a).

The Tribe's need to reach so far for so little shows that there is no real federal or tribal interest here. The IGRA does not pre-empt all impediments to the Tribe's maximization of its profits and the tax is miniscule relative to any measure of the Tribe's revenues. The Tribe argues that "the very existence of this burden, regardless of its magnitude, injures the Tribe's interest in self-determination" but that argument is factually and legally flawed. *Tribe's Br.*, p. 62.

No burden existed as a result of this tax when the Tribe brought this suit, and the evidence shows that no burden would ever have existed had the Tribe not voluntarily accepted it. Preemption is "not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.'" *Cotton Petroleum Corp.*, 490 U.S. at 176 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). Rather, the courts must look to the "particular facts and legislation" involved. *Id.* Given the facts of this case, only the most absolute conception of tribal sovereignty could support the Tribe's argument that the tax is barred.

The IGRA does not support the Tribe's absolute conception. In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008), the Ninth Circuit correctly recognized that "[a]s with the related tribal interest, the federal government's interest in Indian economic vitality does not alone defeat an otherwise legitimate state tax" and that the "concern with self-sufficiency necessarily lessens in the specific context of a multi-million dollar casino expansion."

That logic applies with even greater force here. In *Barona*, the value of the challenged tax was, at a minimum, .26% of the overall project.[2] Here, the Tribe's reimbursement is, at most, .0015% of the Tribe's video facsimile game (including slot machine) revenue during the relevant time period. *See supra* n.1.

Even if such a minute burden could implicate a federal or tribal interest under some circumstances, it does not here. The Tribe notes that the *Bracker* Court struck down what the dissent characterized as a "relatively trivial" "1% tax on a non-Indian logging company" but, as the Tribe recognizes, that was "because the 'comprehensive federal

[2] The court indicated the tax imposed on the contractor at issue was "over $200,000 . . . in the context of a $75 million casino expansion" but would "be compounded by amounts paid" to others. *Barona*, 528 F.3d at 1192-93.

regulatory scheme' applicable to tribal timber harvesting precluded *any* 'additional burdens' upon the tribe." *Tribe's Br.*, p. 62 n.20 (emphasis in *Tribe's Br.*) (quoting *Bracker*, 448 U.S. at 148 (majority) & 159 (Stevens, J., dissenting)).

This tax does not interfere with a comprehensive regulatory scheme. There is no federal regulation under the Indian Trader statutes to interfere with. Under the IGRA, it is the State—not the federal government—that "exercises literally daily supervision over" the Tribe's gaming enterprise. *Bracker*, 448 U.S. at 147. The federal government had no involvement in drafting the leases and did not approve them. *Id.* It has no role in deciding what machines will be used or the standards that will govern them; the State approves the standards of operation and management. Unlike the scheme at issue in *Bracker*, the IGRA does not seek to maximize the Tribe's profits. *Bracker*, 448 U.S. at 149.

This tax involves approximately 1/1000th of one percent of the Tribe's revenues in an area where the federal government has ceded to the State the role of primary non-tribal regulator. The Tribe voluntarily agreed to pay the tax, even though the Lessors have never

required any of their other customers to pay it and the Lessors themselves only paid it because they admittedly breached their agreements with the Tribe to hide the property by violating Connecticut law. Under the circumstances, there is no legitimate federal or tribal interest.

That should end the inquiry. A balancing of interests is only necessary where the tax actually conflicts with a comprehensive federal scheme and this tax does not. In any event, the State and the Town have a strong interest in the integrity of the property tax system and this Court should consider the Tribe's "manipulation" of that system through its contracts with the Lessors to hide property in the balancing. *Barona*, 528 F.3d at 1190-91. The courts—not the Tribe—decide whether a state tax is preempted.

In addition, the State and the Town have an interest in ensuring that the Lessors contribute toward Town services that benefit their business, just like the other businesses in the Town. The district court found that the Town's "maintenance of the roads to the Reservation has some connection to the taxed activity" and benefits the Lessors. (SA 29). Contrary to the district court's reasoning, the Lessors cannot avoid

contributing their share of the associated costs simply because the Town will still have to maintain roads even if the Lessors refuse to pay their taxes. The Tribe's claim to have spent money on roads to access the Reservation is irrelevant; the Tribe spent money on state roads, not town roads, as a business decision to facilitate access to its casino. (JA 1928 ¶2). Its decision to do so does not insulate the Lessors from separate taxes.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants' other briefing, this Court should reverse the District Court's judgment and remand this case for dismissal or for entry of judgment in Defendants' favor.

Respectfully submitted,

INTERVENOR-DEFENDANT-APPELLANT

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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this reply brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 6,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a monospaced typeface (Century Schoolbook) with 10.5 or fewer characters per inch.

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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were filed electronically and served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 26th day of November, 2012, to the Clerk of this Court and the following counsel of record:

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