NO. 17-56003

United States Court of Appeals

FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally recognized Indian Tribe, on its own behalf and as *parens patriae* for its members,
Plaintiff-Appellant,

v.

RIVERSIDE COUNTY; LARRY W. WARD, in his Official Capacity as Riverside County Assessor; PAUL ANGULO, in his Official Capacity as Riverside County Auditor-Controller; DON KENT, in his Official Capacity as Riverside County Treasurer-Tax Collector,
Defendants-Appellees,

DESERT WATER AGENCY,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California, Riverside, No. 5:14-cv-00007-DMG-DTB
District Judge Dolly M. Gee

BRIEF *AMICUS CURIAE* FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL OF THE JUDGMENT BELOW

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Dated: December 28, 2017

By: /s/ Sam Hirsch
Sam Hirsch
Attorney for *Amicus Curiae*
The National Congress of American Indians

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INTEREST OF *AMICUS CURIAE*[1]

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. Because land is fundamental to tribal self-government and to the federal trust relationship with tribal nations, the responsibility of the United States to protect all Indian trust lands from both alienation and state taxation is critically important. The decision below severely undercuts that protection.

INTRODUCTION

This is not a case about "the activities of non-Indians engaged in commerce on an Indian reservation."[2] This is a case about land—specifically, property that the United States holds in trust for the use and benefit of the Agua Caliente Band of Cahuilla Indians and its members.

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[1] No party's counsel authored this brief in whole or in part. No person, other than *amicus*, its members, or its counsel, contributed money intended to fund this brief. All parties have consented to the brief's filing.

[2] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137 (1980).

The decision below turned on one distracting fact: The individuals who lease parcels of this land from the Agua Caliente Indians are non-Indian. In contrast to the status of the lessees, the status of the land itself got short shrift from the District Court. In reaching its erroneous conclusion, the court below failed even to cite the statutes that made these tracts Indian trust lands—the Mission Indian Relief Act of 1891 and the Indian General Allotment (or Dawes) Act—or the constitutional provision that empowered Congress to enact those statutes: Article IV's Territory Clause. These federal laws preempt Defendants' collection of California's possessory-interest tax (PIT) on the Agua Caliente Indians' trust lands and thus mandate reversal of the judgment below.

SUMMARY OF ARGUMENT

The Framers drafted the Territory Clause to ensure that Congress, not the States, would take the lead role in acquiring, regulating, and disposing of Indian land—a power that Congress exercises every time it authorizes the United States to hold land in trust for Indian Tribes and their members. Consistent with the Framers' intent, Territory Clause enactments immunize interests in Indian trust lands from state taxation.

On the Agua Caliente Indian Reservation, Congress's Territory Clause statutes, including the Mission Indian Relief Act and the Dawes Act, render tribal trust lands and individual Indians' allotted trust lands exempt from state taxation. Consistent with the purposes underlying the Territory Clause, this statutory tax immunity reaches lessees' possessory (or leasehold) interests in those same lands, regardless of whether the lessees are Indian or non-Indian. So long as the United States holds the legal title to these lands, the Court should focus on the status of the land, not that of the taxpayer. The court below erred by conceptualizing this case as a clash between Indians and non-Indians over a commercial transaction or activity, rather than as an issue of property rights in lands that the United States holds in trust for Indians.

Absent an unmistakably clear statement from Congress to the contrary, Territory Clause statutes such as the Mission Indian Relief Act and the Dawes Act categorically preempt any state or local tax (regardless of its legal incidence) that burdens a real-property interest in Indian trust land. The judgment below cannot be squared with this rule.

ARGUMENT

I. Article IV's Territory Clause Empowers Congress to Immunize Indian Trust Lands from State Taxation.

The United States holds land in trust for federally recognized Indian Tribes and their individual members. Because the United States holds the legal title, the Tribes and their members possess and use these trust lands but cannot alienate or encumber them.[3] The authority for the United States' holding legal title to Indian trust land flows from Article IV, Section 3, clause 2 of the Constitution, known as the Territory Clause or the Property Clause. This Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

A. The Territory Clause's Origins

The Clause's origins tell a story of war, peace, and struggles to control land.[4] At a time when Anglo-American society was largely rural,

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[3] *See Oklahoma v. Texas*, 258 U.S. 574, 597 (1922). This brief uses the abbreviated term "trust land" when referring to "trust or restricted land." 25 C.F.R. § 162.003.

[4] *See generally* Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1009–38 (2014).

"land was the most important element in the economic life of the nation."[5] But most land in the United States belonged to militarily powerful Native nations, especially west of the Appalachian Mountains.[6] As white settlers and land speculators pushed further into the frontier, tensions with the lands' Indian owners were inevitable.

Conflicts over land triggered cycles of violence.[7] Indians "killed or captured as many as three thousand Anglo-Americans between 1783 and 1790—two-thirds as many as had died fighting in the Revolution."[8] Left unrecorded is the number of Native Americans who were slaughtered. John Jay, later our first Chief Justice, wrote to Thomas Jefferson in December 1786: "Indians have been murdered by our People in cold Blood and no satisfaction given, nor are they pleased with the avidity with which we seek to acquire their Lands."[9] As George Washington wrote, "'[T]he settlem[en]t of the Western Country, and making a Peace with the Indians,

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[5] 1 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 29 (1984).

[6] *See* Ablavsky, *supra*, at 1003–04 & n.12, 1009–10.

[7] *See id.* at 1060.

[8] *Id.* at 1039.

[9] Letter from Jay to Jefferson (Dec. 14, 1786), *in* 10 *The Papers of Thomas Jefferson: Main Series* 596, 599 (Julian P. Bond ed., 1954).

are so analogous, that there can be no definition of the one, without involving considerations of the other.'"[10]

The thirteen States did more to feed the chaos than to calm it. Six States had defined western boundaries and thus no claim to the western lands. They hoped to treat those lands as federal property, to be parceled out and sold to private speculators to retire the Union's Revolutionary War debt.[11] The seven "landed" States, relying on colonial charters that purported to stretch all the way "from the Atlantick . . . to 'the South Sea,'"[12] laid claim to the trans-Appalachian lands and were initially reluctant to cede them to the central government.[13]

These conflicts over land and jurisdiction called for a national response, but the Articles of Confederation shed little light. They gave no power to Congress to acquire, own, or manage land, effectively leaving the

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[10] Ablavsky, *supra*, at 1014 (citation omitted).

[11] *See* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 Minn. L. Rev. 1, 17 (2001).

[12] *Commonwealth v. City of Roxbury*, 75 Mass. 451, 503 (1857) (citation omitted).

[13] *See* Appel, *supra*, at 20–24.

western land claims in limbo.[14] And Article IX granted Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated"[15]—language that James Madison mocked as "obscure and contradictory," if not "absolutely incomprehensible."[16] Seizing on the Articles' ambiguity, several States proceeded to strong-arm Indians into ceding land and signing treaties, sometimes directly clashing with federal treaty negotiators.[17]

As the Framers gathered in Philadelphia in the summer of 1787, "Congress was deluged with bad news regarding Indian affairs."[18] War Secretary Henry Knox wisely concluded that the government was "utterly unable to maintain an Indian war with any dignity or prospect of success"

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[14] *See id.* at 19.

[15] Articles of Confederation, art. IX, § 4.

[16] The Federalist No. 42, at 268–69 (James Madison) (Clinton Rossiter ed., 1961).

[17] *See* Ablavsky, *supra*, at 1018–33.

[18] Reginald Horsman, *Expansion and American Indian Policy, 1783–1812*, at 39 (1967).

and that it would be cheaper just to pay the Indians for their land.[19] The only hope for peace on the frontier was a nationwide "policy of justice toward the Indians and protection of their rights and property against unscrupulous traders, avaricious settlers, and ubiquitous speculators."[20]

B. The Framing of the Territory Clause

At the Convention in Philadelphia, James Madison pushed for a vast expansion of federal authority in Indian affairs.[21] He jettisoned Article IX's confusing power-sharing language and replaced it with the Indian Commerce Clause, empowering Congress "to regulate Commerce . . . with the Indian Tribes."[22] Other significant tools in Madison's effort to centralize power over Indian affairs were located in the Treaty, Contracts, and Supremacy Clauses.[23]

But the capstone of Madison's Indian-affairs project was the Territory Clause, which gave Congress a sweeping "power of very great

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[19] 33 *Journals of the Continental Congress, 1774–1789*, at 388–89 (Roscoe R. Hill ed., 1936).

[20] 1 Prucha, *Great Father*, *supra*, at 46.

[21] *See* 1 *The Records of the Federal Convention of 1787*, at 326 (Max Farrand, ed. 1911).

[22] U.S. Const. art. I, § 8, cl. 3.

[23] *Id.* art. II, § 2, cl. 2; *id.* art. I, § 10, cl. 1; *id.* art. VI, cl. 2.

importance" to regulate "the Western territory."[24] Although the term "Territory" today evokes images of islands like Guam or Puerto Rico, in the 1780s the vast majority of lands within the Territories remained, legally, Indian country, the western Indian lands that the States had ceded.[25]

C. The Territory Clause and the Northwest Ordinance

One key purpose of the Territory Clause was to expressly authorize, and thus ratify, the Northwest Ordinance, one of the organic laws of the United States and among the most significant documents in American history.[26] Enacted on July 13, 1787, just seven weeks before the Framers adopted the Territory Clause, the Northwest Ordinance was a quasi-constitutional document governing all national territory north of the Ohio River and purporting to "forever remain unalterable."[27] Madison strongly supported the Ordinance but rightly noted that the Continental Congress had enacted it "without the least color of constitutional authority."[28] The new Constitution fixed that problem; so when the First Congress

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[24] The Federalist No. 43, *supra*, at 274 (James Madison).

[25] *See* Horsman, *supra*, at 4–15.

[26] *See* 1 U.S.C. Organic Laws.

[27] 1 Stat. 50, 52 n.a. (1789) (reproducing 1787 Ordinance).

[28] The Federalist No. 38, *supra*, at 239.

assembled in 1789, it promptly reenacted the 1787 Northwest Ordinance[29] and then extended its coverage to territory south of the Ohio River.[30] As the Supreme Court long ago established, the Ordinance thus owes its "legal validity and force" to the Territory Clause.[31]

The Ordinance established the young Nation's "fundamental principles" for Indian relations:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[32]

The Ordinance governed not only the Northwest Territory but also any future States that might be formed from the Territory.[33] And the Ordinance provided that the territorial and state legislatures "shall never

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[29] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. Congress "adapt[ed]" the 1787 Ordinance "to the present Constitution," so it would "continue to have full effect." 1 Stat. at 51.

[30] Act of May 26, 1790, ch. 14, 1 Stat. 123.

[31] *Strader v. Graham*, 51 U.S. (10 How.) 82, 96 (1850).

[32] 1 Stat. at 52 n.a.

[33] *See id.*

interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."[34] The Ordinance distinguished areas "in which the Indian titles have been extinguished" from those areas where Indian titles remained in full force, and mandated paying "full compensation" for the taking of "any person's property."[35] And, significantly, the Ordinance proclaimed that "[n]o tax shall be imposed on land the property of the United States."[36]

Together, these provisions established the roadmap for how the Federal Government and the States were to treat Indian land: So long as relations remained peaceful, Congress was not to allow Indian property or the Indian right of occupancy to be invaded, disturbed, or taken (by either the States or their citizens) without the Indians' consent, accompanied by just compensation. Absent such a good-faith purchase, Indian title would remain intact. And if the United States did make a *bona fide* purchase of

[34] *Id.*

[35] *Id.* at 51–52 n.a.

[36] *Id.* at 52 n.a.

Indian lands, no tax could be imposed on those lands because they would then be property belonging to the United States.

D. Judicial Interpretation of the Territory Clause

Although Federal Indian policy has seen many shifts in the ensuing 230 years, the roadmap drawn by the Territory Clause and the Northwest Ordinance has stood the test of time. Courts have cited the Territory Clause in countless Indian-law cases involving land, stretching back decades.[37] The Supreme Court has emphasized that, "[f]rom an early time in the history of the Government," Congress exercised its Territory Clause power by "legislating concerning Indians occupying" federal property.[38] And in a seminal Indian-law case, *United States v. Lara*,[39] the Court

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[37] *See, e.g.*, *United States v. McGowan*, 302 U.S. 535, 537 & n.4, 539 & n.12 (1938) (applying the Clause to Indian trust lands); *Hallowell v. United States*, 221 U.S. 317, 324 (1911) (describing Congress's Territory Clause "power to make rules and regulations" as "ample" where the United States had "not parted with the title to the lands, but still held them in trust for the Indians"); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694 (9th Cir. 1997) (Clause grants Congress power to acquire land "in trust for the Indians" and "set the rules and regulations for its use"); *United States v. West*, 232 F.2d 694, 698 (9th Cir. 1956) (Clause applies to Indian trust lands); *see also Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (giving Clause an "expansive reading," to respect Congress's "complete power" over public lands).

[38] *United States v. Celestine*, 215 U.S. 278, 284 (1909).

[39] 541 U.S. 193 (2004).

reaffirmed the Territory Clause's role as one of the sources of Congress's "broad" and "exclusive" powers "to legislate in respect to Indian tribes" and "the tribal land base."[40]

Furthermore, as detailed below at pages 14–22 (discussing specific statutes relevant to this case), the courts have long read Territory Clause enactments to bar direct state taxation of Indian trust lands and interests in those lands.[41] As two prominent Native American legal scholars have explained, the Territory Clause continues to form a significant "protective barrier for the tribes against state taxation because the states cannot tax federal property; as long as Indian lands are held by the United States in

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[40] *Id.* at 200, 202 (internal quotation marks omitted); *see also Cappaert v. United States*, 426 U.S. 128, 138 (1976). *Lara* thus reaffirmed that Indian trust lands "belong[] to the United States," within the meaning of the Territory Clause, even though some academics had raised doubts. *Compare, e.g.*, *Felix S. Cohen's Handbook of Federal Indian Law* 209–10 (1982 ed.) (attempting to distinguish Indian property from Federal property), *with id.* at 209 n.13 (citing 1846, 1886, and 1911 Supreme Court Indian-lands cases relying on the Territory Clause) *and* Felix S. Cohen, *Handbook of Federal Indian Law* 89–90 & n.5, 94 & n.61 (1942 edition, published by the Department of the Interior) (citing the Clause as a "principal source[] of congressional authority" over Indian trust lands).

[41] *See, e.g.*, *United States v. Rickert*, 188 U.S. 432, 439, 445 (1903); *see also In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 751–60 (1867).

trust for the Indian tribes, there is no way that the states can intrude into the situation with their taxing power."[42]

II. The Territory Clause Statutes Designating the Agua Caliente Indians' Trust Lands Preempt Direct State Taxation.

The Territory Clause statutes that authorize the United States to hold the title to the Agua Caliente Indian trust lands preempt direct state taxation of those lands. Again, some history may be helpful.

A. The Mission Indian Relief Act and the Dawes Act

Although Presidents Grant and Hayes signed Executive Orders setting aside Federal land "for the permanent use and occupancy" of the Agua Caliente Indians in the 1870s,[43] it was not until 1891 that Congress exercised its Territory Clause power to establish the Agua Caliente Indian Reservation.[44] The Mission Indian Relief Act of 1891 provided that the United States would hold the Reservation land in trust "for the sole use and benefit" of the Agua Caliente Band of Mission Indians (now known as

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[42] Vine Deloria Jr. & David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* 88 (1999).

[43] Executive Order of May 15, 1876, *reproduced at* 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* 821 (1904); *see* Executive Order of Sept. 29, 1877, *reproduced at* 1 Kappler, *supra*, at 822.

[44] The Mission Indian Relief Act of 1891, ch. 65, §§ 1–3, 26 Stat. 712.

Cahuilla Indians), "free of all charge or incumbrance whatsoever," but only for 25 years.[45] The 1891 Act also provided that individual Agua Caliente Indians could be "allotted" tracts of land, also with the title held by the United States in trust, "free of all charge or incumbrance whatsoever," and also for only 25 years.[46] After these 25-year periods expired, the trust would be discharged and the land would be conveyed to the Indians in fee simple.[47]

As explained below, those 25-year periods eventually were extended indefinitely, so the lands retain their trust status today. Individual Indian allotments are a key feature of this case, as allotted trust lands today account for more than 99% of the leases at issue here (the remaining leases being on land that the United States holds in trust for the Tribe itself, rather than for individual members).[48]

The 1891 Act's allotment provisions were modeled after one of the most consequential Indian statutes that Congress ever enacted under its

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[45] *Id.* § 3, 26 Stat. at 712.

[46] *Id.* §§ 4–5, 26 Stat. at 713.

[47] *Id.*

[48] *See* Summary-Judgment Order at 29–30 [Doc. 163] [hereinafter Order].

Territory Clause power—the Indian General Allotment Act of 1887, also known as the Dawes Act.[49] This Court has held that the Dawes Act and the Mission Indian Relief Act must be construed *in pari materia*.[50]

Like the 1891 Mission Indian Relief Act, the Dawes Act provided for parts of reservations to be parceled out to individual Indians as "allotments" that the United States would hold in trust, "free from all charge or incumbrance whatsoever," for 25 years.[51] Again, Congress's initial intent was that these allotments would remain in trust for 25 years (or longer, if the President or Congress extended the trust period) and then be conveyed to the individual Indians in fee simple.[52] As Congress clarified in a 1906 amendment to the Dawes Act,[53] which also applied to the Agua

[49] The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 [hereinafter Dawes Act].

[50] *See Kirkwood v. Arenas*, 243 F.2d 863, 866–67 & n.3 (9th Cir. 1957).

[51] Dawes Act § 5, 24 Stat. at 389 (codified as amended at 25 U.S.C. § 348).

[52] *See id.*

[53] Burke Act of 1906, Pub. L. No. 59-149, ch. 2348, 34 Stat. 182 (codified as amended at 25 U.S.C. § 349).

Caliente allotted trust lands,[54] after the United States relinquished legal title to the allotments, they would be subject to state taxation.[55]

The Dawes Act policy of eventually eliminating the allotments' trust status proved disastrous for Indian landholdings, as tracts held by individual Indians in fee simple often racked up tax liabilities or mortgage debt and then were seized by the sheriffs or the banks.[56] The President and Congress therefore extended and re-extended the 25-year trust period[57] until, in 1934, Congress finally extended the allotments' trust status indefinitely.[58] At Agua Caliente the trust periods never expired.[59]

In 1949, Congress ratified the continuing tax-exempt status of the Agua Caliente trust lands and mandated that this status could be changed

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[54] *See* Indian Appropriations Act of 1902, Pub. L. No. 57-31, 32 Stat. 744 (subjecting all Indian allotments to the Dawes Act, as amended).

[55] *See* Burke Act, *supra*, 34 Stat. at 183 (when allottee is issued a fee-simple patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed").

[56] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2044 (2014) (Sotomayor, J., concurring).

[57] *E.g.*, Act of Mar. 2, 1917, Pub. L. No. 64-369, ch. 146, § 3, 39 Stat. 969, 976; 25 U.S.C. § 348 note.

[58] 25 U.S.C. § 5102.

[59] *See Arenas v. United States*, 322 U.S. 419, 420–25 (1944).

only by a clear statement from some future Congress. The 1949 Act extended the California courts' adjudicatory jurisdiction to the Agua Caliente Reservation, but provided that nothing in the Act should "be construed to authorize the alienation, encumbrance, or taxation of the lands of the [Agua Caliente] reservation, . . . so long as the title to such lands is held in trust by the United States, unless such alienation, encumbrance, or taxation is *specifically* authorized by Congress."[60]

B. Cases Interpreting the Territory Clause Statutes

In repeatedly holding all Indian trust lands—including allotted trust lands like those at issue here—to be categorically tax-exempt, courts have adopted a mode of statutory interpretation rooted in the Territory Clause and the Northwest Ordinance. This Court has "broadly construed" Territory Clause statutes to protect "the value, use, and enjoyment" of Indian trust lands from state interference;[61] and those immunities may be

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[60] Act of Oct. 5, 1949, Pub. L. No. 81-322, ch. 604, § 1, 63 Stat. 705 (emphasis added).

[61] *Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 667 (9th Cir. 1975).

"lifted only when Congress has made its intention to do so unmistakably clear."[62]

The leading case is *United States v. Rickert*,[63] in which the Court, citing the Territory Clause, held that a South Dakota county could not impose a state tax on trust lands allotted under the Dawes Act.[64] Even though the Act spoke only about "land," the Court held that the tax immunity extended to the permanent improvements (such as houses and barns) built on the allotted trust lands and even to livestock that grazed on those lands.[65] The Court looked to "the object to be accomplished by allot[ment]" under the Dawes Act—economic development of the land—and concluded that "[e]very reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of

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[62] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *see also Bryan v. Itasca Cty.*, 426 U.S. 373, 392–93 (1976).

[63] 188 U.S. 432 (1903).

[64] *See id.* at 435–41; *id.* at 439 (quoting the Clause). *Rickert*'s discussion of the intergovernmental-immunity or federal-instrumentality doctrine is irrelevant, because California's PIT is preempted here by Acts of Congress, not by the Supremacy Clause. *Cf. United States v. Cty. of Fresno*, 429 U.S. 452, 460 & n.8, 467–68 (1977).

[65] *See* 188 U.S. at 435–44.

the permanent improvements [and livestock]."[66] The United States owed the Indian allottees a duty "to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them."[67]

Likewise, in 1956, in *Squire v. Capoeman*,[68] the Court interpreted the same Territory Clause statute and held that the tax exemption for allotted trust lands extends even further, to include gains from timber sales and all other income "derived directly" from the trust lands.[69] As this Court has stated, "*Capoeman* is not a technical or narrow decision."[70] The *Capoeman* Court conceded that the Dawes Act command to transfer the fee "free of all

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[66] *Id.* at 442; *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973) ("[U]se of permanent improvements upon land is so intimately connected with the use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former.").

[67] *Rickert*, 188 U.S. at 443.

[68] 351 U.S. 1 (1956).

[69] *See id.* at 9. Income exempt under *Capoeman* includes: "rentals (including crop rentals), royalties, proceeds from the sale of the natural resources of the land, income from the sale of crops grown upon the land and from the use of the land for grazing purposes, and income from the sale or exchange of cattle or other livestock raised on the land." Rev. Rul. 67-284, 1967-2 C.B. 55.

[70] *Stevens v. Comm'r*, 452 F.2d 741, 744 (9th Cir. 1971).

charge or incumbrance whatsoever" was "not expressly couched in terms of nontaxability."[71] But the Court rejected the tax collector's attempt to distinguish a "tax on the income derived from the land" from a "direct tax on the allotted land" itself.[72] As in *Rickert*, the Court pointed to the purpose of the Dawes Act's tax immunity: to "guarantee[]" the Indian allottees a "chance of economic survival in competition with others."[73]

In 1980, the Supreme Court mined the Dawes Act's legislative history and concluded that Congress had inserted the "trust" language into the statute precisely to exempt the lands from state taxation: "It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land . . . , but simply because it wished to prevent alienation of the land *and to ensure that allottees would be immune from state taxation*."[74]

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[71] *Capoeman*, 351 U.S. at 6.

[72] *Id.* (quotation marks omitted).

[73] *Id.* at 10.

[74] *United States v. Mitchell*, 445 U.S. 535, 544 (1980) (emphasis added); *see also Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110–15 (1998) (tying federal restraints on alienation to immunity from state taxation).

As this Court subsequently explained in an opinion citing both *Rickert* and *Capoeman*, Congress's allotment "policy was furthered by protecting Indians from the operation of state laws that might decrease the economic value of their allotments."[75] Also applying *Rickert* and *Capoeman*, and reading the Dawes Act and the Mission Indian Relief Act *in pari materia*, this Court has held that Agua Caliente allotted trust lands are "exempt from direct taxation" under those Territory Clause statutes and will remain so as long as the United States holds the title to those lands.[76]

III. The District Court Erred by Ignoring the Territory Clause and the Statutes that Preempt the Possessory-Interest Tax on Agua Caliente Indian Trust Lands.

Given the binding cases interpreting the Territory Clause statutes that regulate the Agua Caliente trust lands, no state property tax can be imposed on (1) the United States' legal interests in those lands, (2) the Tribe's equitable interests in the tribal trust lands, or (3) the individual

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[75] *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (citing *Capoeman*, 351 U.S. at 9–10; *Rickert*, 188 U.S. at 437).

[76] *Kirkwood*, 243 F.2d at 867, 869; *see id.* at 866–67 (citing *Capoeman*), 868 n.6 (referring to *Rickert*).

members' equitable interests in the allotted trust lands. Furthermore, no state tax can be imposed on the rental income the Tribe or its members receive from leasing those lands. That much cannot be disputed.[77]

For the same reasons that a direct tax on the Agua Caliente Indians' trust lands or rental income would be unlawful, the court below should have enjoined Riverside County from collecting California's possessory-interest tax burdening those same lands. In refusing to do so, the court below made two key errors discussed in more detail below. First, the court relied on a false distinction between a tax on an interest in property and a tax on the use of property. Second, the court formalistically focused on the tax's legal incidence (*i.e.*, the identity of the taxpayers as non-Indians), to the exclusion of the tax's economic incidence and fiscal impact on the Tribe.

Both errors flow from a common mistake: conceptualizing this case as a clash between Indians and non-Indians over a commercial transaction or activity, rather than as an issue of property rights in lands that the United States holds in trust for Indians. The former type of dispute is

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[77] *See Agua Caliente Band of Mission Indians v. Cty. of Riverside*, 442 F.2d 1184, 1188 (9th Cir. 1971) (Ely, J., dissenting) ("It is conceded by all concerned that were Riverside County's possessory interest tax imposed directly on the Indian lands, it would be unlawful.").

typically resolved by applying statutes deriving their authority from the Indian Commerce Clause, whereas the latter should be resolved by applying Territory Clause statutes. And any ambiguity in the Territory Clause statutes must be construed to protect the value, use, and enjoyment of the Indians' trust lands from state interference, consistent with the Framers' original understanding of that Clause.

Viewing this case through a Territory Clause lens, the first question to ask is not the legal-incidence question, "*Who* pays the tax?," but rather, "*What* is being taxed?" If the answer is an interest in (or permanent improvement on, or income derived directly from) land that Congress has authorized or allowed the United States to hold in trust for an Indian Tribe or individual, then any state or local tax burdening that interest is categorically preempted, absent an unmistakably clear statement from Congress to the contrary.[78] In these Territory Clause cases, there is no need to engage in a painstaking, particularized balancing of federal, tribal, and state interests.[79]

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[78] This categorical rule covers all "Indian land," as defined in 25 C.F.R. § 162.003.

[79] *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("[I]t is unnecessary to rebalance these interests in every

A. The District Court Erred by Drawing a False Distinction Between a Tax on an Interest in Property and a Tax on the Use of Property.

The District Court repeatedly drew a false distinction between a tax on "the Indian land itself" and a tax on "the non-Indian's use and enjoyment" of that land.[80] The former would indisputably be preempted. But the latter, the court concluded, was permissible, as it taxed only the "use" of property and thus burdened a merely "usufructuary" interest.[81] That conclusion is incorrect for two reasons.

First, both the Supreme Court's and this Court's Indian cases have rejected any such distinction: "It has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense at least, a tax upon 'use' is a tax upon the property itself."[82] Here, all parties conceded below that the PIT is a tax on

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case."). Although the categorical rule is preferable, if the Court feels bound to apply the *Bracker* balancing test, the factors highlighted in this brief weigh heavily on the federal/tribal side of the balance.

[80] Order at 33.

[81] *Id.* at 24, 25 & n.17, 32.

[82] *Mescalero*, 411 U.S. at 158 (citation omitted); *see Confederated Tribes of the Chehalis Reservation of Or. v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153, 1156–57 (9th Cir. 2013).

an interest in property.[83] It is simply not true that the PIT taxes "contract rights" or some sort of commercial "activity" or "transaction"[84] that could just as easily be conducted outside Indian country, like selling cigarettes.

Second, as reflected in a recent Eleventh Circuit decision, the PIT taxes a possessory property interest that is effectively identical to the Indian's property interest. As the District Court correctly stated, a leasehold or possessory interest is a right to possess and use land, with no right to sell it.[85] What the District Court overlooked is that the leasehold interest is indistinguishable from an Indian's equitable or beneficial interest in trust land: That, too, is a right to possess and use land, with no right to sell (because the right of alienation belongs to the titleholder, the United States). Both the leasehold interest and the Indian's equitable interest are "possessory" estates in land—hence the name of the PIT.[86] The former interest is limited to a term of years, while the latter is

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[83] Statement of Undisputed Facts 5, 38 [Doc. 153-1] [hereinafter SUF].

[84] *See* Order at 13, 15, 23–24 & n.16, 26–28, 31, 34.

[85] *See id.* at 24, 25 n.17.

[86] *See* Joseph William Singer, *Property* § 10.2, at 437–46 (5th ed. 2017) (explaining leaseholds); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("As a general proposition, a leasehold interest is property."); *see also In re Greene*, 583 F.3d 614, 622 (9th Cir. 2009).

permanent. But otherwise, there is no meaningful distinction between them—and certainly nothing that should render one taxable when the other is not. Thus the court below erred in placing great weight on "the usufructuary nature of the PIT."[87]

The Eleventh Circuit confirmed this conclusion in *Seminole Tribe of Florida v. Stranburg*, holding that Florida could not collect a tax "on the rent payments made by non-Indian lessees" of tribal trust lands.[88] The court found that the tax was imposed "on land rights that [were] so connected to the land that the tax amount[ed] to a tax on the land itself."[89] Although *Stranburg* was decided under a different Territory Clause statute,[90] the court's conclusion that a rental tax paid by non-Indian lessees is not materially distinguishable from a property tax paid by a Tribe[91] is highly instructive here. The argument that there is a meaningful distinction between taxes on land and taxes on the use of land must fail in this case, just as it did in *Stranburg*.

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[87] Order at 25 n.17.

[88] 799 F.3d 1324, 1328 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2480 (2016).

[89] *Id.* at 1329; *see id.* at 1331 n.8.

[90] 25 U.S.C. § 5108.

[91] *See* 799 F.3d at 1331.

B. The District Court Erred by Formalistically Focusing on the Tax's Legal Incidence, to the Exclusion of Its Economic Incidence and Fiscal Impact on the Tribe.

The District Court's second major error was to focus so tightly on the tax's legal incidence, which falls on non-Indian lessees, that it overlooked both the tax's economic incidence on Indian lessors and the fiscal impact that the California tax, which effectively ousts the Tribe's own tax, has on the tribal government's finances. That approach was incorrect for four reasons.

First, in recent years, outside the Indian context, the Supreme Court has repeatedly sought "to avoid formalism" in its tax jurisprudence and focus instead on specific taxes' "practical effect."[92] "Using legal incidence as the touchstone of taxation is formalistic, allowing states to effectively tax tribes and tribal members by calibrating their tax statutes to place the legal incidence of a tax on nonmembers," while "ignoring the practical effects" on Indians.[93]

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[92] *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991); *see Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1796 (2015); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281, 284–87 (1977).

[93] Mark J. Cowan, *Anatomy of a State/Tribal Tax Dispute: Legal Formalism, Shifting Incidence, Potatoes, and the Idaho Motor Fuel Tax*, 8 ATA J. of Legal Tax Res. 1, 7 (2010) (footnotes omitted); *see also Coeur*

Second, the District Court's singular focus on "*who* bears the legal incidence," that is, "the fact that the *non-Indian* lessees pay the PIT"[94]—a point the court spotlighted by invoking the term "non-Indian" 32 times in its opinion[95]—is a symptom of seeing this dispute through the lens of the Indian Commerce Clause, as an Indian/non-Indian commercial transaction, rather than through the Territory Clause, as a dispute over legally enforceable interests in real property. What matters here is that the PIT is being imposed on property interests that are tax-exempt, not that it was collected from non-Indian lessees.[96]

The District Court's formalistic approach leads to absurd results: The Tribe itself ended up paying the PIT when it subleased an allotment from a non-Indian who in turn had leased the land from one of the Tribe's members.[97] So, even though the state tax could never have been imposed

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d'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 682–88 (9th Cir. 2004) (rejecting such manipulation).

[94] Order at 31 (citation omitted; emphasis added).

[95] *Id.* at 2, 6, 8–9, 11, 13, 19, 22–29, 31–34.

[96] *See Kirschling v. United States*, 746 F.2d 512, 516 (9th Cir. 1984) (rejecting Indian/non-Indian distinction in tax-preemption case).

[97] *See* Order at 6.

against the Tribe directly, the Tribe ended up on the hook because the tax effectively had been "laundered" through a non-Indian lessee.

Third, the District Court erroneously found that the PIT's adverse effect on "leasehold marketability" (the trust lands' "attractiveness for leasing") was "minimal."[98] The Tribe's deposition testimony, however, showed that some developers chose not to lease trust land because it is subject to the PIT, a point Riverside County "does not dispute."[99] As this Court has noted, "a lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax, he enjoys a better bargaining position than he otherwise would, and hence the tax has an adverse economic effect upon him."[100] And the Department of the Interior, which evaluates and approves leases on Indian trust lands nationwide, likewise has concluded that state possessory-interest taxes "increase project costs for the lessee and decrease the funds available to the lessee to make rental payments," which in turn "can impede a tribe's ability to attract non-Indian investment to Indian lands,"

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[98] *Id.* at 6 n.7, 31.

[99] *Id.* at 6, 30.

[100] *Agua Caliente*, 442 F.2d at 1186.

undermining "strong tribal interests in sovereignty and economic self-sufficiency."[101]

Fourth, the District Court erred when it found that the PIT only "minimally affect[ed] the Tribe's revenue generation," that the County had not "'tak[en] revenue that would otherwise go towards supporting the Tribe and its programs,'" and that the PIT therefore did not "interfere[] with tribal governance or economic development."[102] The court based those findings on its mistaken belief that the tribal government could generate revenues from fewer than 1% of the leases at issue (roughly 100 out of 20,000 leases).[103] That is flat wrong. Although the Tribe could generate *rental* income from only the 100 leases on *tribal* trust lands, if the County's PIT were preempted, the Tribe could—and would—generate tribal *tax revenues* from the other 19,900 leases, on *allotted* trust lands.[104]

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[101] 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2012).

[102] Order at 31, 33–34 (citation omitted).

[103] *See id.* at 30–31 (discussing the Tribe's rental income from lease payments, but ignoring potential tribal PIT revenues); *see also id.* at 33 (asserting that a "proportionally low number of leaseholds . . . financially support the Tribe").

[104] *See* SUF at 8–9, 41 (conceding that Tribe is holding its tax in abeyance as long as County collects the PIT).

The Tribe's inherent "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[105] The Tribe can lawfully tax possessory interests on trust lands.[106] And, purely as a matter of law, it could do so here, even concurrently with the County.[107] But as Justice Sotomayor recently explained, so long as the State fails to provide a credit against state taxes for taxes paid to the Tribe, "the resulting double taxation would discourage economic growth," as firms "'may find it easier to avoid doing business on our reservations [than to] . . . bear the brunt of an added tax burden.'"[108] So a "tribe's practical ability to tax [a] non-Indian [lessee] is inversely related to the state's power to tax that entity."[109] Just as tax law

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[105] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

[106] *See* 25 C.F.R. § 162.017(c) ("Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction."); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 196–201 (1985) (upholding Navajo's possessory-interest tax).

[107] *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188–91 (1989); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987).

[108] *Bay Mills*, 134 S. Ct. at 2044 (Sotomayor, J., concurring) (citations omitted).

[109] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 437 (1993).

does not tolerate double taxation in the international and multistate contexts,[110] it should not do so here.

Moreover, a decision favoring the tribal tax over the state tax would not result in unfair diminishment of services to any resident of Riverside County. First, tribal and county governments regularly negotiate tax-sharing compacts establishing how public services will be provided and paid for. As Justice Ginsburg has observed, rejecting formalistic reliance on legal incidence promotes good-faith "cooperative efforts" to resolve tax issues through "constructive intergovernmental agreements."[111] Second, as Judge Posner pointed out in a recent Indian-law case, the County cannot charge general revenue-raising taxes that fund services far from the Reservation; but it can charge user fees for specific services provided to specific Reservation residents.[112]

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[110] *See, e.g.*, 26 U.S.C. § 901 (foreign tax credit); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 194–95 (1995) (multistate sales-tax credits).

[111] *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 130–31 (2005) (Ginsburg, J., dissenting); *see* Cowan, *supra*, at 15–17 (case study).

[112] *See Oneida Tribe of Indians of Wis. v. Village of Hobart*, 732 F.3d 837, 841–42 (7th Cir. 2013).

For the foregoing reasons, this Court should hold the state tax to be preempted on the Agua Caliente trust lands.

CONCLUSION

The judgment below should be reversed.

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Respectfully submitted,

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ADDENDUM

CONSTITUTIONAL PROVISIONS:

Article IV, Section 3 of the United States Constitution (including clause 2, the Territory Clause or Property Clause):

> [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> [2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

REGULATORY PROVISIONS:

25 C.F.R. § 162.003:

> **§ 162.003—What key terms do I need to know?**
>
> * * *
>
> *Indian land* means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.
>
> * * *
>
> *Permanent improvements* means buildings, other structures, and associated infrastructure attached to the leased premises.

* * *

Trust or restricted land means any tract, or interest therein, held in trust or restricted status.

Trust or restricted status means:
(1) That the United States holds title to the tract or interest in trust for the benefit of one or more tribes or individual Indians; or
(2) That one or more tribes or individual Indians holds title to the tract or interest, but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument under Federal law or limitations in Federal law.

* * *

25 C.F.R. § 162.017(a), (c):

§ 162.017—What taxes apply to leases approved under this part?

(a) 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. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

* * *

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

CERTIFICATE OF COMPLIANCE

Counsel for *amicus curiae* certifies that this brief contains **6,985** words, based on the "Word Count" feature of Microsoft Word 2013, including headings, footnotes, and quotations. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Addendum, and Certificates of Counsel.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 28, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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