No. 50791-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EVERI PAYMENTS INC.,
successor in interest to, and formerly known as,
GLOBAL CASH ACCESS, INC.

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE JAMES J. DIXON

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The fundamental issue in this case is whether the Department of Revenue ("DOR") has authority to tax the gaming-related business—cash access services at tribal casinos—provided by Everi Payments, Inc. ("Everi") on tribal land, pursuant to contracts with tribes and authorized by tribal gaming licenses, as required by gaming compacts between the tribes and Washington State. DOR lacks this authority.

DOR's responsive brief ignores the heart of Everi's arguments, many authorities, and much of the evidence. In particular, DOR:

- Ignores the State's Tribal Gaming Compact, which broadly defines "gaming services" to include the services Everi provides (CP 502); requires tribal licensing of gaming service providers like Everi (CP 509); requires tribal reimbursement for regulatory fees and expenses incurred by the State (CP 525); and does not authorize tax on gaming services or providers;[1]
- Disregards its own regulation, WAC 458-20-192 ("Rule 192"), which provides that Business & Occupations Tax ("B&O Tax") is preempted when non-Indians provide on-reservation services to tribes, Rule 192(7)(b); and
- Dismisses the relevance of Everi's contracts with tribes (CP 945-86), despite DOR's prior admission—ignored by DOR on

[1] Tribal State Compact for Class III Gaming Between the Snoqualmie Indian Tribes and State of Washington (CP 494-618). All Washington gaming compacts are available at www.wsgc.wa.gov/tribal-gaming/gaming-compacts (last visited Feb. 22, 2018). DOR fails to mention the Gaming Compact at all in its brief.

appeal—that contractual privity with tribes is the test for preemption under Rule 192(7)(b));. CP 169-70, 213.

Instead, DOR attempts to re-frame this appeal as merely involving "a non-Indian business selling ATM services to non-Indian customers" (Resp. Br. 1), without any tribal involvement (Resp. Br. 2, 34), and where the ATM "transactions at issue" (Resp. Br. *passim*) are properly subject to B&O Tax. DOR's arguments are based on four faulty premises:

- First, the B&O Tax is not a tax on transactions. DOR refers repeatedly to "taxed transactions" and "transactions at issue," but the B&O Tax is "a tax for the act or privilege of engaging in business activities." RCW 82.04.220(1). *Infra*, Part II.A.
- Second, DOR mischaracterizes Everi as merely providing services "to non-Indian customers" (Resp. Br. 1), with "[n]o trib[al] involve[ment]" (Resp. Br. 34). In fact, Everi provides its services to tribal casinos and their patrons;[2] the tribes arrange for and set the terms of these services. *Infra*, Part II.B.
- Third, Everi provides gaming-related services, not mere "banking" (Resp. Br. 36) services that happen "to be located in tribal casinos" (*id.* at 1). *Infra*, Part II.C.
- Fourth, just because "legal incidence" of the tax falls on Everi, a non-Indian, does not mean it escapes preemption. *Infra*, Part II.D.

[2] *See, e.g.*, CP 958 (Everi contracts with Snoqualmie Tribe "to provide certain Services to Service Center [Tribal Casino] and its patrons, subject to and in accordance with the terms and conditions of this Agreement"). *See also* CP 1238 (same language in contract with Colville Tribe, cited by DOR at Resp. Br. 20-21).

DOR's brief is also wrong on preemption law:

Presumption Against State Tax Authority on Indian Land. DOR claims states may impose "generally applicable taxes on non-Indians [providing services] within Indian reservations." Resp. Br. 13. There is no such rule. To the contrary, there is a presumption against state regulatory and tax authority on Indian land that extends to attempts to tax non-Indians doing on-reservation business. *See* App. Br. 18-21 and, *infra*, Part III.

States Lack Authority Over Indian Gaming, Except by Compact. DOR ignores the seminal Supreme Court authority holding that states lack regulatory authority over gaming on Indian lands, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) ("*Cabazon I*" or simply "*Cabazon*"). DOR also ignores *Indian Country U.S.A., Inc. v. State ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 983 n.7 (10th Cir. 1987), in which the Tenth Circuit, applying *Cabazon*, held the state lacked authority to tax bingo activity, and that "preemption of state laws extends to the . . . bingo enterprise as a whole, which includes the involvement of non-Indians [such as Indian Country U.S.A., Inc.]." Under *Cabazon* and *Indian Country U.S.A., Inc.*, states have no authority to tax gaming-related activity on tribal land, including by non-Indians. *Infra*, Part IV.A.

Neither IGRA, the Compact, Nor Case Law Authorizes DOR to Tax Gaming Services. The Indian Gaming Regulatory Act ("IGRA") was passed in 1988 in response to *Cabazon*. A state's authority over on-reservation gaming is limited to that provided for under IGRA. Pursuant to IGRA, as described in the opening brief (App. Br. 22-25) and unrebutted by

DOR, Congress left no regulatory or taxing role for the states except to the extent provided in a tribal-state gaming compact. The only section to address a state's authority to tax gaming activity is 25 U.S.C. 2710(d)(4), which prohibits state taxes on gaming activities except to the extent authorized by tribal-state gaming compact. *Infra*, Part IV.A.

Indian Trader Statutes Apply to Services Provided to Tribes. Everi contracts with tribes to operate cash access services at casinos on the tribes' behalf, charging and collecting surcharges determined by tribes and set forth in the contracts with the tribes, and the tribes pay Everi for those services. These are not mere "transactions between non-Indians" as DOR claims; in any event, the B&O Tax is not a transaction tax. *Infra*, Part IV.B.

Bracker Balancing Supports Preemption. DOR's claim that the balancing test of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) cannot apply because "[n]o tribe is involved" in the "transaction" being taxed (Resp. Br. 34) is wrong on the facts and the law. As a factual matter, the tribes contract for, authorize and set the rates that Everi must charge and collect for cash access transactions. And legally, even if the tribes had no involvement at all in Everi's cash access services, *Bracker* would still apply because the services are carried out on tribal land. Many cases have applied *Bracker* to on-reservation transactions between non-Indians, and no court has ever limited *Bracker* to transactions with tribes. Tribal and federal interests (governmental, regulatory and economic) outweigh the minimal State interests in Everi's on-reservation cash access activities—activities which the State, by DOR's own admission, does not license or regulate.

Resp. Br. 24-25. Thus, if the Court finds it necessary to engage in *Bracker* balancing,[3] the test strongly favors preemption. *Infra*, Part IV.C.

In sum, DOR is attempting to tax income from (1) gaming-related services, (2) provided to tribes on-reservation, and (3) as to which the tribal and federal interests predominate under *Bracker*. For each of these independent reasons, this Court should find the B&O Tax is preempted by federal law; reverse the grant of summary judgment to DOR; and order judgment entered for Everi.

II. DOR'S POSITION IS BASED ON FAULTY PREMISES.

A. The Tax At Issue Is On The Privilege Of Doing Business, Not On Transactions.

Contrary to DOR's characterization,[4] the B&O Tax is "a tax for the act or privilege of engaging in business activities," RCW 82.04.220(1), not a tax on "transactions:"

> A B & O tax is an excise tax imposed for "the privilege of doing business" in a particular jurisdiction. 1B Kelly Kunsch et al., Washington Practice: Methods Of Practice § 72.7, at 452 (1997). . . . Unlike a sales tax, which taxes a specific sale of a good or service, the B & O tax is imposed on the general privilege of engaging in business.

Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 39-40, 156 P.3d 185 (2007) (emphasis added). *See also Steven Klein, Inc. v. State, Dep't of Rev.*, 183 Wn.2d 889, 899, 357 P.3d 59 (2015) (B&O tax is "on the privilege of

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[3] Congress already balanced the competing interests when it enacted IGRA. Here, because the State failed to compact for taxing authority over gaming services, the tax is preempted by IGRA and *Bracker* balancing is unnecessary. App. Br. 24-25.

[4] DOR briefly acknowledges the "tax incident" is the "privilege of engaging in business activities in the taxing jurisdiction" (Resp. Br. 16), but elsewhere refers to the "taxed transactions" or "transactions at issue." (Resp. Br. 1, 2, 3, 19, 20, 21)

doing business," not an income tax). Here, this "privilege" is conferred only by the tribes: business is conducted on tribal land, through tribal contracts (CP 949-86), and as authorized by tribal gaming licenses (CP 350-427).

DOR claims "the fact that Everi also has a contractual relationship with the tribes does not change the fact that the taxed transactions at issue here take place between Everi and non-Indian customers." Resp. Br. 20. But even if Everi entered into a separate contract with each individual patron for every cash access transaction,[5] the relevant contracts are those with the tribes, which grant the privilege of engaging in on-reservation business, because the B&O Tax is not like a "sales tax" on each "individual transaction," but on "the privilege of engaging in the [] business." *Ford Motor Co.*, 160 Wn.2d at 44. *Compare* RCW 82.04.220 (B&O Tax is on privilege of doing business, not each sale or transaction) with RCW 82.08.020 (sales tax is on "each retail sale") and RCW 82.08.195 (describing "transactions" and "bundled transactions" subject to sales tax).

B. Tribes Are Involved In The Cash Access Services: Tribes Grant Everi The Privilege To Provide These Services On-Reservation, And Tribes Dictate The Fees That Everi Must Charge And Collect On Transactions.

DOR wrongly claims that "No tribe is involved in [cash access] transaction[s] between the customer and Everi." Resp. Br. 34; *see also*

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[5] DOR argues that Everi forms a contract with its customers "each time a customer accepts Everi's offer to process the requested cash access transaction for a fee by clicking the 'YES' or 'I AGREE' button." Resp. Br. 20. But, as discussed *infra* Part II.B, it is the tribes—through their contracts with Everi—that determine the surcharge on each transaction (CP 948, 974, 979), which is the sole term to which casino patrons are asked to agree. Resp. Br. 20.

Resp. Br. 2. As discussed above, tribes grant Everi the privilege to provide these cash access transactions, through contracts (CP 949-86) and gaming licenses (CP 350-427).

Furthermore, through their contracts with Everi, tribes dictate the surcharges—the sole term to which casino patrons are asked to agree in order to obtain cash (Resp. Br. 20)—that Everi must charge and collect on each cash access transaction. CP 948, 974 (tribal casino "shall have the right to determine the Cardholder Fees"), 979 (same); *see* App. Br. 10-11. DOR does not dispute this. Tribes are contractually entitled to, and receive, the vast majority of transaction revenue; Everi retains only a small portion as payment for providing its services. *See* App. Br. 9-13.

DOR does not dispute that tribes are also involved in selecting, installing, maintaining, and operating the cash access services. *See* App. Br. 9-10. In fact, DOR admits that the tribal casinos supply cash to the kiosks that Everi operates for cash access transactions. Resp. Br. 7-8. *See also* CP 1160 (cash in the kiosk is "configurable by the casino," and kiosk "lights and alerts . . . notify the casino staff to refill the kiosk prior to depleting currency").

C. The Services Provided By Everi Are Gaming-Related.

Availability of on-site cash access—through ATM withdrawals, credit card cash advances and debit card point-of-sale transactions—is critical to the gaming industry, and tribal casinos depend on these services. App. Br. 6-7. Everi's kiosks are integrated into tribal gaming operations: the kiosks are connected to the tribal lottery system (the system that takes wagers and dispenses tickets), and provide other gaming-related

functionality, including gaming ticket redemption and bill-breaking.[6] App. Br. 7-9. Furthermore, the Compact broadly defines "Gaming Services" to include any services, including maintenance and security, provided directly or indirectly "in connection with" gaming in a tribal casino. CP 502.

D. That Everi Bears The Legal Incidence Of The B&O Tax Does Not Mean The Tax Escapes Preemption.

DOR argues that the "initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax." Resp. Br. 15 (citing *Okla Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995), holding state could not tax fuel sold by tribe in Indian country). Everi has never disputed that it bears the incidence of the tax (CP 901), but even when incidence is on a non-Indian, the tax still may be preempted by federal law. DOR's own cases make this clear. *See, e.g., Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 102 (2005) (cited Resp. Br. 17, 27, 33) ("even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction . . . occurs on the reservation"). Thus, the fact that Everi bears and pays the tax does not mean it escapes preemption.[7]

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[6] DOR concedes that Everi's kiosks are not mere ATMs, but claims the cash access, ticket redemption and bill-breaking functions are entirely separate. (Resp. Br. 4-5) DOR is incorrect: These functions are combined in a single, "full-service kiosk," using "the same cash fund, eliminating the need for separate vaults for each type of transaction." CP 1160.

[7] Similarly, DOR's repeated citation to language in Everi's contracts with tribes to the effect that Everi must comply with its own obligations regarding taxes does not help DOR. Resp. Br. 2, 9, 21, 26, 29. That Everi is responsible for its own tax obligations—whatever those are—says nothing about whether the B&O Tax at issue here is valid or preempted.

III. DOR WRONGLY PRESUMES THAT STATES HAVE JURISDICTION TO TAX IN INDIAN COUNTRY.

DOR claims that "Under well-settled United States Supreme Court precedent, states may impose nondiscriminatory, generally applicable taxes on non-Indians [providing services] within Indian reservations." Resp. Br. 13. However, there is no such general rule, and the cases that DOR cites for this proposition are inapposite. Indeed, contrary to DOR's position, there is a presumption against state regulatory and tax authority on Indian reservations, and that presumption extends to a state's attempt to tax non-Indians doing on-reservation business.

The Supreme Court recognized that tribes retain sovereignty "over both their members and their territory" in *Cabazon*, 480 U.S. at 207 (emphasis added). In holding that California lacked regulatory authority to apply its laws to on-reservation bingo, the Court rejected the state's position—espoused by Justice Stevens in dissent—that such authority should be presumed:

> Justice STEVENS appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in [*Bracker*], in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law."

Cabazon I, 480 U.S. at 216, n.18. This presumption "against state jurisdiction in Indian country" extends to state taxation of the tribal gaming "enterprise as a whole, which includes the involvement of non-Indians." *Indian Country U.S.A., Inc.*, 829 F.2d at 983, n.7.

DOR fails to address the presumption against state authority over on-reservation activity recognized in *Cabazon* and *Indian Country U.S.A., Inc.* Instead, DOR incorrectly claims two Supreme Court cases—*Ariz. Dep't of Rev. v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989)—as holding that a state may impose "generally applicable taxes on non-Indians" doing on-reservation business.[8] Resp. Br. 13-14. These cases do not support DOR. In *Blaze*, far from holding anything about a state's general authority to tax in Indian country, the Court merely applied "a bright line standard for taxation of federal contracts."[9] *Blaze*, 526 U.S. at 37. In *Cotton*, the Court considered whether a state's severance tax on oil and gas produced from the reservation was preempted by federal law—specifically, the Indian Mineral Leasing Act. 490 U.S. at 175-76. In considering congressional intent, the

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[8] DOR also cites two other cases (at Resp. Br. 14) for this proposition: *Neah Bay Fish Co. v. Krummel*, 3 Wn.2d 570, 571-72, 578, 101 P.2d 600 (1940) and *Sac and Fox Nation v. Okla. Tax. Comm'n*, 967 F.2d 1425, 1429-30 (10th Cir. 1992). Neither case so holds. *Neah Bay*, 3 Wn.2d at 571-72 (held state could tax sales to non-Indians; did not involve gaming; pre-dates *Bracker* and modern Supreme Court case law regarding taxation on Indian land); *Sac and Fox*, 967 F.2d at 1429-30 (held state could tax income of non-Indian employees). Moreover, the Supreme Court ultimately vacated the Tenth Circuit opinion in *Sac and Fox*, explaining "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country." *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) (emphasis added).

[9] This bright line standard for federal contractors was first articulated by the Supreme Court in *United States v. New Mexico*, 455 U.S. 720 (1982). *Blaze* held the "same rule applies when the federal contractor renders its services on an Indian reservation." *Blaze*, 526 U.S. at 34. The Court found no need to apply the *Bracker* balancing test or "Indian pre-emption doctrine" because (unlike in the case at bar) the tribe was not involved in the contracting. *Id.* at 37-38.

Court explained "the history of tribal sovereignty serves as a necessary "backdrop" to that process:

> [W]e have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case "requires a particularized examination of the relevant state, federal, and tribal interests." . . . Moreover, in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue. . . . It bears emphasis that . . . federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity. Finally, we note that although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence.

Id. at 176-77 (emphasis added; citations omitted).

Cotton found the state tax valid only because "there was no history of tribal independence from state taxation of these [oil and gas] lessees" (*id.* at 182), the Indian Mineral Leasing Act (and predecessor statutes) contemplated state taxation of lessees (*id.* at 183), and the state actually "regulate[d] the spacing and mechanical integrity of wells located on the reservation" (*id.* at 186). Here, in contrast, there is a history of tribal independence from state regulation and taxation of on-reservation gaming,[10] IGRA does not contemplate state taxation of gaming activity except as provided in a tribal-state gaming compact,[11] and the State does not regulate tribal gaming activity (including the cash access services

[10] *Cabazon I*, 480 U.S. at 219-20; *Indian Country U.S.A., Inc.*, 829 F.2d at 983.

[11] 25 U.S.C. § 2710(d)(4). *See also infra*, Part IV.A.

provided by Everi).[12] Unlike *Cotton*, this is a case "in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186.

IV. THE TAX AT ISSUE IS PREEMPTED BY FEDERAL LAW.

A. Because DOR Has No Authority To Tax Gaming Services, The Tax Is Preempted.

DOR fails to appreciate that IGRA was passed in response to *Cabazon* and—as the Court has repeatedly recognized—a state's authority over on-reservation gaming is limited to what is provided for under IGRA. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114 (1996) ("[IGRA] grants the States a power that they would not otherwise have, *viz.*, some measure of authority over gaming on Indian lands").

Congress left states "no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996).[13] The only section of IGRA that addresses tax on gaming activity is 25 U.S.C. 2710(d)(4). In full, that section provides:

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[12] Resp. Br. 24-25 ("ATM services" provided by Everi at tribal casinos are not regulated or licensed by State).

[13] Further, Congress definitively performed the "balancing" of interests for purposes of state authority over on-reservation gaming activities. Post-IGRA, there is no need to engage in a *Bracker* analysis (as the *Cabazon* Court did pre-IGRA) to find preemption. App. Br. 24-25.

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4) (emphasis added). The paragraph referenced in the opening clause authorizes tribal-state compacts to include provisions relating to "assessment by the State" of gaming activities "in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii).

DOR dismisses section 2710(d)(4) as a "disclaimer," which "neither bars nor permits state taxes." Resp. Br. 24 (emphasis added). But even if viewed as a mere "disclaimer,"[14] it is fatal to DOR's position. Under *Cabazon* and *Indian Country U.S.A., Inc.*, a state lacks authority to tax gaming activity except as authorized by IGRA--and IGRA itself permits taxes only to the extent agreed to by tribal-state gaming compact. 25 U.S.C. § 2710(d)(4). DOR cannot point to any section of IGRA, nor any provision of the State's Gaming Compact, that authorizes or "permits" (to quote DOR's own admission, Resp. Br. 24) it to tax gaming activity. Because no

[14] No court has described 25 U.S.C. § 2710(d)(4) as a "disclaimer." This section was discussed most recently and comprehensively in *Flandreau Santee Sioux Tribe v. Gerlach*, 2017 WL 4124242 (D. S.D. 2017), which held that state taxes on gaming activities are not allowed except to the extent authorized by tribal-state gaming compact--and even then, only to defray the costs of state regulation. *Id.* at *10 (citing 25 U.S.C. § 2710(d)(4) and (d)(3)(C)(iii)).

such section or provision exists, DOR lacks authority to tax the gaming services provided by Everi.

DOR argues its tax on Everi's services is not a tax on gaming because "[t]he mere fact that the withdrawals happen in a casino, and that the customer may use the cash to gamble afterwards, does not turn them into 'gaming.'" Resp. Br. 22-23. Further, DOR cites Everi's "admission" that its services are not "games of chance" or "class I, II or III playable games," and DOR concludes there is "no evidence that 'cash access services' are 'gaming.'" Resp. Br. 24. DOR's position is wrong, in law and fact.

As a matter of law, IGRA comprehensively regulates gaming activities "beyond just pure gameplay at a casino." *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F.Supp.3d 888, 892 (D. S.D. 2016) (alcohol sales at a tribal casino can be directly related to class III gaming); 25 U.S.C. § 2710(d)(4) (unless authorized by compact, state has no authority to tax a class III "activity"). And in fact, the record shows that Everi's services are gaming services:

> First, the State's Compact broadly defines "gaming services":
>
> "Gaming Services" means the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly) in connection with the operation of Class III gaming in a Gaming Facility, including equipment, maintenance or security services for the Gaming Facility.

CP 502 (§ II.M, p. 3) (emphasis added). The "Gaming Services" definition governs what vendors must be licensed by the tribal gaming agencies: any "supplier of gaming services" must be licensed by the tribe "prior to the sale of any gaming services." CP 509 (§ IV.C, p. 10). While the Compact defines

"gaming services" and requires licensing of gaming service providers, it does not authorize the State to tax gaming services or providers. *See* CP 494-530.

Second, as described in the opening brief, the record establishes that cash access services are critical to gaming and tribal casinos depend on these services. App. Br. 6-7. DOR does not dispute this.

Third, Everi has been licensed as a gaming service provider by each tribe with which it works. App. Br. 12-13. DOR counters that tribal licenses "prove nothing [because] [m]ost of them do not specify the services or goods they authorize." Resp. Br. 24. But even a cursory review shows each license is issued by a tribal "gaming commission" or "gaming agency"; virtually all refer to "gaming" or "class III" activity;[15] and most cite the Gaming Compact, IGRA and/or tribal gaming ordinance. CP 351-427.

DOR heavily relies on *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008) and *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). However, the nature of the tax and the activities at issue in those cases were much different than here. Neither case involved taxation of gaming services inside a tribal casino: *Barona* upheld a sales tax on a subcontractor's purchase of electrical equipment

[15] DOR cites a single page (out of 76) titled "non-gaming license" (Resp. Br. 24), but even that page refers to an "Annual Gaming License" in the body of the document. CP 370. DOR also cites a few "business permits." Resp. Br. 24 (CP 355-56). The "business" permits or licenses granted by tribal gaming agencies support preemption, not only as evidence that Everi provides gaming services, but also under the Indian Trader statutes (as evidence Everi sells services to the tribes, *infra*, Part IV.B) and *Bracker* balancing (as evidence that the tribes—not the State—grant Everi the privilege to do on-reservation business, *infra*, Part IV.C).

from a general contractor, 528 F.3d at 1192-93; *Ledyard* upheld a property tax on ownership of slot machines at a casino, 722 F.3d at 470.[16] Neither case considered a tax on the "act or privilege"[17] (like the B&O Tax here) of carrying out gaming-related services in a casino. And neither case affirmed tax on a gaming service provider licensed pursuant to a tribal-state gaming compact. DOR can point to no case, and none exists, upholding state tax on gaming services at a tribal casino.

When courts have considered state regulation or taxation of gaming services in a casino, they have always found state authority preempted. *Cabazon I*, 480 U.S. at 222 ("compelling federal and tribal interests" preempted state regulation over on-reservation bingo and poker); *Indian Country U.S.A., Inc.*, 829 F.2d at 983 and n.7 (state preempted from regulating and taxing "tribal bingo enterprise as a whole, which includes the involvement

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[16] *Ledyard* is also distinguishable because, here, DOR is taxing activities (not passive ownership) that the tribes are involved in: e.g. by licensing and regulating Everi, setting and receiving the surcharges on transactions, and coordinating with Everi on the maintenance and operation of cash access services. App. Br. 9-13 and *supra*, Part II.B. Further in contrast to *Ledyard*, the kiosks through which Everi provides services are typically owned by the tribes, not Everi. CP 947.

[17] Where courts have considered taxes on gross income or receipts from the "act or privilege" of doing business on-reservation, or trading with Indian tribes, those taxes have been preempted. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 (1982) (State's "gross receipts tax is intended to compensate the State for granting the 'privilege of engaging in business,'" which the State did not grant in this case; tax on non-Indian company working on-reservation was preempted); *Bracker*, 448 U.S. at 139-40, 148 (motor carrier licensing tax based on carrier's on-reservation gross receipts preempted); *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 687-89 (1965) (tax on gross proceeds preempted on reservation); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 161-63 (1980) (state's "transaction privilege tax" based on gross receipts on reservation was preempted).

of non-Indians"); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994) (state preempted from taxing non-Indian racing associations' "off-track" betting activities on tribal land) ("*Cabazon II*"); *Flandreau Santee Sioux Tribe v. Gerlach*, 2017 WL 4124242, *10. (state tax preempted on non-Indians' purchase of alcohol and other goods and services at casino). *Cf. Flandreau Santee Sioux Tribe v. Gerlach*, 155 F.Supp.3d 972, 992 (D. S.D. 2015) ("alcohol availability" can be "directly related to class III gaming" and "regulation and taxation is, therefore, compactable between a tribe and a state"); *Flandreau v. Gerlach*, 162 F.Supp.3d at 892 ("IGRA covers activity beyond just pure gameplay at a casino"). DOR fails even to mention—much less distinguish—the *Cabazon* cases or *Indian County U.S.A., Inc.*, and DOR cannot distinguish the *Flandreau* decisions.[18]

B. The Tax Is Preempted Because Everi Provides Services To Tribes On Their Reservations.

DOR argues the "Supreme Court has never held that the Indian Trader statutes preempt a state tax on non-Indian transactions with other

[18] DOR tries to distinguish the *Flandreau* cases because, there, the tribe itself was selling alcohol to non-Indians. Resp. Br. 28-29. But tribes are involved in the provision of cash access services here too (*supra*, Part II.B; App. Br. 9-13) and, in both *Flandreau* and here, the states attempt to tax non-Indians rather than the tribe.

DOR also claims ATM transactions occur all over—not just in casinos—including at markets, stores and gas stations. Resp. Br. 29-30. But the same is true of alcohol sales, which *Flandreau* found to facilitate gaming, 2017 WL 4124242, *9.

Last, DOR claims *Flandreau* was "wrongly decided" because it applied an "existence of the casino" test, unlike in *Barona* and *Ledyard*. Resp. Br. 30. Significantly, as Everi noted in its opening brief, *Flandreau* carefully considered and distinguished *Barona* and *Ledyard* (and other cases relied on by DOR) because the nature of the tax and the activities at issue were much different. App. Br. 29-30, n.15; *Flandreau*, 2017 WL 4124242, *6-7. *See also supra*, pp. 15-17.

non-Indians." Resp. Br. 31. This is correct but misses the point. Everi contracts with tribes to operate cash access services at casinos on the tribes' behalf—tribes set the surcharges that Everi must collect—and tribes pay Everi for those services. *Supra*, Part II.B. These are not mere "transactions between non-Indians"—and, in any event, the B&O Tax is not a transaction tax. *Supra*, Part II.A.

For purposes of preemption under the Indian Trader statutes and Supreme Court case law,[19] the question is whether Everi provides services to the tribes. DOR's Rule 192);confirms this: "Income from the performance of services in Indian country for the tribe or tribal members is not subject to the B&O or public utility tax.");Rule 192(7)(b); App. Br. 44-46. In response to discovery, DOR conceded it "follows the privity relationship" to determine for whom a service is performed (CP 169-70), and if a non-Indian company contracts with a tribe "to provide service and get payment, then you are providing service for the tribe" under Rule 192. CP 213. DOR does not dispute these admissions,[20] which are dispositive.

C. The Tax Is Preempted Under *Bracker* Because Strong Federal And Tribal Interests Outweigh The Minimal State Interests.

1. Through IGRA, Congress Has Already Balanced The Federal, Tribal And State Interests, Preempting State Authority Except To The Extent Provided By Compact.

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[19] 25 U.S.C. §§ 261-264; *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. at 687-89; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. at 163-64. *See* App. Br. 31-34.

[20] Indeed, DOR concedes that Everi provides services to tribes, as stated in Everi's contracts with tribes, but merely claims Everi also serves casino "patrons." Resp. Br. 20-21 (citing CP 1238).

Through its adoption of IGRA, Congress definitively performed the "balancing" of interests for purposes of state authority over on-reservation gaming activities. App. Br. 24-25. "[R]ather than directing the federal courts to perform the balancing of interests between the state on the one side and the tribe and federal government on the other, Congress conducted the balancing itself." *Gaming Corp. of Am.*, 88 F.3d at 546. Thus, post-adoption of IGRA, there is no need for a court to engage in a *Bracker* analysis (as the Court did pre-IGRA, in *Cabazon I*) to decide whether a state may tax such activities. Because Washington's Gaming Compact does not authorize state tax on gaming services, the tax is preempted. *Supra*, Part IV.A.

2. DOR Is Wrong, In Fact And In Law, To Claim *Bracker* Cannot Apply Because "No Tribe Is Involved" In The Services At Issue.

In fact, as discussed above, the tribes contract with Everi and are involved in Everi's cash access services. *Supra*, Part II.B. Furthermore, tribes grant Everi the privilege to provide these services, and B&O Tax applies to that privilege, not to individual transactions. *Supra*, Part II.A.

In law, even if this case merely involved "transactions between non-Indians" and a "tax on transactions," courts have applied *Bracker* balancing to on-reservation transactions between non-Indians—the on-reservation location is the key.[21] No court has ever limited *Bracker* to transactions with

[21] In *Wagnon*, 546 U.S. at 113, the Court highlighted the significance of whether the state seeks to tax within or outside Indian country:

"We have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian country. Without applying the interest-balancing test, . . . we have concluded that '[a]bsent express federal law to the contrary,

tribes. DOR misconstrues *Wagnon v. Prairie Band*, 546 U.S. 95. There, the question was whether *Bracker* balancing applies to state taxation of non-Indians engaged in transactions outside of Indian country. With the geographic component of tribal sovereignty removed, the Court held *Bracker* balancing inapplicable:

> [T]he *Bracker* interest-balancing test applies only where a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation.

Wagnon, 546 U.S. at 99 (emphasis added; citation and quotations omitted). Here, unlike in *Wagnon*, DOR has taxed Everi's on-reservation services.

Indeed, just last year, DOR unsuccessfully made the identical argument: that *Bracker* does not apply to on-reservation transactions between non-Indians. The federal court rejected DOR's position, recognizing that "*Wagnon's* holding was focused on *where* the transactions occurred (on the reservation or off of it), not on the tribal or non-tribal identities of the transacting parties. . . . [*Wagnon*] highlight[s] the dispositive geographic location of the transaction." *Tulalip Tribes v. Washington*, 2017 WL 58836 (W.D. Wa. 2017, Rothstein, J.), *5 (emphasis in original). "Because Defendant's taxes are undisputedly applied to on-reservation activities, *Wagnon* is as inapplicable as *Blaze*," and *Bracker* balancing applies to on-reservation transactions between non-Indians. *Id.*

Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'"

3. Federal And Tribal Interests In The Taxed Activity Are Compelling.

DOR claims that federal and tribal interests "do not apply." Resp. Br. 35, 37. DOR is wrong: *Bracker* specifically requires balancing of federal, tribal and state interests. 448 U.S. at 144-45.[22] As the Court held in *California v. Cabazon*, the federal and tribal interests in Indian gaming are "compelling." 480 U.S. at 222. Congress similarly recognized these strong federal and tribal interests—governmental, economic and regulatory in nature—as the purposes behind IGRA. 25 U.S.C. § 2702 (IGRA's purposes are to promote "tribal economic development, self-sufficiency, and strong tribal governments," and to establish "federal regulatory authority" and "standards" for gaming on Indian lands). *See supra*, Part IV.A. And it is the tribes that grant Everi the "privilege" to provide gaming services on their reservations, which tribes license, contract for, participate in and regulate.[23] *Supra*, Part II.B.

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[22] Even DOR's own regulation admits the relevance of federal and tribal interests. The "balancing test" considers "The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." Rule 192(7)(c).

[23] DOR claims tribal interests are "minimal" because taxes do not affect the amounts received from Everi and there is no evidence that "economic development" interests are harmed. Resp. Br. 37-38. However, the *Bracker* analysis is not so narrow or exacting. Everi has shown how the cash access services benefit tribes, as well as tribal regulatory interests and involvement in those services. *Supra*, Part II.B. This is sufficient. *Indian Country U.S.A., Inc.*, 829 F.3d at 987 n.9 (balancing test "cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax."). Indeed, even if Everi had "introduced no record evidence whatsoever of the impact of the [tax] on the Tribe's business operations or its sovereignty," as was the case in *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1340-41 (11th Cir. 2015) (finding rental tax preempted under *Bracker* based on extensive federal regulation, despite

The State has no authority to grant the "privilege"—doing business with tribal casinos, pursuant to tribal gaming licenses, on Indian land—for which it wants Everi to pay. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("tribe's power to exclude nonmembers entirely" is "well established"); *Ramah*, 458 U.S. at 844 (the "privilege of doing business" on an Indian reservation is bestowed by federal government). Tribal interests are especially strong when, as here, the revenues being taxed are derived from value generated "on-reservation" by activities in which tribal members have a significant interest. App. Br. 40-42. DOR fails to appreciate, but does not dispute this.[24]

4. State Interests In The Taxed Activity Are Minimal.

When, as here, "strong federal and tribal interests exist," a state may avoid preemption "only if its taxes are narrowly tailored to funding the services it provides in connection with the activities taking place on tribal land." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1412 (9th

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no evidence of tribal impacts), the Court still should find preemption based on the extensive and exclusive federal regulation of gaming.

[24] For its *Bracker* analysis (Resp. Br. 36-39), DOR relies heavily on cases where the tribe was merely "marketing a tax exemption" (*Barona*, 528 F.3d at 1193-94), where the activity "would have occurred on non-Indian land" but for "contractual creativity" (*id.* at 1192), or where the business was "importing a product onto the reservation for re-sale to non-Indians." *Salt River Pima-Maricopa Indian Comty. v. State of Arizona*, 50 F.3d 734, 738 (9th Cir. 1995).

Here, by contrast, it is the tribes' on-reservation casino development that creates the need and demand for Everi's services. Gaming is the classic example of "on-reservation value," and readily distinguished from the smokeshop, mall or marketing-tax-exemption cases. *Cabazon I*, 480 U.S. at 219-20 (tribal casinos are not merely "marketing an exemption" from state taxation or regulation). *See* App. Br. 40-42.

Cir. 1992) (internal quotations omitted). A state's interest in assessing tax is "particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within tribal lands and over which it has no control." *Indian County U.S.A., Inc.*, 829 F.2d at 987. A state must show a "specific, legitimate regulatory interest to justify the imposition" of tax; tax is preempted when "the State does not seek to assess its tax in return for the government functions it provides to those who must bear the burden of paying this tax." *Ramah*, 458 U.S. at 843. State taxes are preempted when they "merely serve a generalized interest in raising revenue." *Stranburg*, 799 F.3d at 1337.

DOR fails to identify any "specific regulatory interest," nor any specific state resource,[25] to justify the tax on Everi. Indeed, by DOR's own admission, the State does not regulate or license Everi's cash access services. Resp. Br. 19, 24-25 (services regulated under federal law; state regulation does not apply). Furthermore, pursuant to the Gaming Compact, the State has no unreimbursed expenses related to tribal gaming. CP 525 (Compact requires tribal reimbursement of state regulatory fees and expenses); *see* App. Br. 43-44. DOR does not and cannot dispute this.

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[25] DOR mentions state roads, law enforcement, telecommunications, airport and airspace as "state resources" warranting tax on Everi (Resp. Br. 39-40), but these are generalized services provided to all State residents, not "closely" or "specifically" related to the taxed, on-reservation activity. *Stranburg*, 799 F.3d at 1337 (no services "provided specifically" for taxpayer) and 1342 (tax preempted because state did not show it was "critically connected" to taxed activity); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) (state tax not justified by general services provided to "residents of the reservation and the surrounding area," but not directly connected to the timber industry; tax preempted).

V. EVEN IF THIS COURT FINDS THE B&O TAX NOT PREEMPTED, THE CASE SHOULD BE REMANDED FOR THE TRIAL COURT TO DETERMINE TAXES DUE SOLELY ON THE PORTION OF REVENUE ACTUALLY RETAINED BY EVERI.[26]

The tribes with whom Everi contracts receive the vast majority of the revenue from cash access transactions. Everi retains barely one-third of revenue, yet DOR taxes it all. CP 949, 955-56. DOR acknowledges a taxpayer may be able to exclude from taxable gross income "amounts handled by the agent solely in its capacity as an agent for its principal." Resp. Br. 45. But DOR claims "evidence shows that patrons entered into an agreement with Everi . . . and "[n]o evidence indicates that the amount charged a patron was a commission charged by the Tribe." *Id.* at 46.

DOR mischaracterizes the evidence. Through their contracts with Everi, tribes dictate the surcharges—the sole term (by DOR's admission, Resp. Br. 20) to which casino patrons are asked to agree in order to access cash—that Everi must charge and collect on each transaction. *Supra*, Part

[26] DOR claims Everi failed to timely plead or raise the "pass through" argument and, thus, this Court should not consider it. Resp. Br. 43-44. DOR is wrong. In accordance with RCW 82.32.180, Everi pled the amount of tax it conceded to be correct (CP 7, 15), the requested refund (CP 12) and the reasons therefor (CP 8-12); the refund based on pass-through treatment is less than (and thus subsumed in) the full refund sought. Furthermore, Everi raised the pass-through issue in discovery (CP 321) and made the argument in opposition to DOR's motion for summary judgment. CP 838-39. DOR responded to the argument on the merits (CP 894-95) and the trial court ruled on the merits. Resp. Br. 42 ("Contrary to the trial court ruling, Everi argues that the portion of its receipts from cash access transactions that it pays to the tribes as commissions does not constitute gross income of its business," citing 4/14/17 RP 85) (emphasis added). Because the issue was argued by both parties and ruled on by the trial court, it should be considered on appeal. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987) (treating issue as raised in pleadings where argued by both parties and ruled on at trial); CR 15 (same).

II.A. ATM surcharges are owned by the tribes, and Everi must collect and pay them to the tribes on a monthly basis. CP 974, 979 ("Cardholder Fees shall be the property of Service Center, and at all times the Service Center, in its sole discretion shall have the right to determine the Cardholder Fees").[27] In short, contrary to DOR's claim (Resp. Br. 48), the evidence shows Everi acts as a collection agent for tribes.

Thus, if this Court finds the B&O Tax not preempted, the case should be remanded to determine taxes solely on revenue retained by Everi.

VI. CONCLUSION.

For all the foregoing reasons, this Court should reverse the summary judgment order in favor of DOR and, instead, order summary judgment be entered for Everi.

Dated: March 9, 2018.

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[27] *See Wash. Imaging Servs., LLC v. Wash. Dep't of Rev.*, 171 Wn.2d 548, 557, 252 P.3d 885 (2011) (taxpayer acts as collection agent where it collects money "owed" to principal); *First Am. Title Ins. Co v. State, Dep't of Rev.*, 144 Wn.2d 300, 305, 27 P.3d 604 (2001) ("Where the business acts only as a pass-through for funds, the pass-through funds are not included as income"). *See also* WAC 458-20-159 (agent is one who has either "actual or constructive possession of tangible personal property, the actual ownership of such property being in another"; B&O tax does not apply to agents) and DOR's administrative decisions, Det. No. 88-377, 6 WTD 439 (1988) and Det. No. 91-210, 11 WTD 389 (1992) (attached to App. Br. as Appendix D).

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 9, 2018, I arranged for service of the foregoing Appellant's Reply Brief, to the court and to the parties to this action as follows:

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