No. E070618

In the Court of Appeal of the State of California

Fourth Appellate District, Division 2

Heidi L. Herpel, et al.,
Plaintiffs-Appellants

vs.

County of Riverside, et al.,
Defendants-Respondents; and

Larry W. Ward, as Assessor, etc.,
Real Party in Interest and Respondent

APPELLANTS' OPENING BRIEF

Riverside County Superior Court Case No. PSC1404764
The Honorable Craig G. Riemer and The Honorable John G. Evans

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Fourth APPELLATE DISTRICT, DIVISION Two	COURT OF APPEAL CASE NUMBER: E070618
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 240466 NAME: Sean D. Meenan FIRM NAME: Winston & Strawn LLP STREET ADDRESS: 101 California Street, 35th Floor CITY: San Francisco STATE: CA ZIP CODE: 94111 TELEPHONE NO.: 415-591-1000 FAX NO.: 415-591-1400 E-MAIL ADDRESS: SMeenan@winston.com ATTORNEY FOR (*name*): Plaintiffs-Appellants Heidi L. Herpel, et al	SUPERIOR COURT CASE NUMBER: PSC1404764
APPELLANT/ PETITIONER: Heidi L. Herpel, et al., RESPONDENT/ REAL PARTY IN INTEREST: County of Riverside, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): HEIDI L. HERPEL, JUDITH FABRIS, ROGER ETHERINGTON, and BARBARA ETHERINGTON, on behalf of themselves and all others similarly situated

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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(1)	
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 18, 2019

Sean D. Meenan
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INTRODUCTION

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). In furtherance of this policy, the federal government has enacted a number of measures limiting the authority of state and local governments to impose taxes on Indian land.

The taxing authorities in Riverside County, California, have attempted to make an end-run around this policy by passing along a tax on possessory interests in land from the tribal landowners themselves to their residential lessees who happen not to be Indians—including lead plaintiff Heidi Herpel and those similarly situated (appellants here, collectively referred to as "Lessees"). But federal law prohibits this tax in three independent ways.

(I) *Preemption under* Bracker. The tax at issue fails the preemption test the U.S. Supreme Court introduced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Bracker* altered the preemption framework to account for the unique interests at stake when state law, federal Indian law, and tribal concerns collide—and, as a result, abrogated prior case law on the subject of preemption of state taxes on Indian land. *Bracker* is the first test this Court should apply in examining whether the application of California's possessory interest tax to non-Indians on Indian land is preempted. It is, because the federal and tribal interests reflected in the federal government's

comprehensive and pervasive federal regulatory scheme for the leasing of Indian land outweigh the County's general interest in raising revenue through the tax.

(II) *Express and conflict preemption.* While *Bracker* is the starting point of the analysis, it is not the end, as traditional principles of preemption still apply. Section 162.017 of the Code of Federal Regulations expressly bars states from assessing taxes on possessory interests or permanent improvements on Indian land, thus preempting the California tax as to Lessees' property. The tax is also barred under the doctrine of conflict preemption because § 162.017 prohibits the County from assessing a tax that it is required to collect under California law.

(III) *The federal tax exemption for certain Indian lands.* Courts have held that 25 U.S.C. § 465, which codifies the long-standing exemption from state taxes for lands held in trust by the federal government for use by Indians, bars the application of taxes like the California possessory interest tax to leaseholds and permanent improvements on Indian lands.

For these reasons, the Superior Court erred in upholding the tax. This Court, reviewing these "pure question[s] of law" de novo, *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1089 n.10 (2008); *In re Marriage of Stanton*, 190 Cal. App. 4th 547, 556 (2010), should reverse.

I. STATEMENT OF APPEALABILITY

This appeal is taken from the Superior Court's judgment entered on April 2, 2018, which constitutes an appealable judgment, and the accompanying March 16, 2018 Ruling re Trial on Federal Preemption. 20AA6358-82; Cal. Code Civ. Proc. § 904.1(a)(1). Lessees also appeal the following orders, which are appealable in light of that judgment: (1) the June 5, 2017 Order on Plaintiffs' Motion for Summary Adjudication and Defendants' Motion for Summary Judgment, along with the June 5, 2017 Ruling on Submitted Matters: Plaintiffs' Motion for Summary Adjudication and Defendants' Motion for Summary Judgment, 15AA4782-88; (2) the May 5, 2016 Order Granting Defendants' Motion for Summary Adjudication as to the First Cause of Action, Denying Defendants' Motion for Summary Judgment, and Denying Plaintiffs' Motion for Summary Adjudication, along with the accompanying April 18, 2016 Ruling on Submitted Matters: Plaintiffs' Motion for Summary Adjudication and Defendants' Motion for Summary Judgment, 4AA1341-49. Cal. Code Civ. Proc. § 904.1(a)(2).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

1. The Agua Caliente Band of Cahuilla Indians and Its Members Lease Land on the Agua Caliente Reservation in Riverside County

The Agua Caliente Band of Cahuilla Indians (the "Agua Caliente Tribe" or "Tribe") is a Tribal entity that is federally recognized and, as such, is eligible for funding and services from the Bureau of Indian Affairs

("BIA"), an agency within the U.S. Department of Interior. 16AA4791, 16AA4810. The Agua Caliente Reservation was originally established by an executive order signed by President Grant in 1876. 16AA4797-98. The next year, President Hayes signed another Executive Order expanding the reservation. 16AA4798.

Today, the Agua Caliente Reservation encompasses about 31,000 acres, spread in a checkerboard pattern alongside non-Tribal land in Riverside County; the cities of Palm Springs, Cathedral City, and Rancho Mirage; and unincorporated county land. 16AA4797. The Tribe currently has more than 400 members (the "Tribal members"). 16AA4791.

The Agua Caliente Equalization Act, 25 U.S.C. §§ 951–58, allotted more than 90 percent of the Agua Caliente Reservation to Tribal members. 16AA4798. The Reservation has since been divided into three categories: (1) "Tribal Trust Land" consisting of tracts in which the Tribe owns an interest in trust or restricted status, (2) "Allotted Lands" consisting of tracts in which one or more individual Tribal members owns an interest in trust or restricted status, and (3) fee lands. 16AA4791, 16AA4798.

Tribal members lease out roughly 4,300 acres of Allotted Lands under close to 20,000 lease arrangements, with payments made to the Tribal allottee lessors. 16AA4799. The Tribe itself also leases out a small portion of Tribal Trust Land on the Agua Caliente Reservation. 16AA4800.

2. Each Lessee Has Held a Possessory Interest in the Agua Caliente Reservation

Each Lessee has held a possessory or leasehold interest in property located on a tract of Allotted Land within the Agua Caliente Reservation (together, the "Subject Properties"). 16AA4792, 16AA4794-95, 16AA4810. Lessees' respective interests in the Subject Properties are based on master leases with either the Tribe or one of its allottees as lessor. 16AA4795, 16AA4810.

As required, the leases were entered into in accordance with "25 U.S.C. § 415 . . . as supplemented by" related federal regulations governing "Leasing and Permitting" on Indian land. 16AA4795, 16AA4810, 16AA4971, 16AA5028, 17AA5135. Section 415 provides, among other things, that "[a]ny restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior . . . ." 25 U.S.C. § 415(a); *see also* 16AA4810 (leases were approved by Area Director of BIA). The regulations governing "Leases and Permits" on Indian land are located at Title 25, Part 162 of the Code of Federal Regulations, 25 C.F.R. §§ 162.001–703 (the "Leasing Regulations"), which apply to "Indian land." "Indian land" is defined as "any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status." 25 C.F.R. §§ 162.003,

162.004(a). The Subject Properties fit these descriptions and are covered by these regulations. *See* 16AA4791-92, 16AA4795.

3. Defendants Have Assessed and Collected Possessory Interest Taxes on Lessees' Possessory Interests in and Improvements on Indian Land

Under California law, the County of Riverside calculates and assesses a one-percent *ad valorem* tax on all property within the County, except property exempted by state or federal law. 16AA4791. To determine the total amount owed for these taxes, the Riverside County Assessor-County Clerk-Recorder (the "Assessor") must first locate all taxable property in the County, identify the owners, and determine the property interest. 16AA4791. The County Auditor-Controller then calculates the taxes owed on every taxable property interest located within the County. 16AA4792. The Auditor-Controller applies the appropriate *ad valorem* taxes to every taxable property interest, including the general tax levy (limited by state constitutional amendment to one percent of the taxable property's assessed value). *Id*.

Under Section 107 of the California Revenue and Taxation Code and other authority, the County assesses and collects the one-percent *ad valorem* property tax on the value of possessory interests—i.e., the "[p]ossession of, claim to, or right to the possession of land or improvements"—in the County. 16AA4791-92, 16AA4810; *see also* Cal Rev. & Tax. Code § 107. This tax is referred to as the "possessory interest tax" or "PIT." The application of

the PIT to possessory interests in land and improvements on Agua Caliente Tribal Trust Land and Allotted Land is the subject of this appeal. *See* 16AA4791-92.

As relevant here, the Assessor, on behalf of the County, has assessed the value of Lessees' respective possessory interests in the land and improvements on the Subject Properties, and the County's Treasurer-Tax Collector (the "Tax Collector") has collected those taxes on the County's behalf. 16AA4791-95, 16AA4809-10. The County has not refunded any of the PIT to Lessees. 16AA4793, 16AA4797.

The County does not segregate PIT revenue from other revenues, nor does it maintain records that make such a distinction. 16AA4803, 16AA4811. PIT funds are used to provide services to persons on and off the Agua Caliente Reservation, 16AA4814, and none of those services are provided specifically for non-Indian lessees of Tribal Trust Land or Allotted Land. 16AA4812. A non-Indian lessee must pay the PIT even if he or she does not use the services. 16AA4814.

4. In 2012, the BIA Promulgated § 162.017, Which Prohibits States from Assessing Possessory Interest Taxes on Indian Land

On December 5, 2012, the BIA promulgated regulations within Part 162 that expressly prohibit state and local taxation of leasehold or possessory interests in, and permanent improvements on, Indian land. Residential, Business, and Wind and Solar Resource Leases on Indian Land,

77 Fed. Reg. 72440–01, 72447–48 (Dec. 5, 2012) (pmbl. § 162.017). Section 162.017, entitled "What taxes apply to leases approved under this part?," provides:

> (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.

25 C.F.R. § 162.017 (emphasis added).

Section 162.017 went into effect on January 4, 2013. 77 Fed. Reg. at 72440. Despite its plain language, the County has continued assessing and collecting PIT from Lessees. 16AA4792-95, 16AA4809-10.

B. Procedural Background

On May 23, 2013, plaintiff Herpel, who leases residential property situated on Indian land, filed an administrative claim for a tax refund with the County, Office of the Tax Collector. 1AA0043, 1AA0110. For over a year, the County failed to take formal action on the administrative claim. 1AA0044-45, 1AA0111-12. On September 5, 2014, Herpel deemed the administrative claim denied and, along with the other Lessees, filed a class

action complaint against the County, the Assessor, and the Tax Collector (collectively referred to in this brief as the "County") for Writ of Mandate and Related Declaratory and Injunctive Relief, and Individual Claim for Refund of Taxes (the "Complaint") on behalf of herself and similarly-situated lessees. 1AA0045. The proposed class consists of "[a]ll persons, including . . . business entities, who, at any time . . . received an assessment of, and/or paid to the County, fees, taxes, assessments, levies, and/or other charges on: (a) permanent improvements on leased Indian Land within the County; and/or (b) the leasehold or possessory interest in Indian Land within the County." 1AA0049.

The Complaint sought (1) a tax refund for Herpel; (2) a writ of mandate directing the Tax Collector to comply with the Tax Code by mailing notices of illegal assessments and overpayment to Plaintiffs and Class Members, and by informing Plaintiffs and Class Members that they may file claims for tax refunds with the County after the Tax Collector complies with the Tax Code and issues those notices; and (3) a mandatory injunction compelling the Tax Collector to comply with the Tax Code by issuing similar notices to Plaintiffs and Class Members regarding any future overpayments of taxes based on future illegal assessments of taxes on permanent improvements and/or leasehold or possessory interests in Indian land. 1AA0038. The Court sustained Defendants' demurrer on the causes of action seeking notices related to *future* overpayments, but overruled the

demurrer on the remainder of the Complaint. 1AA0101; *see also* 1AA0054-55.

The parties agreed to litigate the action in phases, focusing first on the dispositive question of federal preemption. In October 2015, the parties filed "Phase I" cross-motions for summary adjudication and/or summary judgment on whether Herpel was entitled to a tax refund because the PIT is preempted by federal law. *See* 2AA0535-57, 2AA575-79. Lessees moved for summary adjudication on the grounds that (1) § 162.017 expressly prohibits state and local governments from assessing and taxing leasehold or possessory interests in and permanent improvements on Indian land; (2) the tax exemption codified in 25 U.S.C. § 465[1] prohibits state and local taxation of Indian land and rights in Indian land; and (3) the PIT is preempted under the balancing test set forth in *Bracker*. 2AA0536. Lessees further argued that, because the PIT is preempted, Herpel is entitled to a refund of PIT she paid and for which she filed the administrative claim. 2AA0536-37. The County moved for summary judgment based on the argument that § 162.017 does not preempt the PIT and, in the alternative, moved for summary adjudication on Herpel's claim for a refund. 2AA0576.

On April 18, 2016, the Superior Court denied Lessees' motion for summary adjudication. 4AA1342. The Court denied the County's motion

[1] Section 465 was recently recodified at 25 U.S.C. § 5108 but is referred to here as "§ 465" for consistency with the record and case law.

for summary judgment but granted its motion for summary adjudication, holding that the PIT was neither prohibited nor preempted by federal law. 4AA1342. The Court held that the PIT is not prohibited by § 465 because "there is no evidence that the subject property was acquired pursuant to that statutory authority, and thus no showing that the section even applies to that property." 4AA1346.

As to the preemption issue, the Superior Court held that it was bound by this Court's decision in *Palm Springs Spa, Inc. v. County of Riverside*, 18 Cal. App. 3d 372 (1971), 4AA1345, which upheld the PIT under the preemption framework that applied in 1971. 18 Cal. App. 3d at 379 (holding that federal law did not "preempt the field of regulating commercial activities between Indians and non-Indians"). The Superior Court rejected Lessees' argument that *Palm Springs Spa*, which focused heavily on whether the applicable federal law contained an expression of congressional intent to preempt, had been abrogated in 1980 by the Supreme Court's decision in *Bracker*, which replaced the traditional field-preemption analysis with a balancing test that mandates a finding of preemption where federal and tribal interests outweigh state interests. *See* 4AA1345-47; *see also Bracker*, 448 U.S. at 143–45 (explaining that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful" to apply traditional preemption rules in cases involving federal Indian law, and setting forth new test that

accounts for "[t]he tradition of Indian sovereignty over the reservation and tribal members").

Although the Court did not agree that *Bracker* changed the result, it acknowledged that the analysis had "[a]rguably . . . changed with the enactment of [§ 162.017]." 4AA1347. The Superior Court thus concluded that *Palm Springs Spa* was only dispositive on taxes paid on or before the date § 162.017 went into effect: January 4, 2013. 4AA1347-48. But because Herpel's claim for a refund was limited to taxes paid before 2013, the Superior Court granted Defendants' motion for summary adjudication as to that claim. 4AA1348.

In December 2016, the parties filed "Phase II" briefs on whether, *after* January 4, 2013, federal law preempted or otherwise prohibited the County from assessing and collecting taxes on the value of Lessees' possessory interests in land and structures on Indian land. *See* 8AA2591-93, 8AA2634-36. Lessees moved under Section 437c(t) of the California Rules of Civil Procedure for summary adjudication, asserting that such taxes are preempted by § 162.017 and under *Bracker*. *See* 8AA2600-01. The County also moved for summary adjudication, arguing that neither § 162.017 nor *Bracker* preempts the PIT. 8AA2635. On June 5, 2017, the Court held that "Section 162.017 does not itself preempt the PIT," but denied the parties' cross-motions because of disputed material facts related to the *Bracker* test. 15AA4782, 15AA4785-86.

On March 16, 2018, the Superior Court held trial on the remaining question of whether the *Bracker* test, when applied to the stipulated facts, establishes that the PIT is preempted. 20AA6373-74. The Court concluded that it did not. *See* 20AA6377-80.

ARGUMENT

A state's authority over non-Indians on Indian land "may be asserted only if not preempted by the operation of federal law." *Cf. New Mexico v. Mescalero Apache Tribe ("Mescalero Apache")*, 462 U.S. 324, 333 (1983). State authority over non-Indians engaging in conduct on Indian land is subject to both "familiar principles of preemption" (i.e., express or implied) and the additional preemption test of *Bracker*, which requires courts to weigh federal and tribal interests against state interests. *Id.*; *see also Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 935–36 (2007) (defining various forms of preemption). And where a state law imposes a tax on certain Indian land, it must clear another hurdle: the long-standing exemption from local taxes codified in 25 U.S.C. § 465.

The PIT fails all of these tests. Decades-old case law addressing some of these issues need not prevent this Court from holding that federal law bars the PIT on several independent grounds: (I) the PIT is preempted under the *Bracker* balancing test, (II) § 162.017 preempts the PIT under the doctrines of express and conflict preemption, and (III) § 465 prohibits enforcement of the PIT.

I. FEDERAL LAW PREEMPTS THE PIT UNDER THE *BRACKER* TEST

A. *Bracker* Created a New Test for Preemption and Abrogated Earlier Cases Decided Under Prior Legal Standards

When the U.S. Supreme Court decided *Bracker* in 1980, it created a new legal framework for questions of federal preemption of exercises of state authority over non-Indians engaging in activity on Indian land. In the years before *Bracker*, the preemption analysis largely turned upon the presence or absence of an express direction from Congress. *See, e.g.*, *Okla. Tax Comm'n v. Tex. Co.*, 336 U.S. 342, 366 (1949). But the Supreme Court in *Bracker* expressed dissatisfaction with this approach, explaining that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law." 448 U.S. at 143. Accordingly, "an express congressional statement"—while still sufficient to establish preemption—is no longer necessary, and the preemption analysis does not end if none exists. *See Mescalero Apache*, 462 U.S. at 333–34.

To account for the unique considerations that Indian law implicates, i.e., "the broad policies that underlie [the relevant federal treaties, statutes, and regulations] and the notions of sovereignty that have developed from historical traditions of tribal independence," the Court added to the traditional preemption analyses (e.g., express, conflict) a new preemption test. *See Bracker*, 448 U.S. at 144–45; *see also Mescalero Apache*, 462 U.S.

at 333–34 ("Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we cautioned that our prior cases did not limit preemption of State laws affecting Indian tribes to only those circumstances."). This "*Bracker* balancing test" requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145. A state law will be preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Mescalero Apache*, 462 U.S. at 334. Because the *Bracker* analysis is "not controlled by standards of pre-emption developed in other areas," *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982), in the absence of another form of preemption, courts must perform a *Bracker* balancing when, as here, "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U.S. at 144.

Despite the analytical transformation *Bracker* effected in 1980, the County's Phase I motion did not describe the *Bracker* balancing test, did not attach a single piece of evidence supporting any asserted state interests, and did not request summary adjudication on the basis of *Bracker*. *See* 2AA0587-609; *see also* 4AA1348 (observing that "[t]he County's motion fails to consider all of th[e] issues" required to conduct a *Bracker* balancing

test). These reasons alone should have precluded the County from obtaining summary adjudication based on the Phase I briefing. *See, e.g.*, 3AA0738-39 (discussing federal and tribal interests).

Nevertheless, in granting the County summary adjudication on Herpel's claim for a refund of taxes paid before 2013, the Superior Court's Phase I order erroneously relied in large part on three earlier cases—*Palm Springs Spa* (1971), *Agua Caliente Band of Mission Indians v. Riverside Cty.*, 442 F.2d 1184 (9th Cir. 1971), and *Fort Mojave Tribe v. San Bernardino Cty.*, 543 F.2d 1253 (9th Cir. 1976). 4AA1345-46. Those pre-*Bracker* decisions focused overwhelmingly on whether there was express preemption—an approach the *Bracker* court made clear was no longer dispositive—and did not give the federal, tribal, and state interests involved the consideration the *Bracker* test now requires. *See Palm Springs Spa*, 18 Cal. App. 3d at 379 (calling the Supreme Court's 1949 express preemption case *Oklahoma Tax Commission* "dispositive"); *see also Fort Mojave*, 543 F.2d at 1257 (finding no "evidence[of] a Congressional intent to preclude" the challenged tax); *Agua Caliente*, 442 F.2d at 1187 (citing *United States v. City of Detroit*, 355 U.S. 466 (1958), in concluding that "no statute . . . expressly forbids the imposition of a state use tax").

In its Phase I Order, the Superior Court concluded, incorrectly, that it was bound by *Palm Springs Spa*, which also involved a taxpayer's challenge to the PIT on Indian land leased to a non-Indian. 4AA1345-46; 18 Cal. App.

3d at 378. But *Palm Springs Spa* analyzed a different set of regulations under a now-outdated test. The plaintiff there framed the issue in terms of whether the PIT was preempted by federal regulations applicable to "*commercial transactions* having an economic impact" on the Tribe. *Palm Springs Spa*, 18 Cal. App. 3d at 378 (emphasis added). As a result, the court analyzed regulations governing "trade with Indians"—and did not even discuss the vast network of federal statutes and regulations governing the *leasing of Indian lands*. *Id.* (citing, inter alia, 25 U.S.C. §§ 261–64).

In addition, the court in *Palm Springs Spa* applied the then-prevailing tests for preemption: the express preemption analysis of *Oklahoma Tax Commission* and *City of Detroit* and the field-preemption test of *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963). *Palm Springs Spa*, 18 Cal. App. 3d at 378–79. After *Bracker*, however, this analysis is incomplete. In *Bracker*, the Supreme Court rejected the argument that a state "may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no congressional statement," explaining, "[t]hat is simply not the law." 448 U.S. at 150–51. And *Head*'s field preemption test fails to account for the historical and sovereignty issues *Bracker* built into the preemption analysis of Indian regulations in 1980. *See* 448 U.S. at 144–45. Because the court in *Palm Springs Spa* did not weigh federal, tribal, and state interests as *Bracker* now requires, nor even articulate

what any of those interests might be, *see* 18 Cal. App. 3d at 379–80, this Court is not bound to follow it.

For similar reasons, the Superior Court should not have been "persua[ded]" by two Ninth Circuit cases from the 1970s—*Agua Caliente* and *Fort Mojave*. *See* 4AA1346-47. These pre-*Bracker* cases also leaned too heavily on the express-preemption analysis and did not adequately consider the factors *Bracker* made mandatory. *See Mescalero Apache*, 462 U.S. at 334 (reiterating that Supreme Court has "rejected the proposition that preemption requires 'an express congressional statement'" of preemptive intent (quoting *Bracker*, 448 U.S. at 144)). In *Agua Caliente*, the court cited *City of Detroit* for the proposition that the PIT was "properly imposed, unless . . . the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it," and held that the PIT was not preempted because "no statute . . . *expressly forbids* the imposition of a state use tax." *Agua Caliente*, 442 F.2d at 1186–87 (emphasis added). The court in *Fort Mojave*, too, applied the express preemption doctrine in a dispute over whether a possessory interest tax could be imposed on non-Indian lessees on tribal land and concluded that the court would not "imply tax exemptions absent" a "clear indication" of congressional intent. *See* 543 F.2d at 1255–57. Again, this "narrow focus on congressional intent to preempt State law as the sole touchstone," *Mescalero Apache*, 462 U.S. at 334, "is simply not the law." *Bracker*, 448 U.S. at 150–51.

After *Bracker*, a holding that a state statute implicating federal Indian law is not preempted under traditional preemption doctrines does not end the preemption inquiry. *See Ramah*, 458 U.S. at 838. This is because the federal government's historical efforts to promote "tribal independence and economic development" must *also* "inform the pre-emption analysis." *Id.* (applying *Bracker* and concluding that state gross-receipts tax was preempted as applied to construction of Indian education institutions, even though "federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority").

Although the Superior Court in its Phase I Order rejected Lessees' argument that *Bracker* abrogated *Palm Springs Spa*, *Fort Mojave*, and *Agua Caliente*, *see* 4AA1345, roughly one year later, in its Phase II Order, the Court reversed course. This time, it correctly held that, because *Bracker* had "repudiated" the reasoning of those cases, they were not binding:

> *Bracker* and its progeny . . . make clear that no specific congressional intent to forbid a state or local tax on non-Indians on Indian land is required to find federal preemption . . . ." As noted above, the decisions in *Agua Caliente I*, *Palm Springs Spa* and *Fort Mojave* were all predicated on the lack of express congressional purpose to preempt a possessory interest tax of non-Indian lessees of Indian land. That reasoning having been repudiated, those cases are no longer reliable authority, and the Court is not bound by them. In short, the Court concludes that the County's position is not supported by *Agua Caliente I*, *Palm Springs Spa*, or *Ft. Mojave.*

15AA4782-85 (alterations in original) (citations to *Agua Caliente Band of Cahuilla Indians v. Riverside County ("Agua Caliente II")*, 181 F. Supp. 3d 725, 736 & n.4 (C.D. Cal. 2016), *appeal filed*, No. 17-56003 (9th Cir. 2017), omitted). The Superior Court's Phase I Order, which was premised on reasoning that the Court itself later acknowledged was based on "cases that are no longer reliable authority," 15AA4785, must be reversed.

B. The PIT Is Preempted Under *Bracker* Because the Federal and Tribal Interests in Leasing Indian Land Outweigh the County's Generalized Interest in Raising Revenue

As discussed above, courts must apply the *Bracker* balancing test to determine whether a state law taxing activity involving Indians and non-Indians on Tribal or Indian land violates federal law. *Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2014). Under *Bracker*, a state tax "is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *Mescalero Apache*, 462 U.S. at 334. "[A]mbiguities in federal law should be construed generously" in favor of tribal sovereignty under this test. *Ramah*, 458 U.S. at 838. Here, the scales weigh decisively in favor of preemption.

1. The PIT Interferes with Strong Federal Interests

Under *Bracker*, "[f]ederal interests are greatest when the government's regulation of a given sphere is 'comprehensive and

pervasive.'" *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008) (quoting *Ramah*, 458 U.S. at 839); *see also Bracker*, 448 U.S. at 151. Here, Lessees challenge the County's imposition of possessory interest taxes on their leasehold interests on Indian land—an an area in which federal regulation is both comprehensive and pervasive.

Federal law is the sole source of exceptions to the general rule prohibiting Tribes and their allottees from conveying interests on Indian land. *See* 25 U.S.C. §§ 177 (general prohibition on conveyance of interest in Indian lands), 391–416j (permitting leases for enumerated purposes). Under 25 U.S.C. §§ 2, 9, 415, and other authority permitting leases of restricted land under certain conditions, the BIA has implemented sweeping regulations that reflect strong federal interests in the leasing of Indian land. *See* 25 C.F.R. §§ 150.1–11 ("Land and Water"), 162.001–703 ("Leases and Permits"). The Leasing Regulations set forth rules governing, among other things: mandatory BIA approval of a lease, documentation required for approval, steps for obtaining a lease, permissible lease durations, mandatory lease provisions, determination of fair market rental value, the timing and manner of rental payments, recordation, late payment charges and fees, and cancellation of a lease for violations.[2]

[2] 25 C.F.R. §§ 162.027, 162.010, 162.311, 162.313, 162.320, 162.322–23, 162.325, 162.338–44, 162.367–68, 162.411, 162.420, 162.422–23, 162.429, 162.433, 162.438–44, 162.467–68; *see also* 25 U.S.C. § 415.

Courts have concluded that this federal regulatory scheme is comprehensive and pervasive. *See*, *e.g.*, *Seminole Tribe v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015) ("[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land."); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1392 (9th Cir. 1987) ("[The Leasing Regulations] constitute a comprehensive regulatory scheme with preemptive effect on state and local laws."); *Agua Caliente II*, 181 F. Supp. 3d at 743 ("The federal statutory and regulatory scheme governing the leasing of Indian lands is detailed and comprehensive."). The BIA itself has concluded that "[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation," explaining that "the Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing." 77 Fed. Reg. at 72447 (pmbl. § 162.017); *see also id.* ("The Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing."). And the "agency's analysis of the regulatory scheme it administers" has "value in delineating the federal and tribal interests implicated in the leasing of Indian land" where, as here, "the subject matter and history are complex and extensive, and the analysis is thorough, consistent, and persuasive." *Seminole Tribe*, 799 F.3d at 1338 (citing *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009)) (discussion of federal and tribal interests in preamble to Final Rule "deserves some weight").

The Superior Court agreed that federal interests in leases on Indian land are "strong," but concluded that (1) Lessees did not cite "any federal statute or regulation that seeks to control the residential, commercial or industrial purposes to which the leaseholds are devoted by the lessees"; and (2) federal supervision of the issuance of leases was not "continuous." 20AA6378. The Superior Court was wrong on both counts.

First, federal law closely controls how the leases may be used. As the Federal Circuit has explained, "allottees [of Indian lands] must choose either (a) to lease at the pleasure of the Secretary [of the BIA], according to the regulations, and on his or her terms, or (b) not to lease at all." *Brown v. United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996). The statutory basis for the leases at issue, 25 U.S.C. § 415, permits leases for "public, religious, educational, recreational, residential, or business purposes." And numerous federal regulations, including those cited in the pretrial briefing, grant the BIA control over the review, approval, and enforcement of all such lease terms, including terms that set forth the lease's purpose and the lessee's authorized uses.

For example, the Leasing Regulations dictate that (1) leases must identify "[t]he purpose of the lease and authorized uses of the leased premises,"[3] 25 C.F.R. §§ 162.313, 162.413 (expressly prohibiting certain

[3] For example, the master lease for Herpel's property permits construction and operation of condominium dwellings, 16AA4972, and Herpel's

uses); (2) parties must submit leases to the BIA, which "work[s] to ensure that the use of the land is consistent with the Indian landowners' wishes and applicable tribal law," *id*. § 162.021(d), and will only approve a lease after determining that it is in the best interest of the Indian landowners and ensuring compliance with applicable laws and ordinances, *id.* §§ 162.338(a), 162.340(a), 162.438(a), 162.440(a); and (3) after a lease is approved, the BIA may enter the premises to ensure lease compliance, initiate an investigation into a reported violation, and, in appropriate circumstances, cancel the lease and invoke available remedies, *id*. §§ 162.364(a)–(b), 162.367(a), 162.464(a)–(b), 162.467(a). These provisions show ample efforts to "control the . . . purposes to which the leaseholds are devoted." *See* 20AA6378. This "regulatory scheme itself is a sufficient federal interest to satisfy [Lessees'] burden of production," and they were not required to show anything more. *See Seminole Tribe*, 799 F.3d at 1341.

Second, the Superior Court erred in concluding that the federal and tribal interests at stake here are "not nearly as strong as in *Bracker*, where the federal supervision was continuous." 20AA6378. *Bracker* described the BIA's "daily supervision" of the taxed activity there (the harvesting of timber) to highlight how "detailed" the applicable regulatory scheme was; it

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proprietary lease provides that the lessee may only use the premises "for a private residential purpose, and shall not erect or maintain . . . more than one single dwelling." 16AA4948. The master lease further provides that the Secretary shall approve a general plan and architects' design. 16AA4980-81.

did not make continuity a prerequisite to a comprehensive scheme. *See* 448 U.S. at 147; *see also* 20AA6378 ("The degree of th[e] regulation [of leasing] is significantly detailed."). By their nature, leasehold interests, whether on or off Indian land, simply do not lend themselves to the type of daily supervision discussed in *Bracker*—which illustrates why *Bracker* requires courts to conduct a "particularized inquiry" specific to the case before it. *See* 448 U.S. at 145.

If the continuity of federal supervision is relevant to the *Bracker* analysis here, the Superior Court was still wrong, because federal supervision of the leasing of Indian lands (as opposed to just the "issuance" of leases, 20AA6378), *is* continuous. Under the Leasing Regulations, the BIA has ongoing "responsibilities in administering and enforcing [the] lease[]," 25 C.F.R. § 162.022, including: responding to notices of lease violation by initiating an investigation, entering the premises to ensure lease compliance and to protect the interests of Indian landowners, issuing notices of violation, and, in appropriate circumstances, cancelling the lease and invoking available remedies, *id*. §§ 162.364–66; responding to "concerns regarding the management of [Indian] land," *id*. § 162.022; taking "emergency action" to preserve the land's value, *id*. §§ 162.022(d), 162.024(a); issuing invoices for lease payment, *id*. §§ 162.327, 162.427□□collecting on delinquent payments and taking action to recover unpaid compensation, *id*. §§ 162.367(b), 162.467(b); invoking other remedies, *id*. §§ 162.367(d),

162.467(d); protecting allottees and lessees from trespassers, *id*. §§ 162.023, 162.371, 162.471; recovering possession, *id*. § 162.023; and ensuring the removal of permanent improvements and restoration of the premises at the lessee's expense, *id*. §§ 162.316(b), 162.416(a)(2). In addition, the BIA ensures compliance with applicable ordinances, *see id*. §§ 162.340(a), 162.440(a), such as the Agua Caliente Land Use Ordinance, which restricts land uses in certain zoning districts and calls for BIA approval of permit applications to confirm that any "proposed development project does not violate the requirements of the property lease and/or sublease." *See* 20AA6083-85, 20AA6119-20. The Superior Court overlooked all of these activities, which constitute "continuous" federal supervision of Indian leasing.

In conclusion, a review of the relevant statutes and regulations confirms that, as the BIA and many courts have held, the federal regulatory scheme governing the leasehold interest of non-Indian lessees is indeed comprehensive and pervasive.

2. The PIT Also Interferes with Strong Tribal Interests

The long history of federal enactments relating to Indian tribes demonstrates a progression toward Indians' retention of control over their own business and economic affairs, as well as tribal sovereignty and self-governance. *See Mescalero Apache*, 462 U.S. at 334–35 (explaining that the "goal of promoting tribal self-government" is "embodied in numerous

federal statutes"); *Bracker*, 448 U.S. at 149 (acknowledging "general federal policy of encouraging tribes to revitalize their self-government and to assume control over their business and economic affairs" (internal quotation marks omitted)); *Mescalero Apache Tribe v. Jones ("Mescalero")*, 411 U.S. 145, 152 (1973) (The "intent and purpose of [the Indian Reorganization Act of 1934] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism'" (quoting H.R. Rep. No. 1804, at 6 (1934))).

"[T]he federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency." 77 Fed. Reg. at 72446 (pmbl. § 162.015). And the stated objective of the Leasing Regulations "is to promote leasing on Indian land for housing, economic development, and other purposes." 25 C.F.R. § 162.001; *Agua Caliente II*, 181 F. Supp. 3d at 742 (quoting 77 Fed. Reg. at 72447 (noting that these purposes "ultimately contribut[e] to tribal well-being and self-government")).

Consistent with these interests, the Tribe has passed its own ordinances governing land use, business leasing, planning and zoning, building and safety, and property maintenance standards. 16AA4815-16. The Tribe also passed a comprehensive Tribal Tax Code Ordinance for the purpose of providing it "with a portion of the revenues necessary to fund essential governmental functions and services within the Tribe's

Reservation." 16AA4815, 20AA6198. But "in order to avoid double taxation," the Tribe has suspended assessment and collection of its own possessory interest tax. 16AA4812, 16AA4815, 20AA6198.

Despite the Tribe's abstention from double taxation, the PIT at issue still burdens Tribal members' right to lease their land. The Tribe considers the PIT "a disincentive to have [members'] property marketed and purchased and/or leased"—in fact, certain developers have cited the PIT as a reason not to lease Tribal land. 16AA4802. The Tribe's experience is consistent with the BIA's conclusion that "the very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs." 77 Fed. Reg. at 72447; *see also id.* at 72448 ("State and local taxation of these activities would significantly affect the marketability of Indian land for economic development," as "dual taxation can make some projects less economically attractive, further discouraging development in Indian country").

According to the Tribe, the "economic burden [of the PIT] is at least the amount of the PIT collected from the Tribe's Reservation each year"—approximately $22.8 million. 16AA4801, 16AA4808-09. Had that money been collected by the Tribe, it could have been used to provide governmental services specific to Indian lands, rather than as general funding for governmental agencies. *See*, *e.g.*, 16AA4803-09. The Tribe would have also

had the authority to decide for itself whether and how to assess the tax, including whether to establish credits, rebates, and incentive programs. 16AA4815-16, 20AA6198. Thus, the PIT interferes not only with the Tribal interest in economic development and self-sufficiency, but also with its interest in sovereignty and self-governance.

The Superior Court correctly found that the PIT "to some degree interferes with the goal of obtaining the highest economic return on the leased property." 20AA6378; *see also Segundo*, 813 F.2d at 1393 (describing the regulations' interest in obtaining the "highest economic return to the owner consistent with prudent management and conservation practices"); *Fort Mojave*, 543 F.2d at 1256 ("[T]he imposition of a [PIT] on the leasehold interest will have an economic effect on the Indian lessors and, perhaps, although not certainly, will reduce the amount of rent they will be able to collect."); *Agua Caliente*, 442 F.2d at 1186 ("[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 that the [sic] tax has an adverse economic effect upon him."); *Palm Springs Spa*, 18 Cal. App. 3d at 376 ("[T]he imposition of the [PIT] . . . lowers the rental fee the owner can charge on a leasehold.").

But the Superior Court erred as a matter of law by relying on *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), for the proposition

that this financial impact "'is simply too indirect and too insubstantial' to support a claim of pre-emption." 20AA6378-79 (quoting *Cotton Petroleum*, 490 U.S. at 186–87). As the Eleventh Circuit explained in *Seminole Tribe v. Stranburg*, a recent decision analogous to this one, there is more to this analysis: *Cotton Petroleum* stands for the proposition that "indirect" financial burdens are insufficient only in the "'*absen[ce of] some special factor* such as' . . . the extensive and exclusive federal regulation of the activities at issue." 799 F.3d at 1399–40 (emphasis added) (quoting *Cotton Petroleum*, 490 U.S. at 186–87). Here, as in *Seminole Tribe*, "the extensive and exclusive federal regulation of Indian land leasing provides the 'special factor' absent in *Cotton Petroleum*. . . . [and] the regulatory scheme itself is a sufficient federal interest to satisfy the [] burden of production here." *See* 799 F.3d at 1341.

3. The State's Interest in Raising Revenue Does Not Justify the PIT

Against such strong federal and tribal interests, a general-purpose tax like the PIT is preempted "absent a state interest of sufficient weight—and raising revenue for providing statewide services generally lacks that heft." *Id.* The Superior Court erred in holding otherwise.

The Superior Court concluded that the County's interest in raising revenue to fund governmental services is a "legitimate state interest," 20AA6379—but "[s]howing that the tax serves legitimate state interests,

such as raising revenues for services used by tribal residents and others, is not enough." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989); *see also Bracker*, 448 U.S. at 150 (distinguishing a "generalized interest in raising revenue" from "a legitimate regulatory interest" specifically "served by" the tax at issue). The Superior Court's conclusion rested on the faulty premise that the Supreme Court's precedent "reveals no" rule that a state's "generalized interest in raising revenue is insufficient" under *Bracker*. *See* 20AA6380. In fact, the Court has said just the opposite:

> The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers *must point to more than its general interest in raising revenues*.

Mescalero Apache, 462 U.S. at 336 (emphasis added) (citations omitted); *see also Ramah*, 458 U.S. at 845 ("general desire to increase revenues" was "insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme" and related policies). Contrary to the Superior Court's order, *Mescalero Apache* does not stand for the proposition that a state tax is insufficient only if it yields "no services to those on whom the tax falls." 20AA6380. The sentence from *Mescalero Apache* that the Court cited for this conclusion in fact stands for the proposition that merely providing services is not enough; those services must also be "provide[d] *in connection with* the . . . activity being taxed." *Seminole Tribe*, 799 F.3d at

1337 (emphasis added) (citing *Bracker*, 448 U.S. at 150–51); *see also Ramah*, 458 U.S. at 844–46 (finding preemption where services lacked specific connection to activity being taxed).

The federal courts of appeals have followed suit, concluding that, under *Bracker*, a general interest in raising revenue is insufficient to justify a tax, and a closer connection between the activity taxed and the services provided is required. In *Hoopa Valley Tribe v. Nevins*, the Ninth Circuit applied this rule in affirming a district court's conclusion that California's timber yield tax on non-Indian companies purchasing tribal timber was preempted. 881 F.2d at 663. Even though the tax helped to fund "road, law enforcement, welfare, and health care services" benefiting "both tribal and non-tribal members," the state's interest was insufficient because "none of those services [was] connected with the timber activities directly affected by the tax." *Id.* at 661; *see also Crow Tribe v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981) ("To the extent that this [coal severance] tax is not related to the actual governmental costs associated with the mining of the Indian coal, the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." (citation omitted)). Similarly, in *Seminole Tribe*, the Eleventh Circuit held that general services provided to all taxpayers did not justify a state rental tax because those services were not connected to the specific activity of renting property on Indian land. 799 F.3d at 1341–42. Like the services provided in *Hoopa Valley* and *Seminole*

Tribe, the County services here are provided to all taxpayers and lack the requisite connection to the activity being taxed: the leasing of Indian land.[4]

The County concedes that the PIT is a "general revenue tax" imposed for general governmental purposes. 16AA4803, 16AA4810-11; *see also* Cal. const. art. XIIIC, §§ 1(a), (d) & 2(a); *Solvang Mun. Improvement Dist. v. Bd. of Supervisors*, 112 Cal. App. 3d 545, 552–53 (1980). The County does not segregate PIT revenue from other revenues, nor does it maintain records that make such a distinction. 16AA4803, 16AA4811. As a result, the County cannot state with certainty how the PIT is spent. 16AA4803-04.

The County collected roughly $22.8 million of PIT in the 2013–14 tax year. 16AA4808-09. Based on its estimates, more than half of that revenue was distributed to State-funded schools and the State's Education Revenue Augmentation Fund, which is used to pay statewide education funding obligations. 16AA4805-15. The County kept the next-largest portion, $3.3 million, 94 percent of which went to the County general fund, and 6 percent of which was earmarked for the library, fire protection, and roads. 16AA4804.

[4] The faulty premise that "fund[ing] governmental services" benefiting all taxpayers justifies the tax also led the Superior Court to give improper weight to the County's asserted "interest in preventing lessees from unfairly benefiting from county services that lessees do not help support." *See* 20AA6380. But these considerations were already weighed in *Bracker*, and the Supreme Court decided that a "generalized interest in raising revenue" for generalized government expenditures with generalized benefits—whether those receiving them pay in or not—could not justify the "intrusion into the federal regulatory scheme." 448 U.S. at 150.

Far from tying PIT revenue to particular services provided to PIT taxpayers in connection with leasing Indian land, 16AA4813, the County has used that money to fund, in part, each and every service it provides, 16AA4811, including educational services, judicial and legal services, fire and police services, health and safety services, administrative and legislative services, and other services such as parks, roadway maintenance, landscaping, redevelopment projects, flood control, and flood-control administration. 16AA4811. The remainder of the PIT was distributed to the City of Palm Springs, Cathedral City, the City of Rancho Mirage, water districts and water agencies, flood control, the Desert Hospital, vector control, the Riverside County Regional Park and Open Space District, and the Palm Springs Cemetery District. 16AA4805-06, 20AA6029.

A non-Indian lessee must pay the PIT even if he or she does not use the services. 16AA4814. The services funded by the PIT are provided to residents on and off the Agua Caliente Reservation, *id*., and none of those services is provided specifically for non-Indian lessees of Tribal Trust Land or Allotted Land. 16AA4812. Even the PIT-funded services most likely to be relevant to lessees on Agua Caliente land, such as law enforcement, fire prevention, flood control, and mosquito abatement, benefit *all* County residents. 16AA4811. Yet they are no more closely tied to the business of leasing on Indian land than law enforcement, infrastructure, and transportation services were "tied to the business of renting commercial

property on Indian land" in *Seminole Tribe*, 799 F.3d at 1341–42, or the road and law-enforcement services "directly relate[d] to the harvesting of tribal timber" in *Hoopa Valley*, 881 F.2d at 661. In fact, *none* of the expenditures of PIT revenue are for services "provided specifically for lessees" of Indian trust land, 16AA4812, nor are they "provided in connection with" leasing activity on Indian lands by non-Indians. *Seminole Tribe*, 799 F.3d at 1337.

The County's generalized interest in raising revenue cannot outweigh the federal and tribal interests described above and permit intrusion into a comprehensive federal regulatory scheme like the Leasing Regulations. *Bracker*, 448 U.S. at 150; *see also Mescalero Apache*, 462 U.S. at 343; *Ramah*, 458 U.S. at 845; *Seminole Tribe*, 799 F.3d at 1337–39 (in reaching same conclusion, giving "some weight" to BIA's own analysis in preamble to § 162.017 ("Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest." 77 Fed. Reg. at 72448)).

* * *

The Eleventh Circuit's opinion in *Seminole Tribe v. Stranburg* is highly instructive. In *Seminole Tribe*, the court applied *Bracker* to a tax materially indistinguishable from the PIT and concluded that the state's interest in raising revenue was not connected to the tax closely enough to outweigh the countervailing federal and tribal interests in the federal

regulatory scheme that governs Indian leasing. 799 F.3d at 1342–43. At issue in that case of first impression was Florida's Rental Tax on commercial rent payments, which was assessed against the lessee and, if unpaid, was enforced through a lien on the lessee's personal property (as opposed to the lessor's land or property). *Id.* at 1326.

In balancing the federal, tribal, and state interests under *Bracker*, the court gave the federal and tribal interests at stake the proper weight. *See id.* at 1337. As to the federal interest, it correctly concluded that the federal government "administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Id.* at 1341. And although the Tribe had not produced any evidence that the tax had hampered its ability to lease the affected property, it did not matter, as "the regulatory scheme itself [wa]s a sufficient federal interest to satisfy [its] burden of production." *Id.*

On the state's side of the scale, the court concluded that the tax was not justified by the desire to fund general services provided to all taxpayers, including law enforcement, criminal prosecution, and health services, and intangible off-reservation benefits such as infrastructure and transportation services—none of which was tied specifically to the act of renting property on Indian land. *Id.* at 1324–26, 1341–42. The court thus held that "the pervasive federal scheme for regulating Indian land leasing" preempted the Rental Tax. *Id.* at 1343.

This Court should follow the Eleventh Circuit, because the Rental Tax and the PIT are indistinguishable in the ways that matter for purposes of *Bracker*. Both taxes, for example, are assessed according to the value of the "[p]ossession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property . . . and [t]axable improvements on tax-exempt land." *Compare* Cal. Rev. & Tax. Code § 107, *with* Fla. Stat. § 212.031(1)(a), (c) (taxing the "privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property" in the state, calculated as a percentage of "the total rent or license fee charged for such real property"). In both instances, the lessee is responsible for paying the tax. *Compare Palm Springs Spa*, 18 Cal. App. 3d at 374, 376, *and* 16AA4810, 16AA4812, 16AA4800, 16AA4812, *with* Fla. Stat. § 212.031(1)(c), (2)(a). And in the event that either tax goes unpaid, a lien is assessed against the lessee's personal property rather than the land or the lessor. *Compare Palm Springs Spa*, 18 Cal. App. 3d at 376, *with Seminole Tribe*, 799 F.3d at 1326 (citing Fla. Stat. § 212.031(4)).

Not only are the taxes themselves functionally indistinguishable, so are the interests they implicate. The federal and tribal interests derive from the same "pervasive federal scheme." *See Seminole Tribe*, 799 F.3d at 1343. And, as in the case of the Rental Tax, none of the generalized services the County provides on the land at issue, "including law enforcement, criminal

prosecution, and health services, as well as intangible off-reservation benefits" like infrastructure and transportation, "are tied to the business of renting commercial property on Indian land." *Id.* at 1341–42.

Given the degree of factual and legal overlap between this case and *Seminole Tribe*, this Court should follow the Eleventh Circuit's well-reasoned decision and hold that, like the Rental Tax, the PIT is preempted under *Bracker*.

II. SECTION 162.017 PREEMPTS THE PIT UNDER THE TRADITIONAL DOCTRINES OF EXPRESS AND CONFLICT PREEMPTION

While *Bracker* pronounced a new (and additional) test for preemption, "familiar principles of preemption" continue to apply to exercises of state authority on Indian lands. *Mescalero Apache*, 462 U.S. at 333–34. A state law is expressly preempted if a federal law contains an explicit statement expressing an intent to supersede statutes like it. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). But an express statement is not a necessary condition for a finding of preemption, which can also be implied. *See Cotton Petroleum*, 490 U.S. at 176–77. One form of implied preemption is conflict preemption, which can arise where "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

Federal law preempts the PIT both expressly and implicitly. Section 162.017 of the Code of Federal Regulations expressly preempts state

taxes on possessory interests in and permanent improvements on Indian land—a class into which the PIT falls. And even if the PIT were not expressly preempted, it is preempted under the doctrine of conflict preemption because California law requires the County to collect the PIT, while federal law prohibits the County from doing so. The Superior Court's contrary conclusions should be reversed.

A. Section 162.017 Expressly Preempts the PIT

Section 162.017 contains an express statement of the BIA's intent to preempt state taxes on permanent improvements and possessory interests on Indian land:

> (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***.
>
> . . .
>
> (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***.

25 C.F.R. § 162.017 (emphasis added). This unambiguous prohibition on state-imposed taxation of possessory interests in and permanent improvements on Indian land is a textbook example of express preemption. *See, e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12–14 (2007) (National Banking Act and accompanying regulations contained "express command" that national banks are not "subject to any visitorial powers

except as authorized by Federal law," preempting state oversight authority (quoting 12 U.S.C. § 484(a))). Despite the plain language of § 162.017, the Superior Court concluded that the regulation does not expressly preempt the PIT. 15AA4785-69. This Court should reverse.

The Superior Court *was* correct, however, to recognize that federal regulations have preemptive force, just as statutes do. 15AA4784 (citing *Fid. Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 154 (1982)); *see also Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1408 (9th Cir. 1992). Although "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," *de la Cuesta*, 458 U.S. at 153–54, the agency that promulgated it must have acted within the scope of its congressionally-delegated authority. *N.Y. v. FERC*, 535 U.S. 1, 18 (2002); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

The key questions, then, are (1) whether the regulation was "intended to pre-empt state law," and (2) "if so, whether that action is within the scope of the Board's delegated authority." *de la Cuesta*, 458 U.S. at 154; *accord* 15AA4784. Both prongs of this test involve significant deference to the agency's discretion. An agency's intent to preempt a state law "should not [be] disturb[ed] . . . unless it appears from the statute or its legislative history that the accommodation [of conflicting policies] is not one that Congress would have sanctioned." *de la Cuesta*, 458 U.S. at 154 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Similarly, if federal law is

ambiguous or silent on a particular issue, a court must assume that Congress implicitly delegated to the agency the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989) (quoting *Shimer*, 367 U.S. at 383, and *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984)).[5]

The Superior Court recited the *de la Cuesta* test correctly in its Phase II Order, but reached the wrong result because it adopted—without any discussion—a portion of the incorrect analysis of *Desert Water Agency v. U.S. Dep't of the Interior ("DWA")*, 849 F.3d 1250 (9th Cir. 2017).[6] In

[5] At Phase I, the Superior Court held that the BIA's statements in § 162.017 were not entitled to deference under these circumstances because "the proper interpretation of an ambiguous statute is not the issue here." 4AA1346. This simply cannot be squared with *de la Cuesta*.

[6] The Superior Court did not adopt *DWA* in its entirety, as it had reached a different result at Phase I as to the significance of § 162.017's prefatory language, which reads, "[s]ubject only to applicable Federal law."

The Ninth Circuit in *DWA* discarded § 162.017's statement of express preemption, in part because it read the prefatory language as a "savings" clause that "subsume[s]" the *Bracker* test. *DWA*, 849 F.3d at 1254–55. Although the court cited an amicus brief filed by Department of Justice on the BIA's behalf for this proposition, *id.*; *see* 5 U.S.C. § 3106, 28 U.S.C. § 516 (DOJ must represent agencies in litigation), a litigation position is not federal law—unlike § 162.017, which went through the rulemaking process. Instead, the Ninth Circuit should have looked to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), where the Supreme Court read a similar clause to "foresee[]—[but] not foreclose—the possibility that [the] federal [regulation] will pre-empt" the state law in question. *Id.* at 870. This is exactly what the preamble to the Final Rule does: it describes the *Bracker* test, applies it, and concludes that (1) "[i]n the case of leasing on Indian lands, the Federal and tribal interests are very strong," and (2) the relevant statutes and regulations "occupy and preempt the field of Indian leasing." 77 Fed. Reg. at 72447 (federal statutory and regulatory scheme governing "all aspects" of Indian leasing is "comprehensive" and "pervasive . . . leav[ing]

DWA, the Ninth Circuit decided only the first *de la Cuesta* prong, holding that § 162.017 "was not intended to have and in fact does not have any preemptive effect." 15AA4785-86 (citing *DWA*, 849 F.3d at 1254–56). The Superior Court should not have been persuaded on this point, as both the plain language of § 162.017 and its preamble contradict *DWA*.

Section 162.017 does, in fact, contain a statement of express preemption that is consistent with the legislative history of the relevant statutes: "Subject only to applicable Federal law, . . . leasehold[s] or possessory interest[s and permanent improvements on the leased land are] *not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State*." 25 C.F.R. § 162.017(a), (c) (emphasis added). And the preamble to its Notice of Proposed Rulemaking confirms that it was "intended to preempt the field of leasing of Indian lands." Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73784-01, 73785 (Nov. 29, 2011).

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no room for State law"); *see also id.* at 72449 (regulation "would bar" state taxes).

In its Phase I Order, the Superior Court aptly rejected a substantially similar argument regarding § 162.017's prefatory language. The court explained that, under the County's proffered interpretation, "the section would say in substance that possessory interest taxes are prohibited except that possessory interest taxes are not prohibited" and, consequently, "[t]he exception would swallow the rule and render it meaningless." 4AA1347. "The Court will not presume that the Secretary of the Interior intended to engage in such an idle act." *Id.* The Superior Court should not have followed *DWA* to the wrong result at Phase II. It should have held instead that § 162.017 was "intended to pre-empt state law." *See de la Cuesta*, 458 U.S. at 154.

The Ninth Circuit erroneously reasoned that "the preamble . . . simply '*[c]larif[ies]*' the agency's view 'that improvements [or leases] on trust or restricted land are not taxable by States or localities.'" *DWA*, 849 F.3d at 1255. But the correct reading of the preamble is that the agency meant what it said, and § 162.017 was indeed "intended to preempt the field of leasing of Indian lands." 76 Fed. Reg. at 73785.

Because it concluded otherwise, the Superior Court did not reach the second *de la Cuesta* prong—whether adopting the preemptive regulation was "within the scope of the [agency's] delegated authority," 458 U.S. at 154. *See* 15AA4786. As explained below, adopting § 162.017, which has a preemptive effect, was within the scope of the BIA's authority, and thus the court was obliged to defer to its pronouncement on the preemption issue.[7] *See de la Cuesta*, 458 U.S. at 154.

Through 25 U.S.C. §§ 2 and 9, Congress delegated to the Department of the Interior "plenary administrative authority in discharging the federal government's trust obligations to Indians." *United States v. Eberhardt*, 789 F.2d 1354, 1359 (1986). These statutes "generally authorize the Executive to manage Indian affairs" and grant Interior the power to "manage[] all Indian affairs" and "all matters arising out of Indian relations." *Id.*, at 1359 n.7

[7] Section 162.017 itself lists more than 30 separate sources of authority, including 25 C.F.R. §§ 2, 9, 380, 393, 394, 395 402, 402a, 403, 403a, 403b, 415, 415a, and 3715. 25 C.F.R. § 162.017.

(quoting 25 U.S.C. § 2); *see also Parravano v. Babbitt*, 861 F. Supp. 914, 921 (N.D. Cal. 1994) ("[I]nterior has been given authority under 25 U.S.C. §§ 2 and 9 to manage and conserve Indian resources, and we must assume that the Department has been given reasonable power to effectively discharge its broad responsibilities for the management of Indian affairs."). The BIA has relied on this broad authority to promulgate an equally broad range of regulations, including § 162.017. *See*, *e.g.*, 25 C.F.R. Chapter I, subchapters D, E, G, H, J, and K.

Because § 162.017 was well "within the scope of [Interior's and the BIA's] delegated authority" and has "pre-emptive . . . force," *see de la Cuesta*, 458 U.S. at 154, the Superior Court should have held that it expressly preempted the PIT. Accordingly, this Court should reverse.

B. The PIT Is Preempted Because It Conflicts with Federal Objectives

Irrespective of whether § 162.017 preempts the PIT expressly, the Superior Court could (and should) have held that it preempts the PIT implicitly, under the doctrine of conflict preemption. The conflict in question is not difficult to spot: § 162.017 prohibits the County from imposing possessory interest taxes on Indian land, while California state law mandates just such a tax. *See* Cal. Const., art. XIII, §§ 1, 14; Cal. Rev. & Tax. Code §§ 103–04, 107, 201. This is "impossibility" conflict preemption, in which it is physically impossible to comply with both federal and state law at the

same time. *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43; *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 758 (2010).

As the County has explained, California law requires it to assess and collect possessory interest tax on Indian land within the County (unless the Court deems the land exempt). *See* 1AA0088-90 (citing Cal. const. art. XIII, §§ 1, 14); Cal. Rev. & Tax. Code §§ 103, 104, 107, 201. On the other hand, § 162.017 provides that leaseholds and possessory interests in Indian land are "*not* subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017(c) (emphasis added).

Because federal law expressly prohibits a possessory interest tax that California law requires the County to collect, an impossibility conflict has arisen. In such a case, the federal regulation preempts the state law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (holding preemption occurs if it is impossible to comply with both state and federal requirements); *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43 ("[F]ederal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility . . . ."). Thus, the doctrine of conflict preemption bars the County's imposition of the PIT as to non-Indian lessees on Indian land. The Court should reverse.

III. SECTION 465 EXEMPTS THE SUBJECT PROPERTIES FROM ENFORCEMENT OF THE POSSESSORY INTEREST TAX

A. Section 465 Covers the Subject Properties

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465 ("§ 465"), codified the long-standing tax exemption for Indian trust lands: "Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust . . . and such lands or rights shall be exempt from State and local taxation." Section 465 "must be read against th[e] backdrop" of "Federal policy towards Indians," which well before the Act prohibited states from taxing lands held in trust by the United States for use by Indians. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975); *see, e.g.*, *In re Kansas Indians*, 72 U.S. 737, 757–61 (1866); *see also Rice*, 324 U.S. at 789. When the Act went into effect, the seminal Supreme Court case effectuating this policy was *United States v. Rickert*, 188 U.S. 432 (1903), in which the Court held that a county could not tax land (and permanent improvements that were "part of the lands") held in trust by the federal government for Indians. *Id.* at 435–37, 442. Section 465 merely codified this proposition, which by 1934 had already been the law of the land for decades. *See* Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–44 (formerly §§ 461–94a)). Accordingly,

Indian lands taken in trust before *and* after the Act are subject to the same tax treatment.[8]

The Superior Court erroneously held that § 465 does not apply to Agua Caliente land because "there is no evidence that the subject property was acquired *pursuant to* that statutory authority, and thus no showing that the section applies to that property." 4AA1346 (emphasis added). This was error, because it did not have to be. In *Mescalero Apache Tribe v. Jones*, the U.S. Supreme Court held that land need "not [be] technically 'acquired'" pursuant to § 465 in order to fall within the Act's tax exemption. 411 U.S. at 155 n.11. *Mescalero* involved a challenge to state taxes imposed on a tribally owned ski resort on federal land outside the boundaries of the Tribe's reservation—land that had *not* been acquired in trust for the Tribe pursuant to § 465. *Id*. at 146, 155 n.11. Nevertheless, the Court applied § 465 to the land, explaining that "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe.'" *Id.* at 155 n.11. Here, it would have been equally "meaningless" for the United States, which already held Agua Caliente land in trust for the

[8] The Superior Court's assumption that § 465 only applies to lands acquired "pursuant to" the Act yields the absurd result that lands acquired after 1934 receive more favorable tax treatment than those acquired earlier, even though federal Indian policy remained unchanged. *See Chehalis*, 724 F.3d at 1155–56.

benefit of the Tribe,[9] to "[re-]convey title to itself" as a formality following the enactment of § 465. *See id.*

In sum, Indian land need not be acquired pursuant to § 465 in order to fall within the Act's tax exemption. The Superior Court's holding to the contrary, *see* 4AA1346, is inconsistent with the Act and Supreme Court precedent, and must be reversed.

B. The Right To Lease Land Is Among the "Bundle" of Property Rights § 465 Protects

As discussed above, § 465 expressly exempts "lands [or] interests in lands" which, like the Subject Properties, are held in trust by the United States for the benefit of Indians. 25 U.S.C. § 465. The U.S. Supreme Court confirmed the breadth of § 465's exemption in *Mescalero*, holding that a use tax on "permanent improvements" on the land fell within § 465's property-tax exemption because the improvements were "so intimately connected with use of the land" as to warrant the same tax treatment. 411 U.S. at 158–59. Under circumstances like these, "a tax upon 'use' is a tax upon the property itself," because "use" had long been considered part of the "bundle of privileges that make up property or ownership of property." *Id.* at 158 (internal quotation marks omitted).

[9] *See* 16AA4797-98; 7AA2582-84; 7AA2586-89; Exec. Order of May 15, 1876; Exec. Order of Sept. 29, 1877; Comm'r of Indian Aff., Ann. Rep. 37 (1877).

Also part of this property-rights bundle are the "privileges" implicated by the PIT: the rights to lease and make improvements to property. *Seminole Tribe*, 799 F.3d at 1331–32; *see also, e.g.*, *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (the "essential attributes of property" include "the right to use, *lease*, and dispose of it for lawful purposes" (emphasis added)). Again, *Seminole Tribe*, in which the Eleventh Circuit concluded that § 465 prohibited the application of a tax analogous to the PIT to non-Indian lessees of Indian land, is highly instructive. *See* 799 F.3d at 1326, 1329.

In considering whether § 465 barred the application of Florida's Rental Tax on commercial rent payments to non-Indian lessees of the Tribe's reservation land, the court began with the premise that "[t]he ability to lease property" is one of the "fundamental privilege[s] of property ownership" under *Mescalero* and is therefore subject to § 465. *Seminole Tribe*, 799 F.3d at 1330. The court rejected the State's attempt to characterize the Rental Tax "as a tax on income [from rental payments] rather than on the land," instead viewing the payments as a means to "secure a lessee's possessory interest *in the land* for the duration of the lease." *Id.* at 1331. And "[j]ust as the use of permanent improvements on land 'is so intimately connected with use of the land itself,' *Mescalero*, 411 U.S. at 158[], payment under a lease is intimately and indistinguishably connected to the leasing of the land itself." *Seminole Tribe*, 799 F.3d at 1331. Resolving any remaining ambiguity in favor of the Tribe in conformity with "the long-standing canon that statutes be construed

liberally in favor of Indians," *id.* at 1332 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)), the court concluded that § 465 exempted non-Indian lessees of the Tribe's reservation land from the Rental Tax. *Id.*

As in *Seminole Tribe*, the PIT is a tax on the possession of and improvements on Indian land. *Id.* at 1332; *see also* Cal. Rev. & Tax. Code § 107; *Mescalero*, 411 U.S. at 158 (tax on permanent improvements was a tax on "the land itself" for purposes of § 465). Lessees have held possessory interests in the Subject Properties, 16AA4792, 16AA4794-95, and allowing them "the right to use and occupy the property in exchange for consideration" is the type of quintessential privilege of property ownership that § 465 was intended to promote and protect. *See Seminole Tribe*, 799 F.3d at 1331 (quoting *Lease*, *Black's Law Dictionary* (10th ed. 2014)). This Court should follow *Seminole Tribe*'s careful analysis[10] and conclude that § 465 exempts the Subject Properties from the PIT.

[10] By contrast, the Ninth Circuit performed no analysis at all when it assumed (in dicta, and in a footnote) that § 465 did not bar the application of the PIT to non-Indian possessory interests in Indian land. *Chehalis*, 724 F.3d at 1158 n.7. For this reason, and because of the Ninth Circuit's apparent misreading of its own case law, the court in *Seminole Tribe* correctly rejected *Chehalis*'s "bare statement." *Seminole Tribe*, 799 F.3d at 1334.

CONCLUSION

For the foregoing reasons, Lessees request that this Court reverse the decision below and remand to the Superior Court for resolution consistent with applicable law and additional appropriate orders.

Dated: January 23, 2019

WINSTON & STRAWN LLP

By: _____

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CERTIFICATE OF WORD COUNT

Counsel hereby certifies that this brief consists of 12,394 words as counted by the Microsoft Word word processing program used to generate the brief. It was prepared in Times New Roman 13-point roman type, with 13-point type used in the footnotes.

Dated: January 23, 2019

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