IN THE SUPREME COURT

STATE OF ARIZONA

SOUTH POINT ENERGY CENTER LLC, Plaintiff/Appellant/Respondent, v. ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY, Defendants/Appellees/Petitioners.	Arizona Supreme Court No. CV-21-0130-PR Court of Appeals Division One No. 1 CA-TX 20-0004 Arizona Tax Court Nos. TX2013-000522, TX2014-000451, TX2015-000850, TX2016-001228, TX2017-001744, TX2018-000019, TX2019-000086

SUPPLEMENTAL BRIEF OF ARIZONA DEPARTMENT OF REVENUE AND MOHAVE COUNTY

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I. SPEC's preemption claim flouts three principles.

As a backdrop to the merits, SPEC's preemption claim contains three errors. First, SPEC's position ignores the fundamental distinction behind federal Indian law. Second is the effect of time itself: by urging this Court to "discover" preemption in an 87-year-old statute, SPEC is advocating something that borders on the impossible. Third, SPEC's key case involved *Indian-owned* property, not property owned by non-Indians.

A. Indian law is built around the distinction between Indians and non-Indians—a distinction SPEC ignores.

The field of "Indian law" is unusual because the law generally disfavors distinctions based on ethnicity. Yet for better or worse, federal Indian law exists for the *express purpose* of drawing distinctions between Indians and non-Indians. This distinction drives every category in the field—the jurisdiction of state courts, the prosecution of criminal cases, the handling of juvenile and probate cases.

The distinction between Indians and non-Indians is also critical with respect to the validity of state taxes. "[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). Whether the taxpayer is an Indian or non-Indian is the "frequently dispositive question." *Id*. Federal law almost always preempts state taxes on Indians for activities conducted on their own

tribal lands. For non-Indians, there is no bright line rule—whether federal law preempts a state tax on the activities of non-Indians on tribal lands is analyzed under the balancing test of *White Mtn. Apache Tribe v. Bracker,* 448 U.S. 136 (1980).[1]

This is why SPEC's predecessor-in-interest spent ten years trying to prove that "the actual owner of the improvements" was the Fort Mojave Indian Tribe. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 221 Ariz. 244, 248 ¶19 (App. 2009). This is why the court of appeals previously called the Facility's ownership the "central issue" in deciding whether the Facility was taxable. *Id.* ¶15. That issue has been decided—the Facility is owned by non-Indians. *Id.* ¶21.

This time around, SPEC argues that, truth be told, federal Indian law doesn't care about the "who" of the challenged tax. In arguing that Arizona may not tax *anybody* who owns improvements on tribal land, SPEC not only flouts precedent—it wants to erase the distinction that drives the entire body of federal Indian law. Any such argument warrants deep skepticism.

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[1] As stated by the *Restatement of the Law of American Indians*: "The Supreme Court applies a legal-incidence-of-the-tax analysis to determine if a state tax is valid. If the legal incidence of a tax is on the on-reservation activities of Indian tribes or individual tribal members, the tax is barred. If the legal incidence of the tax rests on nonmembers, no categorical bar prevents enforcement of the tax, and the court must engage in a preemption analysis to determine whether the balance of federal, state, and tribal interests favors the state," *i.e.*, the *Bracker* analysis. § 36A TD No. 4 (2020).

B. Courts cannot "discover" a new, sweeping field of preemption in an 87-year-old statute.

For 135 years, courts have upheld state property taxes on non-Indian improvements on Indian reservations—from the tax on the railroad in *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885), to the tax on vacation cabins in *Pickerel Lake Outlet Ass'n v. Day Cnty.*, 953 N.W.2d 82 (S.D. 2020). The taxability of non-Indian property located on tribal lands was well-established prior to the 1934 enactment of the Indian Reorganization Act ("IRA").

After 1934, courts could have quickly addressed whether the IRA affected the taxation of non-Indian property. The Supreme Court considered an ad valorem property tax on the reservation property of a non-Indian in *Taber v. Indian Terr. Illuminating Oil Co.*, 300 U.S. 1 (1937). The tax covered both moveable and fixed property. If Congress had prohibited taxation of non-Indian property (of any variety), *Taber* gave the Court the perfect opportunity to say so. But the Court upheld the tax *and not a word was said about the IRA.*

In eight decades since then, a large body of precedent has confirmed that the IRA did not preempt taxation of non-Indian property.[2] But in addition to

[2] In the Petition and this brief, ADOR has cited 17 cases in which taxes on non-Indian property have been upheld; *plus* at least four Supreme Court cases that have reaffirmed the *Fisher* cases in dictum; *plus* three cases concluding that the IRA reflected no desire to change tax exemptions. Tellingly, SPEC's response is to distinguish all these cases on trivial factual grounds.

precedent, the passage of time ***in and of itself*** forecloses the preemption argument. As the Supreme Court put it, the value of precedents "grows in proportion to their antiquity." *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019).

By definition, preemption cannot be difficult to detect, because state law can be preempted only when the purpose of Congress is "clear and manifest." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Thus, after a new federal statute is enacted, litigants have a natural window of opportunity to pursue plausible claims of preemption. After that, claims of preemption weaken for two reasons.

First, Congress is deemed to acquiesce in the co-existence of state and federal law. A claim of preemption becomes "particularly weak" when Congress is "aware of the operation of state law in a field of federal interest," and chooses to "stand by both concepts and to tolerate whatever tension there is between them." *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats*, 489 U.S. 141, 167 (1989) (brackets omitted)).

Second, like a maturing tree, the law gradually solidifies. As cases are decided, the doctrine of *stare decisis* protects the "integrity of the judicial process." *Kimble v. Marvel Entertainment*, 576 U.S. 446, 454 (2015). If no cases find a state law to be preempted, the public is entitled to rely on the presumption that the law is valid, *i.e.*, that it is not preempted. If courts could discover "new meanings" in

"old statutes," they would risk "upsetting reliance interests in the settled meaning of a statute." *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 540 (2019).

Courts sometimes say that "any change must come from the legislature," and the justification for this sentiment grows stronger over time. After all, "it is Congress rather than the courts that preempts state law." *U.S. Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011). After courts have had a chance to interpret a statute, they should demur, lest they "risk amending legislation" and invading the powers of Congress. *New Prime*, 139 S.Ct. at 540.

Here, concerns about legal stability are amplified because SPEC's theory of preemption has no limiting principle. If Arizona cannot tax the Facility, there is no obvious basis on which Arizona's taxing jurisdictions can continue to tax many pipelines and electricity transmission lines. Going forward, any large employer considering where to base its operations could ask: why pay property taxes in a city when taxes are zero on nearby tribal lands? The passage of time thus makes it supremely disruptive for this Court to discover a sweeping category of preemption in a statute that was enacted when Babe Ruth was still a Yankee.

C. *Mescalero Apache Tribe v. Jones* did not involve non-Indians.

SPEC's argument revolves around a misunderstanding and distortion of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). **Mescalero *had nothing to do with taxation of non-Indian property.*** At issue was a use tax on materials

the tribe purchased to erect permanent improvements (ski lifts) on tribal land. The tax was imposed *on the tribe*, who was the only plaintiff. The Court concluded that 25 U.S.C. § 5108 preempted the tax because *tribally-owned* improvements were exempt from state taxes along with the tribe's own land. *Id.* at 158-59.

Years later, Justice White—*Mescalero*'s author—described the case as involving "the intricate problem of state taxation of matters involving *Indian tribes and their members*." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 138 (1980) (emphasis added). Nothing was ever said about non-Indian property.

Yet SPEC would spin *Mescalero* into a broad tax exemption for *all* improvements on tribal land, even those owned by non-Indians. This misreads the opinion, which expressly confirmed the State's ability to tax non-Indian owners on "otherwise exempt" tribal lands. *Id.* at 157. That same day, *McClanahan v. State Tax Comm'n of Ariz.* cited the *Fisher* cases with approval. 411 U.S. 164, 168 (1973). If *Mescalero* had invalidated taxes on *all* permanent improvements, the Court would not have repeatedly reaffirmed the *Fisher* cases, *see infra* at 18; the Peabody Coal Company would not have conceded that Navajo County could tax its on-reservation coal mine, *see infra* at 19; the New Mexico Supreme Court would not have dismissed as "absurd" the idea that non-Indian property on tribal lands was tax-exempt, *see infra* at 17; and SPEC's predecessor would not have spent ten years arguing that this very Facility was tribally-owned.

A footnote in *Pickerel* provides the correct analysis of *Mescalero*. The "heart" of *Mescalero*'s holding was that the tribe's permanent improvements "were so closely connected with" the tribe's land that they were "effectively coextensive with" the tribe's land. 953 N.W.2d at 91 n.14. In contrast, non-Indian property on tribal land "does not implicate the Tribe, its members, or their property." *Id.*

II. The text of 25 U.S.C. § 5108 does not preempt state taxation of non-Indian owned improvements located on tribal lands.

A. Preemption must be grounded in text, and the IRA says nothing about taxation of non-Indian property.

1. The Facility is not "such land and rights" under § 5108.

Determining whether a federal statute preempts a state law is a matter of statutory interpretation. It is not a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," but rather depends on whether "the ordinary meanings of state and federal law conflict." *Wyeth*, 555 U.S. at 589. Simply put, preemption requires a comparison of *text*.

The Opinion was manifestly freewheeling—it said almost nothing about text. The court of appeals never quoted (or even cited) the text of the Arizona statutes at issue. It seized upon a tiny sliver of the text of 25 U.S.C. § 5108. It quoted the words "land and rights" but ignored the preceding word "such"—a word that is critical because it demands that the statute be read as a whole.

The statute, 25 U.S.C. § 5108, concludes: "*such* lands and rights" are exempt from state and local taxation. But what "lands and rights" are being referenced?

By pointing back to what was said before, the word "such" underscores that context is critical. *Salinas v. U.S. R.R. Ret. Bd.*, 141 S.Ct. 691, 698 (2021) ("such" refers to subject matter "discussed before" in the statute).

If one starts at the beginning, the meaning of 25 U.S.C. § 5108 is simple. To further the IRA's overall goals, § 5108 authorizes the acquisition of more tribal land. Congress appropriated the sum of $2,000,000 annually, to be spent by the Interior Secretary "for the purpose of providing land to Indians." The Secretary was authorized to purchase three specific types of interests in real property, *i.e.*, "lands," "surface rights," and "water rights." This enumeration of three kinds of property interests might seem curious, but the phrase is used in related statutes.[3]

After the Secretary purchases one of these categories of property, it must be "taken . . . in trust" to qualify as tax-exempt. The Supreme Court rejected the argument that "tax-exempt status automatically attaches when a tribe acquires reservation land" under 25 U.S.C. § 5108, because that would render superfluous the taking-into-trust procedure. *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 523 U.S. 103, 114 (1998). To the contrary, the Supreme Court concluded,

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[3] *See e.g.*, 25 U.S.C. § 5201 (Secretary is authorized to acquire for tribal agriculture "any interest in lands, water rights, or surface rights to lands."); 25 U.S.C. § 5104 (to facilitate exchanges of tribal lands, the Secretary is authorized to acquire "any interest in lands, water rights, or surface rights to lands."). The specification of both "lands" and "surface rights" might seem redundant, but in the 1930s oil and gas exploration (particularly in Oklahoma) often caused the severance of surface rights and mineral rights.

in § 5108, "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt." *Id.*

The meaning of "such land and rights"—that is, the land and rights that are tax-exempt—can be summarized like this: (1) land, surface rights, and water rights; that are (2) acquired by the Secretary "pursuant to" the IRA; and (3) "taken into trust" for the purpose of "providing land to Indians."

With that checklist in mind, it is obvious that the Facility does not qualify for tax exemption under 25 U.S.C. § 5108. The Secretary never purchased it on behalf of *anybody*; it wasn't even built until approximately 2000; it is owned by non-Indians; it was never taken into trust; and the land beneath it was not acquired pursuant to the IRA.[4] The question is whether the Congress of 1934 would have understood the Facility to qualify as "such land and rights," and the answer is no.

2. SPEC would attribute to Congress an "intent" that is thoroughly implausible.

Because SPEC advocates an interpretation that is freewheeling instead of textual, SPEC would read 25 U.S.C. § 5108 to reflect an intention that is inherently

[4] The Fort Mojave reservation was not "acquired pursuant to" the IRA. *See Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 420 n.1 (1991) (Fort Mojave Reservation was created by Executive Orders that ended in 1911). It thus falls outside the scope of § 5108. *Albrecht v. Riverside Cnty*., 283 Cal. Rptr. 3d 716, 722 (Cal. Ct. App. 2021) (under a "plain reading" of § 5108, reservation land that was not acquired pursuant to § 5108 is not eligible for the tax exemption created by that statute); *Herpel v. Cnty. of Riverside*, 45 Cal.App.5th 96, 118-20 (Cal. Ct. App. 2020) (reservation lands acquired before 1934 do not qualify under § 5108).

implausible in two respects. First, SPEC claims Congress overruled numerous precedents upholding state taxes of non-Indian property on tribal lands. The Court said in 1930 that non-Indian property was "subject to taxation." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). If Congress wanted to change that rule, it needed to say so clearly. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241-43 (2009) (requiring clear statement of intent to overturn Supreme Court precedents).

Second, SPEC posits that Congress intended to create distinctions between "permanent improvements" and other types of on-reservation property. This too would overrule Supreme Court precedents, which placed all types of non-Indian property into a single taxable bucket. The Court first held that states could tax permanent improvements in *Fisher*, 116 U.S. at 31-33. In upholding a tax on (obviously moveable) cattle owned by non-Indians, the Court said it was "sufficient to cite" *Fisher*. *Thomas v. Gay*, 169 U.S. 264, 273 (1898).[5]

Indeed, by creating new distinctions among categories of non-Indian property, the court of appeals showed that it was not *interpreting* § 5108 in a judicial fashion. Neither the IRA nor any case interpreting the IRA has ever tried

[5] Likewise, lower courts applied a single rule (that non-Indian property was taxable) to every type of property. *Compare Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60, 65 (9th Cir. 1896) (upholding tax on cattle, citing *Fisher*); *Torrey v. Baldwin*, 26 P. 908, 910 (Wyo. 1891) *with In re Skelton Lead & Zinc Co. Gross Prod. Tax*, 197 P. 495, 503-05 (Okla. 1921) (upholding property tax on improvements, citing *Thomas*); *Lebo v. Griffith*, 173 N.W. 840, 841 (S.D. 1919); *Noble v. Amoretti*, 71 P. 879, 880 (Wyo. 1903).

to dictate when non-Indian property qualifies as a "permanent improvement." Because the court needed to find such rules *somewhere*, it conscripted a federal income tax case that had nothing to do with federal Indian law. *Whiteco Indus., Inc. v. Comm'r*, 65 T.C. 664 (1975). *Whiteco* had never been applied in any prior Indian tax case. Because it is impossible to argue seriously that "the Congress of 1934 intended to enact the *Whiteco* factors," it is clear that the court of appeals arrogated the powers of Congress.

B. The IRA's history proves the Congress did not intend to bar states from taxing non-Indian property.

1. The silent legislative history proves that SPEC is wrong.

The silence of the legislative history proves that Congress did not intend to overturn Supreme Court precedents—that is, Congress did not intend to upset the rule permitting taxation of non-Indian property. Under the interpretive canon of "the dog that did not bark," the absence of any such statement shows that it could not possibly have been intended.[6]

[6] *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 63 (2004) (silence of legislative history under the "dog that did not bark" canon); *Bryan v. Itasca Cnty.*, 423 U.S. 373, 388-90 (1976) (citing silence in Public Law 280's history as evidence that Congress did not intend to change the rules governing taxation of tribal land).

The IRA was extensively vetted by the Indian Affairs Committees of both the House and Senate.[7] The IRA was debated at length on the floors of the Senate and House.[8] A recent book digested all available materials to reconstruct Congress' intent.[9] In 1000+ pages of legislative history, not one word suggests that the IRA had anything to do with state taxation of non-Indian property.

2. The IRA's author recognized that the statute did not change the taxation of non-Indian property.

Felix S. Cohen was perfectly positioned to observe the intention behind the IRA and communicate it to the bar—*he authored the IRA*. Cohen recognized that the IRA did not change the law regarding state taxation of non-Indian property.

Cohen has been called the "Blackstone of Federal Indian law." *Felix S. Cohen's Handbook of Federal Indian Law* ("*Handbook*") xiv (2012 ed.). This title is playful but also appropriate. During his tenure at the Solicitor's Office in the Department of the Interior, Cohen single-handedly created the field of federal

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[7] *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purpose of Local Self-Government and Economic Enterprise: Hearings on S. 2755 Before the Senate Comm. on Indian Affairs*, 73d Cong. (1934); *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Comm. on Indian Affairs*, 73d Cong. (1934). The committee reports are available at the following links: https://tinyurl.com/4b2sh9f2 (Senate); https://tinyurl.com/bdhh9zpy (House).

[8] 78 Cong. Rec. 11,122-11,139 (June 12, 1934) (Senate) & 11,724-11,744 (June 15, 1934) (House). These debates are available at the following links: https://tinyurl.com/362t65nj (Senate) & https://tinyurl.com/54zxsuvk (House).

[9] Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (2000).

Indian law. Early on, the Supreme Court described Cohen as "an acknowledged expert in Indian law." *Squire v. Capoeman*, 351 U.S. 1, 8 (1956).

Cohen was ideally positioned to discern the IRA's intent because, well, he drafted the statute. Whether his authorship was exclusive is unclear—a recent biography says that he "wrote" the IRA, while other sources identify him as the IRA's "principal drafter."[10] In any event, Cohen certainly had superior insight into the IRA's intentions and effects.

Moreover, due to his position in the Solicitor's Office in the Department of the Interior, Cohen was well-positioned to publicize any change to the taxability of non-Indian property on tribal lands. Solicitor's Opinions are authoritative statements of agency policy—the Supreme Court has cited them as evidence of Congressional intent behind the IRA. *See e.g.*, *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985). The publication of Solicitor's Opinions thus gave Cohen an ideal vehicle to explain whether and how the IRA had changed the taxability of non-Indian property located on tribal lands.

But Cohen didn't perceive any change. In 1936, a Solicitor's Opinion said: "It is well settled that a State has jurisdiction to tax property owned by non-Indians

[10] Alice Beck Kehoe, *A Passion for the True and Just: Felix and Lucy Kramer Cohen and the Indian New Deal* 5 (2016). The current edition of the *Handbook* calls Cohen "a principal drafter" of the IRA. *Handbook* xiii (2012 ed.).

within an Indian reservation." 56 I.D. 38, 39 (Dec. 11, 1936).[11] In 1940, a Solicitor's Opinion advised: "The Supreme Court has repeatedly permitted the taxation by the State of the property of white persons located on Indian reservations on the theory that such taxation did not interfere with the exercise of Federal authority within the reservation." 57 I.D. 124, 125 (May 8, 1940). After Cohen's death, a 1956 Solicitor's Opinion stated: "[T]here is no law which prevents [the Alaska Territory's] taxation of the property of non-Indians even though a non-Indian's property is located upon tribal land under lease from the Indians." 63 I.D. 333, 336 (Sept. 17, 1956).

But these Solicitor's Opinions were just warmups. In 1942, Cohen first published his *Handbook of Federal Indian Law*.[12] This treatise was (and still is) viewed with reverence. The American Law Institute describes the *Handbook* as "the most influential document in the history of federal Indian law." *Restatement of the Law of American Indians*, 1 Rep. Intro. TD No. 1 (2015). This Court called the *Handbook* a "monumental work," *Harrison v. Laveen*, 67 Ariz. 337, 343 (1948), and an "excellent treatise," *In re Denetclaw*, 83 Ariz. 299, 302 (1958). As of 2018, the U.S. Supreme Court has cited the *Handbook* in 67 opinions.[13]

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[11] Solicitor's Opinions are available at https://www.doi.gov/solicitor/decisions.
[12] The 1942 edition of the *Handbook* is available at https://tinyurl.com/ycknec5w.
[13] Adrien Habermacher, *"Felix Cohen was the Blackstone of Federal Indian Law": Taking the Comparison Seriously*, 8 Brit. J. Am. Legal Stud. 371 (2019).

So what did the 1942 *Handbook* say about the effect of the IRA? Cohen quoted 25 U.S.C. § 5108 to illustrate how Congress could create an express tax exemption for tribal lands. *Handbook* 255 (1942 ed.). But the treatise acknowledged that the *Fisher* cases gave states "the right to tax the lessee[s] of Indian lands." *Id.* at 257. It noted that this right to tax non-Indian property "does not imply a right to tax the Indians or their property." *Id.* The *Handbook* cited *Thomas'* rule that property "owned by non-Indians but held on an Indian reservation is subject to state taxation." *Id.* at 262.

The preeminent scholar of Indian law, who drafted the IRA, perceived nothing in the IRA that prohibited state taxation of property owned by non-Indians. This is proof that SPEC would improperly have this Court "invest old statutory terms with new meanings." *New Prime*, 139 S.Ct. at 540.

III. The Court should ignore 25 C.F.R. § 162.017 because it is *ultra vires*, self-contradictory, and entitled to no deference.

Though SPEC eschews reliance on 25 C.F.R. § 162.017, that regulation is the only conceivable basis for distinguishing between "permanent improvements" and other types of on-reservation property. For several reasons, the Court should conclude that the regulation is valueless and has no bearing on this matter.

Nothing in the IRA delegated rulemaking authority to the Interior Department. *A fortiori,* Congress did not empower the Interior Department to regulate the tax liability of non-Indians under state law—the very idea flouts

principles of federalism. Recent developments in administrative law have cast doubt on how much deference is owed to administrative agencies. Finally, the Supreme Court recently suggested that agency regulations have no preemptive effect. *Kansas v. Garcia*, 140 S.Ct. 791, 801 (2020) (preemption can only arise from "the Constitution itself or a valid statute enacted by Congress").

Despite all these question marks, the BIA promulgated 25 C.F.R. § 162.017 in 2013. At first glance, the regulation appears to say that states may not tax any permanent improvements on Indian land, regardless of ownership. But what the regulation gives with one hand, it takes back with the other. It contains the proviso that it is "subject to applicable federal law," which includes court decisions such as *Bracker*. *Desert Water Agency v. U.S. Dep't of Interior*, 849 F.3d 1250, 1254–55 (9th Cir. 2017). Simply put, nobody knows what the regulation means.

Every court that has considered this regulation has found some reason to ignore it. Two courts declared the regulation *ultra vires* because Congress delegated no authority to the BIA. *Pickerel Lake Outlet Ass'n*, 953 N.W.2d at 92-93; *Sifferman v. Chelan Cnty.*, 496 P.3d 328, 344 ¶ 82 (Wash. Ct. App. 2021) ("[T]here is no indication that Congress authorized the [BIA] to wholly exempt leasing activities on Indian land from state taxation.").

Three courts have concluded the regulation doesn't add anything—thus converting it into a non-factor that just washes through. *Desert Water*, 849 F.3d at

1254 (accepting the argument that the regulation "does not purport to preempt any specific state taxes"); *Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty.*, 724 F.3d 1153, 1156 n.6 (9th Cir. 2013) (regulation "merely clarifies" existing law, thus, court declined to address its application); *Herpel v. Cnty. of Riverside*, 45 Cal.App.5th 96, 117-20 & n.18 (Cal. Ct. App. 2020) (rejecting argument that "applicable federal law" does not include *Bracker* because the regulation would improperly "prohibit[] a tax that *Bracker* allows").

Even the cases cited by SPEC have declined to embrace this regulation. *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1338 (11th Cir. 2015) (holding that regulation did not displace *Bracker's* balancing test); *Agua Caliente Band of Cahuilla Indians v. Riverside Cnty*, 181 F.Supp.3d 726, 741 (C.D. Cal. 2016).

After courts have long said the IRA does not preempt state taxation of non-Indian property, it is remarkable for the BIA to declare—with no delegated authority—that Congress "really" intended the opposite. This Court should decline to wade into the morass of issues posed by this regulation.

IV. Recognizing preemption in this case would upset reliance interests and flout stare decisis.

"*Private non-Indian corporations cannot escape their obligation to pay state taxes by locating their property on Indian reservations. Nothing that the U.S. Supreme Court has ever held would imply such an absurd result.*"

-- *Prince v. Cent. Bd. of Educ.*, 543 P.2d 1176, 1182 (N.M. 1975)

The theme here is the accumulation of precedent over a long period of time. The Petition cited three cases in which courts concluded that the IRA did not intend to preempt state taxation of the property of non-Indians. Pet. for Rev. at 8.[14]

As of 1959, when Indian law entered the so-called "modern era," the Supreme Court had recognized "state taxation of non-Indian property inside Indian reservations" as one of the settled rules of federal Indian law. Alex Skibine, *From Foundational Law to Limiting Principles in Federal Indian Law,* 80 Mont. L. Rev. 67, 90 (2019). In the modern era, the Supreme Court has consistently reaffirmed that rule. In *Mescalero*, the Court noted that states had power to tax non-Indian "[l]essees of *otherwise exempt* Indian lands." 411 U.S. 145 at 157 (emphasis added). The Court called the taxation of non-Indian property a "permissible exertion of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan*, 411 U.S. at 168. The Court cited the *Fisher* cases with approval in *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) and *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 111 (2005).

Here in Arizona, lawyers and judges understood the law. In *Kahn v. Ariz. State Tax Comm'n*, the court of appeals noted that non-Indian property located on

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[14] *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 183 n.14 (1989); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 800 F.2d 1446, 1448 (9th Cir. 1986); *Fort Mojave Tribe v. San Bernardino Cnty.*, 543 F.2d 1253, 1256 (9th Cir. 1976).

tribal land "is subject to taxation under the laws of the state." 16 Ariz. App. 17, 19 (App. 1971) (quoting *Cook*, 281 U.S. at 650)); Att'y Gen. Op. I87-75 (1978) ("[I]t has long been established that the State has the right to tax property of non-Indians, even though that property be located on an Indian reservation."). The owners of all the non-Indian property on Arizona's tribal lands have often tried to minimize their tax liability. But they acknowledged the state's ultimate power to tax such property. *See Navajo Cnty. v. Monument Valley Inn, Inc.*, 13 Ariz. App. 525, 527 (App. 1970) (legislature could levy property tax on non-Indian hotel located on tribal land); *Pima Cnty. v. Am. Smelting and Refin. Co.*, 21 Ariz. App. 406, 409 (App. 1974) (legislature could levy property tax on non-Indian mining company located on reservation); *Navajo Cnty. v. Peabody Coal Co.*, 23 Ariz. App. 259, 260 (App. 1975) (mine owner conceded that its improvements on reservation were taxable); *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550 (App. 1997) (property tax on leasehold held by "non-Indian entities" was not a tax on "tribal Indian lands").

SPEC wants the Court to believe that non-Indians can avoid state tax with the "one weird trick" of locating their property on tribal land. That is just not so.

V. *Bracker* supplies the appropriate framework to test the compatibility of Arizona's taxes with federal law.

The case is not over if this Court rejects SPEC's argument under § 5108. SPEC has another preemption argument the parties briefed below, but not addressed by the court of appeals, and, therefore, the parties did not present it for

review before this Court. The tax court analyzed the taxes under the *Bracker* doctrine, which has controlled these cases for forty years. ADOR resisted the *Bracker* argument on the merits (as it must), but that analysis supplies the framework to assess whether Arizona's taxes are preempted by federal law.

CONCLUSION

Felix Cohen did not forget the intent of the law that he wrote in 1934. Nor did three generations of property owners and their capable lawyers fail to spot something in the text of 25 U.S.C. § 5108 that Cohen had forgotten. This Court should vacate the Opinion and remand the matter to the court of appeals to conduct the *Bracker* analysis.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

GAMMAGE & BURNHAM, P.L.C.

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