IN THE
SUPREME COURT OF ARIZONA

NO. CV-21-0130-PR

Ct. App. No. 1 CA-TX 20-0004

Arizona Tax Court Nos. TX2013-000522,
TX2014-000451, TX2015-000850, TX2016-001228,
TX2017-001744, TX2018-000019, TX2019-000086

SOUTH POINT ENERGY CENTER LLC,

Plaintiff/Appellant/Respondent,

v.

ARIZONA DEPARTMENT OF REVENUE; MOHAVE COUNTY,

Defendants/Appellees/Petitioners.

BRIEF OF *AMICI CURIAE* FORT MOJAVE INDIAN TRIBE, THE NAVAJO NATION, THE GILA RIVER INDIAN COMMUNITY, GILA RIVER INDIAN COMMUNITY UTILITY AUTHORITY, THE INTER-TRIBAL ASSOCIATION OF ARIZONA, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS (FILED WITH WRITTEN CONSENT)

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INTERESTS OF *AMICI CURIAE*

Amicus Curiae Fort Mojave Indian Tribe (the "Tribe") is a federally recognized Indian tribe with a reservation in the tri-state area of Arizona, California, and Nevada. The United States holds title to the reservation lands in trust for the Tribe. The Tribe has a significant interest in this case because it involves the Tribe's sovereign authority over permanent improvements on its tribal trust lands. In 1999, the Tribe leased roughly 320 acres of reservation land to South Point Energy Center LLC's ("South Point") predecessor to build and operate a power plant, with an initial lease term of fifty years from the date the facility began commercial operations. This case concerns the validity of a state tax as applied to this permanent facility on tribal trust lands. By attempting to tax the power plant, Arizona and Mohave County (the "State" or "Arizona") improperly infringe on the Tribe's inherent sovereignty by obstructing the Tribe's power to regulate land use on its reservation, and jeopardizing the Tribe's economic self-sufficiency.

Amicus Curiae the Navajo Nation is a federally recognized Indian tribe with a formal reservation that encompasses approximately 17,627,262 acres of sovereign territory in northwestern New Mexico, northeastern Arizona,

and southeastern Utah. The Navajo Nation also owns almost 30,000 acres of land in Colorado. The Navajo Nation is a sovereign government with strong interests in managing its lands, including protecting the use of its environment in the Navajo way and ensuring that its lands may serve as a permanent homeland for Navajo people.

Amicus Curiae the Gila River Indian Community ("the Community") is a sovereign Indian nation composed of members of the Pima and Maricopa Tribes, traditionally known as the Akimel O'otham and Pee-Posh. The Gila River Indian Reservation consists of 584 square miles south of Phoenix. The Community has established rigorous environmental regulations governing facilities within the Community and is strongly committed to the protection of its lands.

Amicus Curiae Gila River Indian Community Utility Authority ("GRICUA") was formed in the late 1990s to manage the electrical and energy needs of the Gila River Indian Community and provide reliable, competitively priced electrical service to the Community. GRICUA's goals include operating the Community's electrical distribution system, overseeing the operation of electrical transmission systems for the

Community, and exploring electrical generation opportunities within the Community.

Amicus Curiae the Inter-Tribal Association of Arizona ("ITAA") is comprised of 21 federally recognized Indian tribes with lands located primarily in Arizona, as well as California, New Mexico, and Nevada. Founded in 1952, ITAA is a united voice for tribal governments on common issues and concerns.

Amicus Curiae the National Congress of American Indians ("NCAI"), founded in 1944, is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their citizens. NCAI represents these governments' collective interests and serves as a consensus-based forum for policy development among its member tribes from each region of Indian Country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and federal policy issues affecting tribal governments.

This case involves an issue of critical importance for tribal self-government and self-sufficiency: whether states may tax permanent improvements on tribal trust lands. *Amici* submit this brief to offer the Court their perspective on the tribal interests threatened by the imposition of such

taxes, and to protect those interests from being severely undercut in this case and others by state taxation.

No person or entity other than the *amici curiae* identified herein provided financial resources for the preparation of this brief.

INTRODUCTION

Mohave County unlawfully levied, assessed, and collected ad valorem property taxes on permanent improvements built on land held by the United States in trust for the Tribe. The court of appeals correctly held that that these taxes are categorically preempted by federal law. In this brief, *Amici* explain how tribal sovereignty interests are implicated by this case and why these interests support affirming the court of appeals decision.

Taxes on permanent improvements strike at the core of Indian tribes' sovereignty over their land. Such taxes do not just deprive tribes of revenue but oust tribes' regulatory control over their land and substitute the state's. As such, this case is not about regulating "the conduct of non-Indians … on [a] reservation"—the sphere where state interests can, in some circumstances, overcome the tribal and federal interests favoring preemption. *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, (1980). Nor is it about drawing distinctions between Indians and non-

Indians. *Contra.* Defs' Supp. Br. at 1 ("federal Indian law exists for the express purpose of drawing distinctions between Indians and non-Indians").[1] Rather, this case is about control over the land itself. Consequently, the sovereign interests of *amici* and indeed, all tribal nations in Arizona are directly implicated.

In this brief, *amici* first describe the significance of land preservation and land-use regulation to tribal nations and the important role of land within tribal sovereignty more generally. A*mici* then describe how state taxation of permanent improvements on tribal trust land jeopardizes tribes' core sovereignty interests in shaping the future of their own lands and threatens tribal self-governance by depriving tribes of a potentially vital source of tax revenue.

[1] Defendants' lack of understanding of federal Indian law and tribal nations more generally is apparent. Above all else, tribal sovereignty is the cornerstone of Federal Indian law, predating the United States Constitution, as affirmed for centuries by the Supreme Court. To the extent that this foundational area of U.S. law has any one purpose, it is to ensure that the sovereignty that tribal nations have retained in their relationship with the United States, remains respected and preserved. Furthermore, though this should be obvious, Felix Cohen—a non-Indian—did not "single-handedly create[] the field of federal Indian law." *Contra.* Defs' Supp. Br. at 12–13.

ARGUMENT

I. State Taxation of Permanent Improvements on Tribal Trust Lands Is Preempted by Federal Law.

A. Governing Trust Lands, Including Permanent Improvements on Trust Lands, Is Essential to Tribal Sovereignty.

For tribal nations, land is a source of identity, culture, and history. Consequently, preserving and restoring tribal lands is uniquely important to tribal sovereignty and is a priority of contemporary federal Indian law policies. For nearly two hundred years, the Supreme Court has recognized tribes as "distinct, independent political communities," qualified to exercise many of the powers and prerogatives of self-government. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (quotation marks omitted). However, through a series of federal policies and most recently through the process of allotment, tribes were divested of much of their original territories. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (stating allotment had the "avowed purpose of … the ultimate destruction of tribal government." (quotation marks omitted)).

When Congress "formally repudiated" its allotment policies with the passage of the Indian Reorganization Act in 1934 ("IRA"), land remained the

focus—with Congress prohibiting further allotments and authorizing the Department of the Interior to take land into trust to rebuild at least part of the land base that many tribes had lost. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 339–40. (1998); Indian Reorganization Act of 1934, Pub. L. No. 73-383, ch. 576, §§ 1, 5, 48 Stat. 984, 984-85. Section 5 of the IRA authorizes the Secretary of the Interior to take lands into trust for Indian tribes and expressly exempts from taxation "lands or rights" taken into trust. *See* 25 U.S.C. § 5108.[2] This exclusion applies to permanent improvements because such improvements are "essentially a part of the lands," and "[e]very reason that can be urged to show that the land [is] not subject to local taxation applies to the assessment and taxation of the permanent improvements." *United States v. Rickert*, 188 U.S. 432, 442 (1903); *see also* 73 C.J.S. *Property* § 21 n.1 Westlaw (database updated Nov. 2021) ("land" includes "such tangible, visible things as are attached thereto or found therein").

[2] When the Secretary considers whether to take land into trust for a tribe, state and local governments have an opportunity to provide written comments to the Secretary as to the potential impact of the proposed acquisition, including on "real property taxes." *See* 25 C.F.R. §§ 151.10, 151.11(d). The potential tax consequences of each land-into-trust decision thus receive a full airing at the time of acquisition. Indeed, the Secretary's decision to place land into trust *despite* these consequences underscores that federal and tribal interests *both* support preemption of state taxes.

Still, most tribes today control only a fraction of the acreage that once comprised their original territories, with most of the remaining tribal lands—about 56 million acres—being held in trust by the United States.[3] Land has thus been at the center of both attempts to tear down tribal sovereignty as well as efforts to preserve and maintain that sovereignty.

Although federal courts' approaches to Indian sovereignty have changed over time, courts consistently recognize that tribal sovereignty centers on tribal lands, *see Plains Commerce Bank*, 554 U.S. at 327, and that "there is a significant geographical component to tribal sovereignty." *Bracker*, 448 U.S. at 151. And tribes' sovereign authority over their lands includes the authority to tax these lands. *See, e.g., Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152 (1980) ("*Colville*") (describing the power to tax as a "fundamental attribute of sovereignty"). Indeed, the Ninth Circuit has stated it "is beyond question that land use regulation is within the Tribe's legitimate sovereign authority"—precisely because such regulation is inseparable from sovereignty over the land itself. *Segundo v.*

[3]U.S. Dep't of the Interior, *Native American Ownership and Governance of Natural Resources*, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ (last visited Jan. 27, 2022).

City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987). This sovereign authority necessarily extends not just to the soil itself but to those permanent improvements that, having become affixed to the soil, are inseparable from it.

B. State Taxation of Permanent Improvements on Tribal Trust Lands Conflicts with Federal Law and Federal Policy in Support of Tribal Sovereignty.

Whenever a state seeks to assert authority over tribal lands, as is the case here, tribal sovereignty is put under fire. But the Supreme Court has recognized that "the Federal Government [is] firmly committed to the goal of promoting tribal self-government." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Congress has expressed this aim through numerous federal statutes, including *inter alia*¸ the IRA. *See, e.g.*, *id.* at 335 n.17. The Supreme Court has further noted "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop'" for interpreting federal statutes. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837-38 (1982) (quotation marks omitted).

Additionally, longstanding principles governing the interpretation of federal statutes that implicate tribal interests dictate that such enactments be

construed liberally in favor of tribes' inherent sovereignty and authority to self-govern. *See, e.g.*, *Bracker*, 448 U.S. at 143–44 ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence"). Consequently, even to the extent this Court were to find Section 5 of the IRA's bar on state taxation to be ambiguous—which it is not—this interpretation principle would dictate that this Court construe its meaning liberally in favor of the tribes' inherent authority to self-govern. *See, e.g.*, *Ramah*, 458 U.S. at 845-46.

Indeed, though states may sometimes regulate certain *activities* of non-Indians on tribal land, *see Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) ("the *Bracker* interest-balancing test applies ... where 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation'" (citation omitted)), states generally may not regulate tribal lands. *See Plains Com. Bank*, 554 U.S. at 327 (explaining that tribal sovereignty "centers *on the land held by the tribe*." (emphasis added)). Central to this dichotomy is the fact that that tribal authority to regulate is at its strongest when regulating tribal lands. *Id.* And in this respect, clearly permanent improvements on tribal land are akin to the land itself, not to activities that

happen to occur on tribal land but that could just as easily have happened elsewhere. And just as "land use regulation is within the Tribe's legitimate sovereign authority over its lands," so too is taxing the permanent improvements on those lands. *Segundo,* 813 F.2d at 1393.

It is hard to imagine a scenario where a state could have the greater interest in taxing—and therefore regulating—permanent improvements on tribal trust lands than the tribe itself. Taxes on permanent improvements do not regulate "the conduct of non-Indians … on [a] reservation." *Bracker*, 448 U.S. at 144. To the contrary, because "improvements … are essentially a part of the lands," *Rickert*, 188 U.S. at 442, these taxes amount to attempts to regulate *the land itself*. As such, it is for good reason that state taxation of permanent improvements on tribal trust lands are categorically preempted by federal law. *See* 25 U.S.C. § 5108.

In *Rickert*, the Supreme Court barred state taxes on "permanent improvements" to tribal lands precisely because such "improvements … are essentially a part of the lands," and this protection was "necessary to effectuate the policy of the United States" to protect the land itself. 188 U.S. at 442. And in *Mescalero Apache Tribe v. Jones*, the Supreme Court stated in that "permanent improvements" on tax-exempt land "would certainly be

immune from [a] State's ad valorem property tax." 411 U.S. 145, 158 (1973). Indeed, *Mescalero* held that Section 5 of the IRA even barred a compensating *use* tax associated with permanent improvements because the "use of permanent improvements upon land is so intimately connected with use of the land itself." *Id.* Likewise, the Ninth Circuit recognized in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, "[w]here a state or local government assesses a tax on land *or improvements* covered by § 465, [courts] are bound by § 465 and *Mescalero* to invalidate such taxes." 724 F.3d 1153, 1158 n.7 (9th Cir. 2013) (emphasis added). The Eleventh Circuit reached a similar conclusion, interpreting Section 5 and *Mescalero* to preempt a tax "on land rights that are so connected to the land that the tax amounts to a tax on the land itself." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1329 (11th Cir. 2015). The Bureau of Indian Affairs has also made clear that state and local taxes on "permanent improvements on the leased [tribal] land" are preempted "without regard to ownership of those improvements." 25 C.F.R. § 162.017(a).

The present case highlights how critical permanent improvements are to sovereignty over land itself. The Tribe has a fundamental interest in shaping the "character" of the land on which the South Point Energy Center

sits. *Brendale*, 492 U.S. at 434. Whether to develop this land, as they have chosen to do here, or how to do so are purely the Tribe's decisions to make. Indeed, these are the core choices that all sovereigns must make. And these choices are particularly salient for tribes, whose sovereignty "centers on" their lands and their members. *See Plains Com. Bank*, 554 U.S. at 327. But state taxation of permanent improvements on tribal trust lands improperly displaces this sovereignty with state control over a separate sovereign's territory.

II. State Taxation of Permanent Improvements on Tribal Trust Lands Threatens Tribal Sovereignty.

State taxation of permanent improvements on tribal trust lands saps tribes of their core sovereign authority by supplanting the tribes' choices as to the future of their tribal trust lands with those of another sovereign. These taxes also deprive tribes of potentially vital sources of tax revenue derived from tribal lands. State taxation of permanent improvements on tribal trust lands thus threatens tribal sovereignty.

A. State Taxes on Permanent Improvements Oust Tribes' Regulatory Authority over Land.

State taxes on permanent improvements strike at the heart of tribes' regulatory authority over land. As Chief Justice Marshall recognized

centuries ago, the power to tax is the "power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 426-27, 431 (1819). The power to tax is also the power to regulate. Indeed, "[e]very tax is in some measure regulatory." *Sonzinsky v. United States*, 300 U.S. 506, 512–14 (1937). The Defendants efforts to tax permanent improvements affixed to the Tribe's tribal trust lands are attempts to regulate these lands. When a state taxes permanent improvements on tribal trust lands, it necessarily supplants the tribe's regulatory choices with those of the state.

As is the case for all sovereigns, the power to tax is an indispensable regulatory tool for tribes.[4] The taxation power "is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 139 (1982). On tribal lands, as elsewhere, tax policies often "seek[] to shape decisions," such as by encouraging or deterring conduct that the sovereign deems desirable or undesirable. *Nat'l Fed'n of Indep. Bus. v.*

[4] Despite the Defendants insinuations to the contrary, tribes *do* indeed assess taxes, so any fearmongering that businesses will flee to Indian reservations to avoid state taxation if this Court affirms the court of appeal's decision is entirely unfounded. *Contra* Defs' Supp. Br. at 19 ("[South Point Energy Center] wants the Court to believe that non-Indians can avoid state tax with the 'one weird trick' of locating their property on tribal land").

Sebelius, 567 U.S. 519, 567 (2012). For example, a sovereign may, "if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions," or it may opt to "tax real estate and personal property in a different manner." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Indeed, "taxes that seek to influence conduct are nothing new." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 567.

This principle applies equally to permanent improvements on land. For decades, researchers have known that "taxes ... affect the timing, intensity, and nature of land use." Barry A. Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 Ind. L.J. 27, 30 (1975). In this manner, taxes shape what happens to land. For instance, "green" property taxes that increase the costs of certain societally undesirable land uses "make[] it more costly for landowners to pursue specific forms of development" and thus ensure that "such development will occur less frequently." OECD, *The Governance of Land Use in OECD Countries: Policy Analysis and Recommendations* 103 (2017); *see also id.* at 109–110 (describing fiscal instruments to manage development). Tax policies thus "play a crucial

role" in land-use decisions "because they influence both costs and benefits of land use." *Id.* at 18.

Accordingly, tribes' tax policy determinations shape—and often determine—whether and what permanent improvements will be built on land. And when a state taxes permanent improvements on tribal trust lands, it supplants the tribe's rightful ability to assign its own regulatory choices to those improvements and often acts as a disincentive to development on reservation trust lands — particularly, as discussed below, where a tribe implements its own tax. In short, as the Department of the Interior acknowledged, "[s]tate and local taxation of improvements undermine Federal and tribal regulation of improvements." Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,448 (Dec. 5, 2021).

The present case illustrates the point. Arizona assessed the South Point station using a methodology specifically developed for "electric generation facilities." A.R.S. §§ 42-14151(A)(4), 42-14156. Arizona's methodology implicates myriad policy decisions, from whether to distinguish electric *generating* businesses from electric transmission and distribution businesses, to when a plant under construction should begin to

be valued.[5] But the relative merit of Arizona's policy choices is irrelevant because for present purposes, the key point is that they are *Arizona's* choices. If tribal self-determination means anything, it means that the Tribe's policy judgments—not Arizona's—should shape the permanent improvements built on tribal trust land.

B. State Taxes on Permanent Improvements Jeopardize Tribes' Interests in Economic Self-Sufficiency.

State taxes on permanent improvements also interfere with tribal sovereignty by undermining tribes' ability to raise revenue. Taxes not only serve tribes' regulatory purposes, as described above, but also further tribes' "interest in raising revenues for essential governmental programs." *Colville*, 447 U.S. at 156. That "interest is strongest" where, as here, "the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Id.* at 156-57. Given how central permanent improvements are to tribes' sovereignty over their land, tribes are necessarily "involved" in those permanent

[5] *See* H.R. 2324, 44th Leg., 2d Reg. Sess. (Ariz. 2000), https://www.azleg.gov/legtext/44leg/2r/summary/h.hb2324_4-13-00_aspassedthehouse.doc.htm; H.R. 2348, 46th Leg., 1st Reg. Sess. (Ariz. 2003), https://www.azleg.gov/legtext/46leg/1r/summary/h.hb2348_03-13-03_aspassedthehouse.doc.htm.

improvements through providing services such as utilities, police protection, and emergency response, particularly where, as here, the permanent improvements are as a large a structure as the energy plant at issue here.

But when states are permitted to impose taxes on permanent improvements, tribes effectively cannot because the resulting double taxation chills the economic activity on which the vitality of reservation economies depend. Tribes already face "extreme difficulty in raising revenue" because many "have virtually no tax base." Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 771 & n.84 (2004). Tribal members are often economically disadvantaged, so income taxes are not practical for raising significant revenues. *See id.* at 771, 773-74 & nn.93-94. Indeed, on almost any measure, economic conditions in Indian country fall far below the national average. Thus, "[w]hile tribal governments operate many of the same public services as other levels of government, they must operate without the usual tax revenue other levels of government rely on." Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country, Part 2: Tribal Governments* at 4 (2017) (emphasis omitted).

Accordingly, in practice, a tribe's ability "to tax [a] non-Indian [lessee] is inversely related to the state's power to tax that entity." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 437 (1993). If both a state and a tribe were to exercise the power to tax, "the resulting double taxation would discourage economic growth." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 811 (2014) (Sotomayor, J., concurring).

The Department of Interior has recognized this economic reality, stating that double taxation "decrease[s] the funds available to the lessee to make rental payments to the Indian landowner" and "can impede a tribe's ability to attract non-Indian investment to Indian lands." Leases on Indian Land, 77 Fed. Reg. at 72,448. As such, state taxation puts tribes in a lose/lose position: Tribes must either forego potentially crucial tax revenues, or risk depressing investment in projects key to the vitality of tribal communities.

Given the devastating impact of double taxation on tribal treasuries, it is especially important to prevent states from imposing taxes that touch and concern tribal trust lands. The critical point is that state taxes on permanent improvements on tribal trust land will operate to deprive tribes of economic

opportunity and the revenues on which their governments, and their citizenry, depend.

CONCLUSION

For the foregoing reasons, the Court should affirm the court of appeal's decision.

DATED this 28th day of January, 2022.

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This certificate of compliance concerns a brief and is submitted under ARCAP 14(a)(5). Undersigned counsel certifies that the *Amicus* Brief which this certificate accompanies uses a proportionately spaced typeface (Book Antiqua) of at least 14 points, is double-spaced, and contains 3,922 words. The brief does not exceed the 12,000-word limit that is set forth by ARCAP 14(a)(4).

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On this date, the *Amici Curiae* Brief, the Certificate of Compliance, and this Certificate of Service were served by AZTurboCourt on the parties or their counsel as follows:

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