No. 24-952

IN THE

Supreme Court of the United States

SOUTH POINT ENERGY CENTER, LLC,

Petitioner,

v.

ARIZONA DEPARTMENT OF REVENUE;
MOHAVE COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

KRISTIN K. MAYES
Attorney General
of Arizona
DANIEL C. BARR
Chief Deputy
Attorney General
JOSHUA D. BENDOR
Solicitor General
ALEXANDER W. SAMUELS
Principal Deputy
Solicitor General

KIMBERLY JOAN CYGAN
Assistant Attorney General
Counsel of Record
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 North Central Avenue
Phoenix, AZ 85004
(602) 542-8391
tax@azag.gov

Counsel for Respondents

131189

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This Court has repeatedly noted the overriding importance of the parties' identities in any state jurisdiction analysis on tribal lands. In cases involving state tax preemption claims, the Court has upheld taxes on non-Indians primarily because the taxes fell on non-Indians and not on a tribe or tribal member. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 187 n.18 (1989) (noting that "[i]t is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers"). In this case, Petitioner South Point Energy Center, LLC ("South Point"), a non-Indian entity, claims that federal law expressly and impliedly preempts a local tax imposed on its wholly owned property located on land that it leases from the Fort Mojave Indian Tribe (the "Tribe"). Importantly, the tax here falls solely on South Point. It does not fall on the Tribe, the Tribe's land, or any tribal member. Nor does South Point pass on the tax as a cost to the Tribe or any tribal member.

The questions presented are:

(1) Did the Arizona Supreme Court correctly hold that the express tax immunity that the Indian Reorganization Act of 1934 affords to Indians and Indian tribes does not extend to a non-Indian entity for its wholly owned and operated permanent improvements to land that it leases from an Indian tribe?

(2) Did the Arizona Court of Appeals correctly hold that federal law does not impliedly preempt a local tax imposed on property that a non-Indian lessee of tribal land owns when the record shows that the tax did not interfere

with any federal or tribal regulatory schemes or interests and that the tax's revenues benefit the non-Indian lessee and the Tribe?

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Page

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Page

INTRODUCTION

This Court has repeatedly made clear that the right of Indians to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."). With respect to the validity of state taxes—as in many other contexts—the distinction between Indians and non-Indians is critical. "[U]nder [this Court's] 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). Indeed, whether the taxpayer is an Indian or a non-Indian is a "frequently dispositive question." *Id.*

The Court has further made clear that no categorical preemption exists with respect to non-Indians doing business on Indian land. Put differently, when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," the preemption question "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). Instead, the Court employs a factual balancing test, which evaluates the "state, federal, and tribal interests at stake" to determine whether federal law preempts a state tax on non-Indians. *Id.* at 145.

The Arizona Supreme Court faithfully followed this Court's long-standing precedent and held that Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, does not expressly preempt state and local property taxes imposed on permanent improvements that a non-Indian wholly owns and operates.

South Point asks this Court to review the Arizona Supreme Court's decision and find that § 5108 creates an express preemption class for South Point's wholly owned and operated property. In doing so, South Point asks this Court to ignore the "who" question in the traditional preemption analysis and to focus instead on a different question—whether the property is affixed to the land. But this Court has never endorsed that type of blinkered approach, and South Point fails to establish any compelling reason for this Court to take review of this case.

South Point also asks this Court to review the Arizona Court of Appeals' conclusion on remand that federal law does not impliedly preempt the tax on South Point's property. This request for fact-bound error correction does not warrant this Court's review. The court below correctly applied the framework that this Court prescribed in *Bracker*, 448 U.S. at 145, and reached the correct conclusion given the lack of evidence demonstrating that the tax interferes with federal or tribal interests.

Setting aside for a moment that the decisions below were correct, South Point is also incorrect in asserting that a conflict exists between the decisions below and decisions of the Ninth and Eleventh Circuit. The cases that South Point cites have one important common fact that distinguishes them from the facts here: a tribe had a substantial interest in the property or activity that the state or local authorities sought to tax. South Point cites no case where any court has ever held that property taxes on improvements that non-Indians own on leased tribal land are per se barred—and that is the crux of the question here.

Moreover, this case would be a poor vehicle for this Court's review because a question exists about whether the land underneath the improvements even falls within § 5108's scope. The land's status is critical to South Point's express preemption argument because Section 5108's tax exemption applies to trust land that was acquired pursuant to the Indian Reorganization Act. The record here does not reflect when or how the specific land was acquired.

For all these reasons, this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Legal Background.

1. Direct state taxation of tribal property or of the income of reservation Indians is presumably preempted absent express congressional authorization. *Bryan v. Itasca County*, 426 U.S. 373, 376-77 (1976). It is well-settled, however, that states may apply generally applicable taxes to non-Indians doing business with Indian tribes on tribal lands. *Cotton Petroleum*, 490 U.S. at 175 ("[A] State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.").

This Court has recognized on several occasions that states or their subdivisions may tax non-Indian-owned property—including improvements on Indian lands. *See, e.g., Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 29, 32-33

(1885) (upholding a territorial and county tax on a railroad company's property, including its railroad and depots, located within an Indian reservation); *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1, 3, 5 (1937) (upholding a state ad valorem tax on property, including a dwelling, a garage, a tool house, derricks, and pipelines, located on leased Indian lands).

In *Thomas v. Gay*, 169 U.S. 264, 268, 275 (1898), for example, the Court upheld a county tax on non-Indian lessees' cattle located on leased Indian land, stating that "[t]he taxes in question . . . were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees." The Court further stated that such a tax was "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." *Id.* at 273.

In *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 343, 367 (1949), this Court similarly upheld a state tax on petroleum that a non-Indian lessee of mineral rights produced from Indian lands. The Court identified the tax as "a tax on the lessee's property, not an occupation or excise tax." *Id.* at 346.

2. This line of authority both predates and postdates Section 5 of the Indian Reorganization Act of 1934, which provides that the Secretary of the Interior may "acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108.[1]

---

1. Section 5 was codified as 25 U.S.C. § 465 and was renumbered in 2017 as § 5108.

As this Court has previously noted, Congress passed the Indian Reorganization Act "'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.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). This Court further noted that "the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment" and that it "gave the Secretary of the Interior power to create new reservations." *Id.* at 151.

Section 5108 further provides as follows:

> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Under the statute's plain language, the two conditions necessary to qualify for any tax exemption under § 5108 are (1) the Secretary's acquisition of "land," "surface rights," or "water rights" under § 5108 and (2) the taking of that property into trust for the tribe or individual Indian for whom the Secretary acquired the land.

The Ninth Circuit has concluded that the Indian Reorganization Act neither "expanded nor reduced" traditional tax immunities. *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1256 (9th Cir. 1976). It later noted that the Indian Reorganization Act did not contain "any specific provisions relating to or limiting

a state's authority to tax transactions involving non-Indians." *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 800 F.2d 1446, 1448 (9th Cir. 1986). This Court has reached a similar conclusion in rejecting the suggestion that § 5108 affected taxation of mineral lessees: "Nor can a congressional intent to pre-empt state taxation be found in the Indian Reorganization Act." *Cotton Petroleum*, 490 U.S. at 183 n.14.

B. Factual Background.

In 1999, South Point's predecessor-in-interest entered into a ground lease with the Tribe, enabling it to construct and operate an electric generating plant (the "Facility") on the Tribe's reservation within Mohave County (the "County"), Arizona. Arizona Tax Court Index of Record ("R.") 130, ¶¶ 1-5, 29. The lease specifically provided that South Point owned all buildings, improvements, fixtures, machinery, and equipment on the leased land. *Id.* ¶ 31.

In 2012, South Point and the Tribe entered into a second lease, which amended and superseded the original ground lease. *Id.* ¶ 56. As in the first lease, South Point owns and controls the improvements. *Id.* ¶ 73. The second lease also requires South Point to remove all aboveground improvements except roads, foundations, and underground piping and equipment when the lease expires. *Id.* ¶ 75.

In the second lease, the Tribe accelerated South Point's payment of certain revenue streams by obligating South Point to make a one-time, lump-sum payment of $27 million and to then make ten annual payments of $2 million per year. *Id.* ¶¶ 58-61. Thus, although the lease expires in 2051, virtually all of South Point's monetary

obligations to the Tribe under the lease terminated in 2021. *Id.* ¶¶ 63, 79.

All of the electric power that the Facility generates is sold to nontribal customers off the reservation. *Id.* ¶ 12. South Point bears all power generation costs on and off the leased land. *Id.* ¶ 32. The Tribe is not a partner in the Facility's operations. *Id.* ¶ 77. It did not contribute any funds to construct the Facility, *id.* ¶ 15, and it does not provide any annual operating funds to the Facility, *id.* ¶ 16. The Facility does not have any contracts to sell power to the Tribe or to any entity on the reservation. *Id.* ¶ 14.

The Bureau of Indian Affairs (the "BIA") has minimal involvement with the Facility. *Id.* ¶ 9. According to the BIA, "BIA authority is limited to approval or disapproval of the lease" between South Point and the Tribe (*id.* ¶ 7) and to the approval of any subsequent lease amendments (*id.* ¶¶ 41, 53, 56).

Since 2003, the Arizona Department of Revenue (the "Department") has centrally valued the Facility pursuant to A.R.S. §§ 42-14151(A)(4) and -14156. *Id.* ¶ 80. There are three components to valuing electrical generation property: land, personal property, and real property improvements. A.R.S. § 42-14156(A)(1)-(3). The Department's valuations here, however, consisted only of personal property and statutorily defined real property improvements. R. 70, ¶ 9.

Based on these values, the County and other local taxing jurisdictions levied and collected property taxes (the "Tax") on the Facility's personal property and improvements, but not on the land. R. 130, ¶¶ 83, 86-

110. As with all property taxes collected from property owners in the County, the County used its share of the Tax's revenues to fund public services, which are available to all County residents, including South Point and tribal members. *Id.* ¶¶ 115, 116.

C. Procedural History.

The Tax imposed here has been repeatedly challenged for over twenty years. Litigation began in the U.S. District Court for the District of Arizona. The Tribe sued the Department's director to prevent the Department from assessing property tax on the Facility. *Fort Mojave Indian Tribe v. Killian*, No. 02-cv-1212, slip op. at 2-3 (D. Ariz. Jan. 29, 2004), ECF No. 99. South Point's predecessor-in-interest, Calpine Construction Finance Co. ("Calpine"), intervened. *Id.* at 3. The court dismissed Calpine's complaint for lack of subject-matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. *Id.* at 8-9. The court also dismissed the Tribe's complaint based on the Tribe's lack of standing to challenge the relevant property tax statutes. *Fort Mojave Indian Tribe v. Killian*, No. 02-cv-1212, slip op. at 21 (D. Ariz. Mar. 31, 2004), ECF No. 138. Neither the Tribe nor Calpine appealed the federal court's dismissal.

The lawsuit's impetus stemmed from Calpine's and the Tribe's 2001 modification to their 1999 ground lease. R. 144 (Ex. 12). As additional consideration for the lease modification, the Tribe agreed to initiate the federal lawsuit. *Id.* at 7, § 3. Calpine in turn agreed to intervene, to reimburse the Tribe for one-half of its legal fees and costs, and to reimburse it for 100% of them if the Tribe and Calpine prevailed. *Id.*

While awaiting the district court's ruling, Calpine sued the Department and the County (collectively, "Defendants") in the Arizona Tax Court to obtain a refund of allegedly illegally collected taxes. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 211 P.3d 1228, 1231, ¶ 8 (Ariz. Ct. App. 2009). The tax court denied the refunds, and Calpine appealed. *Id.* ¶ 11. The Arizona Court of Appeals held that Calpine, not the Tribe, owned the improvements and personal property that comprise the Facility and that because Calpine owned the property, it was liable for property taxes. *Id.* at 1233, ¶ 22.

In the present matter, South Point sued Defendants again, seeking a refund for itself of property taxes assessed on the Facility's improvements and personal property. This time, South Point asserted that the taxes were illegal on two grounds: (1) property taxes on permanent improvements on Indian lands are expressly preempted as a matter of law regardless of ownership, and (2) the taxes on the Facility's improvements and personal property are impliedly preempted under the *Bracker* balancing test. Neither the Tribe nor the BIA intervened. The Arizona Tax Court rejected South Point's express and implied preemption arguments. Pet. App. at 62a, 69a.

South Point appealed. The Arizona Court of Appeals ruled that § 5108 expressly exempted permanent improvements on the Tribe's land from state taxation regardless of ownership. *Id.* at 57a.

Defendants sought review in the Arizona Supreme Court, which granted review and reversed, holding that § 5108 does not expressly exempt the Facility from taxation. *Id.* at 42a. The court then vacated most of the

court of appeals' opinion and remanded the case back to the court of appeals to determine whether the *Bracker* balancing test impliedly exempted the Facility from tax. *Id.* at 43a.

After another round of briefing and oral argument, the Arizona Court of Appeals ruled for Defendants, finding that the *Bracker* balancing test did not impliedly exempt the Facility from tax. *Id.* at 20a. The court found that the federal and tribal interests were minimal and that the tax revenues that supported local school districts, maintained roads, and provided numerous other services justified the Tax. *Id.* at 17a-20a. The Arizona Supreme Court subsequently denied review. *Id.* at 1a.

REASONS FOR NOT GRANTING THE WRIT

I. The Arizona Supreme Court's Express Preemption Decision Is Correct.

The Arizona Supreme Court adopted a reading of § 5108 that is faithful to its text and to this Court's precedent. South Point provides no sound reason for questioning the court's interpretation.

The court's decision began by analyzing § 5108's plain language. Pet. App. at 29a. Although the court recognized the general principle that ownership rights in land include permanent improvements that a lessee affixes to that land, the court explained that an exception to this general principle occurs when the lessor and the lessee agree that the lessee owns those improvements. *Id.* at 30a. The court found that the BIA's leasing regulations recognize this exception as applying to leases of land that the federal

government owns pursuant to § 5108. *Id.* And the court concluded that this exception applied to South Point under its lease agreement with the Tribe. *Id.* Based on this fact, the court found that § 5108 "seemingly does not exempt the Plant from the County's property taxes because the land owned by the United States in trust for the Tribe does not include the Plant." *Id.* at 30a-31a.

The Arizona Supreme Court next examined this Court's decisions in *United States v. Rickert*, 188 U.S. 432 (1903), and *Mescalero*, and correctly rejected South Point's argument that these cases stand for the proposition that non-Indian-owned improvements benefit from the same tax-exempt status as the land beneath them. Pet. App. at 36a.

Rickert addressed the Indian Allotment Act's effect on the state taxation of property that had been allotted to individual tribal members. 188 U.S. at 441-42. This Court concluded that the state could not tax allotted lands or improvements thereon because taxation would impair the federal policy of assimilating Indians into society that the Allotment Act set forth. 188 U.S. at 442. The Court's conclusion focused on the fact that individual Indian allottees owned and used the improvements: "The fact remains that the improvements here in question are essentially a part of the lands, and *their use by the Indians* is necessary to effectuate the policy of the United States." *Id.* (emphasis added).

South Point argues that the Arizona Supreme Court erred in stating that *Rickert* turned on the property owners' status as Indians. Pet. at 21. But *Rickert* also held that the state could not tax "the personal property,

consisting of cattle, horses, and other property of like character" because of "what has been said in reference to the assessment and taxation of the land and the permanent improvements thereon." 188 U.S. at 443-44. In other words, *Rickert* said that the same rationale applied both to personal property and to permanent improvements. Contrary to South Point's assertion, *Rickert* had nothing to do with the specific type of property and everything to do with who owned and used it.

The Arizona Supreme Court's decision is also consistent with *Mescalero*, where New Mexico sought to impose a use tax on the tribe for materials used to construct a tribal ski resort on federal land. *Mescalero*, 411 U.S. at 146. The resort was developed "under the auspices of the Indian Reorganization Act of 1934" with money that the federal government had lent the tribe under § 10 of the Act. *Id.*

As in *Rickert*, *Mescalero* focused on the "use" of the permanent improvements: "It has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense, at least, a tax upon 'use' is a tax upon the property itself." *Id*. at 158. This Court held that "use of permanent improvements upon land is so intimately connected with use of the land" that immunity from taxation of the land must extend to the improvements. *Id.* Accordingly, the Court held that the personalty installed in constructing the resort, as part of the tribe's use of the land, was not subject to tax. *Id.*

Nothing in *Mescalero* indicates that this Court intended to establish a broad tax exemption for all improvements

on tribal land, including those that non-Indians own. The Arizona Supreme Court correctly concluded that "when ownership of permanent improvements is purposefully plucked from that bundle [of privileges making up property or property ownership], as occurred here, it loses that intimate connection [with use of the land itself]." Pet. App. at 38a.

South Point argues that the Arizona Supreme Court erroneously pointed to pre-*Mescalero* cases that did not interpret § 5108. Pet. at 21. The pre-*Mescalero* cases—which demonstrate a long and consistent tradition of permitting state or local taxation of non-Indian-owned property on Indian land—actually reinforce the court's holding that *Mescalero* does not support the Tax's preemption.

By way of example, this Court's 1949 decision in *Oklahoma Tax Commission* helps illustrate the consistency of this Court's precedent and how the Arizona Supreme Court's decision correctly applied that precedent. *See* Pet. App. at 37a. The case held that "whether immunity shall be extended in situations like these is essentially legislative in character" and that because Congress had not created such tax immunity by affirmative action, no automatic immunity applied. 336 U.S. at 365-66. As the Arizona Supreme Court noted, *Mescalero* relied on *Oklahoma Tax Commission* when it stated that "[l]essees of otherwise exempt Indian lands are also subject to state taxation." Pet. App. at 37a (citing *Mescalero*, 411 U.S. at 157). The court correctly found that *Mescalero* evidenced no intention by this Court to deviate from its long-standing precedent allowing the taxation of non-Indian-owned improvements to tribal land.

South Point also contends that a BIA regulation, 25 C.F.R. § 162.107(a), confirms that § 5108's express preemption applies to non-Indian-owned improvements. Pet. at 21. It does not. Although the regulation states that "permanent improvements on the leased land, without regard to ownership of those improvements," are not subject to state and local taxes, the regulation is prefaced with the language "[s]ubject only to applicable Federal law." Pet. App. at 41a. Applicable federal law includes decisions such as *Bracker*, which "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty." 448 U.S. at 145; *see Desert Water Agency v. U.S. Dep't of Interior*, 849 F.3d 1250, 1256 (9th Cir. 2017) (viewing the regulation's caveat as encompassing the *Bracker* balancing test). Applicable law also includes § 5108 itself. The BIA cannot expand § 5108's preemption beyond what the statute's plain language provides. *See Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (stating that preemption can arise only from "the Constitution itself or a valid statute enacted by Congress"); *see also Pickerel Lake Outlet Ass'n v. Day County*, 953 N.W.2d 82, 93, ¶ 29 (S.D. 2020) ("Congress has not authorized the BIA to preempt the State's authority to tax structures owned by non-Indians."). Thus, even assuming that the regulation's language sweeps more broadly than the statute's, that does not change the preemption calculus here.

South Point's remaining criticisms of the Arizona Supreme Court's decision also fail. South Point argues that the Tribe and the federal government have interests in permanent improvements even if they do not own them because the "permanent improvements to trust land are literally attached to the federal government's trust land" and "tribes retain an interest in regulating and taxing

permanent improvements." Pet. at 21-22. South Point cites nothing establishing that this is sufficient to support such categorical express preemption for permanent improvements. South Point's argument ignores the fact that this Court's cases are built around the distinction between Indians and non-Indians. *See*, *e.g.*, *Wagnon*, 546 U.S. at 101; *Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). South Point bears the Tax's legal incidence, and "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax." *Chickasaw Nation*, 515 U.S at 459.

South Point asserts that "the legal incidence of a property tax falls on the *property*, not the owner" (Pet. at 20), but this does not mean that the Tax here falls on the Tribe either. South Point is still the actual "taxpayer." *See Circle K Stores, Inc. v. Apache County*, 18 P.3d 713, 718, ¶ 13 (Ariz. Ct. App. 2001) (stating that "although the idea that property 'owes' taxes figuratively captures the essence of ad valorem taxation, the property itself is not the 'taxpayer'" and the actual taxpayer is "the person or entity that owns or controls the property"). In *Oklahoma Tax Commission*, this Court specifically noted that the case presented "no question concerning the immunity of the Indian lands themselves from state taxation" and that there was "no possibility that ultimate liability for the taxes may fall upon the owner of the land." 336 U.S. at 353. Likewise, here, there is no possibility that the Tribe will be liable for the Tax imposed on South Point's property.

In short, South Point cannot identify any errors in the Arizona Supreme Court's decision that warrant this Court's review.

II. No Conflict Exists Between the Arizona Supreme Court's Decision and Any Ninth or Eleventh Circuit Decision.

Contrary to South Point's assertion (Pet. at 14-16), there is no conflict between the Arizona Supreme Court's decision and any Ninth or Eleventh Circuit decision with respect to whether federal law expressly preempts state and local taxes on non-Indian-owned permanent improvements to tribal trust land. Those circuits' cases addressed materially different facts and circumstances. In an attempt to create a conflict, South Point overstates these cases' holdings and selectively references certain statements out of context. The underlying facts reveal that no concrete split is implicated here.

In *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1154 (9th Cir. 2013), the Ninth Circuit ruled that § 5108 preempted the taxation of permanent improvements on tribal land because of the tribal interest in the improvements that the county sought to tax.

In *Chehalis*, the tribe and a non-tribal enterprise formed CTGW, LLC ("CTGW") to construct and operate a lodge on trust land. Under the agreement, the tribe owned an undivided fifty-one percent interest in CTGW. *Id.* The tribe and CTGW subsequently entered into a lease agreement giving CTGW the right to use the trust land for the lodge. *Id.* The lease provided that CTGW would own the lodge's physical structures for twenty-five years, after which the tribe would become the owner. *Id.* at 1155. Thus, the tribe had interests in the improvements both as the majority owner of the entity that owned and operated

the improvements during the lease and as the 100% owner of the improvements at the lease's expiration.

Although the county recognized that § 5108 exempted trust land from state and local taxation, the county argued that "the structures on the land were not tax exempt, because . . . they were owned by CTGW and not the Tribe." *Id.* at 1155. The Ninth Circuit rejected the county's attempt to distinguish *Mescalero*, holding that it was not material that a tribal entity, rather than the tribe itself, owned the improvements at issue. *Id.* at 1157. The Ninth Circuit noted that *Mescalero* made clear that this distinction "was unimportant because 'the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct *its* business.'" *Id.* (quoting *Mescalero*, 411 U.S. at 157 n.13) (emphasis added). In light of that ruling, the Ninth Circuit held that the immunity question in the case before it "'cannot be made to turn on' the Tribe's decision to give ownership of the Lodge to *its* limited liability company." *Id.* (emphasis added). In other words, a tribe is not stripped of its immunity from local property taxes by using a limited liability corporation for its venture.

In arguing that the Ninth Circuit's holding reaches farther than that, South Point points to the Ninth Circuit's statement that § 5108 preempts state and local tax on improvements "without regard to the ownership of the improvements." Pet. at 15. South Point reads too much into that statement. The Ninth Circuit's language focusing on the form in which the tribe chooses to do its business and its reliance on *Rickert* and *Mescalero*—which both involved improvements that either a tribe or tribal members owned and used—show that the Ninth Circuit

based its holding on its understanding that CTGW was a tribal business. It does not matter whether the tribe itself or its tribal entity owns the improvements—the improvements are tribal property and cannot be taxed. Viewed in its proper context, the statement "without regard to the ownership of the improvements" simply should not be read as broadly as South Point urges this Court to read it.

South Point's arguments would not have prevailed in the Eleventh Circuit either. In *Seminole Tribe of Florida v. Stranburg,* 799 F.3d 1324, 1332 (11th Cir. 2015), the Eleventh Circuit concluded that § 5108 preempted a state rental tax imposed on the rent that non-Indian lessees paid to a tribe for the use of commercial space at the tribe's casinos on Indian land. Florida had imposed a tax on the "privilege of [engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property." *Id.* at 1326. The law required the tribe, as the landlord, to collect and remit the tax. *Id.* If the lessor tribe did not remit the tax to the state, the law held the tribe liable to pay the tax and imposed penalties on it. *Id.* Relying on *Mescalero*, the Eleventh Circuit found that by taxing the privilege of engaging in the business of leasing real property, Florida was taxing "a privilege of ownership" of real property. *Id.* at 1330.

In a far cry from the facts here, *Stranburg* thus involved a *rental tax* that was directly imposed on a transaction involving the tribe and *its* privileges of property ownership. It does not necessarily follow that "§ 5108 preempts state and local taxes on non-Indian-owned permanent improvements in the Eleventh Circuit," as South Point suggests. Pet. at 16. Unlike the tax in

Stranburg, the tax here does not fall on any transaction with the Tribe or on its privilege of property ownership. Moreover, the Tribe and its members are never liable for the Tax, and the County has no recourse against the lessor Tribe for nonpayment of the Tax. Again, the difference in outcomes is based on materially different facts, not on any disagreement as to the law.

Finally, in its search for a conflict, South Point also cites agency guidance from Nevada and Washington, and Oregon legislation to support its claim that "had this case been in federal court, state taxation would have been foreclosed." Pet. at 15-16. To begin with, the Oregon legislation reflects a policy determination, not a conflicting court decision. And to the extent that the Nevada and Washington agency guidance relies on *Chehalis*, they too overread the Ninth Circuit's decision in that case. Perhaps more importantly, a conflict with state agency guidance is not the type of conflict that this Court typically intervenes in to resolve. *See* Supreme Court Rule 10 (stating that "a petition for a writ of certiorari will be granted only for compelling reasons[,]" such as various types of conflicts among state courts of last resort and federal circuit courts).

III. This Case Is a Poor Vehicle for Deciding the Express Preemption Question Presented.

There is another reason why this Court's review is not warranted. The record does not establish that § 5108 even applies to the Tribe's land that lies beneath the Facility. The Arizona Supreme Court did not rule on this question because it held that § 5108 did not exempt the Facility from tax. Pet. App. at 43a.

Section 5108 provides that "any lands or rights acquired pursuant to this Act . . . shall be exempt from State and local taxation." The Fort Mojave Indian Reservation, however, was established before § 5108's enactment in 1934. *See Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 420 n.1 (1991) (stating that Executive Orders that ended in 1911 created the Fort Mojave Indian Reservation). The record does not indicate whether the Interior Secretary "acquired" the specific land underneath the Facility "pursuant to" § 5108.[2]

If all federally owned land provided for a tribe's use—whenever or however acquired—qualified as exempt under § 5108, the phrase "pursuant to" in § 5108 would have no effect. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (citation omitted). This Court has noted that in § 5108, "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt." *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998). The Court rejected the argument that "tax-exempt status automatically attaches when a tribe acquires reservation land" under § 5108 because that would render superfluous the taking-into-trust procedure. *Id.*

---

2. In *Mescalero*, this Court applied § 5108 to land that was not technically acquired in trust for the Indian tribe because "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." 411 U.S. at 155 n.11. Although the Court found that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by [§ 5108]" (*id.*), it did not explicitly explain its reasoning as to why that was so.

Several jurisdictions have found that the tax exemption in § 5108 does not apply to trust land that was acquired before the Indian Reorganization Act's enactment or in cases where no evidence existed that the land had been acquired pursuant to the Act. *See, e.g.*, *Albrecht v. Riverside County*, 283 Cal. Rptr. 3d 716, 722-24 (Cal. Ct. App. 2021); *Sifferman v. Chelan County*, 496 P.3d 329, 343 (Wash. Ct. App. 2021); *Herpel v. County of Riverside*, 258 Cal. Rptr. 3d 444, 462-64 (Cal. Ct. App. 2020); *Pickerel Lake*, 953 N.W.2d at 90.

Thus, the question presented—which "comprise[s] every subsidiary question fairly included therein" under this Court's Rule 14—necessarily implicates additional issues: When was the land underlying the Facility taken into trust for the Tribe's benefit? How was that property taken into trust? And if the land was not technically acquired in trust pursuant to the Indian Reorganization Act, was the manner of acquisition "sufficient" for purposes of § 5108? These complications—which the courts below did not reach—render this case a far-from-ideal vehicle for resolving the question presented.

IV. South Point's Complaint About the Fact-Bound Application of the *Bracker* Balancing Test Does Not Merit This Court's Review.

In addition to seeking review of the Arizona Supreme Court's express preemption holding, South Point seeks review of the Arizona Court of Appeals' implied preemption holding. South Point contends that the court below misapplied the factual *Bracker* balancing test. Pet. at 22-26. This Court, however, rarely grants a petition for a writ of certiorari when the asserted error consists

of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. This Court should not do so here, especially given that there are no errors to correct.

The very nature of the *Bracker* balancing test is a case-by-case, fact-intensive analysis. If an examination of the facts reveals that the state authority "interferes or is incompatible with" federal and tribal interests, the state authority will be preempted "unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*, 448 U.S. at 145).

Courts must therefore initially determine whether the tax is incompatible with federal or tribal interests. Only after this Court was satisfied that the tax in *Bracker* conflicted with the federal and tribal interests did it consider whether the state's interest outweighed the federal and tribal interests. The conflict inquiry thus precedes any analysis of the relevant state interests. If there is no incompatibility, there is no preemption.

Contrary to South Point's assertion (Pet. at 22), the Arizona Court of Appeals did not "mangle its analysis of all three sets of interests." It properly applied the *Bracker* balancing test and found no incompatibility between the federal and tribal interests and the Tax imposed on South Point. Pet. App. at 17a-19a. The court also correctly found that Defendants' interests plainly outweighed any federal and tribal interests given that the Tax funds many government services that all County residents—including South Point, its employees, and the Tribe—enjoy. *Id.* at 19a-20a.

A. The Tax Does Not Interfere with Federal Interests.

South Point argues that the court below erroneously deemed the federal government's involvement in the leasing of tribal trust land immaterial because Arizona was not taxing the lease itself. Pet. at 22-25. The court did not err. Under this Court's precedent, the relevant question is not whether federal regulations regarding the leasing of Indian lands exist, but whether the regulations are pervasive with respect to the subject of the tax. That is not the case here.

In *Bracker*, the Court invalidated the taxes that Arizona imposed on a non-Indian logging company for its timber harvesting operations on tribal land. 448 U.S. at 137-38. At the outset, the Court noted that the federal government comprehensively regulated the harvesting of Indian timber. *Id.* at 145. The BIA exercised daily supervision of the timber harvesting, all of which benefited the tribe. *Id.* at 147. The BIA's employees regulated the cutting, hauling, and marking of timber. *Id.* The BIA also decided such matters as how much timber would be cut, which trees would be felled, which roads would be used, which hauling equipment would be employed, the speeds at which logging equipment could travel, and the width, length, height, and weight of loads. *Id.*

In *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 846-47 (1982), the Court similarly invalidated a gross receipts tax that a state had imposed on a non-Indian construction company that a tribe had hired to construct a school for Indian children on the reservation. The construction took place pursuant to

federal legislation that authorized the Interior Secretary to promulgate "detailed and comprehensive regulations respecting 'school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations.'" *Id.* at 840-41 (quoting 25 C.F.R. § 274.1). Under the regulations, "the BIA has wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization . . . and the non-Indian firm that actually constructs the facilities." *Id.* at 841. As in *Bracker*, the subject of the tax directly implicated tribal activities with respect to which the Tribe and the federal government had a pervasive regulatory scheme.

The leasing scheme here is not comparable to the comprehensive and pervasive regulatory schemes at issue in *Bracker* and *Ramah*. The leasing regulations do not control the economic activities that lessees can engage in or directly regulate the lessees. Here, once the BIA approved the lease, its role with respect to the Facility was essentially done. The BIA does not make or review managerial decisions at the Facility, and it has nothing to do with the Facility's day-to-day operations. In fact, the BIA has very little interaction with the Facility at all. R. 130, ¶ 9.

South Point again tries to manufacture conflict by cherry-picking quotes from other courts' decisions and arguing that the federal leasing regulations can give rise to a substantial federal interest even when the state tax is not imposed on the lease. Pet. at 24-25. South Point's sweeping argument would, however, make all economic development on Indian lands by non-Indians subject to implied preemption. None of the cases upholding state

taxes could have been decided as they were if that were the rule. *See, e.g.*, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997) (upholding taxes on non-Indian lessee's food and beverage sales and room rentals to non-Indians at hotel located on a reservation and leased from tribe); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (holding that federal statutes and regulations governing the leasing of trust lands did not preempt state sales tax on ticket sales by non-Indians to non-Indians for events held on the reservation); *Salt River Pima-Maricopa Indian Cmty. v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995) (holding that state tax on sales of non-Indian goods by non-Indians to non-Indians at shopping center on leased reservation land was not preempted).

B. The Tax Does Not Interfere with Tribal Interests.

South Point's claim that the Tax is incompatible with tribal interests (Pet. at 26) is unfounded. The Tribe does not bear the Tax's economic burden. Nothing in any of the leases requires the Tribe to reimburse South Point for the Tax. In addition, unlike the taxes in *Bracker*, 448 U.S. at 151, the Tax is not passed on to the Tribe as a cost. Nor is there anything in this case like the sales tax charged to the tribe's construction contractor in *Ramah*, 458 U.S. at 835, which was passed on to the tribe as part of the new school cost.

Nor does South Point identify other tribal interests sufficient to trigger implied preemption. Tribal regulation of the Facility (Pet. at 10) is limited. Water use and building permits and certificates of occupancy issued two decades

ago (*id.*) can hardly be considered active tribal involvement. South Point points to federal environmental laws that it claims require the Tribe to regulate South Point's on-reservation activities for emergency planning purposes (*id.*), but it does not identify what exactly the Tribe does in that regard. South Point also claims that the Tribe provides the Facility with all "customary governmental services" (*id.*), but utility and telecommunication services are not "customary governmental services" and South Point pays the Tribe at competitive rates, as it would any other commercial provider of such services. R. 130, ¶ 78.

Likewise, South Point's implementation of tribal employment preferences at the Facility (Pet. at 10) does not support preemption. In cases where tribal employment was a relevant factor in finding preemption, the regulated activity involved non-Indians doing business with the tribe itself. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). *Cabazon's* preemption finding was also influenced by the facts that the activity was a major source of employment for tribal members and that the profits were the tribes' sole source of income. *Id.* at 218-19. None of those factors are present here.

Put simply, a state or local tax is not preempted merely because a tribe regulates or provides services to a non-Indian business. Rather, the state regulation must "nullify," "disturb," "disarrange," or "supplant" tribal law to interfere with tribal authority. *New Mexico*, 462 U.S. at 338; *see also Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981) (stating that to support a preemption claim, "the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources").

The record here shows that the Tribe has received tens of millions of dollars from South Point in the form of rent, taxes, water payments, etc. R. 130, ¶¶ 34-35, 38-39, 43-46, 48, 54, 61. The record here does not establish that the Tribe could have obtained more in payments from South Point but for the Tax or that South Point's payments to the Tribe did not fully cover the cost of any tribal services. Nor does this Court's precedent support the argument that any tax with any indirect effect on a tribal lease necessitates a finding of implied preemption—and that is the logical consequence of South Point's argument here.

C. Defendants' Interests Justify the Tax.

South Point argues that the court below also erred in assessing the State's interest. Pet. at 25. Citing *Bracker* and *Ramah*, South Point argues that a state's generalized interest in raising revenue is not a sufficient state interest and that any services that the State provides must be directly related to the Facility to justify imposing the tax. *Id.* South Point misconstrues this Court's precedent.

In *Bracker*, this Court stated that "any applicable regulatory interest of the State must be given weight." 448 U.S. at 144. In addition, off-reservation services may be considered when determining the validity of a tax on non-Indians. *Cotton Petroleum*, 490 U.S. at 189 ("[T]he relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it."). This Court also rejected any argument that a state tax was impermissible because it was disproportionate to the value of the services that the State provided. *Id.* at 185 n.15 ("Not only would such a proportionality requirement create nightmarish

administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax collector.").

In *Bracker*, the Court further concluded that it did "not believe that respondents' generalized interest in raising revenue is *in this context sufficient* to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber." 448 U.S. at 150 (emphasis added). *Bracker* did not hold that a state's general interest in revenue is legally irrelevant to the weighing of interests, but rather that the state's interest in that case was outweighed by the federal and tribal interests in a comprehensive federal regulatory scheme governing the tribe's timber operations, which the tax threatened. *Id.* at 151. The Court did not hold that a more particularized state interest is always required.

Similarly, the cases that have required a close nexus between the taxed activity and the state or local interests have all involved taxes that threatened comprehensive and pervasive federal regulation. *Ramah*, 458 U.S. at 839-43; *Bracker*, 448 U.S. at 151. In other words, the close nexus requirement is triggered only when the tax conflicts with strong federal and tribal interests. Courts will then examine nexus as a means for a state to justify such a tax in the face of such interests. *See, e.g., Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992) ("We have previously held that a State may avoid the preemption of its taxing authority in a case where strong federal and tribal interests exist only if its taxes are 'narrowly tailored' to funding the services it provides in connection with the activities taking place on tribal land.").

Finally, the record here demonstrates more than just a generalized interest in raising revenue. The record shows that the Tax supports numerous services benefiting all County residents, including South Point, its employees, and the Tribe. R. 130, ¶¶ 115, 116, 118, 122, 123. Given the lack of relevant federal and tribal interests, the implied preemption analysis tips heavily in the State's favor. There is no need for this Court to disturb the Arizona Court Appeals' fact-bound application of the *Bracker* balancing test.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

May 23, 2025

Respectfully submitted,

KRISTIN K. MAYES
Attorney General
of Arizona
DANIEL C. BARR
Chief Deputy
Attorney General
JOSHUA D. BENDOR
Solicitor General
ALEXANDER W. SAMUELS
Principal Deputy
Solicitor General

KIMBERLY JOAN CYGAN
Assistant Attorney General
Counsel of Record
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 North Central Avenue
Phoenix, AZ 85004
(602) 542-8391
tax@azag.gov

Counsel for Respondents