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 SUPREME COURT OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Reorganization Act of 1934 provides that Indian trust "lands ... shall be exempt from State and local taxation." 25 U.S.C. § 5108. It is settled that § 5108 preempts state and local taxation on "permanent improvements" upon tribal land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). But courts have split over whether that principle covers non-Indian-owned permanent improvements. In this case, petitioner South Point Energy Center, LLC owns a permanent improvement, a natural-gas-fired power plant, on the Fort Mojave Indian Reservation. The plant falls completely on trust land and is regulated entirely by the Tribe and the federal government. Yet Mohave County, Arizona, imposes property taxes on the plant. The Arizona Supreme Court upheld that tax solely because South Point, the owner of the permanent improvement, "is a non-Indian." Pet.App.42a.

The questions presented are:

1. Whether 25 U.S.C. § 5108 expressly preempts state and local taxation of permanent improvements on trust land when the improvement's owner is a non-Indian.

2. Whether federal law impliedly preempts state and local taxation of petitioner's permanent improvement.

CORPORATE DISCLOSURE STATEMENT

Petitioner South Point Energy Center, LLC is a wholly owned subsidiary of Calpine Corporation, a privately held corporation.

Calpine recently executed a definitive agreement to be acquired by Constellation Energy Corporation, a publicly traded company. That transaction has not yet closed.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *S. Point v. Ariz. Dep't of Revenue, et al.*, No. CV-24-0076-PR (Ariz.) (denial of petition for review entered on December 4, 2024).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. 1 CA-TX 20-0004 (Ariz. Ct. App.) (opinion and judgment issued on March 19, 2024, regarding implied preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. CV-21-0130-PR (Ariz.) (opinion and judgment issued on April 26, 2022, regarding express preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. 1 CA-TX 20-0004 (Ariz. Ct. App.) (opinion and judgment issued on April 27, 2021, regarding express preemption).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct.) (judgment issued on March 10, 2020; opinion on implied preemption entered on February 4, 2020; opinion on express preemption entered on May 16, 2018).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, Nos. 1 CA-TX 15-0005, 1 CA-TX 15-0006 (Ariz. Ct. App.) (opinion and judgment issued on November 3, 2016, reversing tax court's dismissal).
- *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct.)

(judgment issued on June 10, 2015; order denying motion for reconsideration entered on May 13, 2015; order granting motion to dismiss entered on February 27, 2015).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner South Point Energy Center, LLC respectfully petitions for a writ of certiorari to review the judgments of the Arizona Supreme Court and Arizona Court of Appeals.

OPINIONS BELOW

The order of the Arizona Supreme Court denying discretionary review of the Arizona Court of Appeals' post-remand decision on implied preemption is unreported and appended at Pet.App.1a-2a. The post-remand opinion of the Arizona Court of Appeals in favor of respondents on implied preemption is reported at 546 P.3d 1130. Pet.App.3a-20a. The opinion of the Arizona Supreme Court vacating and remanding the Arizona Court of Appeals' decision on express preemption is reported at 508

P.3d 246. Pet.App.21a-43a. The Arizona Court of Appeals' opinion on express preemption is reported at 490 P.3d 372. Pet.App.44a-57a. The Arizona Tax Court's summary judgment opinion is unreported and available at 2020 WL 13907987. Pet.App.58a-62a. The Arizona Tax Court's decision denying South Point's motion for partial summary judgment on express preemption is unreported and appended at Pet.App.63a-70a.

JURISDICTION

The judgment of the Arizona Court of Appeals was entered on March 19, 2024. The order of the Arizona Supreme Court denying a timely filed petition for discretionary review was entered on December 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 5108 (Section 5 of the Indian Reorganization Act of 1934) provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments,

> whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> ...
>
> Title to any land 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.

The full text of Article VI of the Constitution and 25 U.S.C. § 5108 is set forth in the Appendix. Pet.App.71a-72a.

STATEMENT

Tribal lands are some of the most economically vulnerable places in our Nation. Attracting non-Indian-owned permanent improvements—like power plants—that tribes can tax spurs economic development on tribal lands. State and local taxes on such permanent improvements undercut those efforts. As tribes and tribal organizations argued in this case as amici, such taxes "interfere with tribal sovereignty by undermining tribes' ability to raise revenue" and "chill[] the economic activity on which the vitality of reservation economies depend." Fort Mojave Indian Tribe et al. Amicus Br. (Tribes Br.) 17-18, *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue*, 508 P.3d 246 (Ariz. 2022) (No. CV-21-0130-PR).

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108, provides that "lands or rights" taken in trust for tribes by the United States "shall be exempt from State or local taxation." Given that taxes on permanent improvements function as taxes on land, this Court has long

understood "land" in § 5108 to encompass "permanent improvements on [a] Tribe's tax-exempt land." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). This case presents the important question whether the statute preempts state and local taxation of such permanent improvements owned by non-Indians. That issue demands a national resolution that only this Court can provide.

In the decision below, the Arizona Supreme Court held that § 5108 does not "exempt taxation of non-Indian-owned permanent improvements." Pet.App.36a. That holding squarely conflicts with decisions of the Ninth and Eleventh Circuits. The Ninth Circuit held that § 5108 preempts state taxation of permanent improvements to trust land "*without regard to the ownership of the improvements*." *Confederated Tribes of Chehalis Rsrv. v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1159 (9th Cir. 2013) (emphasis added). The Eleventh Circuit similarly held that § 5108 preempts a state tax imposed on "non-Indian lessees." *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1328 (11th Cir. 2015). The split between the Arizona Supreme Court and the Ninth Circuit in particular plunges into uncertainty Arizona's 22 federally recognized tribes and the non-Indian businesses that own permanent improvements on the tribes' 19 million acres of trust land and threatens to discourage investment on these trust lands.

Further, the Arizona Court of Appeals held below that federal law does not impliedly preempt the County's tax. The implied preemption inquiry in this context calls for an examination "into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The court gave short shrift to the significant federal and tribal interests

at stake and improperly treated the State's general interest in generating revenue as dispositive, in significant tension with this Court's precedents and with federal circuit precedents. That one-sided assessment of the relevant interests skewed the implied preemption analysis in the State's favor and amplifies the case for this Court's review.

The decisions below upset the consistent and even-handed application of federal law on questions that strike at the heart of tribal sovereignty and self-sufficiency. This case offers an optimal vehicle to resolve these questions, as the decisions below turned entirely on the questions presented. Only this Court can resolve the warring preemption rules that linger over tribes and their business partners.

A. Legal Background

1. In 1934, Congress enacted the Indian Reorganization Act "to restore the principles of tribal self-determination and self-governance" that earlier federal policies had sought to extinguish. *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 558 (2018) (citations omitted). Section 5108 is "the capstone of the IRA's land provisions." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012) (citation omitted). Section 5108 authorizes the Secretary of the Interior "to acquire ... any interest in lands ... for the purpose of providing land for Indians." 25 U.S.C. § 5108.[1] "Title to any lands or rights acquired" under this law are taken in trust for the relevant Indian tribe, and

[1] Before the 2016 reclassification of Title 25 of the U.S. Code, current § 5108 was instead § 465. *See* U.S. Code Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t25/T25-ERT.pdf.

"such lands or rights shall be exempt from State and local taxation." *Id.*

This provision plays "a key role in the IRA's overall effort 'to rehabilitate the Indian's economic life.'" *Patchak*, 567 U.S. at 226 (quoting *Mescalero*, 411 U.S. at 152). Trust land insulated from state and local taxation "functions as a primary mechanism to foster Indian tribes' economic development." *Id.* This Court has held that § 5108's tax exemption for trust land extends to permanent improvements on that land, confirming the decades-old rule that permanent improvements enjoy the same tax-exempt status as the land beneath them. *Mescalero*, 411 U.S. at 158 (citing *United States v. Rickert*, 188 U.S. 432, 441-43 (1903)).

2. Congress exerts extensive control over leasing of trust lands. Any tribe wishing to lease trust land must obtain "the approval of the Secretary of Interior." 25 U.S.C. § 415(a). To guide the lease-approval process, the Secretary has promulgated "an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Stranburg*, 799 F.3d at 1341. The Bureau of Indian Affairs (BIA) manages the Secretary's lease-approval process. The "regulations cover all aspects of leasing," from big-ticket items like BIA authorization to details like land valuations and late payments. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012).

The BIA also heavily regulates permanent improvements created pursuant to these leases, including "construction of ... permanent improvements," 25 C.F.R. § 162.414; "ownership of permanent improvements," *id.* § 162.415; "removal of the permanent improvements," *id.* § 162.416; "due diligence requirements" for permanent

improvements, *id.* § 162.417; "performance bond[s]" for "[t]he construction of any required permanent improvements," *id.* § 162.434(a)(2); and "insurance" for "all insurable permanent improvements," *id.* § 162.437.

A BIA regulation confirms § 5108's application to taxation of all permanent improvements to trust land: "Subject only to applicable Federal law, permanent improvements on the leased land, *without regard to ownership of those improvements*, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State." *Id.* § 162.017(a) (emphasis added). The BIA explained that it used the phrase "without regard to ownership" "to indicate that no improvements on leased Indian land are subject to State taxation, regardless of who owns the improvements." 77 Fed. Reg. at 72,449. According to the BIA, "State and local taxation of improvements undermine Federal and tribal regulation of improvements." *Id.* at 72,448. Of course, "[i]mprovements may be subject to taxation by the Indian tribe with jurisdiction." 25 C.F.R. § 162.017(a).

B. Factual Background

1. The Fort Mojave Indian Tribe is a federally recognized Indian tribe organized under the Indian Reorganization Act. *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255 (9th Cir. 1976). The Fort Mojave Indian Reservation consists of 33,000 acres of desert land, spanning portions of Arizona, California, and Nevada. Pet.App.76a-77a, 145a; BIA, Southpoint Power Plant: Final Environmental Impact Statement 99 (Jan. 1999) (EIS).[2] The Secretary of Interior holds title to all of

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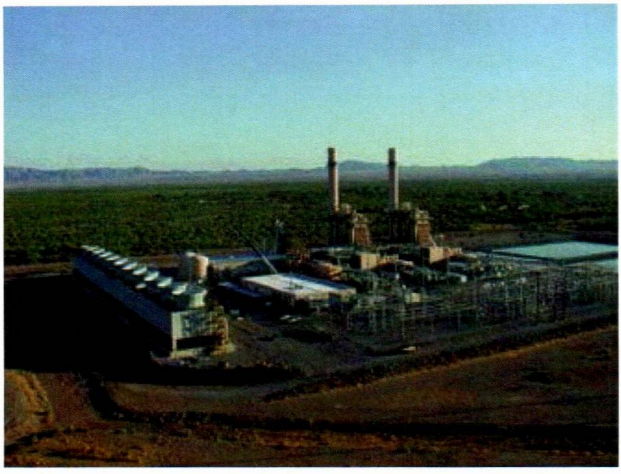
[2] https://www.energy.gov/sites/prod/files/2015/04/f22/EIS-0308-FEIS.pdf.

the Reservation's land in trust for the Tribe's benefit. EIS at 115.

2. In 1999, the Tribe leased 320 acres of Reservation trust land to South Point for the construction of a 500-megawatt natural-gas-fired power plant (the "Facility").[3] Pet.App.23a, 74a, 143a. South Point was drawn to the Tribe's trust land in part because the Tribe had perfected water rights to the Colorado River in quantities adequate to meet the Facility's consumptive use requirements. EIS at 164-65. After the 1999 lease was executed, South Point built and operated the Facility. Pet.App.23a. In 2012, the Tribe and South Point executed an amended lease that altered the parties' financial obligations but otherwise remained substantially the same. Pet.App.24a-25a. The Facility falls entirely on Reservation trust land leased from the Tribe, within the geographical boundaries of Mohave County, Arizona. EIS at S-2. South Point owns the Facility, Pet.App.24a-25a, pictured here:[4]

[3] While the Tribe initially leased to South Point's predecessors-in-interest, South Point now owns the facility and directly leases the trust land.

[4] Appellant's Br. 16, *S. Point Energy Ctr., LLC v. Ariz. Dep't of Revenue*, 490 P.3d 372 (Ariz. Ct. App. 2021) (No. 1 CA-TX 20-0004).



The Facility would typically be subject to tribal taxes. Pet.App.134a, 202a. But the Tribe generally grants taxpayers on the Reservation a credit against tribal taxes for similar state or local taxes. Pet.App.134a, 202a. Alternatively, the Tribe allows developers to enter agreements for lump-sum payments in lieu of separately assessed annual taxes. Pet.App.134a-135a, 203a.

The Tribe and South Point settled on lump-sum payments. Under a modification to the 1999 lease, South Point agreed to pay the Tribe $2 million per year in lieu of leasehold interest taxes. Pet.App.86a, 152a. South Point made these payments in addition to payments for other items, like base rent and water rights. Pet.App.86a, 151a-152a. The 2012 lease superseded this arrangement and authorized South Point to make a lump-sum payment of $27 million, together with annual payments totaling $18 million, in satisfaction of amounts owed for the ground lease, water usage, and tribal taxes. Pet.App.88a-89a, 158a. South Point's payments helped the Tribe achieve its goal of becoming debt-free by 2017. Pet.App.133a, 201a.

3. The United States has regulated the Tribe's lease to South Point from its inception. The BIA approved each version of the lease and its modifications. Pet.App.7a; *see also* Pet.App.83a-85a, 88a, 149a-151a, 157a. The approval involved a 374-page BIA-issued Environmental Impact Statement. EIS at S-1. The BIA concluded that the Facility would bring "substantial economic benefits to the [Tribe] through the land lease revenues, water lease payments, ... and employment opportunities." EIS at 31. The BIA further found that the Facility would help "fulfill stated tribal goals for economic development and self-sufficiency." EIS at 193.

The Tribe also regulates the Facility. Tribal laws required South Point to obtain water use and building permits. EIS at 4. South Point had to get certificates of occupancy from the Tribe's Building and Safety Department. Pet.App.119a, 189a. The lease required South Point to enter a compliance agreement with the Tribe regarding tribal employment preferences at the Facility. Pet.App.109a, 176a. And federal environmental laws require the Tribe to regulate South Point's on-reservation activities for emergency planning purposes. Pet.App.102a-104a, 168a-170a.

The Tribe provides the Facility with all customary government services. The Fort Mojave Tribal Police Department takes care of law enforcement. Pet.App.81a-82a, 148a. Fire and emergency-response services come from the Mohave Valley Fire Department under a service agreement with the Tribe. Pet.App.126a-127a, 195a-196a. Tribal entities provide sewer, telephone, internet, and back-up power services. Pet.App.128a-131a, 197a-200a.

4. The County admits that it has no regulatory authority over South Point, the Tribe, or on-reservation activities. Pet.App.102a, 120a-121a, 168a, 189a-191a. And

the County admits that it provides no services to the Facility. Pet.App.125a, 130a-131a, 195a, 198a-200a; *see also* Pet.App.19a.

Yet the County seeks to tax the Facility as if it were any other property within the State. Between 2010 and 2017 (and continuing to this day), the Arizona Department of Revenue centrally valued the Facility as an electric generation plant, and Mohave County assessed and collected state *ad valorem* property taxes on the Facility based on the Department's valuation. Pet.App.75a-76a, 143a-144a; *see also* Pet.App.23a. South Point timely paid these taxes, which totaled more than $20 million. Pet.App.76a, 144a; S. Point Disclosure 2-4, *S. Point Energy Ctr. LLC v. Ariz. Dep't of Revenue, et al.*, No. TX 2013-000522 (Ariz. Tax Ct. Mar. 11, 2020).

C. Procedural History

1. After entering the 1999 lease, the Tribe challenged the County's taxing authority in the U.S. District Court for the District of Arizona. South Point attempted to intervene. *Fort Mojave Indian Tribe v. Killian*, No. 02-cv-1212, slip op. at 3 (D. Ariz. Jan. 29, 2004), ECF No. 99. The district court, however, dismissed South Point's intervenor complaint for lack of jurisdiction under the Tax Injunction Act. *Id.* at 8-9. And the district court dismissed the Tribe's complaint for lack of Article III standing, reasoning that any harm to the Tribe would not be "fairly traceable" to the County's tax against South Point. *Killian*, No. 02-cv-1212, slip op. at 21 (Mar. 31, 2004), ECF No. 138.

South Point also sued the County under state law for a refund in the Arizona Tax Court. *Calpine Constr. Fin. Co. v. Ariz. Dep't of Revenue*, 211 P.3d 1228, 1231 (Ariz. Ct. App. 2009). But the Arizona Court of Appeals upheld

the tax under Arizona law because South Point, not the Tribe, owned the permanent improvements. *Id.* at 249.

2. Around the time of the 2012 lease agreement, South Point returned to the Tax Court, claiming that federal law expressly or impliedly preempts the County's tax. The Tax Court did not agree. Pet.App.62a, 69a.

The Arizona Court of Appeals, however, held that "§ 5108 establishes a categorical exemption for permanent improvements on Indian land held in trust by the United States." Pet.App.57a. The court recognized that this rule comported with the rule in the Ninth Circuit, which "held § 5108 applies to all permanent improvements on trust land, regardless of whether they are tribal-owned." Pet.App.50a (citing *Chehalis*, 724 F.3d at 1157, 1159). The court did not reach implied preemption. Pet.App.51a-52a.

The Arizona Supreme Court granted review and vacated the decision. The Arizona Supreme Court recognized that § 5108 "preempts state and local taxes imposed on [trust] land." Pet.App.42a. But the court held that § 5108 "does not preempt a state or locality from taxing [permanent] improvements" when the "lessee" of trust land "is a non-Indian." Pet.App.42a. The Arizona Supreme Court then remanded for the court of appeals to consider implied preemption. Pet.App.43a.

On remand, the Arizona Court of Appeals held that South Point was not "impliedly exempt from the County's tax." Pet.App.20a. The court rejected "the pervasiveness of federal regulation of tribal leases" as "immaterial." Pet.App.17a. The court discounted the Tribe's "interest in economic development" because, according to the court, the "legal incidence" of the tax fell on South Point. Pet.App.18a. And the court credited the County's general interest in revenue generation, even though "South Point

demands few direct services from" the County. Pet.App.19a.

The Arizona Supreme Court denied South Point's petition for discretionary review. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

As tribes and tribal organizations emphasized below, this case presents "an issue of critical importance for tribal self-government and self-sufficiency." Tribes Br. 3. The Arizona Supreme Court's decision creates a direct conflict with the Ninth and Eleventh Circuits over whether federal law expressly preempts state and local taxes on non-Indian-owned permanent improvements to tribal trust land. Especially pernicious is the split with the Ninth Circuit, which subjects Arizona's 22 tribes and their business partners to conflicting rules: state and local taxes on non-Indian-owned permanent improvements to trust land in Arizona are simultaneously preempted (if in federal court) and valid (if in state court). Only this Court can end the uncertainty that threatens to chill desperately needed investment and development on tribal land.

I. The Arizona Supreme Court's Express Preemption Holding Requires This Court's Review

The Arizona Supreme Court's holding that 25 U.S.C. § 5108 does not preempt state or local taxes on permanent improvements to trust land if a non-Indian entity owns those improvements flatly contradicts the rule in the Ninth and Eleventh Circuits and demands this Court's review.

A. The Decision Below Creates an Intolerable Split Over Whether § 5108 Expressly Preempts State and Local Taxes on Non-Indian-Owned Permanent Improvements to Trust Land

Section 5108 provides that trust "lands or rights shall be exempt from State or local taxation." These trust "lands" include "permanent improvements upon [the] land" given that permanent improvements are "so intimately connected with use of the land itself." *Mescalero*, 411 U.S. at 158. In holding that § 5108 does not "exempt taxation of non-Indian-owned permanent improvements," Pet.App.36a, the Arizona Supreme Court created a direct conflict with the Ninth and Eleventh Circuits.

1. The Ninth Circuit confronted this question in *Chehalis*, which concerned a local property tax on a permanent improvement on trust land—the Great Wolf Lodge. The district court upheld the tax because, in its view, "state and local governments are not necessarily prohibited from taxing permanent improvements, like the Great Wolf Lodge, that are owned by non-Indians." 724 F.3d at 1155. The Ninth Circuit reversed, holding that § 5108 "preempts state and local taxes on permanent improvements built on" trust land "*without regard to the ownership of the improvements*." *Id.* at 1159 (emphasis added).

The Arizona Supreme Court recognized the conflict. The court posited that *Chehalis* was distinguishable because the tribe owned 51% of the LLC that owned the Great Wolf Lodge. Pet.App.38a; *see Chehalis*, 724 F.3d at 1154. Given that fact, the Arizona Supreme Court concluded that *Chehalis* stands only for the proposition that § 5108 "preemption applies to permanent improvements regardless of the ownership vehicle a *tribe* uses to own the improvements." Pet.App.39a. The Arizona Supreme

Court recognized, however, that the Ninth Circuit broadly stated that § 5108 preempts "without regard to the ownership of the improvements." Pet.App.39a (quoting *Chehalis*, 724 F.3d at 1159) (emphasis omitted). The Arizona Supreme Court stated that, if the Ninth Circuit meant that "broader reading," the Arizona Supreme Court "reject[ed]" it. Pet.App.39a.

Chehalis makes clear that the Ninth Circuit's broad language was intentional. The Ninth Circuit viewed the appeal as raising a "purely legal question," 724 F.3d at 1155, and its reasoning did not turn on the facts surrounding the Tribe's ownership of the LLC. Its analysis focused exclusively on *where* the permanent improvement sits, not *who owns* the permanent improvement: if land is "held in trust pursuant to [§ 5108]," § 5108's "exemption from state and local taxation applies to the permanent improvements on that land." *Id.* at 1157. And the court made clear that its conclusion was not limited to permanent improvements with ownership structures like the Great Wolf Lodge, as it held that the county could not "tax the Great Wolf Lodge *or other permanent improvements* on that land." *Id.* (emphasis added). Indeed, the Eleventh Circuit likewise has read *Chehalis* as "invalidat[ing] a Washington state tax on permanent improvements owned by a non-Indian corporation." *Stranburg*, 799 F.3d at 1333.

Similarly, both States and localities within the Ninth Circuit have understood *Chehalis* plainly to foreclose State taxation of non-Indian-owned permanent improvements to trust land. Citing *Chehalis*, Nevada's Department of Taxation announced that "[d]ue to recent decisions by Federal courts ... any permanent improvement *owned by any person or company* and located on trust lands, are not taxable property by the State of Nevada and its subdivisions." Nev. Dep't of Tax'n, Guidance

Letter 14-001, *Taxability of Real Property Located on Tribal Lands Held in Trust by the U.S. Government* 1 (Sept. 17, 2014). Washington's State Department of Revenue similarly explained that under *Chehalis* "state and local governments cannot assess property tax on permanent improvements built on trust land" "without regard to the ownership of the improvements." Wash. State Dep't of Revenue, Property Tax Advisory 1.1.2014, *Taxation of Permanent Improvements on Tribal Trust Land* 1-2 (Mar. 31, 2014). And, following *Chehalis*, Oregon passed legislation providing that "*[r]egardless of ownership*, permanent improvements are exempt from state and local property taxes and fees ... if the improvements are located on [trust] land." Or. Rev. Stat. § 307.181(2)(a). There is no doubt that, had this case been in federal court, state taxation would have been foreclosed.

2. The outcome below also would have been different in the Eleventh Circuit. In *Stranburg*, the Eleventh Circuit held that § 5108 preempted a state rental tax imposed on "non-Indian lessees" of tribal land. 799 F.3d at 1328. The Eleventh Circuit reasoned that § 5108 extends to rental taxes by equating them to taxes on permanent improvements, which it deemed unquestionably within the ambit of § 5108: "[j]ust as the use of permanent improvements on land 'is so intimately connected with use of the land itself,' ... payment under a lease is intimately and indistinguishably connected to the leasing of the land itself." *Id.* at 1331 (quoting *Mescalero*, 411 U.S. at 158). The court then explained why § 5108 preempts taxes that "fall[] on the non-Indian lessees": "By the plain text of the statute, the tax exemption contained in [§ 5108] attaches to the [trust] land and the rights in that land." *Id.* at 1331 n.8. A fortiori then, § 5108 preempts state and local taxes on non-Indian-owned permanent improvements in the Eleventh Circuit.

B. The Express Preemption Question Is Important and Squarely Presented

This split over the meaning of § 5108 is enormously consequential for tribes and their business partners. And the question implicates an issue that demands a national, uniform rule.

1. The Arizona Supreme Court created an intolerable split over the meaning of a federal statute that will cause disparate outcomes based on location and court system. Most absurdly, in federal courts in Arizona, § 5108 "preempts state and local taxes on permanent improvements built on" Indian trust land, "without regard to the ownership of the improvements." *Chehalis*, 724 F.3d at 1159. But down the street in state court, § 5108 "does not preempt a state or locality from taxing the improvements" when the "lessee is a non-Indian." Pet.App.42a.

Worse, the affected parties may not be able to obtain a federal forum in the first instance. Because of the Tax Injunction Act, 28 U.S.C. § 1341, non-tribal taxpayers are stuck bringing their challenges to state taxes in state court. *See supra* p. 11. That leaves the tribes, which are not barred by the Tax Injunction Act, to challenge the tax in federal court. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 474-75 (1976). But tribes may not always succeed in establishing standing, as occurred in this case. *See supra* p. 11.

The decision below has therefore plunged into uncertainty the 22 federally recognized tribes in Arizona[5] and the non-Indian businesses that own permanent improvements to the tribes' trust land. For parties who entered

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[5] Ariz. Dep't of Educ., *22 Federally Recognized Tribes in Arizona*, https://www.azed.gov/oie/22-federally-recognized-tribes-arizona.

leases relying on *Chehalis*, their mutual understanding of the deal will be upended if they cannot get into federal court. And going forward, to find out which reading of federal law applies, tribes and taxpayers will be forced to put their fate in the which-court-will-we-get roulette. As the National Congress of American Indians has explained, such "uncertainty" surrounding state and local taxation has a "chilling effect on both outside and tribal investment."[6]

The geographical makeup of some tribes compounds the prospect of disparate outcomes. Numerous tribes have reservation trust land that spans several States. In Arizona, for instance, the Fort Mojave Tribe, the Navajo Nation, the Colorado River Indian Tribes, and the Quechan Tribe all occupy land in several States.[7] These tribes and their lessees will face conflicting taxation rules depending on the location of leased land within the *same tribe's* sovereign boundaries.

2. The tax status of non-Indian-owned permanent improvements to tribal trust lands is enormously

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[6] NCAI, *Supplemental Comments on ANPRM for 25 C.F.R. Part 140*, at 4 (Oct. 30, 2017), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/40%20-%20NCAI.pdf; *see also, e.g.*, Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor?*, JOPNA 2016-1, at 24 (May 4, 2016), https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/2024-02/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

[7] Fort Mojave Indian Tribe, *The People by the River*, https://www.fortmojaveindiantribe.com/about-us/; Bureau of Land Mgmt., *The Lands of Navajo Nation* (Nov. 30, 2020) https://www.blm.gov/blog/2020-11-30/lands-navajo-nation; Colo. River Indian Tribes, *About the Mohave, Chemehuevi, Hopi and Navajo Tribes*, https://www.crit-nsn.gov/crit_contents/about/; Inter Tribal Council of Ariz., *Quechan Tribe*, https://itcaonline.com/member-tribes/quechan-tribe/.

consequential. State taxes on permanent improvements on trust land severely undercut tribal sovereignty. "The power to tax is an essential attribute of Indian sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

Moreover, as the BIA has explained, "[s]tate and local taxation of lessee-owned improvements ... can impede a tribe's ability to attract non-Indian investment to Indian lands," which is "critical to the vitality of tribal economies." 77 Fed. Reg. at 72,448. "[E]mployment opportunities are few" on tribal trust land because there is "virtually no private sector." Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. Penn. J. Bus. L. 683, 690 (2021). And the lack of "income, property, or sales" on trust land means "there is no stable tax base on most reservations." Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 774 (2004).

The decision below puts tribes into a cruel and economically unbearable dilemma that only this Court can correct. The tribe can forgo taxing permanent improvements on trust land, for which the tribe provides utilities, law enforcement, and fire and emergency services. As the tribal amici below explained, that would mean losing out on "crucial tax revenues." Tribes Br. 19. Or the tribe can tax permanent improvements even though the improvements are subject to state and local taxes, which will "depress[] investment in projects key to the vitality of tribal communities." *Id.* That can mean the loss of facilities like South Point's, which provide the Tribe "substantial economic benefits" through "lease revenues" and "employment opportunities," and thereby help the tribe achieve its "goals for economic development and self-

sufficiency." EIS at 31, 193. And it can mean the loss of businesses that provide critical services to Indians such as grocery stores. Only this Court can restore these vital economic lifelines for tribes in Arizona and restore uniformity for other tribes across the Nation.

3. This case is the ideal vehicle to resolve the express preemption question. There are no jurisdictional or procedural barriers to this Court's review. And the question presented squarely determined the outcome in the Arizona Supreme Court. Pet.App.42a.

C. The Arizona Supreme Court's Interpretation of § 5108 Is Incorrect

The Arizona Supreme Court wrongly interpreted § 5108 as not preempting state and local taxes on non-Indian-owned permanent improvements to trust land.

1. The plain text of § 5108 displays no preference for Indian ownership. Section 5108 preempts state and local taxes on land "taken in the name of the United States in trust for" Indians. If the land is trust land, § 5108 preempts state and local taxes on that land. And permanent improvements on trust land are part of the trust land such that taxes on permanent improvements amount to taxes on the land. *Mescalero*, 411 U.S. at 158; *Rickert*, 188 U.S. at 441-42. That principle does not change depending on who owns the permanent improvement. After all, the legal incidence of a property tax falls on the *property*, not the owner. *See United States v. Allegheny County*, 322 U.S. 174, 184 (1944); *see also Peabody Coal Co. v. Navajo County*, 572 P.2d 797, 800 (Ariz. 1977) ("it is the property that owes the tax and not the owner"). And the relationship between a permanent improvement and the land is based on the improvement's permanence, not its ownership.

The BIA recognizes this basic principle. As the agency has explained, "a property tax on ... improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement." 77 Fed. Reg. at 72,448. A BIA regulation thus provides that "permanent improvements on the leased land, *without regard to ownership of those improvements*, are not subject to" state or local taxation. 25 C.F.R. § 162.017(a) (emphasis added).

2. The Arizona Supreme Court's contrary reasoning is unpersuasive. *First*, the court reasoned that *Mescalero* does not control because *Mescalero* "concerned tribal property and tribal activities." Pet.App.36a. But ownership of the permanent improvements was not relevant to the Court's logic in *Mescalero*. *See* 411 U.S. at 158-59.

Second, the Arizona Supreme Court stated that *Rickert*, this Court's pre-§ 5108 case holding permanent improvements on trust land immune from state and local taxes, "turned on the property owners' status as Indians." Pet.App.36a. But *Rickert* did not turn on ownership; it turned on the fact that the improvements were *permanent* improvements, making them "essentially a part of the lands." 188 U.S. at 442.

Third, the Arizona Supreme Court pointed to pre-*Mescalero* cases that indicated that the Constitution does not by its own force preempt state and local taxes on non-Indian-owned permanent improvements. *See* Pet.App.36a-37a. Those cases, where preemption had no statutory basis, are irrelevant to the interpretation of § 5108.

Finally, the Arizona Supreme Court concluded that § 5108 does not apply because "the Indian beneficiary has

no possessory or use interest in the permanent improvements, and the federal government's 'lands or rights' [thus] do not include those improvements." Pet.App.38a. But 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 on tribal trust lands even if they do not own or possess them.

II. The Arizona Court of Appeals' Implied Preemption Holding Also Merits Review

The Arizona Court of Appeals' post-remand decision on implied preemption involves questions that have divided courts and also merits this Court's review. This Court should grant review on both questions presented to give itself the broadest possible set of preemption grounds to resolve this case.

1. This Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *Bracker*, 448 U.S. at 144. The normal presumption against preemption "is reversed" in this context because the "backdrop of tribal sovereignty" "free from state jurisdiction and control is deeply rooted in the Nation's history." 1 *Cohen's Handbook of Federal Indian Law* § 7.03 (citations omitted).

In this context, courts assess "the nature of the state, federal, and tribal interests at stake" to ascertain whether "the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. The Arizona Court of Appeals mangled its analysis of all three sets of interests.

2. State regulation implicating a "pervasive" "federal regulatory scheme" puts at issue significant federal interests. *Id.* at 148. This is true even when the federal

government does not directly regulate "the activity taxed." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839-42 & n. 5 (1982) (citation omitted); *see also Bracker*, 448 U.S. at 147-49.

The federal government has a strong interest in regulating permanent improvements on tribal trust land. "[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land," spanning "dozens of congressional statutes and federal regulations." *Stranburg*, 799 F.3d at 1341; *see supra* pp. 6-7. And the BIA specifically regulates permanent improvements on trust land. *See supra* pp. 6-7. In this case, the BIA approved each version of South Point's lease and its modifications. *See supra* p. 10. State tax authority over permanent improvements constructed pursuant to these leases frustrates the federal scheme.

In assessing the federal interests, the court below overlooked this Court's precedents and put Arizona on the wrong side of an acknowledged conflict over what establishes a legally cognizable federal interest—in particular, whether a federal regulatory scheme must directly regulate the object of state taxation to create a cognizable federal interest.

The Arizona Court of Appeals held that "the pervasiveness of federal regulation of tribal *leases* is immaterial because no aspect of the lease" itself "is subject to tax." Pet.App.17a (emphasis added). The Arizona Court of Appeals aligned itself with the California Court of Appeal, which held that "extensive" federal regulation of *leases* on Indian land did not sufficiently evince a federal interest regarding taxes on *possessory interests in property* under those leases. *Herpel v. County of Riverside*, 258 Cal. Rptr. 3d 444, 454-57 (Cal. Ct. App. 2020). The California Court

of Appeal acknowledged "that this [view] puts [it] in disagreement with courts that have described the federal interest in the context of the Leasing Regulations as similar to those in *Bracker* and *Ramah*." *Id.* at 456.

Contrary to the decision below, other courts have held that extensive federal regulation of leasing gives rise to substantial federal interests in the *Bracker* analysis even when the state tax is not imposed directly on the lease. In holding a state rental tax impliedly preempted, the Eleventh Circuit held that federal regulations concerning leasing of Indian land demonstrate a federal interest in not only state regulation of the "leasing of Indian land" itself, but also state "regulation of the activities occurring under the lease." *Stranburg*, 799 F.3d at 1339; *see also Agua Caliente Band of Cahuilla Indians v. Riverside County*, 749 F. App'x 650, 652 (9th Cir. 2019) (Watford, J., concurring) ("pervasive[]" BIA regulation of the "leasing of Indian trust lands" creates a "substantial" federal interest in taxes on "non-tribal-member lessees").

Likewise, the Eighth Circuit held that the Indian Gaming Regulatory Act's regulation of gaming activities on tribal land evinces a federal and tribal interest in avoiding state taxes on non-tribal individuals' purchases of amenities at tribal casinos, even if not "directly related to the operation of gaming activities." *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936 (8th Cir. 2019). It sufficed that those purchases "contribute significantly to the economic success of" the gaming activities. *Id.*

What is more, the Eighth Circuit recognizes that an especially "strong[]" federal interest exists "in cases where the Federal Government has blessed the Tribe's venture." *HCI Distrib., Inc. v. Peterson*, 110 F.4th 1062, 1069 (8th Cir. 2024). The federal government blessed the

venture here, *see supra* p. 10, yet the Arizona Court of Appeals erroneously deemed the federal government's involvement in the leasing categorically "immaterial" because Arizona is not taxing the lease itself, Pet.App.17a.

3. The Arizona Court of Appeals also erred in assessing the State's interest. A State's "generalized interest in raising revenue [is not] sufficient." *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 845. Even where a State provides "significant services" to a tribe, those services must be "related to" the on-reservation activity being taxed to "justify the imposition of [the] tax." *Ramah*, 458 U.S. at 845 & n.10.

Here, as in *Bracker* and *Ramah*, "this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 843. The Arizona Court of Appeals acknowledged that "South Point demands few direct services from the state or Mohave County." Pet.App.19a. The County, in fact, concedes that it provides *no services* to the Facility. *See supra* pp. 10-11.

The Arizona Court of Appeals nonetheless found that the state interest in taxation outweighed the competing federal and tribal interests, pointing to the County's interest in generating revenue to pay for schools, to "maintain roads," and to provide, among other things, "flood control," "libraries," and "law enforcement." Pet.App.20a. As just discussed, that approach conflicts with *Ramah* and *Bracker*. It also conflicts with circuit-level authority. The Eleventh Circuit held that a "state's interests in a particular tax can outweigh federal tribal interests" only when the State's tax "relate[s] to services it provides *in connection with the entity and activity being taxed* and not merely serve a generalized interest in raising revenue."

Stranberg, 799 F.3d at 1337 (emphasis added). And the Eighth Circuit held that "a 'generalized interest in raising revenue' ... to provide government services throughout" the State "does not outweigh ... federal and tribal interests." *Flandreau Santee Sioux*, 938 F.3d at 937 (citation omitted).

4. Finally, the Arizona Court of Appeals erred in discounting the tribal interests at stake. The court held that the Tribe lacks a strong interest because South Point, not the Tribe, "bears the tax's legal incidence." Pet.App.18a. But this Court has expressly rejected the view that "the legal incidence and not the actual burden of the tax would control the pre-emption inquiry" and has deemed "it significant [if] the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian" entity. *Ramah*, 458 U.S. at 844 n.8. The tax here imposes real burdens on the Tribe. *See supra* pp. 9-11.

The court below believed that this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), supported its narrow approach to measuring tribal interests. Pet.App.18a-19a. *Cotton Petroleum*, however, did not direct courts to categorically ignore taxes' true impacts on a tribe. The Eleventh Circuit has therefore considered indirect economic burdens on a tribe in conducting the *Bracker* analysis. *See Stranburg*, 799 F.3d at 1340-41.

* * *

The court's one-sided analysis of each factor tipped the analysis in the State's favor. Under the court's analysis, it is difficult to conceive of *any* situation in which a state or local tax could be impliedly preempted, making *Bracker* preemption meaningless. The implied preemption question implicates the same weighty interests that

undergird the express preemption question. At the very least, this Court should grant review on both questions presented to have all possible arguments available to the Court on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 3, 2025