No. _____

In The
Supreme Court of the United States

KRISTI NOEM, Governor of the State of South Dakota, JAMES TERWILLIGER, Secretary, South Dakota Department of Revenue,

Petitioners,

v.

FLANDREAU SANTEE SIOUX TRIBE, a Federally-Recognized Indian Tribe,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

This Court prescribed the *Bracker* test to determine whether federal regulation of certain economic activity on Indian reservations preempts state taxation of a non-tribal member's involvement in the regulated activity. Given the conflicting outcomes that have resulted from the application of the *Bracker* test since its promulgation 40 years ago, and the inception and maturation of a multi-billion-dollar Indian gaming industry since, the question presented is:

> **Does the *Bracker* test currently serve as a consistent and predictable rule of law in light of the exponential expansion of Indian gaming since 1988 and the fiscal demands the industry now places on state budgets?**

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. Petitioners are Governor Kristi Noem, Governor of the State of South Dakota, and James Terwilliger, Secretary of the South Dakota Department of Revenue. Respondent is the Flandreau Santee Sioux Tribe.

STATEMENT OF RELATED PROCEEDINGS

Flandreau Santee Sioux Tribe v. Gerlach, Civ. No. 14-4171, 269 F.Supp.3d 910 (D.S.D. 2018) (amended judgment entered February 5, 2018).

Flandreau Santee Sioux Tribe v. Noem, No. 18-1271, 938 F.3d 928 (8th Cir. 2019) (judgment entered September 6, 2019; petitioner's petition for rehearing denied October 24, 2019).

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JURISDICTION

The judgment of the United States Court of Appeals for the 8th Circuit was entered on September 6, 2019. A petition for rehearing was denied on October 24, 2019 (Petitioner's Appendix at 71). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*.

The relevant statutory provisions are located in the appendix.

STATEMENT OF THE CASE

The Flandreau Santee Sioux Tribe is a federally-recognized Indian tribe with its reservation wholly located within Moody County, South Dakota. On its reservation, the tribe owns and operates the Royal

River Casino and Hotel. The tribe and the State of South Dakota maintain a gaming compact pursuant to the Indian Gaming Regulatory Act (IGRA) which sets the parameters of Class III gaming activities at the tribe's casino. 25 U.S.C. § 2701 *et seq;* Gaming Compact Excerpts, Petitioner's Appendix at 86.

At or near its casino, the tribe offers a number of non-gaming amenities such as food and beverages, lodging, recreational vehicle sites, live entertainment events and gift shop items. The tax at issue here is a 4.5% tax on the purchase of these amenities by non-tribal member patrons (non-member patrons). SDCL 10-46-2, -4. It is undisputed that the legal incidence of the tax falls on non-member patrons, not on the tribe or its members.[1]

In November 2014, the tribe filed suit in federal district court, challenging, *inter alia*, the state's authority to levy this tax. The district court concluded that IGRA, which regulates tribal gaming on Indian lands, expressly preempted the tax. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F.Supp.3d 910, 918-927 (D.S.D. 2017), Petitioner's Appendix at 28.

On appeal, a divided three-judge panel rejected the district court's conclusion that IGRA expressly preempts the tax. *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019) (*Flandreau Tribe*), Petitioner's Appendix at 1. However, the majority ruled

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[1] Consistent with federal law, the state does not tax the tribe's sale of these amenities to the tribe or its members. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

that the tax, while not preempted by IGRA, is otherwise preempted by application of the *Bracker* test, which weighs federal, tribal and state interests to determine whether federal regulation of an economic activity on the reservation preempts state taxation of a non-tribal member's involvement in that activity. *Flandreau Tribe*, Petitioner's Appendix at 4-16, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

When weighing the respective interests in this case, the *Flandreau Tribe* majority afforded inordinate weight to "IGRA's broad policies of increasing tribal revenues through gaming." *Flandreau Tribe*, Petitioner's Appendix at 15. Matters of the extent of federal regulation and the state's interest were subordinated to IGRA's broad purposes. The *Flandreau Tribe* court ruled that the state's tax conflicted with these broad purposes because the sale of "amenities [allegedly] contribute significantly to the economic success of the tribe's Class III gaming at the casino," and the state tax would negatively impact the tribe's revenues by raising the cost of these amenities. *Flandreau Tribe*, Petitioner's Appendix at 14.

Although heavily influenced by this potential impact on the tribe's revenues, the *Flandreau Tribe* court did not perform any quantitative analysis of whether the tax would impact either general or Class III gaming revenues in any substantial way, *e.g.*, how a nominal 45¢ tax on a $10 meal thwarted IGRA's purposes. *Flandreau Tribe*, Petitioner's Appendix at 13-16. The state's evidence showed that the maximum possible

impact of the tax, $268,000, was a nominal percentage of the casino's gross revenues (as reflected in Docket 127, filed under seal in the district court). Petitioner's Appendix at 84-85. Despite the patently nominal impact of the tax on the cost of amenities, the *Flandreau Tribe* court concluded that "the State's interest in raising revenue to provide government services throughout South Dakota does not outweigh the federal and tribal interests in Class III gaming reflected in IGRA and the history of tribal independence in gaming." *Flandreau Tribe*, Petitioner's Appendix at 16.

Judge Colloton dissented. *Flandreau Tribe*, Petitioner's Appendix at 21-27. Judge Colloton would have found that the tax was not preempted by either IGRA or the application of the *Bracker* test. *Flandreau Tribe*, Petitioner's Appendix at 21-27 (Colloton, J. dissenting). Judge Colloton relied on *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), where this Court found that a state severance taxes on a non-member's oil and gas drilling on tribal lands was not preempted simply because federal regulation of tribal oil and gas leases was motivated by a "congressional purpose to provide tribes with a profitable source of revenue." *Flandreau Tribe*, Petitioner's Appendix at 23 (Colloton, J. dissenting). Contrary to the majority, Judge Colloton found that "a potential negative impact of the state tax on the tribe's finances" alone was not sufficient to demonstrate that a tax thwarted IGRA's objectives or "sufficient reason to declare the state tax preempted" under *Cotton*. *Flandreau Tribe*, Petitioner's Appendix at 26 (Colloton, J. dissenting). And, unlike the majority,

Judge Colloton looked beyond simply the state's general interest in raising revenue to the "range of services" that the state provides for the casino and its patrons and found they outweighed the nominal burden imposed by the state's 4.5% use tax. *Flandreau Tribe*, Petitioner's Appendix at 24 (Colloton, J. dissenting).

The state's petition for rehearing was denied. The state now seeks a writ of *certiorari.*

REASONS FOR GRANTING WRIT OF *CERTIORARI*

Justice Rehnquist's dissent in *Ramah*, joined by Justices Stevens and White, predicted that the *Bracker* balancing test was "destined" to lead to unpredictable outcomes to questions concerning "the extent to which the States can tax economic activity on Indian reservations within their borders." *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 847 (1982) (Rehnquist, J. dissenting). Justice Rehnquist's prediction has proven true.

This Court "last addressed the subject of state taxation of nonmembers for activity on an Indian reservation thirty years ago" in *Cotton. Flandreau Tribe*, Petitioner's Appendix at 22 (Colloton, J. dissenting). Since *Cotton*, Indian gaming has evolved well beyond the business of running bingo parlors that it was at the time of the *Bracker* decision and IGRA's enactment. Today, Indian gaming is a $33.7 billion industry, greater than the revenues of Las Vegas ($11.9 billion)

and Atlantic City ($3 billion) combined.[2] Revenues are generated not just from gaming, but also from lodging, meals and beverages, live entertainment and the sale of goods, fuel and other incidentals. Petti, Briones and Long, *Scope Creep: What Are the Limits Under IGRA on State Powers to Regulate Ancillary Non-Gaming Business Ventures*, 18 GAMING LAW REVIEW AND ECONOMICS 1, 19, 26 (2014). These activities entail demands for state government services and a corresponding need for states to realize revenue from these activities to offset the cost of services the states provide to Indian casinos and ancillary businesses, and the patrons on whom they depend. The myriad tax questions incidental to an industry of resort-style gaming destinations have exposed the *Bracker* test's inability to serve as a "consistent and predictable rule of law." *Ramah*, 458 U.S. at 838 (Rehnquist, J. dissenting).

As a result, there is conflict regarding exactly what the "*relevant* state, federal, and tribal interests" are for purposes of the *Bracker* test and the preemptive force that *Bracker* intends these often competing interests to have. *Ramah*, 458 U.S. at 838. Specifically, court opinions diverge considerably regarding the

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[2] https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase.

https://www.nigc.gov/images/uploads/reports/growthinindiangaminggraph1995to2004.pdf.

https://www.ktnv.com/news/nevada-casinos-win-11-9b-in-2018-up-from-2017-revenue.

https://www.pressofatlanticcity.com/news/casinos_tourism/atlantic-city-gaming-revenues-eclipse-billion-in-pilot-increases-million/article_df2935f2-da5f-587e-bd39-b663075f425e.html.

preemptive force of federal regulation when the object of a state tax (*e.g.*, lodging, meals) is outside the scope of the federally-regulated activity (gaming) and imposes only nominal, indirect burdens on the profitability of the regulated activity. The 8th Circuit and Oklahoma Supreme Court take an expansive view, finding preemption if a tax applied to a non-regulated activity would indirectly diminish the profitability of a regulated activity; the 2nd, 9th and 10th Circuits, and the Wisconsin Supreme Court, take a restrictive view, rejecting preemption if a state tax applied to non-regulated activity would impose no direct or substantial, adverse economic impact on a regulated activity.

"[T]ax administration requires predictability." *Oklahoma Tax Commission v. Chickasaw*, 515 U.S. 450, 460 (1995). Yet the particularized inquiry of the *Bracker* analysis is anything but predictable. Echoing Justice Rehnquist, the Wisconsin Supreme Court has critiqued the *Bracker* test for providing "uncertain guidance" and "ignor[ing] the value of manageable judicial standards." *Anderson v. Wisconsin Dep't of Revenue*, 484 N.W.2d 914, 923 (Wis. 1992) (Abrahamson, J. dissenting), citing *Ramah*, 458 U.S. at 847 (Rehnquist, J. dissenting) and quoting Frickey, *Congressional Intent, Practical Reasoning and the Dynamic Nature of Federal Indian Law*, 78 CAL.L.REV. 1137, 1187, 1189 (1990). The case-by-case preemption determinations prescribed by *Bracker*, which require, somewhat paradoxically, reading federal statutes "generously to preserve tribal immunity" when "no federal statute . . . expressly preempts state law," become "unguided judicial

excursions" prone to inconsistent and unpredictable results. *Anderson*, 484 N.W.2d at 923 (Abrahamson, J. dissenting), quoting Frickey, *Congressional Intent* at 1189. Conflicting applications of *Bracker*, particularly in the IGRA context, have created a system where a state's authority to impose a tax is unknown, and a judicial balancing of the respective federal, tribal and state interests against uncertain standards invites, rather than discourages, litigation between tribes and states. *Anderson*, 484 N.W.2d at 923.

Certiorari is warranted here so that this court can reboot the *Bracker* test to provide more consistent and predictable outcomes in the area of state taxation of activities incidental to Indian gaming and other revenue-generating activities on Indian lands that place fiscal demands on state government.

A. *Bracker* And Its Development

In *Bracker*, this Court examined whether a state could impose motor carrier license and fuel taxes on a non-member logging company's use of roads located solely within an Indian reservation. The subject roads had been "built, maintained and policed exclusively by the Federal Government, the Tribe and its contractors." *Bracker*, 448 U.S. at 150. The state performed no regulatory function or service in connection with the roads to justify its taxes. *Bracker*, 448 U.S. at 148-149, 151 (Powell, J. concurring). "[I]n a context in which the Federal Government ha[d] undertaken to regulate the most minute details of the Tribe's timber operations,"

the Court held that the state's taxes were preempted. *Bracker*, 448 U.S. at 149.

In *Ramah*, this Court examined whether a state could impose gross receipts taxes on two non-member construction contractors hired by the tribe to build a school on the reservation. The legal incidence of the taxes fell on the contractors, but the *Ramah* court determined that the burden of the tax "ultimately fell on the Tribe" (though only because the tribe had contractually agreed to assume responsibility for the taxes). *Ramah*, 458 U.S. at 839-842. But since the state had "declined to take any responsibility for the education of . . . Indian children," it could not assert a legitimate regulatory interest which outweighed the "comprehensive [federal] regulatory scheme" governing Indian education. *Ramah*, 458 U.S. at 843-846.

Ramah's focus on "the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations" provoked a dissent from Justices Rehnquist, White and Stevens. *Ramah*, 458 U.S. at 847-848. The dissent opined that elevating "the financial burden" of the tax into "the single, determinative factor" subordinated the consideration of other matters of greater concern to the preemption question, such as how "the assessment of state taxes would obstruct federal policies," whether the federal government regulates the actual "activity taxed," and who bears the legal incidence of the tax as opposed to where the ultimate burden falls. *Ramah*, 458 U.S. at 850, 852, 853, 856. The dissent would have found the tax not preempted because it did not obstruct the policy of delivering quality

education to Indian students, because the quality of education, not the construction of schools, was the activity subject to federal regulation, and the tax's only impact on the quality of education was to indirectly deplete funds available for the unregulated activity of constructing Indian school buildings. *Ramah*, 458 U.S. at 855.

In *Cotton*, this Court retreated from the economic-centric analysis of *Ramah*. At issue in *Cotton* were state severances taxes totaling approximately 8% imposed on a non-member company's extraction of oil and gas from Indian lands. The Court concluded that the taxes were not preempted by the Indian Mineral Leasing Act (IMLA). *Cotton*, 490 U.S. at 186. Unlike the timber harvesting at issue in *Bracker, Cotton* determined that IMLA's regulation of tribal mineral leases, though "extensive," was not "exclusive." *Cotton*, 490 U.S. at 186. The economic burden of the tax was found to fall on the lessees, even though the "taxes [would] have at least a marginal effect on the demand for on-reservation leases [and] the value to the Tribe of those leases." *Cotton*, 490 U.S. at 186-187. *Cotton* found these indirect economic burdens non-determinative because, though IMLA had been enacted to "provide Indian tribes with badly needed revenue," it had not "intended to remove all barriers to profit maximization." *Cotton*, 490 U.S. at 180.

B. IGRA And The Activity It Regulates

Congress enacted IGRA in 1988 for the stated purposes of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments" and "provid[ing] a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly, by both operator and players." 25 U.S.C. § 2702.

> At the time IGRA was enacted, gaming was primarily a cash business with high volume transactions, sometimes involving large sums of money. Most of the perceived risks were related to the cash-intensive nature of the business, such as theft, corruption, money laundering and other potential wrongs. Moreover, back then, the industry still had the taint of organized crime.

Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 20 GAMING LAW REVIEW AND ECONOMICS 5, 388, 395 (2016). Thus, IGRA is "intended to expressly preempt the field in the *governance of gaming activities* on Indian lands." S.Rep.No. 446, 100th Cong., 2nd Sess. 6 (1988) (emphasis added).

IGRA denies states taxing authority only in respect to "taxes . . . upon an Indian tribe or upon any other person or entity . . . engage[d] in Class III activity." 25 U.S.C. § 2710(d). Class III gaming activity has

been described by this Court to mean "just what it sounds like – the stuff involved in playing Class III games . . . what goes on in a casino, each roll of the dice and spin of the wheel . . . gambling in the poker hall not the proceedings of the off-site administrative authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014).

"Most gaming operations have additional amenities that are connected in a business sense to the casino operation and are co-located with a casino, but do not themselves constitute gaming. These range from a simple snack shop, at the modest end, to a full resort with swimming pools, golf courses, hotels and often multiple restaurants. Such ancillary activities may also include spas, concert venues, conference centers and even RV parks." Washburn, *Recurring Issues in Indian Gaming* at 395. "IGRA is premised, at least in part, on the notion that gaming activities pose unique risks not presented by golf courses, swimming pools, hotels, restaurants, spas, concert venues, RV parks or conference centers." Washburn, *Recurring Issues in Indian Gaming* at 395. Consequently, the United States Department of Interior forbids, and tribes resist, attempts by states to regulate these amenities through their gaming compacts with tribes.

As noted by the Department of Interior, "the Tribe's provision of food [and] beverages . . . to its patrons may occur on the same parcel [of land] on which it conducts Class III gaming, [but] it does not follow . . . that it is 'directly related' [to gaming] under IGRA." Washburn, *Recurring Issues in Indian Gaming* at 395,

quoting Letter from Donald E. Laverdure, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, to the Hon. Greg Sarris, Chairman, Federated Indians of the Graton Rancheria (July 13, 2012) at 11; Petti, Briones and Long, *Scope Creep* at 26, 27. The question of whether states may regulate amenities like hotel rooms through their gaming compacts is not whether, "but for the existence of the Tribe's Class III gaming" would the amenity be provided, but whether amenities are directly related to gaming. Petti, Briones and Long, *Scope Creep* at 26. The Department of Interior has consistently taken the position that states may not regulate activities "tangentially related to the Tribe's gaming operation" through gaming compacts because they do not "implicate the integrity of the Tribe's gaming activities." Petti, Briones and Long, *Scope Creep* at 27.

C. *Bracker* Has Spawned Conflicts Concerning The Preemptive Force Of Federal Regulation And Tribal Interests Vis-À-Vis State Interests And Conflicting Outcomes To Identical Tax Questions

While the flexibility of the *Bracker* test purposefully lends itself to varying outcomes, the matter of exactly what federal, tribal and state interests are *relevant* under the test, and their preemptive force, is not meant to be variable. *Ramah*, 458 U.S. at 838. Yet, one finds perplexing variability in the application of *Bracker* factors, such as the extent of federal regulation necessary to effect preemption, the necessity of a

nexus between the taxed activity and the federally-regulated activity, the preemptive force of broad purposes underlying a federal regulatory scheme, the nature of economic burdens that will trigger preemption, and the weight afforded state interests in raising revenue. This variability has led the 8th Circuit and Oklahoma Supreme Courts to overstate the extent of IGRA's regulatory scope, and vest "the extent of economic burden on the tribe" with "paramount" importance, to the exclusion of more relevant considerations. *Ramah* at 848 (Rehnquist, J. dissenting). As a result, conflicts have emerged concerning the actual relevance and preemptive force of interests identified as elements of the *Bracker* analysis. The 8th Circuit and Oklahoma Supreme Courts are stuck in the *Ramah* era on matters concerning taxation of activities ancillary to Indian gaming and in conflict with the 2nd, 9th, 10th and 11th Circuits and the Wisconsin Supreme Court.

i. Conflicts Regarding Necessity Of Nexus Between Tax And The Federally-Regulated Activity

The proper question under *Bracker* is whether "the activity taxed" is the subject of comprehensive federal regulation. *Ramah*, 458 U.S. at 851 (Rehnquist, J. dissenting). Justice Rehnquist took issue with the *Ramah* majority's preemption of a state's tax upon the gross-receipts of a non-member construction contractor because federal regulations designed to deliver quality education to Indian reservations did "not

regulate school construction." *Ramah*, 458 U.S. at 851, 852 (Rehnquist, J. dissenting). Justice Rehnquist would have permitted the tax because the federal government "simply d[id] not regulate the construction activity which the State s[ought] to tax." *Ramah*, 458 U.S. at 852 (Rehnquist, J. dissenting).

The *Flandreau Tribe* court did not feel so constrained. It preempted the state's use tax even though "amenities such as a gift shop, hotel and RV park" were "obviously" not "related to [the operation of] Class III gaming" or "to regulating the Casino's Class III gaming." *Flandreau Tribe*, Petitioner's Appendix at 11, 12; Washburn, *Recurring Issues in Indian Gaming* at 395.

Unlike the *Flandreau Tribe* court, other courts have felt constrained to affirm a state's tax if it did not fall upon a federally-regulated activity. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 473 (2d Cir. 2013), upheld a state tax on slot machines owned and leased by two non-Indian vendors to the tribe for its casino. The *Mashantucket* court felt that IGRA's "preemption of the 'field' of gaming regulations" was not implicated because "*mere ownership* of slot machines by [non-member] vendors does not qualify as gaming, and taxing such ownership therefore does not interfere with the 'governance of gaming.'" *Mashantucket*, 722 F.3d at 470, 473. Applying these findings here, per *Mashantucket*, neither IGRA nor *Bracker* "exempt non-Indian [patrons] of [casino amenities] from generally-applicable state taxes that would apply

in the absence of legislation." *Mashantucket*, 722 F.3d at 473.[3]

In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008), the court examined whether a state sales tax on construction materials purchased by a non-Indian electrical contractor for use in an Indian casino expansion project was federally preempted. Mindful of the fact that IGRA's "core objective is to regulate how Indian casinos function so as to assure the gaming is conducted fairly and honestly," *Yee* ruled that the tax was not preempted by IGRA or *Bracker*. The tax was "not on Indian gaming activity or profits, but rather on construction materials purchased by a non-Indian electrical contractor." *Yee*, 528 F.3d at 1192. Echoing Justice Rehnquist's dissent in *Ramah*, the *Yee* court observed that "IGRA is a gambling regulation statute, not a code governing construction contractors." *Yee*, 528 F.3d at 1192. Simply put, the *Yee* court believed that "[e]xtending IGRA to preempt any commercial activity remotely related to Indian gaming – employment contracts, food service contracts,

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[3] In contrast to *Mashantucket*, the *Video Gaming Technologies v. Rogers County*, ___ P.3d ___, 2019 WL 6877909 (Okla. 2019), court found that an *ad valorem* tax on electronic gaming equipment owned by a non-member and leased to a tribe for use in its casino was sufficiently related to the regulation of gaming to authorize preemption. But in contrast to the *Flandreau Tribe* court, *Video Gaming Technologies* required a nexus between the tax and the federally-regulated activity as a predicate to preemption. Though Justice Rehnquist disagreed with the *Ramah* court's finding of a sufficient nexus between the tax and the federal government's regulation of Indian education, the nexus was a necessary predicate to preemption.

innkeeper codes – stretches the statute beyond its stated purpose." *Yee*, 528 F.3d at 1193.

And in *Anderson*, the court found that the state could tax the income of a non-Indian teacher at an Indian school who did not live on the reservation. The *Anderson* court could find no federally-regulated activity to warrant preemption. "[N]either the Secretary of the Interior nor the BIA ha[d] significant involvement in the operation of the schools" nor did the imposition of the tax on the teacher's income "obstruct federal policies." *Anderson*, 484 N.W.2d at 918. *Mashantucket*, *Yee* and *Anderson* demonstrate that, while the *Bracker* test is meant to be flexible, it is not intended to be so flexible as to preempt taxes that "obviously" have no nexus with a federally-regulated activity. *Flandreau Tribe*, Petitioner's Appendix at 11, 12.

Nor is *Bracker* meant to be so flexible as to yield conflicting outcomes to identical tax questions. Compare *Mashantucket*, 722 F.3d at 470, 473, with *Video Gaming Technologies v. Rogers County Bd. of Tax Roll Corrections*, ___ P.3d ___, 2019 WL 6877909, ¶ 36 (Okla. 2019). Both the *Mashantucket* and *Video Gaming Technologies* courts were faced with the identical question of whether IGRA preempted a state tax on non-member's ownership of video gaming leased to tribal casinos. Without explaining how preemption of *ad valorem* taxes was essential to governing gaming in tribal casinos or assuring the integrity of gaming devices, the *Video Gaming Technologies* court ruled that "[t]he comprehensive regulations of IGRA occupy the field with respect to *ad valorem* taxes imposed on

gaming equipment used exclusively in tribal gaming." *Video Gaming Technologies*, 2019 WL 6877909 at *10. Contrary to *Video Gaming Technologies*, the *Mashantucket* court ruled that "*mere ownership* of slot machines by the vendors does not qualify as gaming, and taxing such ownership . . . does not interfere with the 'governance of gaming.'" *Mashantucket*, 722 F.3d at 470. Same tax, same regulatory scheme, conflicting outcomes.

IGRA covers only the narrow field of shielding tribal gaming from corrupting influences. Washburn, *Recurring Issues in Indian Gaming* at 395. But *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1196 (10th Cir. 2011), found that, though a tax may fall on a federally-regulated activity, it will not be preempted by *Bracker* unless federal regulation is *exclusive.* Consequently, a state tax imposed on non-Indian lessees for oil and gas extracted from the Ute Mountain reservation was not preempted because IMLA's regulation of oil and gas leasing in Indian lands was not "pervasive" and "comprehensive." *Ute Mountain*, 660 F.3d at 1196. Likewise, though IGRA is a comprehensive prophylaxis against corruption of tribal gaming, it is by no means *exclusive* or *pervasive*; per IGRA and compacts with tribes, states are responsible for myriad enabling and oversight functions in the realm of Indian gaming. Gaming Compact Excerpts, Petitioner's Appendix at 86-90; *Cotton*, 490 U.S. at 186 (IMLA did not preempt tax where its reach was extensive but not exclusive).

For example, South Dakota's compact with the Flandreau Tribe describes tribal gaming as "a joint effort" between the tribe and the state and cites the necessity for this joint effort "to ensure the health, safety, and welfare of the public." Through its laws and administrative agencies, South Dakota sets minimum standards for gaming operations, the integrity of games and specifications of gaming devices. It vets and licenses vendors who provide gaming devices to tribal casinos. It tests, inspects and approves gaming devices for use in the casinos and retains the authority to remove gaming devices found to not meet minimum specifications from play. The compact authorizes state agents to enter the casino premises to conduct unannounced and/or undercover inspections. Gaming Compact Excerpts, Petitioner's Appendix at 86-90. With IGRA, to paraphrase Shakespeare, the game's the thing.

Department of Interior policy firmly reflects that IGRA's regulatory reach is limited to gaming. The department does not permit states to use their gaming compacts to control matters "tangentially related" to gaming because they do not "implicate the integrity of the Tribe's gaming activities." Petti, Briones and Long, *Scope Creep* at 26, 27. "Obviously," if a casino hotel is not a "gaming facility" subject to state regulation via the state's gaming compact with a tribe, taxation of the hotel is not preempted by IGRA. Petti, Briones and Long, *Scope Creep* at 26, 27; Washburn, *Recurring Issues in Indian Gaming* at 395.

The *Flandreau Tribe* court's extension of the field to activities "obviously" not regulated by IGRA, and which have no articulable relation to regulatory measures necessary to preserve the integrity of tribal gaming, is the type of unguided judicial exercise that Justice Rehnquist predicted would result from the *Bracker* test. *Anderson*, 484 N.W.2d at 923 (Abrahamson, J. dissenting), quoting Frickey, *Congressional Intent* at 1189. The *Flandreau Tribe* court's preemption determination is, thus, in direct conflict with authorities from both this Court and federal circuit and state high courts requiring a nexus between a tax and the pervasively and comprehensively federally-regulated activity invoked to preempt it.

ii. Conflicts Concerning The Preemptive Force Of Broad Congressional Statements Of Purpose

As originally conceived, the *Bracker* test was less concerned with the "broad purposes" of federal regulations than with whether a "State's taxes would interfere with a 'pervasive' regulatory scheme." *Ramah*, 458 U.S. at 852 (Rehnquist, J. dissenting). To paraphrase Justice Rehnquist, "[a]t the most general level [any tax c]ould threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [gaming] is capable of yielding.'" *Ramah*, 458 U.S. at 850 (Rehnquist, J. dissenting). Preemption cannot be grounded simply on "indirect burdens on [a] broad congressional purpose." *Cotton*, 490 U.S. at 186-187. Rather, "attention to [the]

specifics" of federal regulatory schemes, not broad statements of purpose, are supposed to govern *Bracker's* analysis of whether "the assessment of state taxes would obstruct" a pervasive federal regulatory scheme. *Ramah*, 458 U.S. at 850 (Rehnquist, J. dissenting).

Contrary to *Bracker*, one finds courts openly employing broad statements of purpose to preempt taxes that admittedly do not implicate or obstruct any federal regulatory scheme. The *Flandreau Tribe* court openly stated that IGRA's "broad policies" had "great[er] relevance" to its *Bracker* analysis than the fact that the state's "use tax on non-members for non-gaming activities at the Casino and Store" was "not relevant to regulating the Casino's Class III gaming." *Flandreau Tribe*, Petitioner's Appendix at 12-13; Washburn, *Recurring Issues in Indian Gaming* at 395. Even though the taxed "amenities were not 'directly related to the operation of gaming activities,' " and "[e]ven if gaming was not . . . reduced" by the state's tax, the *Flandreau Tribe* court ruled "IGRA's broad policies" preempted the tax. *Flandreau Tribe*, Petitioner's Appendix at 11-13. The *Video Gaming Technologies* court was equally open about not letting "[t]he fact that the specific tax . . . d[id] not infringe on" IGRA's regulatory scheme to "remove the applicable stated purpose of IGRA or its importance." *Video Gaming Technologies*, 2019 WL 6877909 at ¶ 33. Both *Flandreau Tribe* and *Video Gaming Technologies* placed "great[er] relevance" on broad purposes underlying IGRA than on the impact of the subject taxes on IGRA's regulatory function.

Consistent with *Bracker*, other courts do not assign overriding, preemptive force to IGRA's broad statements of purposes. In *Mashantucket*, the court ruled that "the Tribe's generalized interests in sovereignty and economic development" and "the federal interests protected by IGRA" were not sufficiently "impeded by the State's generally-applicable tax" on non-member ownership of slot machines to warrant preemption. *Mashantucket*, 722 F.3d at 476. Likewise, in *Yee*, the court ruled that federal law did not preempt a sales tax on an electrical contractor's purchase of construction materials for an Indian casino. *Yee*, 528 F.3d at 1191. *Yee* found that IGRA's broad purpose of "promoting tribal economic development" was not intended to preclude state taxes simply because of a potential adverse impact on "the overall profitability of the Tribe's casino operation." *Yee*, 528 F.3d at 1191-1192.[4]

Outside of IGRA, courts have rejected the broad purpose of "promot[ing] tribal economic development" as "an overriding force preempting an otherwise valid state tax on non-Indians." *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996). The fact that "the federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency . . . does not, without more, defeat a state tax on non-Indians." *Gila River*, 91 F.3d at 1237. Likewise, *Seminole Tribe of Fla. v. Stranburg*,

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[4] The economic burden of the tax on the Tribe in *Yee* amounted to over $200,000, which would be compounded by the amount of tax imposed on other contractors if the tax were upheld. *See Yee*, 528 F.3d at 1191.

799 F.3d 1324, 1340 (11th Cir. 2015), ruled that "the federal interest in promoting Indian economic development" is not sufficient, by itself, to "preempt all state taxes when any reduction of Indian income is threatened." The Wisconsin Supreme Court stated most succinctly that "finding that Indian education has been declared by Congress to be an important goal does not equate to finding a pervasive federal regulatory scheme." *Anderson*, 484 N.W.2d at 919.

While "examin[ation of] the pre-emptive force of the relevant federal legislation [requires] cognizan[ce] of . . . broad policies that underlie the legislation," the *Flandreau Tribe* and *Video Gaming Technologies* courts have lost sight of the fact that more than "indirect burdens on [a] broad congressional purpose" is needed to preempt a state's non-discriminatory, generally-applicable tax. *Cotton*, 490 U.S. at 187. But then, nothing in *Bracker's* open standards restrains courts from doing so. Giving such overriding consideration to broad statements of purpose places *Flandreau Tribe* and *Video Gaming Technologies* in direct conflict with this Court and other federal circuit and state high courts.

iii. Conflicts Concerning The Preemptive Force Of Indirect Economic Impacts

The *Bracker* test originally postulated federal *preemption* (as evidenced by "the comprehensiveness of the regulations") as the "*principal* barrier to" state taxation of certain tribal economic activities. *Ramah*,

458 U.S. at 848, 850 (Rehnquist, J. dissenting). But practically before the ink was dry on *Bracker*, *Ramah* appeared to make "the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations . . . the paramount consideration." *Ramah*, 458 U.S. at 848 (Rehnquist, J. dissenting).

Cotton sounded a retreat from the "paramount" importance *Ramah* had bestowed on "indirect economic burden[s] on [a] tribal organization." *Ramah*, 458 U.S. at 853, 854 (Rehnquist, J. dissenting). *Cotton*, now joined by Justices Rehnquist, White and Stevens, observed that, while "Congress sought to provide Indian tribes with a profitable source of revenue," there was "no evidence for the further supposition that Congress intended to remove all barriers to profit maximization." *Cotton Petroleum*, 490 U.S. at 180.[5] In light of this principle, *Cotton* found that state severance taxes on oil and gas extraction were not so "unusually large" as to "impose a substantial burden on the Tribe." *Cotton*, 490 U.S. at 186-187. *Cotton* anticipated that the taxes would have "at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its [own] tax" on the leases. *Cotton*, 490 U.S. at

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[5] See also *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114-115 (2005) (the "downstream economic consequences" of a state tax on a tribe's finances are not sufficient to invalidate a state tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 136 (1980) (a state tax "does not infringe the right of reservation Indians to 'make their own laws and be ruled by them' . . . merely because" the tax will "deprive the Tribes of revenues which they are currently receiving").

186-187. Nonetheless, *Cotton* found that the "marginal effect" of the taxes on the price of oil and gas leases was "simply too indirect and too insubstantial to" permit preemption. *Cotton*, 490 U.S. at 186-187. Despite *Cotton's* curtailing of *Ramah*, the *Flandreau Tribe* and *Video Gaming Technologies* decisions attest that *Ramah's* ghost still haunts IGRA jurisprudence. *Ramah*, 458 U.S. at 853, 854 (Rehnquist, J. dissenting).

The *Flandreau Tribe* court ruled that the state's tax was preempted by *Bracker*, not IGRA. While the IGRA preemption analysis is mainly an exercise in statutory interpretation, *Bracker* is additionally animated by "traditional notions of Indian self-government [that] are . . . deeply engrained in our jurisprudence." *Ramah*, 458 U.S. at 837. But since *Bracker* is principally concerned with "the extent of federal regulation and control," and because "tribal self-government is ultimately dependent on and subject to the broad power of Congress," *Bracker's* prescribed test "overlap[s]" with IGRA's preemption analysis. *Cotton*, 490 U.S. at 176-177, 186-190 and 204 (Blackmun, J. dissenting).

Of course, IGRA and *Bracker* are "independent" barriers to state taxation that, "standing alone, can be a sufficient basis" for preempting a state tax. *Ramah*, 458 U.S. at 837. That said, the *Flandreau Tribe* court's *Bracker* analysis should not have survived its IGRA findings, and, but for inappropriately making the indirect "economic burden [of the state's tax] on the tribe . . . the paramount consideration," it could not have. *Ramah*, 458 U.S. at 848 (Rehnquist, J. dissenting).

The *Flandreau Tribe* court's IGRA analysis concedes that federal regulation and control do not extend to the taxed amenities. *Flandreau Tribe*, Petitioner's Appendix at 11. In the *Flandreau Tribe* court's words, amenities "obviously" are not directly related to the regulated activity of Class III gaming. *Flandreau Tribe*, Petitioner's Appendix at 11. Amenities are not addressed in the South Dakota/Flandreau Tribe gaming compact because, again in the *Flandreau Tribe* court's words, they are "not relevant to regulating the Casino's Class III gaming." *Flandreau Tribe*, Petitioner's Appendix at 12; Petti, Briones and Long, *Scope Creep* at 26. Federal interests are necessarily weak when a tax "obviously" does not implicate any area of federal regulation or control.

In the absence of any demonstrable federal regulation and control of amenities, the *Flandreau Tribe* court shifted the focus of its analysis to the (assumed) contribution of tax-free amenities to the general success of the tribe's casino. *Flandreau Tribe*, Petitioner's Appendix at 14. Here again, the *Flandreau Tribe* court's IGRA analysis all but defeats its *Bracker* analysis. Per *Bracker*, the protection afforded to the tribe's interest in raising revenue from amenities is a function of, and proportionate, to the extent of "federal regulation and control" over the field, which is zero according to the *Flandreau Tribe* court's own IGRA analysis. While a tax can be *Bracker* preempted without being statutorily preempted, it is hard to fathom how a *Bracker* analysis that starts with *zero* federal regulatory oversight over the taxed activity can end in

preemption. A *Bracker* analysis so untethered from the requisite predicate of a federally-regulated activity is, again, the epitome of the unguided judicial excursions that Justice Rehnquist predicted the *Bracker* test would permit. *Anderson*, 484 N.W.2d at 923 (Abrahamson, J. dissenting).

In the absence of any demonstrable impact on matters subject to federal regulation and control, the *Flandreau Tribe* court instead focuses on indirect impacts (and IGRA's broad purposes). *Flandreau Tribe*, Petitioner's Appendix at 15. According to the *Flandreau Tribe* court, the state's amenities tax "would raise their cost to non-member patrons or reduce tribal revenues from these sales." *Flandreau Tribe*, Petitioner's Appendix at 15. "Obviously," because amenities are "not relevant to regulating the Casino's Class III gaming," the loss of tribal revenues from the sale of amenities has no bearing on the *Bracker* analysis. In addition, there is no evidence that increasing the cost of amenities would materially reduce general tribal revenues. The tribe's expert studiously refrained from calculating the "deadweight loss" effect – the point at which buyers refuse to buy what sellers are willing to sell because of the intercession of a tax – of the state's tax on tribal revenues. Petitioner's Appendix at 81-82.

Consequently, the *Flandreau Tribe* court's *Bracker* analysis rests on nothing more than an hypothesis[6] that increasing the cost of amenities *might* indirectly adversely impact gaming revenues, "contrary to IGRA's broad policies." *Flandreau Tribe*, Petitioner's Appendix at 15. Following the *Flandreau Tribe* court's lead, the *Video Gaming Technologies* court preempted a state's *ad valorem* tax on non-member ownership of video gaming machines leased to the tribal casinos because it would "impact the overall cost of providing the gaming machines" to the tribe which ultimately could decrease tribal gaming revenues. *Video Gaming Technologies*, 2019 WL 6877909 at ¶ 10. Making a *possible, indirect* economic burden the "paramount consideration" of the *Bracker* test conflicts with other courts' applications of *Bracker*.

Contrary to both *Flandreau Tribe* and *Video Gaming Technologies*, the *Mashantucket* court ruled that a state tax on the ownership of slot machines that were leased by two non-member vendors to a tribal casino was not preempted. Though the tax was "likely to have a minimal effect on the Tribe's economic development," the *Mashantucket* court did not, like the *Flandreau Tribe* court, end its analysis there. *Mashantucket*, 722 F.3d at 473. The *Mashantucket* court quantified the tax[7] and analyzed its economic effect in relation to

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[6] The impact of the state's tax on gaming revenues (if any) is characterized as hypothetical because it was never quantified by the tribe.

[7] The tax at issue in *Mashantucket* was approximately $20,000 per annum. *Mashantucket*, 722 F.3d at 474.

IGRA's purposes and objectives. *Mashantucket*, 722 F.3d at 474. The court concluded that the "negligible" economic impact of the tax would "not prevent 'the Indian tribe [from being] the *primary* beneficiary of the gaming operation.'" *Mashantucket*, 722 F.3d at 473, referencing 25 U.S.C. § 2702(2) (emphasis added).

In *Yee*, the court found that a tax on materials purchased by a non-member electrical contractor for use in expanding a tribal casino was not preempted. Because "the legal incidence of the tax f[ell] upon the non-Indian subcontractor, [the court found] the tribal interests to be weak." *Yee*, 528 F.3d at 1191. The tribe could not overcome this weakness in its preemption claim simply because the state tax "may affect the overall profitability of the Tribe's casino operation." *Yee*, 528 F.3d at 1191-1192. Unlike the *Flandreau Tribe* court, *Yee* quantified the amount of the tax and its impact relative to the cost of the expansion project.[8] *Yee*, 528 F.3d at 1191-1192. The mere fact that the increased cost of the expansion project due to the tax might "reduc[e] . . . tribal revenues" was not enough to warrant preemption. *Yee*, 528 F.3d at 1192.

Likewise, in *Ute Mountain*, the court found that a tax on oil and gas extracted from reservation lands by non-member lessees, much like the tax at issue in *Cotton*, was not preempted. The tribe claimed that without the tax, "oil and gas production [on tribal

[8] The economic burden of the tax in *Yee* amounted to over $200,000, which it noted could be compounded by the amount of tax imposed on other contractors if the tax were upheld. *Yee*, 528 F.3d at 1191.

lands] would become more attractive relative to oil and gas production elsewhere . . . which would result in increased production: and "increase in revenues from royalties and current [tribal] taxes." *Ute Mountain*, 660 F.3d at 1198. *Ute Mountain* ruled that, since the legal incidence of the tax fell on the lessees, these "economic burdens on the Tribe's ability to increase its own taxes and attract new leases" were "indirect" and "too insubstantial" to justify preemption." *Ute Mountain*, 660 F.3d at 1198.

Which demonstrates how "economic burden" is possibly the slipperiest of *Bracker's* standards. *Anderson*, 484 N.W.2d at 923 (Abrahamson, J. dissenting). Taken to its logical end, "economic burden" can be a black hole from which no tax could escape because tribes could always "contend that the economic burden of a state tax on non-tribal entities doing business with a tribe will almost always fall in some fashion on the tribe – even if only indirectly." *Ute Mountain Ute Tribe*, 660 F.3d at 1197, n. 29.[9] Unlike *Ute Mountain*, the *Flandreau Tribe* and *Video Gaming Technologies* courts did not resist the impulse to take the concept of economic burden to this illogical end. Both courts looked no further than the adverse impact on the general profitability of the tribe's casino operations because *Bracker's* unguided standards do not require any deeper inquiry. *Mashantucket, Yee, Ute Mountain* and

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[9] See also *Anderson*, 484 N.W.2d at 921 (declining to give weight to a number of incidental and speculative financial burdens that a tax on non-member teacher salaries might inflict on the tribe, such as a demand for higher wages by the employees).

Anderson require more. They require further inquiry into whether a tax obstructs a federally-regulated activity, is oppressively or disproportionately large in relation to gaming revenues realized by a tribe, or prevents a tribe from being the primary beneficiary of its Class III gaming revenues.

Unlike the *Flandreau Tribe* and *Video Gaming Technologies* courts, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994), performed a quantitative analysis of the economic impact of a state fee to license a tribal simulcast horse race wagering facility on the tribe's finances. *Cabazon* preempted the fee because the amount of the fee nearly equaled the tribe's profits. "[T]he State benefitted from the tribal gaming operation to a considerably greater extent than the" tribes, in contravention of IGRA's mandate that tribes be the "primary beneficiary" of gaming revenues. *Cabazon*, 37 F.3d at 433. Similarly, in *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), the court examined whether a state 30% severance tax on coal mined on tribal lands was preempted by IMLA. The *Crow Tribe* court found the tax preempted because "the magnitude of the tax . . . prevent[ed] the Tribe from receiving a large portion of the economic benefits of its coal." *Crow*, 650 F.2d at 1113. While many courts assess a state's tax for whether it is disproportionate to the revenues or profits taxed, prevents tribes from primarily benefitting from the taxed activity or infringes on tribal self-government, *Bracker* does not expressly require consideration of these factors.

Echoes of Justice Rehnquist's dissent in *Ramah* resound in Judge Colloton's dissent here; "the indirect effects of state taxation on tribal finances do not justify a finding of preemption." *Flandreau Tribe*, Petitioner's Appendix at 26 (Colloton, J. dissenting). Though "the pre-emptive effect of federal regulation" is meant to be the "paramount consideration" of the *Bracker* test, "profit maximization" was the dispositive consideration of the *Flandreau Tribe* court's opinion. *Ramah*, 458 U.S. at 848 (Rehnquist, J. dissenting); *Cotton Petroleum*, 490 U.S. at 180.

iv. Conflicts In Weight Afforded State Interest In Taxation

Like the "economic burden" element of the *Bracker* test, the state's interest in levying taxes is also susceptible to illogical and arbitrary outcomes. The state's "interest in being in control of, and able to apply, it's [generally applicable tax] laws throughout its territory" is well established. *Cotton*, 490 U.S. at 188. Yet, *Bracker's* vague contours readily permit the mantra of *a-state-must-assert-more-than-a-generalized-interest-in-raising-revenue* to become a rug under which legitimate state interests can be swept.

The *Flandreau Tribe* court's analysis of South Dakota's interests exhibits the lack of "attention to specifics" that Justice Rehnquist predicted the *Bracker* test would permit. *Ramah*, 458 U.S. at 850 (Rehnquist, J. dissenting). Here, the record reflects that:

> The State provides a range of services for the Casino: law enforcement operations, R. Doc. 80-7, at 34; R. Doc. 119-11, at 7-13; R. Doc. 125-23, at 4-5; roads that facilitate the Casino's fifty-mile shuttle service for patrons, R. Doc. 80-7, at 16, 21, 28-29; R. Doc. 119-15, at 50; job training for a Casino employee from the State's Department of Human Services, R. Doc. 81-14, at 3-5; and inspection of Casino equipment by the State Fire Marshal, R. Doc. 119-21, at 7-8. Nor is federal and tribal regulation of the amenities "exclusive." The State issues an alcohol license to the Casino and regulates the service of alcoholic beverages, R. Doc. 32, at 14 (¶ 56); R. Doc. 80-10, at 13-14; the State's Department of Health licenses vendors who sell food products to the Casino, R. Doc. 80-10, at 4, 15-16; R. Doc. 82-4, at 4-6; and the Tribe purchases water from the City of Flandreau, whose water system operators are certified by the State's Department of Environment and Natural Resources, R. Doc. 80-2, at 8-9; R. Doc. 132-21, at 5-7. Although the state tax revenue derived from the sales of amenities would not equal the cost of the state services provided on the reservation, "[n]either *Bracker*, nor *Ramah* . . . imposes such a proportionality requirement on the States." *Cotton Petroleum*, 490 U.S. at 185, 109 S.Ct. 1698.

Flandreau Tribe, Petitioner's Appendix at 24-25 (Colloton, J. dissenting). As these gaming-related state services demonstrate, this is not a case of "complete abdication or noninvolvement by the State in the

on-reservation activity." *Flandreau Tribe*, Petitioner's Appendix at 24 (Colloton, J. dissenting). To the contrary, as in *Cotton* (but not *Bracker*), South Dakota is heavily involved in the implementation of gaming on tribal lands. And though South Dakota sought simply "to assess taxes in return for governmental functions it performs for" the Flandreau Tribe, the court dismissively characterized the state's interest here as "only a 'generalized interest in raising revenue' that [wa]s insufficient to permit 'intrusion into the federal regulatory scheme.'" *Flandreau Tribe*, Petitioner's Appendix at 16.

This reasoning places *Flandreau Tribe* in conflict with several circuit courts. *Ute Mountain* asserted that a state's interest in revenue raising is not only legitimate but may be entitled to more than nominal weight. *Ute Mountain*, 660 F.3d at 1199. *Ute Mountain* found that the state's administrative dispute resolution procedures, well inspections and highway infrastructure used to transport oil and gas after it was extracted from tribal lands provided a sufficient connection between a severance tax and the federally-regulated activity to ward off preemption. *Ute Mountain*, 660 F.3d at 1199-1200. Likewise, *Stranburg* recognized that, so long as a state tax was "sufficiently connected to the particular activity taxed," it would "amount to more than just a generalized interest in raising revenue." *Stranburg*, 799 F.3d at 1342. *Mashantucket* found a sufficient connection between state-provided services and a tax on gaming devices owned by non-members and leased to tribal casinos where, as here, state

governmental entities "maintain[ed] roads to and throughout the Indian reservation [and] provide[d] emergency services to the Tribe." *Mashantucket*, 722 F.3d at 475.

"The Indian Gaming landscape has developed in unexpected ways in the past 30 years." Washburn, *Recurring Issues in Indian Gaming* at 388. Tribal casinos now include hotels, restaurants, spas, golf courses, RV parks, conference facilities, concert venues, marinas and other ancillary business not envisioned when Congress enacted IGRA. Petti, Briones and Long, *Scope Creep* at 26; Washburn, *Recurring Issues in Indian Gaming* at 395. Like mining, thriving Indian gaming facilities "place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws." *Crow Tribe*, 650 F.2d at 1114.

Despite the strain that the amenities of a large casino operation can place on state resources, the *Flandreau Tribe* opinion places these ancillary businesses beyond state taxation not because they obstruct a federally-regulated activity, but because, in a purely general sense, they "contribute significantly to the economic success" of the tribe's casino. *Flandreau Tribe*, Petitioner's Appendix at 14. State-provided roads, law enforcement and emergency services, alcohol and liquor licensing, banking and insurance regulation, employee training and inspection of gaming devices "contribute [as] significantly to the economic success of

the tribe's Class III gaming" as amenities, yet *Bracker's* "unguided" standards allow the state's interest in raising revenue to pay for the many services it provides to be swept under the rug. *Flandreau Tribe*, Petitioner's Appendix at 14.

IGRA is reasonably clear that its preemption extends only to the "governance of gaming," to ensure the integrity of gaming at tribal casinos so that gaming can "provide Indian tribes with a profitable source of revenue." *Cotton*, 490 U.S. at 179. Crooked games will not lure patrons to the slot machine floors, card tables or roulette wheels no matter what is on the menu at the buffet or who is playing the concert hall that night. IGRA's concern is strictly with gaming, not amenities. Reasoning that stretches IGRA's reach to activities peripherally related to gaming could only be permitted by a test that lacks "manageable standards." *Anderson*, 484 N.W.2d at 923 (Abrahamson, J. dissenting).

Flandreau Tribe and *Video Gaming Technologies* fulfill Justice Rehnquist's prediction that the *Bracker* test is susceptible to inconsistent and unpredictable reasoning and results. Whether Congress' purpose of promoting tribal economic development through IGRA preempts state taxes on revenues from ancillary businesses is a question best addressed by this Court in light of the demands that an ever-expanding industry places on state governments now and in the future.

CONCLUSION

A petition for a writ of *certiorari* should be granted to reboot *Bracker* to more consistently and predictably address tax questions attending the multi-billion-dollar Indian gaming industry.

Dated this 21st day of February 2020.

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