No. 19-1056

IN THE
Supreme Court of the United States

KRISTI NOEM, Governor of South Dakota, et al.,
Petitioners,

v.

FLANDREAU SANTEE SIOUX TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

SETH PEARMAN
ATTORNEY GENERAL,
FLANDREAU SANTEE SIOUX TRIBE
603 West Broad Avenue
Flandreau, SD 57028

REBECCA KIDDER
FREDERICKS PEEBLES & PATTERSON LLP
1830 W. Fulton St., Ste 102
Rapid City, SD 57702

SHANNON R. FALON
JOHNSON JANKLOW ABDALLAH REITER LLP
101 S. Main Ave., Suite 100
Sioux Falls, SD 57104

ADAM G. UNIKOWSKY
Counsel of Record
ALLISON M. TJEMSLAND*
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

TIM HENNESSY
JOHN NYHAN
FREDERICKS PEEBLES & PATTERSON LLP
2020 L Street, Suite 250
Sacramento, CA 95811

** Not admitted in D.C.; supervised by principals of the Firm.*

QUESTION PRESENTED

Whether the preemption test of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), should be overruled as applied to taxes related to Indian gaming, and replaced with a new, unspecified test.

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INTRODUCTION

This case concerns a state's authority to tax non-Indians' activities on Indian reservations. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court held that "[t]his inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. This Court has repeatedly applied and reaffirmed *Bracker*'s interest-balancing test. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 111 & n.5 (2005) (collecting cases).

In this case, South Dakota attempted to tax non-tribal members' purchases of casino amenities (like food and alcohol) sold by the Flandreau Santee Sioux Tribe at its casino. Faithfully applying *Bracker*, the Eighth Circuit concluded that the tax was preempted.

Rather than challenge the Eighth Circuit's application of *Bracker* to the facts of this case, Petitioners ask the Court to overrule *Bracker*. In their Question Presented, Petitioners allege that *Bracker* is not a "consistent and predictable rule of law." Pet. i. They therefore urge the Court to "reboot the *Bracker* test" in the area of "Indian gaming and other revenue-generating activities on Indian lands that place fiscal demands on state government." Pet. 8.

The Court should deny certiorari. This case does not satisfy the ordinary criteria for certiorari review. The decision below is narrow and fact-bound. Petitioners purport to identify four conflicts of authority, but all of the cases cited by Petitioners apply the same legal test

and reach different outcomes based on different factual records.

In addition, the Eighth Circuit's decision is correct. The court rightly held that the tax was preempted under *Bracker* because "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." Pet. App. 16 (quotation marks omitted). Rather, the State asserted a "generalized interest in raising revenue" that "does not outweigh the federal and tribal interests" at stake. *Id.* (internal quotation marks omitted).

Petitioners have not submitted a persuasive case for "rebooting" *Bracker*. *Bracker* was correct when it was decided. Even if it was not, *stare decisis* requires adhering to *Bracker*. *Bracker* is a 40-year-old decision synthesizing foundational principles of federal Indian law dating back to the early Republic. Moreover, Congress has plenary power over Indian affairs and could have modified *Bracker*, yet it has left *Bracker* intact. Indeed, in the Indian Regulatory Gaming Act ("IGRA"), Congress made clear that it was *not* disturbing pre-existing preemption law—under which states lacked regulatory authority over tribal gaming facilities.

Even if the Court is inclined to reconsider *Bracker*, this case would be a poor vehicle for several reasons. First, although Petitioners assert that *Bracker* should be rebooted, they do not state what *Bracker* should be replaced with. At times Petitioners appear to endorse a rule under which on-reservation tribal sovereignty interests are entitled to *no* weight, and states would

have the same liberty to tax on-reservation activity as off-reservation activity. If that really is Petitioners' position, then they seek to overrule precedents dating back to the Marshall Court. At times, Petitioners hint at a less far-reaching approach that would merely scale back *Bracker* to some unspecified extent, but that rule would be even less administrable than the status quo. Petitioners' inability to propose a coherent alternative to *Bracker* is a serious vehicle problem.

Second, the Question Presented raised by Petitioners is not actually presented. The Question Presented asserts that *Bracker* should be reconsidered in view of the "fiscal demands the industry now places on state budgets," and Petitioners later clarify that their "reboot" of *Bracker* would apply to activities "that place fiscal demands on state government." Pet. i, 8. But the factual record in this case establishes that the Tribe's casino does not impose fiscal demands on State government. Instead, those fiscal demands are borne by the Tribe itself. That fact was the foundation for the decision below. Petitioners' argument therefore boils down to a disagreement with the lower courts' interpretation of the factual record.

Finally, this case is an inappropriate vehicle to reconsider *Bracker*, because it is impossible to resolve this case without addressing multiple antecedent questions on the interpretation of IGRA.

The petition should, therefore, be denied.

STATEMENT

A. Factual background

The Flandreau Santee Sioux Tribe (the "Tribe") is a federally-recognized tribe with a reservation in Moody County, South Dakota. The tribal government maintains and enforces a comprehensive legal code, and virtually all government services on the reservation are provided or funded by the Tribe. For instance:

- The tribal police department provides law enforcement services on the reservation. JA620-21, 623.[1]
- The Tribe funds dispatch services, ambulance services, fire protection, and emergency preparedness on the reservation. JA620-21.
- The Tribe operates a judicial system, including criminal, civil and family courts. JA623, 628-30.
- The Tribe operates a health clinic, at an annual cost to the Tribe exceeding $1 million, and for which the Tribe recently built an expanded facility at a cost of approximately $14-$18 million. JA625.
- The Tribe provides an array of additional social services, including meals for the elderly, energy assistance, emergency housing, and domestic violence victim assistance. JA619-28.

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[1] "JA" refers to the Joint Appendix in the Eighth Circuit.

In addition, the Tribe also funds several off-reservation services. JA619-33. For example:

- The Tribe funds off-reservation road construction and maintenance, including recently spending $3 million for an off-reservation road. JA674, 676.
- The Tribe provides funding for teacher salaries and supplies to the off-reservation public school in Flandreau. JA622, 626.
- The Tribe purchased five fire trucks for the City of Flandreau's Fire Department. JA674.

The Tribe operates the Royal River Casino & Hotel ("Casino") on its reservation. The Casino includes a gaming floor, hotel, restaurant, bar, gift shop, snack bar, and live entertainment venue, all within the Casino facility. The Casino is crucial to the Tribe: the tribal government and government services are funded primarily with Casino revenues and revenues from the Tribe's 6% sales tax, 90% of which is generated by Casino transactions. Pet. App. 14, 31.

Before opening the Casino, the Tribe negotiated a tribal-state gaming compact ("Compact") with the State, as required by IGRA. Pet. App. 10; JA 78-89. The Compact and IGRA govern the terms under which the Tribe may operate the Casino. Consistent with IGRA, the parties negotiated a provision permitting "the assessment by the State of such [gaming] activities in such amounts as are necessary to defray the costs of regulating such activity." Pet. App. 9; *see* 25 U.S.C. § 2710(d)(3)(C)(iii). Thus, the Tribe pays the State's costs for regulating gaming activity.

B. Proceedings below

This case concerns South Dakota's effort to collect use taxes from non-member Casino patrons who purchase goods and services from the Tribe's Casino, other than the play of games ("Casino Amenities"). As noted above, Casino patrons who buy the Casino Amenities (including alcohol and food purchased on the Casino gaming floor while gaming) pay a 6% tribal tax. In this case, South Dakota asserts a right to force the Tribe to collect and remit a 4.5% state tax on those Amenity purchases, over and above the tribal sales tax.

The State has never contended that this tax revenue is necessary to compensate it for services provided to the Tribe, the Casino, or Casino patrons. Under the Compact, the Tribe pays for any on-reservation services the State provides to the Casino or Casino patrons. Nor has the State ever suggested that it will use this money to provide services to the Tribe. Rather, it is the tribal government that provides and pays for law enforcement, courts, and social services. Indeed, there are no State-owned buildings on the reservation of any kind. JA651. Instead, the State simply seeks to deposit this tax revenue into the State treasury.

The State used a blunt tool to force the Tribe to pay the tax: it refused to renew the Casino's liquor licenses until the Tribe paid the tax. Pet. App. 2, 17. In response, the Tribe filed this suit, claiming that the use tax on Casino Amenities was preempted.

The District Court found that IGRA expressly preempted the tax. The District Court observed that under IGRA, compacts may include provisions

addressing activities that are "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The District Court held that IGRA bars a state from taxing such activities outside of the compacting process. Pet. App. 41-42. The District Court concluded that the Casino Amenities were "directly related to the operation of gaming activities" because their "only significant purpose" was to "facilitate gaming activities at the Casino." Pet. App. 54-55.

The Eighth Circuit affirmed on different grounds. The Eighth Circuit disagreed with the District Court's conclusion that IGRA expressly preempted the tax. It concluded that the Casino Amenities were not "directly related" to gaming. Pet. App. 11. Alternatively, it held that even if the Casino Amenities were "directly related" to gaming, IGRA still did not expressly preempt the tax because IGRA "does not address the legal effect of non-inclusion" of a subject in a Compact. Pet. App. 12.

The Eighth Circuit therefore concluded that the Tribe's preemption challenge should be judged under the *Bracker* standard, which requires assessing whether "the State's interests in imposing the tax outweigh the relevant federal and Tribal interests." Pet. App. 12. Evaluating the factual record, the Eighth Circuit concluded that "the amenities contribute significantly to the economic success of the Tribe's Class III gaming at the Casino." Pet. App. 14. "The State's taxation of the Casino amenities would raise their cost to nonmember patrons or reduce tribal revenues from these sales." Pet. App. 15. "Even if gaming was not thereby reduced, the impact would be contrary to IGRA's broad policies of

increasing tribal revenues through gaming and ensuring that tribes are the primary beneficiary of their gaming operations to promote economic development, self-sufficiency, and strong tribal governments." *Id.*

Addressing the State's interests, the Court explained that "[a]s in *Bracker*, 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." Pet. App. 16 (internal quotation marks omitted). Rather, the State asserted a "generalized interest in raising revenue" that "does not outweigh the federal and tribal interests" at stake. *Id.* (internal quotation marks omitted).

Judge Colloton dissented in relevant part. Under his understanding of the factual record, the State "provides a range of services for the Casino." Pet. App. 24. In Judge Colloton's view, "[a]lthough the state tax revenue derived from the sales of amenities would not equal the cost of the state services provided on the reservation," there was no "proportionality requirement." Pet. App. 25 (internal quotation marks omitted).

ARGUMENT

The Eighth Circuit's decision does not conflict with the decision of any other court. It faithfully applies this Court's precedents to the facts of this case. The Court should decline Petitioners' request to "reboot" decades of Supreme Court precedent and replace it with an unspecified new doctrine.

I. THERE IS NO CONFLICT OF AUTHORITY.

Petitioners claim that the decision below implicates circuit splits on four separate issues. Pet. 13-36. On all four issues, Petitioners' claim rests primarily on *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). Pet. 15-16, 22, 28-29, 35. No split exists. The decision below is consistent with *Mashantucket* and with every other decision cited by Petitioners.

A. *Mashantucket* does not conflict with the decision below.

The decision below is consistent with *Mashantucket*. In *Mashantucket*, the Second Circuit applied *Bracker* and upheld the Town of Ledyard's tax on non-Indian vendors who sold slot machines to the Foxwoods Casino in Connecticut. In its analysis of the federal interests at stake, the Second Circuit observed that IGRA did not expressly preempt the challenged tax, 722 F.3d at 472-73—a conclusion the Eighth Circuit also reached. But—contrary to Petitioners' proposed approach to preemption, Pet. 26—the court's analysis did not end there. The Second Circuit undertook an analysis of the tribal and state interests at stake as required under *Bracker*. It concluded that the state's interests were stronger—based on facts materially different than the facts here.

The court first held that the tribe's interests were attenuated because "the incidence of the generally applicable tax falls on the non-Indian's *ownership of property*, rather than on the *transaction* between the

Tribe and the non-Indian." 722 F.3d at 469 (emphasis in original). Here, by contrast, the use tax is triggered by, and hence directly burdens, transactions with the Tribe itself.

The *Mashantucket* court acknowledged that the Town's "encroachment into an area of tribal sovereignty, however modest, is a recognized injury that must be considered in a *Bracker* balancing." *Id.* at 474. The court nonetheless concluded that the tribal interests were weak because the total tax was "$20,000 per annum," "less than two tenths of one percent of the … revenue per annum that the vendors anticipate from their dealings with the Tribe." *Id.* The court observed that "[t]he Tribe's payments to the State of twenty-five percent of its gross operating revenues from video facsimile games have exceeded $1.5 billion since 2003." *Id.* Thus, "[t]he tax's economic effect on the Tribe is less than minimal." *Id.* Here, by contrast, the tax would inflict substantial economic harm on the Tribe. The Eighth Circuit cited the Tribe's undisputed "evidence that over 90% of its sales tax revenues are generated by the 6% sales tax on transactions at the Casino and the Store." Pet. App. 14. The Tribe also demonstrated that Casino Amenities are "sold below cost to attract patrons and encourage gaming," and that "increases in patronage at one amenity is directly tied to increases in gaming activity itself." *Id.*

With regard to the state's interests, the *Mashantucket* court cited evidence establishing that a ruling in the tribe's favor would lead to lawsuits that "would tie up hundreds of thousands of dollars per year." 722 F.3d at 475.

The court also found a "nexus between the tax and the services that the Town provides," pointing to, for example, "the education and [busing] of the Tribe's children." *Id.* (quotation marks omitted). In this case, by contrast, the State pointed only to a "generalized interest in raising revenue." Pet. App. 16 (quotation marks omitted). And here, the Eighth Circuit found that "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." *Id.* (quotation marks omitted).

A different decision, issued on the same day by the same Eighth Circuit panel, illustrates that there is no conflict with *Mashantucket.* That decision reversed the District Court's grant of summary judgment to the Tribe on a preemption challenge to a different South Dakota tax. *See Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019).

The tax in *Haeder* was a "tax on the gross receipts of a nonmember contractor for services performed in renovating and expanding the Flandreau Santee Sioux Tribe's gaming casino…." *Id.* at 942. The Eighth Circuit stated that "[t]he projected total tax that would be paid when the Casino's renovation is completed is $480,000." *Id.* at 946. "Absent a showing that the effect of this one-time tax on construction would be to reduce the demand for the Casino's commercial activities, this indirect financial burden is simply too indirect and too insubstantial to support the Tribe's claim of preemption." *Id.* (alterations and internal quotation marks omitted). The court also emphasized that the tax "does not regulate Casino construction or gaming

activities." *Id.*

The Tribe respectfully disagrees with *Haeder*, and on remand, at trial, the Tribe intends to offer evidence showing that the tax impacts gaming revenues and undermines IGRA's purpose. But *Haeder* shows that the Second and Eighth Circuits align.

Petitioners point to *Mashantucket*'s observation that the tax at issue did not directly apply to gaming activities. Pet. 15, 18. But *Haeder* made the identical observation. 938 F.3d at 946. In both the Second and Eighth Circuits, that fact is not dispositive, but must be balanced with the rest of the *Bracker* factors.

In *Mashantucket*, the Second Circuit declined to find preemption because the tax was only $20,000 per year. In *Haeder*, the tax was far higher and the Tribe's Casino generates far less revenue than the billion-dollar operation at Foxwoods, yet the Eighth Circuit reversed the District Court's grant of summary judgment to the Tribe. Thus, *Haeder* demonstrates that the Eighth Circuit almost certainly would have reached the same conclusion as the Second Circuit on the facts of *Mashantucket*.

Petitioners claim that *Mashantucket* conflicts with *Video Gaming Technologies, Inc. v. Rogers County Board of Tax Roll Corrections*, No. 117,491, __ P.3d __, 2019 WL 6877909 (Okla. Dec. 12, 2019). Pet. 17. Any conflict between *Mashantucket* and *Video Gaming* would not warrant review in this case, but in any event, *Mashantucket* and *Video Gaming* do not conflict. Although the *Video Gaming* court found that a tax similar to the tax in *Mashantucket* was preempted, its

ruling was based on different facts.

First, the *Video Gaming* court emphasized that Oklahoma law "allows [the] County to seize property when ad valorem taxes are not paid." 2019 WL 6877909, at *9 (citing Okla. Stat. tit. 68, § 3104 (2011)). Thus, although the non-Indian contractor technically owned the machines, the "County's remedy for collection of delinquent taxes would directly affect the tribe[and] its gaming operation, and severely threaten the policies behind IGRA—including Nation's sovereignty over its land." *Id.* The *Mashantucket* court did not identify any comparable Connecticut statute.

Second, the *Video Gaming* court found that the "County has not shown it provides any regulatory functions or services … to justify its taxation of [gaming] equipment." *Id.* In that respect, *Video Gaming* is similar to this case—and different from *Mashantucket*, where the Second Circuit identified particular services that the local government offered to the tribe. *Supra*, at 11.

Third, the *Video Gaming* court found that the "County's argument regarding uniform application of the law also fails," because "Oklahoma also already has use exemptions for *ad valorem* taxation that require [the] County to consider property use in certain circumstances." 2019 WL 6877909, at *9 (citing Oklahoma statutes and case law). *Mashantucket*, by contrast, did not identify any comparable Connecticut law. 722 F.3d at 475-76.

B. The decision below does not conflict with any other decision.

Petitioners purport to identify conflicts of authority on four separate issues, citing numerous cases. Pet. 13-36. But none of the cases cited by Petitioners conflict with the decision below; rather, they apply the same test to different factual records.

Nexus between tax and federal regulation. Relying on Justice Rehnquist's dissent in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), Petitioners contend that the Eighth Circuit should have declined to find preemption because the Casino Amenities are not subject to federal regulation. Pet. 14-20. According to Petitioners, other courts have followed Justice Rehnquist's approach and found that taxes were not preempted when the taxes did not "fall upon a federal[]-regulated activity." Pet. 15.

That contention lacks merit. All courts have faithfully followed the majority opinion in *Ramah*. Some courts have found preemption and others have declined to find preemption, based on factual and legal differences in each case.

Petitioners rely most heavily on *Mashantucket* (Pet. 15-16), but as explained above, *Mashantucket* does not conflict with the Eighth Circuit's decision.

Petitioners also rely on *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). Pet. 16-17. *Barona Band* is readily distinguishable. It involved a non-Indian contractor purchasing supplies from a non-Indian off-reservation vendor—not the tribe—subject to the contractual proviso that transfers of title

technically take place on the Indian reservation. 528 F.3d at 1187-88. On those facts, the court found that the state's interests outweighed the tribe's interests under *Bracker*. The court relied on authority "express[ing] disfavor toward tribal manipulation of tax policy." *Id.* at 1190-91. The court acknowledged the tribe's sovereignty interest over its own territory, but found that the tribe's interests were lessoned because the purchases were consummated "for the sole purpose of receiving preferential tax treatment." *Id.* at 1191. "That these sophisticated parties contracted to create a taxable event on Indian territory which otherwise would occur on non-Indian territory factually distinguishes the present case from the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land." *Id.* Likewise, there was little federal interest in commercial activity "rigged to trigger a tax exemption." *Id.* at 1192.

Here, by contrast, there is no "rigged" tax exemption. The State expressly admitted that the Tribe was not "marketing a tax exemption" in this case. JA619. Rather, this is a transaction between the Tribe's on-reservation Casino and non-Indian patrons of that Casino. Unlike the transaction in *Barona Band* that had nothing to do with the tribe, the transactions in this case have everything to do with the Tribe. Unlike *Barona Band*, the Tribe is *providing* the Casino Amenities; unlike *Barona Band*, the Tribe is also *taxing* those transactions to generate revenue to operate its government.

Anderson v. Wisconsin Department of Revenue, 484 N.W.2d 914 (Wis. 1992), is even further afield. *Anderson*

did not concern Indian gaming. The court there held, unsurprisingly, that the state could tax the income of an Indian who lived off-reservation but worked on-reservation. *Id.* at 915. The court held that any "possible burden on the tribe is too speculative." *Id.* at 921. The court further found that "Wisconsin is seeking to assess its tax in return for the governmental functions the state provides to those who must bear the burden of paying the tax." *Id.* at 918. This Court later reached the same conclusion without engaging in *Bracker* balancing, based on the "well-established principle" that a state may tax all resident income. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995). Here, by contrast, the Eighth Circuit found that the tax *would* burden the Tribe, and that the State *was not* seeking to assess its tax to offset its costs for governmental functions performed on the reservation. *Supra*, at 8.

Finally, Petitioners invoke *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011). Contrary to Petitioners' description (Pet. 18), *Ute Mountain* did not hold that that a tax "will not be preempted by *Bracker* unless federal regulation is *exclusive*." Rather, *Ute Mountain* was a straightforward application of this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). As the Eighth Circuit explained, in *Cotton*, the state tax was not preempted because "the State regulated aspects of the on-reservation oil and gas development at issue and provided substantial services to the tribe and its lessee," and "no economic burden [fell] on the tribe by virtue of the state taxes." Pet. App. 15 (describing *Cotton*'s holding) (internal quotation marks omitted); *see Cotton*,

490 U.S. at 185. Those same facts were present in *Ute Mountain*. The "State play[ed] a supporting regulatory role," 660 F.3d at 1199; the "state service" provided the "off-reservation infrastructure" that "primarily justifies the [state] taxes at issue," *id.*; and "the economic burden of the tax falls on the non-Indian operators," *id.* at 1201. Further, both *Ute Mountain* and *Cotton* weighed the unique regulatory background of express congressional authority to impose state taxes in the field in 1924, as a result of which little to no weight is granted to the tribal interests in sovereignty. *Id.* at 1192-94; *Cotton*, 490 U.S. at 182.

Here, unlike in *Cotton* and *Ute Mountain*, the State does not regulate the Casino or Casino Amenities, beyond the limited oversight the Tribe agreed to in the Compact. Indeed, the very premise of IGRA is that the states may only exercise authority if the tribe agrees to state regulation in a compact. *See infra* at 24. Nor does the State provide substantial services to the Tribe—and any services the State does provide are fully compensated by the Tribe. *See infra* at 20-22. Therefore, the Eighth Circuit rightly held that *Bracker*, not *Cotton*, was the applicable precedent. Pet. App. 16.

Preemptive force of broad statements of purpose. Petitioners next purport to identify a conflict of authority on whether "broad congressional statements of purpose" can preempt state legislation. Pet. 20-23. As framed by Petitioners, the Eighth Circuit found that "IGRA's broad policies" preempted Sstate law, whereas other courts have declined to find preemption based on "broad policies." This contention mischaracterizes both the Eighth Circuit's decision and decisions of other

courts.

The Eighth Circuit did not hold that IGRA's "broad policies" preempted state law. The District Court did find that IGRA expressly preempted state taxes, but the Eighth Circuit reversed that holding. Pet. App. 7-12. Rather, the Eighth Circuit observed that IGRA's purposes of promoting tribal independence and economic development are relevant to the *Bracker* analysis. Pet. App. 12-13. As *Haeder* illustrates, the Eighth Circuit does not view these legislative goals as overriding forces in every case; rather, the ultimate preemption conclusion will turn on the factual record.

Petitioners cite dicta from various cases stating, at a high level of generality, that the goal of ensuring economic self-sufficiency does not in and of itself mandate preemption. Pet. 22-23. The Eighth Circuit did not hold otherwise; it conducted a record-specific balancing of federal, state, and tribal interests.

Preemptive force of indirect economic impacts. Petitioners next claim that there is a conflict on whether the "indirect" effect of a tax on Indian gaming warrants preemption. Pet. 23-32.

This argument is a reprise of Petitioners' prior argument (Pet. 14-20) that there is an insufficient nexus between the taxed activities and federal regulation. Petitioners again assert that the Eighth Circuit's decision conflicts with *Mashantucket*, *Yee*, *Anderson*, and *Ute Mountain*. Pet. 28-30. For the reasons explained above, it does not.

Petitioners also assert that the Tribe's expert did not sufficiently quantify the economic harm of the tax and

that the Eighth Circuit's decision therefore rested on a mere "hypothesis" that the tax would harm the Tribe. Pet. 28-29. Petitioners' challenge to the Eighth Circuit's interpretation of the factual record is factbound and does not implicate any circuit split.

Moreover, Petitioners' argument is meritless. The Eighth Circuit correctly concluded that the State's tax would cause significant economic harm to the Tribe. Pet. App. 14-15. The State itself determined that it would collect at least $150,000 per year in use tax. JA454-55. This would reduce gaming revenue. The District Court concluded that "the only significant purpose of these amenities is to facilitate gaming." Pet. App. 52. It found that the Casino Amenities and gaming were complementary, *i.e.*, that "increases in patronage at one amenity is directly tied to increases in gaming activity itself." Pet. App. 53. Indeed, many Casino Amenities operate at a loss to encourage gaming activity. *Id.* The Court cited a study showing that a $1 increase in restaurant food sales resulted in a $91 increase in gaming revenue—illustrating how the Casino Amenities induce patrons to game. JA317. The District Court further cited evidence showing that reducing demand for the Casino Amenities would reduce gaming revenues. For instance, one study showed that a 10% increase in the price of food would reduce consumption of entertainment (such as gaming) by 7.2%. Pet. App. 53.

Alternatively, the State's tax would preclude the imposition of a tribal tax. It was undisputed that if the Tribe imposed its tribal tax alongside the state tax, then the effective tax rate on the Casino Amenities would

10.5%—*i.e.*, a 6% tribal tax plus a 4.5% state tax—which would be the highest in the nation. JA269-70. This would put the Casino at a severe competitive disadvantage relative to neighboring casinos. Thus, the Tribe would have no choice but to reduce its own tax, resulting in a loss of 75% of tax revenue. JA270, 499.

Weight afforded state interest in taxation. Finally, Petitioners claim that "South Dakota is heavily involved in the implementation of gaming on tribal lands." Pet. 34. Thus, according to Petitioners, "South Dakota sought simply to assess taxes in return for governmental functions it performs for the Flandreau Tribe." *Id.* (internal quotation marks omitted). Based on that factual premise, Petitioners assert that the Eighth Circuit's decision conflicts with other decisions holding that a state may recover taxes when it performs services for a tribe. Pet. 34-36.

Petitioners' argument is another factbound challenge to the Eighth Circuit's interpretation of the record. The Eighth Circuit disagreed with Petitioners' factual premise: it concluded that "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." Pet. App. 16 (quotation marks omitted). Petitioners point to Judge Colloton's dissent, which stated that the "State provides a range of services for the Casino" that justify the tax. Pet. 33. But whether the majority or the dissent correctly interpreted the factual record is not a cert-worthy question.

In any event, the majority's view of the record is correct. The extensive record demonstrates that the Tribe pays the costs of government services on its

reservation, including to Casino patrons. *See* JA619-30, 674-77. Any contribution by the State was sporadic, indirect, and *de minimis*. JA638-59. Indeed, the Tribe provided evidence that—even without the State's use tax—the Casino was a net positive to the South Dakota treasury, benefiting the State's economy and decreasing people's reliance on State welfare programs. JA664-72.

Petitioners fail to show any error in these conclusions. Petitioners' assertion (quoting Judge Colloton) that the State provides "law enforcement operations" to the Tribe (Pet. 33) is misleading. The tribal police department handles law enforcement on the reservation, at the Tribe's expense. JA620-21. Although Moody County (not the State) provides certain services such as dispatching, the Tribe pays for those services out of pocket. *Id.* The "law enforcement functions" supplied by the State consist of *de minimis* functions the State might provide in the future, like the speculative possibility of providing an AMBER alert for a missing child on the reservation. JA187.

Likewise, although Petitioners assert that South Dakota builds roads (Pet. 33), it omits that its roads are funded by fuel taxes, not use taxes. S.D. Const. art. XI, § 8. The State collects fuel tax for *all* fuel purchased statewide, including fuel purchased by the Tribe and fuel purchased on-reservation, via its tax on fuel wholesalers. S.D. Code § 10-47B-5. Moreover, the Tribe has paid millions to fund construction and maintenance of both on-reservation and off-reservation roads, used by both members and non-members, without receiving *one penny* in fuel taxes. JA674, 676.

Any other services the State provides are *de*

minimis. For instance, Petitioners refer to the fact that a single one of the Casino's hundreds of employees used the State's job training program, one time. Pet. 33. This employee received $75.00 from the State, which he would have received wherever he worked. JA639.

When the State *does* provide services to the Casino, it recovers the cost of those services from the Tribe via the process specifically prescribed by IGRA, or by direct payment from the Tribe for the service. JA617-18, 620, 644-48. IGRA directs states and tribes to negotiate compacts that include "provisions relating to … the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). Thus, the Compact provides that when the South Dakota Commission on Gaming inspects gaming devices at the Casino, it is reimbursed by the Tribe. JA87-88. When the State imposes a use tax at the Casino, it is not seeking to recover its costs caused by the Casino; instead, it is attempting to fill the State's general treasury. *Bracker* holds, and all circuits agree, that the State's "generalized interest in raising revenue" does not justify its tax. 448 U.S. at 150.

II. THE COURT SHOULD NOT OVERRULE *BRACKER* AND ITS PROGENY.

The decision below faithfully applies existing Supreme Court precedent. The Court should decline Petitioners' invitation to overrule that precedent.

A. The Eighth Circuit Correctly Applied Existing Precedent.

The Eighth Circuit's decision correctly applies *Bracker* and *Ramah*.

As the Eighth Circuit rightly held, there are powerful federal and tribal interests in preempting the State's use tax. IGRA's stated purposes are "promoting tribal economic development, self-sufficiency, and strong tribal governments … ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation [and] protect[ing] such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702. In view of those purposes, even the State does not suggest it may tax gaming itself. But gaming revenues and the Casino Amenities are inextricably intertwined. As the District Court explained, the Casino Amenities could not exist without the Casino: "but for the existence of the Casino," the Casino Amenities "would not exist in the sleepy but pleasant little town of Flandreau, population 2,332." Pet. App. 54. And the Casino could not be economically successful without the Casino Amenities: for instance, "[w]ithout a hotel or RV park, the Casino simply could not operate in order to further the self-sufficiency of the Tribe." *Id.* Taxing the Casino Amenities hinders federal and tribal interests just as much as taxing gaming itself.

Moreover, as noted above, the effect of the State's use tax would be to subject Casino patrons to the highest tax rate in the country. *Supra*, at 19-20. That would conflict with IGRA's core goal of ensuring a level playing field between tribal and non-tribal casinos. The Tribe could avoid that outcome by repealing its tribal tax, but

that would be grossly unfair to the Tribe, which is paying for all of the government services at the Casino. *Supra*, at 20-22. The State should not be able to siphon tax dollars that rightly belong to the Tribe based solely on a generalized interest in raising revenue.

Petitioners' primary argument is that because the federal government does not directly regulate the Casino Amenities under IGRA, the State should be able to tax the Casino Amenities. The Tribe disagrees with the premise that the federal government does not regulate the Casino Amenities. IGRA comprehensively regulates tribal casino facilities by assigning tribes the responsibility to regulate the operation of casino gaming with federal oversight, 25 U.S.C. § 2710(d)(1), including the casino facilities and operations, both of which include the Casino Amenities. *See, e.g.*, 25 U.S.C. § 2710(b)(1); 25 C.F.R. § 559.4 (requiring tribally-issued facility license and certification to federal official); 25 U.S.C. § 2710(b)(2)(B) & (b)(3) (limiting tribes' use of gaming revenues); JA529-36. IGRA authorizes states, through tribal-state compacts, to obtain jurisdiction to regulate gaming-related matters and to negotiate payment for regulatory costs in the compacting process. 25 U.S.C. § 2710(d)(3)(C); *see infra*, at 34.

But even if Petitioners' premise is correct, this Court rejected that exact argument in both *Bracker* and *Ramah*. In *Ramah*, the Court held that a construction tax was preempted not because the construction was federally regulated, but because it "necessarily impedes the clearly expressed federal interest in promoting the quality and quantity of educational opportunities for Indians by depleting the funds available for the

construction of Indian schools." 458 U.S. at 842 (quotation marks omitted). Likewise, in *Bracker*, the Court "struck down Arizona's use fuel tax and motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways," but to "guarantee[] Indians that they will receive the benefit of whatever profit the forest is capable of yielding." *Id.* at 841 n.5 (explaining *Bracker*'s holding; quotation marks and alterations omitted).

Petitioners do not attempt to reconcile their position with the majority opinions in *Bracker* and *Ramah*. Instead, they repeatedly contend that the Eighth Circuit's decision would be wrong under the view expressed by Justice Rehnquist's *Ramah* dissent. Pet. 5, 6, 7, 9, 14, 15, 20, 21, 23, 24, 25, 32. The majority opinion in *Ramah*, however, disagreed with Justice Rehnquist's view, 458 U.S. at 841 n.5, and is binding precedent.

B. *Bracker* is correct.

The Court should not overrule *Bracker* because it is correctly decided.

Although Petitioners say they want to "reboot" *Bracker*, it is not clear what Petitioners' proposed alternative is. *See infra* at 33-37 (explaining why this is a vehicle problem). The Tribe's best guess is that Petitioners wish to abolish the *Bracker* doctrine altogether and replace it with a new rule that affords *no* weight to tribal interests, even for on-reservation transactions between a nonmember and the tribe, so long as the legal incidence of the tax formally rests on a non-member.

Under current law, this Court sharply distinguishes

between taxation of on- and off-reservation activity. When the State taxes on-reservation activity, the Court applies *Bracker*'s interest-balancing test; when the State taxes off-reservation activity, it has virtual *carte blanche* taxation authority unless federal law provides to the contrary. As *Wagnon* explains, "the doctrine of tribal sovereignty," which "historically gave state law no role to play within a tribe's territorial boundaries," "requires us to reverse the general rule that exemptions from tax laws should be clearly expressed." 546 U.S. at 112 (internal quotation marks and alterations omitted). "[T]he particularized inquiry we set forth in *Bracker* relied specifically on that backdrop." *Id.*

Petitioners would apparently replace *Bracker* with a new rule that would give on-reservation tribal sovereignty interests *no* weight as long as the tax was formally levied on a non-Indian. Petitioners' position is that a state tax is not preempted—even as applied to non-Indians' on-reservation purchases from the Tribe—unless it is applied to activity that is *itself* exclusively and pervasively regulated by the federal government. *E.g.*, Pet. 26-27. But the Court does not need *Bracker* for that. Even outside the context of federal Indian law, state law is preempted when federal law supplies a "framework of regulation so pervasive that Congress left no room for the States to supplement it, or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (ellipses and internal quotation marks omitted). Thus, Petitioners' position appears to be that principles of Indian sovereignty, even on Indian

reservations, carry *zero* weight; either a state tax is preempted under ordinary principles of federal preemption, or it is not preempted.

This position would be a remarkable break from almost two centuries of federal Indian law. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), Chief Justice Marshall famously opined that "the laws of [a State] can have no force" within reservation boundaries. "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219 (1959). In *Bracker*, the Court reaffirmed the principle that "the Indian tribes retain attributes of sovereignty over both their members and their territory." 448 U.S. at 142 (internal quotation marks omitted). In view of that tribal sovereignty interest, the Court characterized the "reservation boundary" as "an important factor to weigh in determining whether state authority has exceeded the permissible limits." *Id.* at 151. Illustrating the longstanding nature of this principle, the Court's tripartite balancing test drew on case law dating back to the nineteenth century. *See id.* at 142, 145.

Petitioners would throw that history away. According to Petitioners, there can be no preemption without a predicate showing of "federal regulatory oversight." Pet. 26-27. Thus, according to Petitioners, as long as the federal government does not directly regulate the Casino Amenities, the State should have free rein to tax. In Petitioners' view, it is irrelevant that the Tribe operates the Casino Amenities, on the Tribe's

own reservation, at the Tribe's Casino, for purposes of funding its tribal government services. And it is irrelevant that the Tribe operates and pays for all relevant local government functions, including a tribal police force and judicial system. Petitioners ask this Court to hold that they may nonetheless tax and exploit the Tribe's operations on the Tribe's sovereign territory. That holding would conflict with principles of tribal sovereignty dating to the dawn of the Republic.

Petitioners' position would also have grave practical consequences. The irony of Petitioners' position is that the *exercise* of on-reservation sovereignty would actually *expose* tribes to state taxes. According to Petitioners, if the federal government micromanaged the Casino Amenities—dictating what should be sold, at what price, with what taxes—then the State could not levy taxes. But precisely *because* the Tribe regulates the Casino, including the Casino Amenities, Petitioners claim that the Tribe's Casino is subject to state taxation.

That proposed rule neither respects nor promotes tribal sovereignty. To the contrary, it gives tribes the perverse incentive to cede control of on-reservation operations to the federal government. By exercising control over their own affairs on their own reservations, tribes would be exposed to state use taxes that rob them of the fruits of their efforts.

That would be an especially perverse outcome in the context of IGRA, which was intended to promote tribal sovereignty. IGRA recognized that a "tribe's governmental interests include raising revenues to provide governmental services," and "realizing the objectives of economic self-sufficiency and Indian self-

determination." S. Rep. No. 100-446, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. Here, the Casino Amenities—which both generate tribal tax revenue, and encourage patrons to stay and play at the Casino—allow the Tribe to achieve those purposes. Yet Petitioners would allow the State to tax the Casino Amenities precisely *because* the Tribe is fulfilling IGRA's objectives of ensuring Indian self-determination. The Court should reject this harmful rule.

C. *Bracker* should not be overruled.

Even if the Court disagrees with *Bracker*, it should not be overruled. Principles of *stare decisis* require adhering to existing law. Those principles are at their zenith in the context of IGRA, where Congress operated under the presumption that courts would adhere to existing law, including *Bracker*.

"*Stare decisis* … is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (internal quotation marks omitted). "For that reason, this Court has always held that any departure from the doctrine demands special justification." *Id.* (internal quotation marks omitted); *accord Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

In *Bay Mills*, this Court declined to overrule *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which recognized the doctrine of

tribal sovereign immunity. The *Bay Mills* Court held that *stare decisis* principles applied with special force for four reasons. All four are equally applicable here.

First, "*Kiowa* itself was no one-off," but instead "reaffirmed a long line of precedents." *Bay Mills*, 572 U.S. at 798. Here, too, *Bracker*'s balancing test drew on authorities dating back to the late nineteenth century. *See Bracker*, 448 U.S. at 145.

Second, the Court "relied on *Kiowa* subsequently." *Bay Mills*, 572 U.S. at 798. Here, too, the Court has relied on *Bracker* subsequently; indeed, Petitioners make clear they want to overrule not only *Bracker* but *Ramah*, which relied on *Bracker*'s framework. *See also Wagnon*, 546 U.S. at 110-11 (collecting cases applying *Bracker*'s framework).

Third, "tribes … have for many years relied on *Kiowa*." *Bay Mills*, 572 U.S. at 798. Tribes have also relied on *Bracker*. They have set up businesses and enacted tribal taxes, under the assumption that *Bracker* governed. Further, tribes have exercised self-determination and control of on-reservation operations—rather than allowing the federal government to operate them—under the assumption that this would not expose them to state taxation, as Petitioners now advocate.

Fourth, "Congress exercises primary authority in this area and remains free to alter what we have done." *Bay Mills*, 572 U.S. at 799 (internal quotation marks omitted). That is equally true here. Congress is free to amend IGRA to achieve the result Petitioners now advocate.

Overruling *Bracker* would be particularly incongruous because Congress assumed *Bracker* would remain in force when it enacted IGRA. IGRA states that it shall not be "interpreted as conferring upon a State … authority to impose any tax … upon any … person or entity authorized by an Indian tribe to engage in a class III [gaming] activity." 25 U.S.C. § 2710(d)(4). In the proceedings below, Petitioners advocated, and the Eighth Circuit adopted, an interpretation of this provision under which it does not *preempt* any tax; it merely does not *authorize* any tax. Pet. App. 10 ("[S]ubsection (d)(4) is a lack of authorization, not a prohibition."). In other words, IGRA, by its terms, leaves existing taxing jurisdiction in place.

Adopting Petitioners' proposed rule would pull the rug out from under Congress in three respects. First, Petitioners argue that if IGRA does not expressly preempt a particular tax, that should "all but defeat[] *Bracker*" preemption. Pet. App. 26. According to Petitioners, if IGRA *does not* expressly preempt a tax, the Court should draw a negative inference that the tax is *not* preempted. That proposed rule directly conflicts with IGRA's command that it should *not* be construed to authorize a new tax.

Second, at the time of IGRA's enactment in 1988, *Bracker* and *Ramah* had recently been decided. Those were the very decisions that Congress elected to leave intact. It would subvert Congress's intent to hold that Justice Rehnquist's *Ramah* dissent is now the law of the land.

Third, IGRA must be viewed against the backdrop of *California v. Cabazon Band of Mission Indians*, 480

U.S. 202 (1987). In *Cabazon*, this Court held that the states "lack[] any regulatory authority over gaming in Indian lands." *Bay Mills*, 572 U.S. at 794 (describing *Cabazon*'s holding). The Court applied *Bracker*'s framework in reaching that conclusion. *Cabazon*, 480 U.S. at 216 n.18, 216-17. Significantly, the Court emphasized that the tribes were providing not only gaming, but also ancillary services that increase attendance at the games: "The[] tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who … spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities … in order to increase attendance at the games." 480 U.S. at 219. Thus, *Cabazon* itself understood Indian gaming—over which states lacked regulatory authority—to encompass not only the gaming itself, but also the amenities within the tribal casinos.

In IGRA, Congress addressed the "vacuum of state authority" not by conferring unilateral regulatory authority to states, but by enacting a "carefully crafted compact-based solution." *Bay Mills*, 572 U.S. at 795 n.6 (internal quotation marks omitted). In other words, IGRA *assumes the existence* of *Cabazon*'s legal framework, under which states lack regulatory authority over Indian gaming and associated amenities. It would be a serious bait and switch for the Court to overrule *Bracker*, *Ramah*, and *Cabazon* and hold that states *do* have such authority.

III. THIS CASE WOULD BE A POOR VEHICLE TO RECONSIDER *BRACKER*.

Even if the Court were inclined to reconsider *Bracker*, this case would be an inappropriate vehicle for several reasons.

A. Petitioners do not identify their alternative to *Bracker*.

Petitioners urge this Court to "reboot *Bracker* to more consistently and predictably address tax questions." Pet. 37. But replace *Bracker* with what? Petitioners never specify their proposed alternative.

Portions of the petition imply that Petitioners seek to replace *Bracker* altogether with standard principles of federal preemption. That would be a remarkable break from principles of federal Indian law dating back to the Marshall Court. *Supra*, at 27-28. It would also undermine IGRA, which intended to "preserve the principles [that] have guided the evolution of Federal-Indian law for over 150 years." S. Rep. No. 100–446, at 5, *as reprinted in* 1988 U.S.C.C.A.N. at 3075.

Perhaps Petitioners will say in their reply brief that they have some different alternative to *Bracker*; one that does take into account tribal interests on the reservation, but to a lesser extent than under current law. Indeed, Petitioners hint at such a position when they propose that courts inquire into whether a tax is "oppressively or disproportionately large in relation to gaming revenues realized by a tribe." Pet. 31.

If Petitioners do take this position, then the fundamental basis of their petition would be

undermined. Petitioners' Question Presented states that the Court should adopt a new test that is more "consistent and predictable." Pet. i. But ratcheting up the weight given to state interests to an unspecified extent is no more "consistent and predictable" than the status quo. Phrases like "disproportionately large in relation to gaming revenues," (Pet. 31), still require courts to determine what "proportion" of gaming revenues a state should fairly claim—a test that still requires balancing of state and tribal interests.

Indeed, there will be *less* consistency and predictability under such a test. Courts have been applying *Bracker* for four decades. A large body of law applying *Bracker* now exists that permits predictable outcomes. Indeed, the Court has not resolved any circuit splits on the proper interpretation of *Bracker* in decades. Petitioners would replace that stable body of law with some new, untested framework.

Nor does IGRA provides any guidance in determining that fair "proportion." To the contrary, IGRA contemplates that tribes will compensate states, via tribal-state compacts, "in such amounts as are necessary to defray the costs of regulating such activity"—25 U.S.C. § 2710(d)(3)(C)(iii)—and not a dollar more. That is precisely the arrangement the State eschews.

At a minimum, before the Court grants certiorari, it should know what it is getting into. In the absence of a coherent statement of Petitioners' proposed alternative to *Bracker*, this Court's review is unwarranted.

B. The Court could not reach the Question Presented unless it overturned the Eighth Circuit's factual conclusion on the tax's effect.

The core premise of the petition is that Indian gaming "entail[s] 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." Pet. 6. This premise is reflected in the Question Presented, which asks the Court to overrule *Bracker* in view of "the fiscal demands the industry now places on state budgets." Pet. i.

Thus, Petitioners seek a rule that would allow states to tax on-reservation gaming operations *when they impose demands on state budgets*. The factual premise of that position is that the State's tax does, in fact, offset the cost imposed on the State by the Tribe's operations.

As explained above, however, the Eighth Circuit rejected that factual premise, finding that the State sought to assess taxes unconnected to any governmental function it performs for the Tribe. Pet. App. 16; *see supra* at 8. The Court could not even reach the question presented unless it overturned that factual conclusion. But as already explained, the Eighth Circuit's conclusion on that factbound question is correct—and in any event, does not warrant review.

C. The Court could not reach the Question Presented unless it resolved whether the Casino Amenities could be addressed in the Compact.

Finally, Petitioners' core theory is that IGRA preempts state taxes only as to activities which are properly the subject of tribal-state compacts. Because, Petitioners claim, states and tribes cannot negotiate compact provisions related to the Casino Amenities, the state can impose use taxes. Pet. 12-13, 18-19, 26.

But the Tribe's position is that IGRA *does* authorize states and tribes to negotiate compact provisions related to the Casino Amenities. The Court could not even reach Petitioners' theory unless it rejected all of the Tribe's statutory arguments.

If, as Petitioners claim, the Casino and Casino Amenities impose costs on the States, IGRA authorizes the State to negotiate compact provisions to recover those costs. *See* 25 U.S.C. § 2710(d)(3)(C)(iii) (compacts may include "provisions relating to … the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity"); *see also* § 2710(d)(3)(C)(i)-(ii) (compacts may allocate regulatory authority between tribe and state). To reach the question presented, the Court would have to *accept* Petitioners' (incorrect) contention that the Casino imposes burdens on the State's budget, while *also* holding that those burdens could not be addressed in the compact.

IGRA also provides that compacts may address "any other subjects that are directly related to the operation

of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The Eighth Circuit concluded that the Casino Amenities are not "directly related to the operation of gaming activities," Pet. App. 11, but the Tribe disagrees with that conclusion and would press its contrary argument in this Court. The Casino Amenities are in the Casino facility, and some (such as food and beverages) are sold on the gaming floor. The Tribe offers them below cost to encourage people to come to the Casino, stay longer, and game at higher levels. *See supra*, at 19. Thus, the Casino Amenities are an integral part of the Casino facility and casino gaming. That demonstrates that the Casino Amenities are "directly related" to gaming.

Petitioners rely on law review articles and a statement from a Department of the Interior official for the proposition that Casino Amenities are not "directly related" to gaming. *E.g.*, Pet. 12, 13. But those sources did not consider the *Bracker* question here, and more importantly, that position has not been adopted by any court.

Thus, Petitioners err in arguing that IGRA does not directly relate to the activities at issue here. At a minimum, the existence of this antecedent legal question is a further factor counseling against review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SETH PEARMAN
ATTORNEY GENERAL,
FLANDREAU
SANTEE SIOUX TRIBE
603 West Broad Avenue
Flandreau, SD 57028

REBECCA KIDDER
FREDERICKS PEEBLES &
PATTERSON LLP
1830 W. Fulton St., Ste 102
Rapid City, SD 57702

SHANNON R. FALON
JOHNSON JANKLOW
ABDALLAH REITER LLP
101 S. Main Ave., Suite 100
Sioux Falls, SD 57104

ADAM G. UNIKOWSKY
Counsel of Record
ALLISON M. TJEMSLAND*
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

TIM HENNESSY
JOHN NYHAN
FREDERICKS PEEBLES &
PATTERSON LLP
2020 L Street, Suite 250
Sacramento, CA 95811

** Not admitted in D.C.; supervised by principals of the Firm.*