No. 19-1056

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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ARGUMENT

This petition requests a writ of *certiorari* to permit this Court to flesh out its *Bracker* test to more consistently and predictably address tax questions attending the multi-billion-dollar Indian gaming industry. Petitioner replies to respondent's brief in opposition as follows.

A. Petitioner Does Not Seek To "Overrule" *Bracker*

Respondent's brief in opposition erroneously argues that petitioner is asking this court to "overrule *Bracker*" and replace it with an "unspecified test." BRIEF IN OPPOSITION at 8, 22. This is a straw argument designed to paint the petition and the relief it seeks as extremist. Contrary to respondent's characterizations of the petitioner's arguments:

- Petitioner does not "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." BRIEF IN OPPOSITION at 2-3 (emphasis in original).
- Petitioner does not seek to "abolish the *Bracker* doctrine and replace it with a new rule that affords *no* weight to tribal interests."

- Petitioner does not seek to "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." BRIEF IN OPPOSITION at 25, 26 (emphasis in original).

As is evident from the petition, petitioner simply asks this Court to flesh out the *Bracker* test. Specifically, petitioner asks the court to more clearly identify what considerations are *relevant* to *Bracker* and to shed light on the preemptive force these considerations have, such as: the necessity of a nexus between a tax and a federally-regulated activity and the extent of the nexus required to trigger preemption, the preemptive force of broad congressional statements of purpose, the preemptive force of indirect economic impacts, the weight afforded to a state's interest in taxation, the preemptive force of a tax whose legal incidence does not fall on the tribe, and whether off-reservation state services that facilitate on-reservation activity can give rise to taxation.

Respondent's brief in opposition conspicuously fails to identify a case which articulates a consistent set of elements or factors considered when applying the *Bracker* test. No consistent test exists because no court has ever distilled *Bracker* into a coherent, authoritative test. Though intended to be "fact specific" and "particularized" while also being "flexible," this Court's precedent has never fully delineated what specific facts or considerations should receive this particularized attention or the weight these facts and

considerations are due. *Bracker's* contours, to the extent it has any, are not found in any one opinion from this Court. Consequently, *Bracker* has evolved in a piecemeal and not entirely consistent fashion.

For example, *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), placed a premium on indirect economic impacts, while *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), backed off somewhat from *Ramah*. These disparate opinions have allowed lower courts to pick and choose between *Ramah* and *Cotton* without a manageable standard for determining when one should control over the other. Likewise, in both *Ramah* and *Cotton*, the legal incidence of the tax fell on off-reservation, nontribal contractors performing on-reservation work. But in *Ramah* the court found that services the state provided to facilitate the contractor's business, which contributed to the overall viability of the business and allowed him to bid for on-reservation work, were not relevant to the preemption analysis; *Cotton* effectively found the opposite. Compare *Ramah*, 458 U.S. at 844 with *Cotton*, 490 U.S. at 185. While distinctions in the degree of federal regulation partly account for the disparate outcomes of *Ramah* and *Cotton*, the *Flandreau Tribe* court opinion shows that what constitutes "exclusive" or "pervasive" federal regulation under *Bracker* has never been sufficiently delineated into a manageable standard so as to prevent random outcomes.

B. The Hyperbole Of Respondent's Brief In Opposition Demonstrates The Need For More Defined *Bracker* Standards

Bracker's vague contours permit decision making based on sweeping, conclusory arguments of the type employed in respondent's brief in opposition. For example:

- Respondent's broad assertion that "the Tribe pays the State's costs for regulating gaming" suggests the tribe pays the state for costs associated with amenities. BRIEF IN OPPOSITION at 5. It does not. The amenities are currently tax and fee free. *Bracker* does not sufficiently differentiate between gaming revenue and amenities revenues or delineate standards for adjudicating when amenities are "related" to gaming.

- Respondent states generally that "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." BRIEF IN OPPOSITION at 5, 10. While the tribe's 6% sales tax may account for 90% of its *sales* tax revenues, respondent fails to identify what percentage of total tribal governmental funding is derived from sales taxes as compared to *gaming* revenues. Certainly, if sales taxes were more than a nominal percentage of the tribe's total budget respondent would have reported it. *Bracker* does not sufficiently delineate the types or magnitude of economic impacts that will trigger preemption.

- Though repeatedly claiming that the effect of the state's amenities tax "would be to reduce the demand for the Casino's commercial activities," respondent cites virtually no data that it would suffer any significant reduction in demand or that, if it did, any such reduction in demand would be sufficiently significant to warrant preemption. BRIEF IN OPPOSITION at 11. *Bracker* does not delineate what type or quantum of economic data is determinative of preemption.

- Respondent's broad assertion that "any services the State does provide are fully compensated by the Tribe" is incorrect, as is the assertion that "[w]hen the state *does* provide services to the Casino, it recovers the cost of those services from the tribe." BRIEF IN OPPOSITION at 17, 22 (emphasis in original). The tribe reimburses the state only for its gaming regulatory services, not for the costs of services the state provides that facilitate the operations of casino amenities. *Bracker* does not sufficiently delineate which state services may be considered in the preemption analysis.

- Respondent greatly exaggerates in asserting that the state's 4.5% tax on non-member amenities use would "rob" the tribe "of the fruits of their efforts" and prevent them from "realizing the objectives of economic self-sufficiency and Indian self-determination." BRIEF IN OPPOSITION at 28. Neither the *Flandreau Tribe* court nor the tribe itself have

supplied data demonstrating that the state's tax would have such extreme and injurious impacts. *Bracker* has not delineated standards for adjudicating when tribal sovereignty has been impermissibly infringed.

- Contrary to respondent's assertion, and as found by the *Flandreau Tribe* court itself, IGRA does not "comprehensively regulate tribal casino facilities," "including casino facilities and operations," it only regulates the integrity of tribal gaming. BRIEF IN OPPOSITION at 24. *Bracker* allows broad congressional statements of purpose to mask the absence of any actual adverse effect on areas subject to federal regulation or tribal control.

The actual question presented here is whether the limited analyses of the *Flandreau Tribe* and *Video Gaming* decisions reflect the proper contours of the *Bracker* test, or whether *Bracker* preemption requires the deeper analysis and more substantive levels of proof found in *Mashantucket Pequot Tribe v. Ledyard*, 722 F.3d 457 (2d Cir. 2013), and other cases.

C. There Is A Stark Contrast Between *Flandreau Tribe* and *Mashantucket* (And Other Cases)

Respondent argues that there is no conflict between *Flandreau Tribe* and *Mashantucket*. In truth, the contrast is stark. The *Flandreau Tribe* court's analysis rested one-dimensionally on an assumed

reduction in gaming revenue that would result from the state's amenities tax. The *Flandreau Tribe* court's conclusory finding of injury to tribal economic development, self-sufficiency and autonomous government was based simply on this hypothetical reduction in gaming revenue, without any showing of how the tax stripped the tribe of sovereignty or the economic benefits of gaming.

In contrast, *Mashantucket* conducted a thorough weighing of federal state and tribal interests. It performed a substantive analysis of whether the tax actually infringed on any area of federal regulation, whether the tax frustrated IGRA's purposes or federal interests in preserving tribal sovereignty, the direct and indirect effects of the tax, the tribal interests at stake, the services the state provides on- and off-reservation, *etc. Mashantucket*, 722 F.3d at 471-477. In terms of the level of analysis applied in the two cases, the conflict between *Flandreau Tribe* and *Mashantucket* is clear. The problem is that *Bracker* is so devoid of form that it permits the wide disparity in the levels of analysis that exists between the *Flandreau Tribe* and *Mashantucket* decisions.

D. Preemption Is Not Warranted Simply Because Taxation Would "Reduce" Revenues

Respondent repeatedly argues that preemption is warranted under *Bracker* simply because the amenities tax could "reduce gaming revenue." BRIEF IN OPPOSITION at 19. The fact that this argument

persists and was the controlling consideration of the *Flandreau Tribe* court's analysis reveals how *Bracker*, as it stands, is simply too ill-defined to serve as a predictable and consistent rule of law. The current state of *Bracker* jurisprudence allows courts to pick and choose between *Ramah* and *Cotton* according to no set of controlling principles.

E. State Amenities Tax Is Not "Grossly Unfair"

Respondent asserts that it is "grossly unfair" to put the tribe in a position to either charge a 10.5% tax on amenities (6% tribal tax + 4.5% state tax) or reduce its own sales tax. BRIEF IN OPPOSITION at 20, 24. According to respondent, a 10.5% tax "would put the Casino at a severe competitive disadvantage relative to neighboring casinos." BRIEF IN OPPOSITION at 20. Again, respondent provides no quantification or data supporting these assertions. Respondent cites only a generic industry study claiming that "a 10% increase in the price of food would reduce consumption of entertainment (such as gaming) by 7.2%." BRIEF IN OPPOSITION at 19.

Assuming this is true, respondent has not shown that a simple 7.2% decrease in the demand for gaming would warrant preemption. Preemption should be warranted only when a tax would prevent a tribe from being the primary beneficiary of the regulated activity or exercising its sovereign powers. According to respondent's own worst-case-scenario, the tax would merely reduce the tribe's benefit from 100% of current

net gaming revenues to 92.8% of current gaming revenues, which still leaves the tribe in the position of being the primary beneficiary of gaming revenues. Apart from an assumed diminution in gaming revenues, the tribe has not identified how the state's tax would impermissibly infringe on its sovereign powers or interfere in the conduct of its own affairs. There is no substance to the tribe's claim of gross unfairness without any quantification of what the fiscal impact actually would be.

The tribe in *Cotton*, made a similar argument which this court rejected. In *Cotton*, the combined effect of the state's 8% and the tribe's 6% severance taxes put the tribe at a competitive disadvantage relative to the flat 8% charged on off-reservation wells. *Cotton*, 490 U.S. at 168-169. Noting that preemption was not warranted simply because a tax impaired a tribe's ability to realize "the maximum profit available," *Cotton* ruled that the competitive disadvantage of co-taxation of the wells by the state and tribe alone would not effect preemption when there was "no evidence in the record that the tax has had an adverse effect on the Tribe's ability to attract oil and gas lessees." *Cotton*, 490 U.S. at 191. Likewise, the respondent, like the *Flandreau Tribe* court, has failed to demonstrate that co-taxation of casino amenities by the state and tribe would significantly, adversely affect the tribe's ability to attract patrons to its casino.

F. The Casino Has Rigged Its Business Model To Shelter Non-Member Amenities Use From Taxation

Respondent distinguishes *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008), from this case by arguing that there is no evidence of "tribal manipulation of tax policy" here. BRIEF IN OPPOSITION at 15. But, as respondent admits, the tribe deflates the cost of amenities – sells them "at a loss" – in order to "encourage gaming activity." BRIEF IN OPPOSITION at 19. This is just an artful form of tax evasion; the tribe forgoes revenue in an area subject to state taxation (non-member amenities usage) in order to maximize revenue in an area not subject to state taxation (gaming). Then the tribe uses this tax dodge as justification for preemption. In other words, the tribe's unilaterally-adopted business model is "rigged" first to evade taxes on amenities by shifting revenue from taxable to non-taxable areas of its income stream, and then to use these artificial "losses" to "trigger a tax exemption." As in *Yee*, the tribe has "alter[ed] the economic reality" of non-member amenities revenues in order "to reap a [gaming revenue] windfall at the public's expense." *Yee*, 528 F.3d at 1190.

G. The State Has An Interest In Receiving Compensation For Off-Reservation Services That Contribute To The Success Of Casino Amenities

Respondent argues, without citation to the record, that the "record in this case establishes that the Tribe's

casino does not impose fiscal demands on State government." BRIEF IN OPPOSITION at 3. Judge Colloton pointed to a "range of services" the state provides that facilitate the economic activities of the casino's amenities. *Flandreau Tribe*, Petitioner's Appendix at 24 (Colloton, J. Dissenting). Respondent then argues preemption because it pays for all on-reservation costs associated with servicing its amenities.

Apart from the fact that this is obviously not true, the argument itself shows how *Bracker's* vague contours allow the tribe and *Flandreau Tribe* court to ignore the off-reservation demands the casino's amenities place on the state budget. Case in point, law enforcement. The tribe certainly pays for the tribal police who enforce the laws *on* the reservation, but it is the state who must police the roads leading out of the reservation for DUI drivers who got drunk on the casino's tax-free liquor. While the tribe may pay for roads *on* the reservation (and may even have paid to construct one road to the reservation to bring patrons to its casino), it is the state who builds and maintains the system of roads leading to the reservation. The fact that fuel taxes generally pay for road construction and maintenance should not mean that the state is not entitled to some offsetting use taxes to cover the costs of these roads.

The *Flandreau Tribe* court's decision to afford the state's off-reservation services due weight places it in direct conflict with the Ninth Circuit's decisions in *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1199, 1200 (10th Cir. 2011), and *Crow Tribe of Indians v.*

State of Montana, 650 F.2d 1104, 1116 (9th Cir. 1981), which both took the state's "supporting regulatory role" and off-reservation infrastructure services into account.

Casino hotels, bars, RV parks, convenience stores, *etc.* do not operate in a snow globe, independent of any state regulatory or infrastructure support. These amenities depend on "solvent state and local governments," "sound local banking institutions," a regulated insurance industry to protect amenity businesses from liability and make patrons feel safe on the premises, drinking water, regulated cooking facilities, a regulated liquor industry to supply spirits, a well-regulated communications infrastructure by which to conduct business, and so on. *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2096 (2018). Casino patrons and the casino alike benefit from the regulatory and infrastructure services the state provides that create a market for the amenities and facilitate commercial transactions with them. *Wayfair*, 138 S.Ct. at 2096. However, *Bracker* does not require consideration of off-reservation services, nor does it hint at the weight such services should be given in the preemption analysis.

H. The Issue Here Is More Fundamental Than An "Incorrect Interpretation" Of Law Or Erroneous Determination Of A "Fact-Bound" Question By The Lower Court

According to respondent, there is no conflict because the Second, Eighth, Ninth and Tenth Circuits,

and Oklahoma and Wisconsin high courts, allegedly all "apply the same test." However, as detailed in petitioner's brief, the tests applied in these courts, while nominally referred to as the *Bracker* test, vary considerably in terms of the factors considered and the weight they are given.

Thus, the problem here is not the *Flandreau Tribe* court's interpretation or misinterpretation of *Bracker*, or its underlying factual determinations, but the fundamental lack of structure to the *Bracker* test that allowed the decision below to rest on essentially one consideration – an assumed reduction in gaming revenues indirectly caused by the state's amenities tax. Also, contrary to respondent's assertions, relief here very obviously does not depend on or require this Court to "overrule" the *Flandreau Tribe* court's factual determinations. This case can be remanded to the court below with instructions to reconsider its opinion in light of the clarifications of the *Bracker* test that this petition requests.

I. This Case Provides An Appropriate Vehicle To Refine *Bracker*

This case is an appropriate vehicle to revisit and refine *Bracker* because the *Flandreau Tribe* court's decision neatly frames up so many of the deficiencies in the *Bracker* test for this Court to address, namely:

- The decision's finding of *Bracker* preemption despite its contradictory determination that

the subject amenities "obviously" are not related to gaming.

- The decision's premise that preemption can result from even the slightest infringement on a broad congressional purpose, federally-regulated activity or tribal sovereignty.
- The decision's premise that preemption can result from oblique, tangential or nominal economic burdens.
- The decision's disregard for the absence of quantified proof of economic burden.
- The decision's parsimonious regard for state services that contribute as much to the success of casino amenities as the amenities contribute to casino gaming.

The stark conflict between the *Bracker* analyses performed in *Flandreau Tribe* and *Video Gaming* and *Mashantucket, Yee, Ute Mountain* and *Anderson* make this case an appropriate vehicle to delineate *Bracker's* contours into a more equitable, consistent and predictable legal test.

CONCLUSION

A petition for a writ of *certiorari* should be granted.

Dated this 1st day of May 2020.

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