No. _____

In The
Supreme Court of the United States

ROGERS COUNTY BOARD OF TAX ROLL CORRECTIONS, a political subdivision; CATHY PINKERTON BAKER, Rogers County Treasurer, in her official capacity; and SCOTT MARSH, Rogers County Assessor, in his official capacity,

Petitioners,

v.

VIDEO GAMING TECHNOLOGIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a generally applicable state *ad valorem* tax, as assessed against personal property owned by a non-Indian, out-of-state corporate entity and leased to a tribe for use in its casino operations, is preempted by the Indian Gaming Regulatory Act and the Court's "particularized inquiry" balancing test, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the tax does not infringe on any federal regulatory purpose contained in the IGRA, the tax does not interfere with any tribal sovereignty interests, and the tax supports relevant and important government interests, such as law enforcement, schools and health services.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. Rule. 29.6 does not apply to these Petitioners.

STATEMENT OF RELATED PROCEEDINGS

Video Gaming Technologies, Inc. v. Rogers County Board of Tax Roll Corrections, a political subdivision; Cathy Pinkerton Baker, Rogers County Treasurer (official capacity); and Scott Marsh, Rogers County Assessor (official capacity), Case No. CJ-2014-155, District Court of Rogers County, State of Oklahoma. Judgment entered in on September 27, 2018.

Video Gaming Technologies, Inc. v. Rogers County Board of Tax Roll Corrections, a political subdivision; Cathy Pinkerton Baker, Rogers County Treasurer (official capacity); and Scott Marsh, Rogers County Assessor (official capacity), Case No. SD-117,491, Supreme Court of the State of Oklahoma. Judgment entered on December 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rogers County Board of Tax Roll Corrections, a political subdivision; Cathy Pinkerton Baker, Rogers County Treasurer (official capacity); and Scott Marsh, Rogers County Assessor (official capacity) petition this Court for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The order of the District Court of Rogers County, State of Oklahoma, granting Petitioners' Motion for Summary Judgment and denying Respondent's Motion for Summary Judgment, Pet. App. 28, is unpublished. The opinion of the Oklahoma Supreme Court reversing the District Court's order and ordering that Respondent's Motion for Summary Judgment be granted, Pet. App. 1-27, is not yet officially reported but can be found at 2019 WL 6877909.

JURISDICTION

The opinion of the Oklahoma Supreme Court was issued on December 17, 2019. Justice Sotomayor extended the time to file this petition to May 15, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED IN CASE

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

68 Okla. Stat. §2804:

> "All property in this state, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation."

68 Okla. Stat. §2831:

> "A. All property, both real and personal, having an actual, constructive or taxable situs in this state, shall, except as hereinafter provided, be listed and assessed and taxable in the county, school districts, and municipal subdivision thereof, where actually located on the first day of January of each year. . . ."

INTRODUCTION

This case presents a good vehicle for review of an issue that has created a division in both federal and state courts: the degree to which the Indian Gaming Regulatory Act ("IGRA") preempts state law. In this case, the issue is whether the IGRA reveals a congressional intent to exempt non-Indian, out-of-state corporate suppliers of gaming equipment from generally applicable state property taxes. Oklahoma's *ad valorem* tax was sought to be imposed on Respondent Video Gaming Technologies, Inc. ("VGT, Inc."). VGT,

Inc. is a non-Indian, out-of-state corporate entity that leased its gaming equipment to non-party Cherokee National Entertainment, LLC, to be used in casino operations. The tax amount was *de minimis*. Nevertheless, the Oklahoma Supreme Court held that the "comprehensive regulations of IGRA occupy the field" with respect to *ad valorem* taxes imposed on gaming equipment used in tribal gaming and that such taxes were therefore impermissible under this Court's *Bracker* balancing test. Pet. App. 26. The *Bracker* inquiry is designed to assay the propriety of state assertions of authority over "non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144.

The decision of the Oklahoma Supreme Court is an outlier on the issue of IGRA preemption in the *Bracker* context. It is in direct conflict with a decision of the Second Circuit. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). The IRGA does not "occupy the field" with respect to *ad valorem* taxation of gaming equipment. And, to the extent the IGRA is concerned with preserving an Indian tribe's ability to conduct "gaming" activities, Oklahoma's nominal *ad valorem* tax does not interfere with the tribe's "governance of gaming." The tax is *not* imposed on gaming activities, nor is it imposed on any transaction occurring between VGT, Inc., and a tribe. Instead, the tax was imposed on VGT, Inc., as a consequence of its ownership of personal property located in Rogers County.

A federally recognized Indian tribe is not a party to this case. Rather, fundamentally, this is a case by

which a foreign corporation seeks to reduce its overall cost of doing business in Oklahoma. The issues at stake are critically important insofar as local governments in Oklahoma use *ad valorem* tax monies to fund local government operations, schools, law enforcement, health services and other government services – in the very jurisdictions where these casinos operate. The Court's decision will therefore negatively affect *ad valorem* taxation in numerous counties throughout Oklahoma, and will likely be used by other non-Indian business entities as a basis for refusing to comply with neutrally applicable state tax law.

STATEMENT OF CASE

Respondent VGT, Inc. is a corporate entity principally located in Franklin, Tennessee; it is authorized to do business in the State of Oklahoma. It is not a federally recognized Indian tribe or a member of a tribe.

VGT, Inc. owns gaming machines. It leases those gaming machines to non-party Cherokee Nation Enterprises, LLC ("CNE, LLC") for use in casinos throughout Oklahoma. CNE, LLC, is a limited liability company and wholly owned by the Cherokee Nation, a federally recognized Indian tribe located in Oklahoma. CNE, LLC, owns and operates ten gaming facilities on behalf of the Cherokee Nation.

On an unspecified date, VGT, Inc., and CNE, LLC, entered into an equipment lease agreement whereby VGT, Inc. supplied gaming equipment, software, and

related services to the Cherokee Nation. For purposes of this case, the equipment was used in the "Hard Rock Casino," located entirely in the City of Catoosa and in Rogers County (a political subdivision of the State of Oklahoma). The casino is located on tribal trust land, and the lease agreement was allegedly executed on tribal trust land.

According to VGT, Inc., the "lease agreements between VGT and the Nation are based upon a variety of competing economic factors and include consideration of several costs that are balanced to arrive at the lease terms." VGT, Inc. did not provide the district court with copies of its lease agreements. Rather, via affidavit, VGT, Inc. asserted that, if it was required to pay *ad valorem* taxes on its personal property, the taxes would "impact the consideration of the overall costs of providing the gaming machines to the Nation and the overall price at which VGT would agree to lease those same machines to the Nation." The Oklahoma Supreme Court later noted that any passed on cost "will not threaten the purpose of Nation being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37.

In that regard, the Cherokee Nation's gaming activities produce significant revenue; the Cherokee Nation allegedly has a $2.03 **billion** impact in northeast Oklahoma. In contrast, no party disputed that the *ad valorem* taxes at issue are *de minimus*. The Rogers County Assessor has annually assessed *ad valorem* tax on VGT's gaming machines beginning in 2005. VGT, Inc. paid those taxes without complaint for tax years 2005 through 2010.

In 2011, VGT, Inc. was assessed $10,087.00 as an *ad valorem* tax on its gaming machines located in Rogers County. In 2012, the amount was $8,613.00, and in 2013 the amount was $10,352.00. On December 19, 2012, VGT, Inc. filed a complaint with the Rogers County Board of Tax Roll Corrections, protesting the 2011 and 2012 taxes and arguing, for the first time, that its gaming equipment was exempt from *ad valorem* taxation due to "preemption" under the IGRA and the balancing test set forth in *Bracker, supra*. On December 30, 2013, VGT, Inc. filed the same complaint with respect to 2013 *ad valorem* taxes.

On April 4, 2014, the Rogers County Board of Tax Roll Corrections rejected VGT, Inc.'s complaints. VGT, Inc. filed an appeal of the decision to the District Court in and for Rogers County pursuant to state law.[1] 68 Okla. Stat. §2871(H). VGT, Inc. did not contest the valuation that supported the 2011-2013 tax assessments, nor was there any dispute that this type of property would normally be subject to a tax under Oklahoma law. *E.g.*, 68 Okla. Stat. §2831. The assessment was based on the value of the personal property and was assessed against VGT, Inc. as the owner of the

[1] Petitioners in the present matter are sued in their official capacities as representatives of Rogers County in the assessment and collection of county *ad valorem* taxes. *E.g.*, 68 Okla. Stat. §2871(B) (board of tax roll corrections); §§2915, 3014 (county treasurer); §3014-3017 (county assessor). Rogers County is a political subdivision of the State of Oklahoma. *See Bradon v. Holt*, 469 U.S. 464, 471 (1985) (holding official capacity suit against individual is really a suit against the entity that he or she represents).

property; the assessment was not based on how, or by whom, the property was used, nor was the assessment based on any "transaction" occurring between VGT, Inc. and CNE, LLC.

The tax revenue generated from *ad valorem* assessments funds the operations of Rogers County's government; schools located in Rogers County; law enforcement; health services; and other government services within Rogers County. The legal incidence of the *ad valorem* tax falls on VGT, Inc. While VGT, Inc. claimed, through affidavits, that the "economic burden" related the *ad valorem* tax would "ultimately fall" on the Cherokee Nation, it did not present any evidence indicating that such a tax would interfere with gaming activities. An attorney for Cherokee Nation Businesses, LLC, submitted an affidavit and indicated that the gaming equipment "supplied by VGT" was an "essential part" of gaming operations and that the lease agreement with VGT, Inc. was "negotiated and executed by the Nation on tribal trust land." However, the attorney did not indicate that the *ad valorem* tax imposed on VGT, Inc. would have any effect on gaming operations nor did the attorney establish that the *ad valorem* tax prevented the Cherokee Nation from being the "primary beneficiary of the gaming operation" as contemplated by the IGRA. *E.g.*, 25 U.S.C. §2702.

A. Oklahoma District Court

In the state district court, the parties filed cross Motions for Summary Judgment where, within the

meaning of Supreme Court Rule 1.14(g)(1), the preemption issues were directly addressed by the parties. The district court found that Petitioners' Motion for Summary Judgment should be granted and that VGT, Inc.'s Motion for Summary Judgment should be denied. Pet. App. 28-29. The district court found:

> [T]he rationale set forth by the Second Circuit Court of Appeals in the case of *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), to be persuasive. Accordingly, the Court orders that the State of Oklahoma's ad valorem tax statutes are not preempted or barred by the Indian Trader Statutes, the Indian Gaming Regulatory Act, or pursuant to the balancing test set forth by the United States Supreme Court in *White Mountain Apache Tribe v. Bracker*, found at 448 U.S. 136 (1980). Pet. App. 28.

B. Oklahoma Supreme Court

VGT, Inc. appealed the district court's decision. Pet. App. 1. The Oklahoma Supreme Court retained the appeal and addressed, within the meaning of Supreme Court Rule 1.14(g)(1), the federal preemption issues that were briefed by the parties in the district court.[2] In particular, the Oklahoma Supreme Court

[2] The Oklahoma Supreme Court is the court of last resort in Oklahoma for civil matters. In appeals involving the granting of summary judgment, an Oklahoma appellate court only reviews the briefing of the parties submitted in the district court; additional briefing is not typically allowed. *See* Okla. Sup. Ct. Rule. 1.36. Hence, the federal preemption issue, including analysis of

reversed the trial court and directed the trial court to grant VGT, Inc.'s Motion for Summary Judgment, finding that the IGRA "occupies the field" with respect to state taxation of property used in gaming operations and that the *ad valorem* tax was preempted by the IGRA and the *Bracker* balancing test. Pet. App. 26, ¶41.

The Oklahoma Supreme Court categorically rejected the reasoning in *Mashantucket*, Pet. App. 23, ¶36, finding that the IGRA expressly preempted the "field of 'governance of gaming' " and that there was no distinction, for IGRA preemption purposes, between "owning" gaming equipment and "engaging in gaming activity." While mere ownership of gaming equipment "does not automatically subject [VGT, Inc.] to IGRA," the Court found that IGRA preemption applied because the property was used exclusively in tribal gaming operations. Pet. App. 23, ¶35.

The Court noted this Court's discussion of "gaming" in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), which "focused on the action rather than the equipment," but the Oklahoma Supreme Court held that the IGRA was nevertheless concerned with "gaming equipment" because the statute is concerned with "prevent[ing] corruption." Pet. App. 21-22, ¶¶32, 33. The Court also found that it must "err toward Indians on questions of preemption" and that gaming

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the IGRA, was timely and appropriately raised by the parties and formed the basis for the Oklahoma Supreme Court's decision to find the *ad valorem* tax statute preempted. 28 U.S.C. §1257(a).

equipment was not "tangential" to gaming, but instead, "is a *sin qua non* of gaming." Pet. App. 23, ¶36. The Court stated that that "burden" of the *ad valorem* tax will "ultimately fall on" the Cherokee Nation, however, the Court also found that the "passed on cost will not threaten the purpose of Nation being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37.

The Court noted that Rogers County had a recognized statutory basis for the *ad valorem* tax and that the tax funds assisted in the operation of Rogers County government, local schools, law enforcement, health services, roads and other governmental services. Pet. App. 7, ¶10. Nevertheless, the Court found that these state interests were not sufficient to justify the tax because there were not connected to specific "regulatory functions or services" that the County provided to VGT, Inc. Pet. App. 24-25, ¶39.

The Court concluded that, because gaming equipment is not peripheral to gaming, but is the *sine qua non* of gaming under the IGRA, and because of the "lack of justification" for the tax (other than a generalized interest in "raising revenue"), the tax was preempted. Pet. App. 26, ¶41. The Court found that the district court erred in relying on *Mashuntucket* and in failing to consider the "more recent guidance of the U.S. Supreme Court in *Bay Mills*." Pet. App. 27, ¶42.

REASONS FOR GRANTING THE PETITION

Review on certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10 provides examples of the "character of the reasons" the Court considers in granting certiorari review, including where a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States court of appeals. Rule 1.10(b).

A. The Court Should Grant Review to Resolve a Direct Conflict Between the Oklahoma Supreme Court and the Second Circuit Court of Appeals.

The Oklahoma Supreme Court has issued a decision that is diametrically opposed to the decision of the Second Circuit in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). Both cases involve a *de minimis* property tax imposed on the non-Indian owner of gaming equipment. Both cases involve leases of the gaming equipment to an Indian tribe for use in casino operations. Both cases involve application of the *Bracker* balancing test in the context of the IGRA. In the face of indistinguishable facts, the Oklahoma Supreme Court found that the property tax was preempted by federal law, Pet. App. 1, whereas the Second Circuit found that the property tax was not preempted. *Mashantucket*, 722 F.3d at 477.

Balancing tests have the virtue of flexibility, but their faults are highlighted when they result in

conflicting decisions in the face of indistinguishable facts. *Cf. Arizona Dep't of Revenue v Blaze Const. Co., Inc.*, 526 U.S. 32 (1999) (noting "interest balancing" clouds tax law standards).

The Oklahoma Supreme Court's opinion is also in conflict with the opinions of circuit courts in similar, but not identical, factual situations. Other circuit courts have held that state laws are not preempted by the IGRA (or the *Bracker* balancing test) where those laws have only peripheral or *de minimus* effects on Indian "gaming." *E.g.*, *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1186 (9th Cir. 2008) (finding sales tax on construction materials purchased by a non-Indian entity and used in building casino not preempted by IGRA or *Bracker*); *Flandreau Santee Sioux Tribe v. Header*, 938 F.3d 941 (8th Cir. 2019) (finding gross receipts tax imposed on nonmember contractor for services performed in expanding gaming casino on reservation not preempted by IGRA or *Bracker*); *Casino Res. Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) (finding claim related to termination of management contract was not preempted by IGRA as it was merely peripherally associated with gaming); *cf. Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019) (petition for writ of *certiorari* pending at time of this submission) (holding the IGRA did *not* expressly preempt a state tax on nonmember purchases of amenities at a casino since the amenities were not directly related to "gaming activity," but tax failed *Bracker* analysis because it interfered with the economic success of the tribe's

Class III gaming); *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226 (10th Cir. 2017) (holding IGRA did not expressly or impliedly preempt regulatory enforcement actions against non-Indian, state-licensed gaming manufacturer vendors doing business with Indian tribe's gaming enterprise, but refusing to apply *Bracker* balancing).

This Court is the only avenue by which litigants can seek clarity on questions of federal law of this nature – i.e., the preemptive reach of the IGRA and the Court's *Bracker* balancing test in the context of a generally applicable *de minimus* state property tax on gaming equipment owned by an out-of-state non-Indian corporate entity.

B. The Oklahoma Supreme Court's Application of the *Bracker* Balancing Test, in the Context of the IGRA, is Deserving of Scrutiny by this Court.

Certiorari review is necessary because the Oklahoma Supreme Court's application of the *Bracker* balancing test is fundamentally flawed. The IGRA does not "occupy the field" related to state taxation of property owned by non-Indians. The statute was intended to expressly preempt the field of the "governance of gaming." The *ad valorem* tax has no effect on the Cherokee Nation's "governance of gaming." It is a neutrally applicable tax imposed upon VGT, Inc. – a non-Indian corporation who elects to conduct business in Rogers County (and all throughout the State of Oklahoma). In

addition, the *ad valorem* tax does not interfere with tribal sovereignty and does not impinge on any tribal interest protected by the IGRA. Finally, the County has a legitimate interest in applying its law throughout its jurisdiction; an interest in even-handed application of that law; and an interest in raising revenue to support relevant government services, including those available to VGT, Inc. as a foreign corporation doing business in Rogers County.

1. The *Bracker* Balancing Test

As originally conceived, the *Bracker* balancing test applied to those "difficult questions . . . where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144. The analysis is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty," but instead courts are required to make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," i.e., an analysis which is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

In *Bracker*, the Court addressed a challenge to Arizona's motor carrier license and use fuel taxes as applied to a non-Indian logging company's use of roads located on tribal land. Consistent with the goal of assessing whether the state taxes would interfere with federal law, the Court analyzed the federal statutes and regulations at issue and ultimately concluded that

"the federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id.* at 148. The Court noted that the taxes would directly undermine federal policy, i.e., "the Federal Government [had] undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits of derived from the harvesting and sale of reservation timber." *Id.* In light of the "pervasive" federal scheme of regulation, the unquestionable incidence of the economic burden on the tribe (i.e., the tribe had agreed to reimburse the company for any tax liability), and the lack of any identified regulatory function or service performed by the State, the Court concluded that the Arizona taxes were preempted by federal law. *Id.* at 151.

In *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), the State of New Mexico sought to impose a gross-receipts tax on two non-Indian construction companies hired by the tribe to build a school on the reservation. In that case, although the construction company initially paid the tax, the company "was reimbursed by the [tribe] for the full amount paid." *Id.* at 835. In assessing the extent of the federal scheme, the Court noted that the "[f]ederal regulation of the construction and financing of Indian educational facilities [was] both comprehensive and pervasive" which "left the State with no duties or responsibilities" when it came to the education of Indian children. *Id.* The Court was clearly concerned with the fact that the State had "declined to take any

responsibility for the education of these Indian children," and therefore held the State was precluded from imposing "an additional burden on the comprehensive federal scheme intended to provide this education." *Id.* at 844. The Court rejected the State's general justification for taxing the monies received by the contractor, insofar as the State had no legitimate basis for additionally burdening the "comprehensive federal scheme." *Id.* at 845.

Following *Bracker* and *Ramah*, the Court altered course in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), where the State of New Mexico sought to impose a severance tax on oil and gas proceeds related to a lease between an Indian tribe and a non-Indian oil and gas producer. The on-reservation production was subject to both a 6% tribal severance tax and the State's generally applicable 8% severance tax. The Court assessed the propriety of the tax under the *Bracker* analysis, and noted that "congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes" but also that "federal preemption is not limited to cases which Congress has expressly – as compared to impliedly – preempted the state activity." *Id.* at 176-77. The Court rejected the argument that the severance tax was preempted by the federal policy contained in the 1938 Indian Mineral Leasing Act, noting that the federal act "neither expressly permits state taxation nor expressly precludes it." *Id.* at 177. While the purpose of the federal act was, indeed, to provide tribes with "badly needed revenue," the Court found no

evidence to conclude that "Congress intended to remove all barriers to profit maximization." *Id.* at 180.

In *Cotton*, the Court also rejected any argument that the state tax was impermissible because it was disproportionate to the value of the services provided by the State. *Id.* at 185-86 ("Neither *Bracker*, nor *Ramah Navajo School Bd.*, however, imposes such a proportionality requirement on the States."); *id.* at 186 n.16 ("Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector."). The Court noted that the "intangible value of citizenship in an organized society is not easily measured in dollars and cents" and that "there is no constitutional requirement that the benefits received from the taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations." *Id.* at 189-90.[3]

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[3] In even later cases, the Court has limited the scope of the *Bracker* analysis in favor of bright lines in tax cases. *E.g.*, *Arizona Dep't of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32 (1999) (holding *Bracker* inapplicable to nondiscriminatory tax imposed on private company's proceeds from contracts with federal government regardless of whether contractor rendered services on Indian reservation); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (holding *Bracker* inapplicable where state imposed tax on non-Indian related to a transaction that occurred off the reservation); *cf. Rice v. Rehner*, 463 U.S. 713 (1983) (holding, under *Bracker*, that California could require federally licensed trader

As discussed below, the *ad valorem* tax at issue here is not preempted by *Bracker* because the tax does not conflict with the federal regulatory regime, it does not impinge on any tribal sovereignty interests, and the County has a legitimate interest in assessing the tax.

2. The Federal Statutory Regime: The IGRA preempts the field of "governance of gaming." It does not preempt a generally applicable *de minimus* property tax imposed on a non-Indian corporate entity.

In this case, the federal regulatory "scheme" that must be analyzed under the *Bracker* balancing test is the Indian Gaming Regulatory Act, which was enacted in 1988 as a response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Court held that California could not enforce its anti-gambling laws against an Indian tribe because Congress had not expressly provided for such authority. *Id.* at 214. In response, Congress enacted the IGRA to give states a role in regulating tribal gaming. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("[T]he Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands."). The IGRA is "intended to expressly preempt the field

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who operated general store on reservation to obtain a state liquor license to sell liquor for off-premises consumption).

in the *governance of gaming activities*." S.Rep.No. 446, 100th Cong., 2nd Sess. 6 (1988) (emphasis added).

The IGRA itself states that its purpose is:

- "to provide 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";
- "to provide 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 ensure that gaming is conducted fairly and honestly by both the operator and players"; and
- "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of the National Indian Gaming Commission are necessary to meet the congressional concerns regarding gaming and to protect such gaming as a means of generated tribal revenue." 25 U.S.C. §2702; Pet. App. 32.

One Court has stated that the core objective of the IGRA is "to regulate how Indian casinos function so as to 'assure the gaming is conducted fairly and honestly by both the operator and the players.'" *Barona Band*, 528 F.3d at 1193.

The IGRA divides gaming on Indian lands into three classes – I, II, and III – and provides a different regulatory scheme for each class of gaming. Class III gaming, which is the type at issue here, is defined as "all forms of gaming that are not class I gaming or class II gaming," 25 U.S.C. §2703(8), and includes such things as slot machines, casino games, banking card games, dog racing, and lotteries. It is the most heavily regulated of the three classes. The Act provides that class III gaming is lawful only where it is: (1) authorized by an ordinance or resolution that (a) is adopted by the governing body of the Indian tribe, (b) satisfies certain statutorily prescribed requirements, and (c) is approved by the National Indian Gaming Commission; (2) located in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." §2710(d)(1).

Consequently, the States have an active role in regulating class III gaming via the "compact" process. The IGRA contemplates that the Tribal-State compact will include provisions related to the "conduct of gaming activities," including application of criminal and civil laws and regulations to such activity; the allocation of criminal and civil jurisdiction between the State and tribe necessary for enforcement of such laws and regulations; the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; taxation by the tribe of such activity in amounts comparable to amounts

assessed by the State for comparable activities; remedies for breach of contract; standards for the operation of such activity and maintenance of the gaming facility, including licensing; and any other subjects that are "directly related to the operation of gaming activities." 25 U.S.C. §2710(d)(3)(A), (C). Nothing in the Act impairs the right of the tribe to regulate class III gaming on Indian lands "concurrently with the State," except to the extent such regulations are in conflict with, or less stringent than, the laws and regulations made applicable by the compact. 25 U.S.C. §2710(d)(5).

In this case, the Oklahoma Supreme Court found that the IGRA "occupies the field" with respect to *ad valorem* taxes imposed on gaming equipment because the IGRA is concerned with "gaming" and the equipment at issue is *used* in gaming activities. This is true despite the fact that the equipment at issue is *owned* by a non-Indian corporation and the *de minimus* tax is based on *ownership* and not *use*. Pet. App. 23, 26, ¶¶35, 41. The Court made the paradoxical finding that VGT, Inc.'s ownership of the gaming equipment did *not* subject it to IGRA, but that the *use* of the equipment is "inextricably intertwined with IGRA gaming activities" and therefore impermissible. Pet. App. 23, ¶35.

What is "gaming"? In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), the Court addressed the scope of the IGRA in the context of tribal sovereign immunity. The Court found that the State of Michigan's lawsuit to enjoin an Indian tribe from operating a casino on land located *outside* the reservation was barred by tribal sovereignty principles. The Court

recognized that the IGRA partially abrogated sovereign immunity in 25 U.S.C. §2710. In construing this partial abrogation, the Court rejected a broad interpretation of "gaming." The Court noted that "numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like – the stuff involved in playing class III games"; the multiple references to "class III gaming activity" "make perfect sense if 'class III gaming activity' is what goes in a casino – each roll of the dice and spin of the wheel." *Bay Mills*, 572 U.S. at 792. The phrase does not refer to activity that occurs off the reservation, or to licensing or oversight occurring on reservation but related to off-reservation gaming activities. *Id.* Nevertheless, the "State's regulatory power over tribal gaming outside Indian territory . . . is capacious," as the State has other methods of enforcing its laws outside the relevant Indian territory. *Id.*

If the phrase "gaming activity" in the IGRA refers to the *activity* that occurs at on-reservation casinos, the Oklahoma Supreme Court's conclusion that "gaming," for purposes of preemption, can also refer to "ownership" of gaming equipment by a non-Indian corporation is clearly in error. The *ad valorem* tax is not targeted at gaming – it is not based on "each roll of the dice and spin of the wheel." *Id.* at 792. It is also not based, in any regard, on the lease agreement between VGT, Inc. and Cherokee Nation, or on the consideration exchanged by the parties in that leasing agreement.[4] It is targeted solely at the fair cash value

[4] VGT, Inc. did not even present its leasing agreement to the district court for consideration. For that reason, no comparison

of the personal property owned by a non-Indian corporate entity. "Nothing within IGRA reveals congressional intent to exempt non-Indian suppliers of gaming equipment from generally applicable state laws that would apply in the absence of legislation." *Mashantucket*, 722 F.3d at 473.

The *Bay Mills* analysis of "gaming" is consistent with extant IGRA preemption case law in similar contexts. Other courts, both before and after *Bay Mills*, have rejected the argument that the IRGA preempts generally applicable laws as applied to non-Indians when those laws' effects are *de minimus* on a tribe's ability to conduct gaming operations. *E.g.*, *Mashantucket*, 722 F.3d at 470; *Barona Band*, 528 F.3d at 1192; *Haeder*, 938 F.3d at 944; *Everi Payments, Inc. v. Washington State Dep't of Rev.*, 432 P.3d 411 (Wis. Ct. App. 2018) (finding IGRA did not preempt generally applicable business and occupational tax imposed on corporation that provided cash access services inside casinos, as tax did "not interfere with the tribes' ability to govern their gaming"); *Casino Res. Corp.*, 243 F.3d at 439 ("[N]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints."); *cf. Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018), *cert. denied sub nom.*, 139 S. Ct. 1600 (2019) (citing *Bay Mills* and noting that "Class III gaming activity relates only to activities actually involved in the playing of the game, and not

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was made between the monies received by VGT, Inc. related to operation of its gaming machines, and the amount of the tax in this case.

activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike").

In this case, the Oklahoma Supreme Court found that the district court erred by relying on *Mashantucket* and by "not considering the more recent guidance of the U.S. Supreme Court in *Bay Mills*." Pet. App. 27, ¶42. This holding is anomalous because *Bay Mills* did not address preemption of a tax imposed on a non-Indian corporate entity. In addition, as shown above, to the extent *Bay Mills* is relevant, it shows that the IGRA is concerned with "gaming"; and "gaming" refers to "what goes on in the casino." The IGRA is not concerned with a *de minimus ad valorem* tax imposed on the non-Indian owner of personal property, where said tax does not interfere with the "governance of gaming." And while it is true that the IGRA is concerned with the potential corruption of gaming, 25 U.S.C. §2702(2), the Oklahoma Supreme Court did not explain how the tax interfered with this concern.

Finally, and relatedly, the Oklahoma Supreme Court's finding that the IGRA "occupies the field" with respect to *ad valorem* taxation of gaming equipment is out of sync with "field preemption" case law. "Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona v. U.S.*, 562 U.S. 387, 401 (2012). The "basic premise of field preemption . . . is that States may not enter, in any respect, an area the Federal Government has reserved for itself." *Id.* at 402. This type of preemption does not apply here

because the IGRA recognizes a broad role for States in negotiating a Tribal-State compact for purposes of class III gaming. 25 U.S.C. §2710(d); *Pueblo of Pojoaque*, 863 F.3d at 1236 ("Because IGRA expressly contemplates parallel state laws, there is no manifestation of congressional intent to preempt the field."). In fact, *Bay Mills* recognized that IGRA's purpose was to rectify "*Cabazon's* ouster of state authority" related to regulation of gaming on Indian lands. *Bay Mills*, 572 U.S. at 794-95. VGT, Inc. did not show that the *ad valorem* tax violated any provision of the Tribal-State compact. Indeed, VGT, Inc. did not even submit the compact to the district court for consideration.[5]

In short, the *ad valorem* tax imposed on VGT, Inc. in this case does not implicate or impinge upon any federal regulatory interest contained in the IGRA. Certiorari review is necessary to address the preemptive scope of the IGRA.

3. The Tribal Interest: The Nominal Tax Has No Effect on Tribal Interests or Tribal Sovereignty.

The *Bracker* test also contemplates assessment of whether the *ad valorem* tax interferes with tribal sovereignty, such as whether this is a case "in which an unusually large state tax has imposed a substantial

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[5] For that reason, this case is similar to *Mashantucket* because nothing in the record shows that the Tribal-State Compact or the IGRA "forbids (or permits) the State to apply its personal property tax to the vendors." *Mashantucket*, 722 F.3d at 469.

burden on the Tribe," *Cotton*, 490 U.S. at 186, or whether the tax interferes with the tribe's ability to "make their own laws and be ruled by them." *Bracker*, 448 U.S. at 142.

The Cherokee Nation's sovereignty is not impaired by the nominal tax. Similar to the party line-up in *Cotton* (and unlike *Bracker* and *Ramah*), a federally recognized Indian tribe is not a party to this lawsuit. Rather, fundamentally, this case represents an attempt by an out-of-state company to reduce its overall cost of doing business. The present lawsuit is one of at least eight lawsuits filed by VGT, Inc., in various district courts of Oklahoma, by which it seeks to avoid paying *ad valorem* taxes.[6] It voluntarily paid *ad valorem* taxes from 2005 through 2010 in Rogers County, and presumably incorporated the tax into its cost of doing business at that time. It challenged the tax for the first time in 2011, and then asserted via affidavit, that the tax "would impact the consideration of the overall costs of providing the gaming machines to the Nation and the overall price at which VGT would agree to lease those same machines to the Nation." *E.g.*, Pet. App. 6-7, ¶¶8, 10. VGT, Inc. did not provide a copy of its historical lease agreements with the Cherokee Nation to the district court for consideration nor did it provide

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[6] *E.g.*, *Video Gaming Technologies v. Tulsa County Bd. of Tax Roll Corrections, et al.*, 455 P.3d 918 (Okla. 2019) (addressing jurisdictional issue in Tulsa County tax protest case). VGT, Inc. has filed similar lawsuits in Grady County, McIntosh County, Noble County, Nowata County, Osage County, and Okfuskee County. A federally recognized Indian tribe is not a party to any of these cases.

any details concerning the alleged "impact" the tax would have on the cost of providing gaming machines to the Nation.

The record in this case is barren of any facts showing that the ad valorem tax burdens "gaming." The Oklahoma Supreme Court found that "the legal incidence of the *ad valorem* tax falls on the non-Indian lessor, not on Nation." Pet. App. 8, ¶12. In addition, the Court found that, while those taxes might "ultimately fall on Nation," the tax will "not threaten the purpose of Nation being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37. These findings show that the tax has no effects on the tribe's right to "make their own laws and be ruled by them," *New Mexico v. Mescalero*, 462 U.S. 324, 323 (1983), and does not interfere with any purpose outlined in the IGRA. That is, it does not prevent the tribe from being the "primary beneficiary of the gaming operation." 25 U.S.C. §2702.

The Oklahoma Supreme Court also noted that one remedy for failure to pay *ad valorem* taxes could include seizure of the gaming machines, *e.g.*, 68 Okla. Stat. §3104, and that such a seizure would "directly affect the tribe, impact its gaming operations, and severely threaten the policies behind IGRA – including the sovereignty over its land." Pet. App. 24, ¶37. However, this case did not implicate, in any regard, the remedies available to the County for VGT, Inc.'s failure to pay *ad valorem* taxes. It solely concerned with the propriety of the tax itself. The "remedy" issue is therefore a red herring and not at issue here. *E.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447

U.S. 134, 162 (1980) (refusing to address potential remedy [i.e., entering reservation to seize stocks of cigarettes] for failure to pay taxes since the State never entered reservation to seize cigarettes and never threatened to do so except in papers filed in the litigation).

Further, the fact that state authorities may not have a right to exercise a remedy available to them under state law does not mean they are precluded from otherwise demanding compliance with neutrally applicable state tax laws. "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (sovereign immunity barred State from "pursuing the most efficient remedy" but other alternatives existed).

Finally, the Oklahoma Supreme Court noted that the "burden" of the tax will "ultimately" fall on the Nation. However, the Court did not quantify the nature of the burden, and even assuming that cost is passed on to the tribe, it is minimal when compared to the gaming industry at issue. VGT, Inc. noted the $2.03 **billion** impact the tribe has on northeast Oklahoma. By contrast, the total *ad valorem* tax for 2011 at issue here was $10,087.00. As noted by the Oklahoma Supreme Court, in light of the "success of Nation's gaming enterprises, the passed on cost" will **not interfere** with the Nation "being the primary beneficiary of the gaming operation." Pet. App. 24, ¶37.

So, even assuming the Court considers the downhill consequences of the *ad valorem* tax,[7] these "indirect burdens" do not result in preemption when the tax does not impair a recognized federal right or tribal sovereignty interest. *See*, *e.g.*, *Cotton*, 490 U.S. at 180 (finding federal act did not represent intent to "remove all barriers to profit maximization," and rejecting argument that preemption should apply in the face of "indirect burdens" on alleged "broad congressional purpose"). Certiorari review is necessary to address the type of deference that Courts are to provide to tribal interests in a case such as this one.

4. The Interests of Rogers County: Rogers County Has a Valid Interest in Funding Relevant Government Services, Such as Schools, Law Enforcement and Health Services.

The *Bracker* test also contemplates an assessment of the nature of the "state interests" at issue, including an assessment of the "government functions it performs for those on whom the taxes fall." *Bracker*, 448 U.S. at 150. Here, the Oklahoma Supreme Court agreed that the taxes fell on VGT, Inc. and therefore analyzed the tax with respect to the County's relationship with VGT, Inc. Pet. App. 24-25, ¶39.

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[7] The Court, in recent years, has distanced itself from analyzing the "downhill" consequences of a validly enacted state tax. *E.g.*, *Wagnon*, 546 U.S. at 114 (refusing to engage in interest-balancing based on the "downstream economic consequences" of a Kansas motor fuel tax).

The Oklahoma Supreme Court rejected the County's justification for the tax. Pet. App. 24-25, ¶39. The Court noted that the County's interest was "primarily revenue raising without providing specific regulatory functions or services to justify it" and that this was "not a case in which the [County] seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Id.* (citing *Bracker*). The County allegedly did not show that it provided any "regulatory or services to VGT, the out-of-state company, to justify its taxation of equipment which is only located in Rogers County for use Nation's gaming enterprise." *Id.*

Certiorari review is necessary to review these findings. Petitioners contend the Oklahoma Supreme Court erred by failing to give any weight to the purpose of the *ad valorem* tax. In *Cotton*, the Court held that "state interests **must** be given weight and courts should be careful not to make legislative decisions in the absence of congressional action." *Cotton*, 480 U.S. 177 (emphasis added). That interest is the strongest when non-Indians are taxed and when those taxes are used to provide the non-Indians with government services. *E.g.*, *Colville*, 447 U.S. at 157; *Mescalero*, 462 U.S. at 336. Consideration of the state's interest includes an analysis of the off-reservation effects that necessitate State action. *Id.*; *see also Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011) (noting off-reservation infrastructure can be considered as part of the state's interest in tax, where burden of tax fell on

non-Indian lessees and lessees benefitted from infrastructure).

Several "state" interests are deserving of consideration in this case. First, "[a] state has a sovereign interest in being in control of, and able to apply, its laws throughout its territory." *Mashantucket*, 722 F.3d at 476-77 (citing *Cotton*, 490 U.S. at 188).

Second, VGT, Inc., as an out-of-state corporation doing business in Rogers County (and all throughout Oklahoma), is a consumer of government services just like any other taxpayer in the same region. Rogers County "has an interest in the uniform application of its tax code." *See Mashantucket*, 722 F.3d at 475.

And, third, "[r]aising revenue to provide general government services is a legitimate state interest." *See Barona Band*, 528 F.3d at 1192-93. As noted in *Mashantucket*, this Court has recognized "the dependency of state budgets on the receipt of local tax revenues" and "appreciate[s] the difficulties encountered by [local governments] should a substantial portion of [their] rightful tax revenue be tied up in" litigation. *Mashantucket*, 722 F.3d at 475 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527-28 (1981)). If preemption is allowed in this case, other property owners would likely challenge taxation of personal property located in Rogers County. In addition, the preemption holding would be applied in the seven (7) other counties in Oklahoma where VGT, Inc. has pending lawsuits. *See supra* n.6.

Oklahoma state law provides that "all property in this state, whether real or personal, except that which is specifically exempt by law . . . shall be subject to *ad valorem* taxation." 68 Okla. Stat. §2804. Oklahoma law allows county governments, such as Rogers County, to assess these taxes on the value of such personal property, including property owned by corporations that elect to do business in the county. 68 Okla. Stat. §2837. The importance of *ad valorem* taxation to local governments is underscored by the fact that such taxation is recognized by Oklahoma's Constitution; such taxes are of local concern and cannot be "levied for State purposes." *E.g.*, OKLAHOMA CONSTITUTION, Art. 10, §9(a) (discussing amount and apportionment of *ad valorem* tax).

The *ad valorem* assessment itself is based on the fair cash value of the property at issue; it is not based on how, or by whom, the property is used, nor is the assessment based on any "transaction" occurring between the property owner and some third person or entity (such as the tribe). *E.g.*, OKLAHOMA CONSTITUTION, Art. 10, §8 (discussing valuation of property for taxation); *cf.*, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (distinguishing between valid *ad valorem* tax on ownership of property and invalid excise tax on the activity of selling real estate, under Indian General Allotment Act). In this case, the record reflects that tax revenue received by Rogers County from *ad valorem* assessments helps fund the operation of Rogers County

government, schools, law enforcement, health services, roads and other government services. Pet. App. 7, ¶10.

Property tax collections are the single largest source of local government revenue in Oklahoma. *Ad valorem* tax revenues are used for the benefit of all county taxpayers, including VGT, Inc. For instance, the *ad valorem* tax is used to support county law enforcement services – i.e., services that are generally available to the tribe and to VGT, Inc. in and around the "Hard Rock Casino." Likewise, *ad valorem* taxation funds Rogers County government, schools, health services and other government services, all of which generally benefit VGT, Inc., as it partakes of the right to engage in commerce in Rogers County.

It is axiomatic that, as casinos have expanded, local governments have experienced a concomitant burden on their infrastructure, in terms of maintaining and constructing roads and providing law enforcement and other general government services to taxpayers. While tribes may share in some of these costs, it is not unfair or irrational for Rogers County to insist that VGT, Inc. contribute to such "off reservation" costs by way of payment of *ad valorem* taxes – costs which would otherwise be borne by other taxpayers of Rogers County.

Certiorari review is necessary to identify the appropriate deference to apply to the County's interests in this regard. Petitioners contend the Oklahoma Supreme Court erred in not considering the interests referenced above. In *Cotton*, the Court noted that "[t]he

intangible value of citizenship in an organized society is not easily measured in dollars and cents" and that there is no "proportionality" requirement imposed on taxation of non-Indians in such a context. *Cotton*, 490 U.S. at 187-189 ("Neither *Bracker*, nor *Ramah Navajo School Bd.*, however, imposes such a proportionality requirement on the States."). In a case such as this one, where the incidence of the tax falls on a non-Indian corporation, and where the tax does not threaten tribal sovereignty or some other recognized federal interest, the Court should reject any argument that the *ad valorem* tax must be proportional to the value of the services it provides to VGT, Inc. *Cf., Colville*, 447 U.S. at 157.

5. The *Bracker* Balancing Test Favors Petitioners.

When these federal, tribal and state interests are properly analyzed, the balancing favors Rogers County. As shown above, the federal regulatory regime is substantial, but it is not exclusive. Rather, the IGRA leaves substantial room for state regulation pursuant to the Tribal-State compact. VGT, Inc. did not show that the tax was barred by the Tribal-State compact or some other provision of the IGRA. Further, the point of the IGRA is to regulate "gaming" activity, and to ensure the Indian tribe "is the primary beneficiary of the gaming operation." The *ad valorem* tax does not impinge on any of these interests. Here, the tax was imposed on ownership of personal property by a

non-Indian corporation; it was not directed at "gaming activities."

Similarly, the tax does not impose any burden on Indian sovereignty. As in *Cotton*, an Indian tribe is not a party to this case. And, the Court should reject any argument that the downhill consequences of this tax somehow burdens tribal sovereignty interests, or some other tribal interest protected by the IGRA. The tax is *de minimus* and does not impair any interest of the tribe related to the "governance of gaming."

Finally, Rogers County has a substantial interest in being in control of and in applying its law throughout its territory; an interest in even-handed application of its tax laws; and an interest in generating revenue to fund government services, such as law enforcement, schools, and health services. VGT, Inc., as a non-Indian taxpayer who elects to conduct business in Rogers County, receives the benefits of this tax along with all other taxpayers in Rogers County.

* * *

In conclusion, Petitioners respectfully request the Court grant this petition for writ of *certiorari* to review the *Bracker*-balancing conducted by the Oklahoma Supreme Court in the context of the IGRA. In light of the Oklahoma Supreme Court's decision, courts across the nation need guidance on the preemptive scope of the IGRA, along with an analysis of the relevant various federal, state and tribal interests at issue. As discussed above, Petitioners contend that the *ad valorem* tax at issue here is not preempted and that the

contrary decision by the Oklahoma Supreme Court should be reversed.

CONCLUSION

The petition for writ of *certiorari* should be granted to review the decision of the Oklahoma Supreme Court.

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