No. 19-1298

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 a Writ of Certiorari
to the Oklahoma Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous Oklahoma Supreme Court properly applied the multi-factored balancing test of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), to the facts and circumstances of this case to determine that a local county tax on electronic gaming equipment used exclusively in a tribal casino is preempted by federal law.

CORPORATE DISCLOSURE STATEMENT

Respondent, Video Gaming Technologies, Inc. (VGT) is a wholly owned subsidiary of Aristocrat Technologies, Inc., which in turn is a wholly owned subsidiary of Aristocrat International Pty Ltd, a wholly owned subsidiary of Aristocrat Leisure Limited, which is publicly traded on the Australian stock exchange (ASX: ALL). Other than Aristocrat Leisure Limited, no publicly held corporation owns 10% or more of VGT's stock.

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INTRODUCTION

This Court's precedent mandates a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), to determine whether a state tax on non-Indians relating to Indian gaming is preempted by federal law. The Oklahoma Supreme Court properly applied that settled balancing analysis here. In particular, the court unanimously held that a local *ad valorem* tax on electronic gaming equipment leased by Respondent, Video Gaming Technologies, Inc. ("VGT"), to the Cherokee Nation exclusively for use in casino gaming on tribal land is preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). The court relied on a series of case-specific facts and circumstances in reaching that conclusion under the *Bracker* test, including: (i) the fact that Oklahoma law authorizes seizure of gaming equipment from tribal casinos as a remedy for nonpayment of the tax; (ii) Respondents defended the tax based only on a generalized interest in revenue raising, without providing any regulatory services to VGT, the Cherokee Nation, or the casino; and (iii) the burden of the tax would ultimately fall on the Cherokee Nation.

Petitioners focus most of their arguments on challenging the Oklahoma Supreme Court's application of the multi-factored *Bracker* balancing analysis to the specific circumstances of this case. That request for factbound error correction does not warrant this Court's review. The state court faithfully adhered to the framework prescribed by this Court in *Bracker*, and its well-reasoned decision reaches the correct conclusion under that test given the many

case-specific ways in which the challenged tax would burden the federal and tribal interests protected by IGRA.

Although Petitioners assert that the decision below conflicts with *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), that case addressed a materially different set of facts. The split of authority invoked by Petitioners is therefore illusory. Given the wide variety of state and local laws governed by the *Bracker* test and that test's fact-intensive, multi-pronged analysis, it is no surprise that some laws have been held to be preempted, while others have not. Moreover, the preemption of an *ad valorem* tax on leased gaming equipment for exclusive use in tribal casinos is an extremely narrow issue that has produced only two appellate decisions in the four decades since *Bracker* was decided—*Mashantucket* and the decision in this case. Thus, even if there were a bona fide conflict of authority, the matter would merit additional percolation before review by this Court.

Recently, this Court denied the petition in *Flandreau Santee Sioux Tribe v. Noem*, No. 19-1056, *cert. denied* ___ U.S. ___, 2020 WL 2621731 (May 26, 2020), which likewise attempted to manufacture a split between another factually dissimilar lower court decision and *Mashantucket*. The petition here should be denied as well.

Petitioners' repeated request for the Court to review a different question—whether "a *de minimis* property tax imposed on the non-Indian owner of gaming equipment" is preempted (Pet. 11; *see also* Pet.

3, 5, 11, 13, 18, 21, 24, 28)—is not appropriate for this Court's review because it was neither pressed nor passed on below.

STATEMENT

A. Factual And Legal Background

This case concerns the validity of a local county tax sought to be applied to electronic gaming equipment owned by Respondent VGT and leased to the Cherokee Nation for use by the Tribe at its casino on tribal land near Tulsa, Oklahoma. The term electronic gaming equipment refers generally to electronic games, such as slot machines, electronic bingo, electronic poker and the like.

The Cherokee Nation is a federally recognized Indian tribe headquartered in Tahlequah, Oklahoma. Pet. App. 6. To promote tribal self-governance pursuant to IGRA, the Cherokee Nation entered into a compact with the State of Oklahoma that permitted the Cherokee Nation to engage in casino gaming, including Class III gaming such as blackjack, roulette, and slots, on tribal land. Pet. App. 18-20. The compact provides that Oklahoma will perform certain regulatory services related to the Cherokee Nation's gaming activities. Pet. App. 20-21. The Cherokee Nation, in turn, agreed to pay fees to the State for these regulatory services. *Id.* Pursuant to Oklahoma law, $250,000 of the fees paid by the Cherokee Nation go to the Oklahoma Department of Mental Health and Substance Abuse Services, 88% go to the Education Reform Revolving Fund, and 12% go into the State's General Revenue Fund. *See* 3A Okla. Stat. § 280. Each

year, the Cherokee Nation's gaming operations yield millions of dollars in revenue for the State. *See* Pet. App. 21.

The Cherokee Nation owns and operates ten casino-gaming facilities in Oklahoma through a wholly-owned subsidiary. Pet. App. 6. These gaming operations are subject to extensive federal regulation under IGRA. Pet. App. 17-21. IGRA established the National Indian Gaming Commission ("NIGC"), which exercises broad federal regulatory authority over Indian gaming, including licensing, classification of gaming operations, and imposition of annual fees on gaming operations. Pet. App. 21; 25 U.S.C. §§ 2701, 2706, 2710 and 2717.

VGT is a non-Indian Tennessee corporation that owns and leases electronic gaming equipment, software, and related services to the Cherokee Nation exclusively for use in its casinos on Indian lands, including the one in Rogers County at issue here. *Id.* Pet. App. 6. The gaming machines supplied by VGT to the Cherokee Nation are an essential part of the Cherokee Nation's gaming operations. *Id.* They produce significant revenue for the Cherokee Nation, enabling it to invest millions of dollars in programs and services that benefit its citizens.

B. Procedural History

In 2011, 2012, and 2013, Respondents sought to impose *ad valorem* taxes on VGT with respect to gaming equipment owned by VGT and leased to the Cherokee Nation for use in the Tribe's Rogers County

casino. Pet. App. 3.[1] VGT filed protests of those assessments with the Rogers County Board of Tax Roll Corrections, arguing they were preempted by federal law. The board denied those protests. Pet App. 3.

VGT timely appealed to the District Court of Rogers County, which conducted *de novo* review pursuant to state law. Pet. App. 4. On summary judgment, the following facts were undisputed:

- Rogers County seeks to tax gaming equipment used exclusively by the Cherokee Nation in tribal gaming operations regulated by IGRA. Pet. App. 3, 6, 17-21.

- The gaming equipment is "essential to the [Cherokee] Nation's gaming operations." Pet. App. 6.

- The burden of the *ad valorem* taxes ultimately falls upon the Cherokee Nation, as it would impact the overall costs of providing the gaming machines and therefore the price for which VGT would agree to lease them. Pet. App. 7

[1] Petitioners have never disputed that the gaming equipment is located on Indian lands, such that *McGirt v Oklahoma*, No. 18-9526, 590 U.S. ___ (July 9, 2020), might supply any basis for review by this Court.

- Rogers County claimed only a generalized revenue raising interest in the *ad valorem* assessments. Pet. App. 7, 24-25.[2]

Conversely, there was no evidence in the summary judgment record to support the following contentions now made by Petitioners:

- The *ad valorem* taxes at issue are *de minimis*. *See* Pet. 3, 5, 11, 13, 18, 21, 24, 28.

- The challenged *ad valorem* taxes support regulatory functions or services that Rogers County provides to VGT, the Cherokee Nation, or its gaming operations. *See* Pet. App. 24-25.

- The challenged *ad valorem* taxes are vital to Rogers County generally or to particular services provided by the County. *See* Pet. App. 24.

On cross-motions for summary judgment, the District Court ruled in favor of Petitioners. Pet. App. 2-5, 29.

The Oklahoma Supreme Court unanimously reversed, concluding that the *ad valorem* taxes are

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[2] Petitioners claim "[c]ertiorari review is necessary to review these findings." Pet. 30. In support, Petitioners repeatedly attempt to cast doubt on these undisputed facts in the summary judgment record while advancing numerous unsupported factual allegations. *See* Pet. 5, 33; *cf.* Pet. App. 6-7. This inappropriate factfinding request underscores the lack of certworthiness of this case. *Id.*

preempted by federal law. Pet App. 27. Across more than twenty pages of careful analysis, the court balanced each of the context-sensitive *Bracker* factors in light of the summary judgment record and methodically assessed similarities and differences with this Court's cases and other lower-court decisions applying the *Bracker* test. *See* Pet. App. 7-27.

Most notably, the Oklahoma Supreme Court mirrored this Court's analysis in *Bracker*. *First*, like *Bracker*, the court considered the federal regulatory scheme affected by the taxes at issue and found it comprehensive and pervasive. Pet. App. 21; *see Bracker*, 448 U.S. at 145-151.

Second, like *Bracker*, the Oklahoma Supreme Court found the taxes at issue would threaten significant federal and tribal interests. Pet. App. 24-26; *see Bracker*, 448 U.S. at 141, 148. With respect to IGRA, those interests include "assuring that gaming is conducted fairly and honestly," "ensuring the tribe is the primary beneficiary of the operation," and "preserving sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands." Pet. App. 18-19. Accordingly, the court took into account Oklahoma's invasive remedy of seizing gaming equipment in tribal casinos for non-payment of the taxes, which "would directly affect the tribe, impact its gaming operation, and severely threaten the policies behind IGRA—including the Nation's sovereignty over its land." Pet. App. 24.

Third, as in *Bracker*, the Oklahoma Supreme Court weighed the fact that the County asserted only a general interest in raising revenue and identified no

regulatory functions or services it provided in return to VGT, the tribe, or the regulated activities. Pet. App. 24-25; *see Bracker*, 448 U.S. at 150. Additionally, the court discounted the asserted government interest in uniformly collecting the taxes in light of the many state-specific exemptions to its applicability and multiple factors involved in its calculation. Pet. App. 25-26.

Thus, applying *Bracker* and its progeny, the Oklahoma Supreme Court concluded that all three factors of the balancing analysis weighed in favor of federal preemption. Pet App. 27. The court accordingly held, based on the specific facts and circumstances of this case, that the tax sought to be applied by Rogers County is preempted and unenforceable.

ARGUMENT

I. The Oklahoma Supreme Court Applied The Proper Analysis And Its Decision Does Not Present The Conflict Petitioners Claim.

A. It Is Undisputed That The Oklahoma Supreme Court Applied The Analysis Prescribed By *Bracker*.

Petitioners do not dispute that *Bracker* supplies the proper analysis for determining whether a state or local law is preempted in these circumstances, or that the Oklahoma Supreme Court applied that analysis here. Indeed, Petitioners acknowledge that "the *Bracker* inquiry is designed to [analyze] the propriety of state assertions of authority over 'non-Indians engaging in activity on the reservation,'" Pet. 3

(quoting *Bracker*, 448 U.S. at 144), and that the Oklahoma Supreme Court devoted a significant portion of its opinion to applying that inquiry to the tax at issue here, *see, e.g.,* Pet. 13 (contesting "the Oklahoma Supreme Court's application of the *Bracker* balancing test").

The decision below carefully conducted the *Bracker* analysis, observing that "[w]hen a state or county seeks to impose a non-discriminatory tax on non-Indians on tribal land, there is no rigid preemption rule," and courts instead "must (1) look to the comprehensiveness of the federal regulations in place, in light of the broad underlying policies and notions of sovereignty in the area; (2) consider the number of policies underlying the federal scheme which are threatened; and (3) determine if the state is able to justify the tax other than as a generalized interest in raising revenue." Pet. App. 8, 17 (citing *Bracker*, 448 U.S. at 142; *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)).

The upshot is that this case is about whether the Oklahoma Supreme Court reached the correct result, not whether that court applied the correct legal test. That contention regarding factbound application of settled precedent is unworthy of this Court's review, and is incorrect in any event. *See* Part III, *infra.*

B. The Split Of Authority Asserted By Petitioners Does Not Exist.

Petitioners identify only the Second Circuit's decision in *Mashantucket* as allegedly conflicting with

the Oklahoma Supreme Court's reasoning here. However, there are critical differences in facts and circumstances that distinguish this case from *Mashantucket*. Moreover, the Second Circuit itself acknowledged that its application of the *Bracker* balancing test presented an "arguably close case." 722 F.3d at 476.

1. In weighing the intrusiveness of the tax on the sovereignty of the Cherokee Nation over its lands and activities, the Oklahoma Supreme Court noted that Oklahoma law authorizes the highly invasive non-payment remedy of seizing the property subject to the tax. Pet. App. 24. The court observed that the "County's remedy for collection of delinquent taxes would directly affect the tribe, impact its gaming operation, and severely threaten the policies behind IGRA—including Nation's sovereignty over its land." *Id.* (citing *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) (state seizure of property used in federally regulated gaming operations would impermissibly infringe on Indian nation's sovereignty)).

Petitioners downplay this distinction (Pet. 27), but the pertinent question for purposes of identifying a conflict of authority is whether the *Second Circuit* would. Petitioners have no answer to this question, because the Second Circuit did not confront a state-law seizure remedy in *Mashantucket*.[3]

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[3] Instead, Petitioners cite *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980), to cast doubt on the relevance of the state-law seizure remedy.

2. In *Mashantucket*, weighing the state's interest, the Second Circuit found it significant that Connecticut's "generally-applicable" *ad valorem* tax was based solely on ownership of the property and not on its use. 722 F.3d at 475-76. Weighing against a finding of preemption, the Second Circuit observed that if the local government there were required to consider the use of the property subject to the *ad valorem* tax, "[t]his additional level of analysis would further frustrate the [government's] revenue collection and would render the State's tax more difficult and expensive to administer." *Id.* at 475.

The Second Circuit's consideration is inapplicable to the *ad valorem* tax sought to be imposed by Petitioners here. As the Oklahoma Supreme Court noted in discounting Petitioners' asserted interest in uniformly collecting the *ad valorem* tax, Oklahoma law provides a variety of use exemptions, including for religious, charitable, and cultural purposes. *See* Pet. App. 25-26; Okla. Stat. Tit. 68, § 2887. Furthermore, Oklahoma law requires the assessment of a host of statutory factors in calculating the *ad valorem* tax where it does apply. *See* Pet. App. 26.

The Second Circuit did not consider whether the existence of such myriad use exemptions or

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But *Colville* involved the imposition of a valid tax in an unregulated field that was levied on consumers rather than vendors to the tribe. *See Colville*, 447 U.S. at 155. The tax there did not concern an area already subject to comprehensive federal regulation, and this Court accordingly did not perform the balancing between state, federal and tribal interests required by *Bracker*.

computational factors would weigh in favor of preemption, as the Oklahoma Supreme Court found. Given these markedly different state-law scenarios, there is no direct conflict between the two opinions.

3. On the summary judgment record, Petitioners presented no evidence to substantiate their frequent assertion that the preempted taxes are "critically important" for local schools, law enforcement, health services, or other government services. Pet. 4; *see also* Pet. i, 7, 29, 32-33. Nor did Petitioners submit any evidence that the preempted tax revenues would support regulatory functions or services provided to VGT, the Cherokee Nation, or the Cherokee Nation's gaming operations. *See* Pet. App. 24-25. Accordingly, the Oklahoma Supreme Court found that Petitioners "lack[ed] justification" for the tax "other than as a generalized interest in raising revenue." Pet. App. 26.

By contrast, the Second Circuit in *Mashantucket* weighed against preemption the fact that the local government there had established a number of services provided throughout the Indian reservation benefiting the tribe, its members, and the casino, including emergency services and road maintenance. *See Mashantucket*, 722 F.3d at 460, 475.

4. Paradoxically, while making an unsubstantiated assertion that the preempted taxes are "critical" to support county services, Petitioners downplay the amount of the taxes as "*de minimis*" to argue against preemption. Pet. 11; *see also* Pet. 3, 5, 13, 18, 21, 24, 28.

Putting aside Petitioners' failure to press this claim below or establish any factual basis for it in the record, *see infra* Part II, and further setting aside the fact that the Oklahoma Supreme Court did not pass on it, the Second Circuit in *Mashantucket* did not consider if or when a *de minimis* tax burden would defeat preemption. Thus, no conflict exists on the central claim pressed by Petitioners.

5. As the Oklahoma Supreme Court observed, a year after the Second Circuit's decision in *Mashantucket,* this Court decided *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014), which figured prominently in the state court's analysis of the preemptive effect of IGRA. Pet. App. 13-14, 21-23, 27.

In describing IGRA's regulatory coverage, *Bay Mills* held that "'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games," such as "each roll of the dice and spin of the wheel." *Bay Mills*, 572 U.S. at 792; *see* Pet. App. 13-14. Thus, "Class III gaming, the most closely regulated and the kind involved here, includes casino games, *slot machines*, and horse racing." *Id.* at 785 (emphasis added).

Applying this guidance, the Oklahoma Supreme Court reasoned that, "when gaming equipment is used exclusively in a tribal gaming operation," it is "inextricably intertwined with IGRA gaming activities" rather than being peripheral to them. Pet. App. 23; *cf. Mashantucket*, 722 F.3d at 473. Similarly, other lower courts have adopted *Bay Mills'* concept of "gaming activity" as "the stuff involved in playing" games, and none are alleged to conflict with the

decision below. *Bay Mills*, 572 U.S. at 792; *see Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 942, 944 (8th Cir. 2019); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019), *cert. denied* ___ U.S. ___, 2020 WL 2621731 (May 26 2020); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018); *see* Pet. App. 14-17 (discussing these cases).

Consequently, any tension between the decision below and *Mashantucket* would not warrant review, in any event, because the Second Circuit's opinion did not take into account the later-issued opinion by this Court in *Bay Mills*, which casts important light on IGRA's scope and purposes. Indeed, the Second Circuit noted that *Mashantucket* was a "close case" to begin with. 722 F.3d at 476.

C. The Extremely Limited And Infrequently Decided Issue Warrants Further Percolation.

In the *four decades* since this Court's decision in *Bracker*, only one federal court of appeals (in *Mashantucket*) and only one state supreme court (in this case) have applied its balancing analysis to an *ad valorem* tax on gaming equipment. Even if the two opinions were not distinguishable on the multiple grounds discussed above, further percolation of the issue would be warranted given the infrequency with which this issue arises.

Moreover, if this issue arises in the future, other federal and state courts will have the benefit of the Oklahoma Supreme Court's well-reasoned opinion. Subsequent decisions may well produce widespread

agreement with the decision below, particularly in light of *Bay Mills*.

II. The Question Petitioner Urges This Court To Decide—Whether A *De Minimis* Tax On Indian Gaming Is Preempted—Is Not Before This Court, And Petitioners' Proposed Categorical Exception Is Both Unfaithful To *Bracker* And Unworkable.

Petitioners repeatedly argue that this Court should grant certiorari to decide whether IGRA "preempt[s] a generally applicable *de minimus* [sic] property tax imposed on a non-Indian." Pet. 18; *see id.* at 3, 5, 11, 12, 13, 18, 21, 23, 24, 28. But this central claim on which Petitioners seek review is not properly before this Court.

Petitioners did not press the claim below. Indeed, the term *de minimis* does not appear anywhere in Petitioners' state-court briefing. Therefore, the contention that "no party disputed that the *ad valorem* taxes at issue are *de minimis*" is misleading because Petitioners never alleged—nor sought to support with evidence in the summary judgment record—that the taxes were *de minimis* in any documented sense. Pet. 5.

The question whether there is a *de minimis* exception to IGRA preemption and *Bracker* balancing therefore falls outside of this Court's certiorari jurisdiction. *See* 28 U.S.C. 1257(a); Rule 14.1(g)(1); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997); *see also* Shapiro *et al.*, *Supreme Court Practice* 3-49 (11th ed. 2019) (this Court "will not consider federal

questions not pressed or passed upon in the state courts").

Moreover, it is Petitioners' proposed categorical rule—"IGRA is not concerned with a *de minimus ad valorem* tax imposed on the non-Indian owner of personal property," Pet. 24—that flouts the "particularized inquiry" demanded by the *Bracker* balancing test. *Bracker*, 448 U.S. at 145; *see* Pet. App. 8.

And this supposed bright-line rule is ill-defined and unworkable. Nowhere does the petition specify the amount below which a tax burden is *de minimis*, nor does it identify the period of time over which the amount should be aggregated. This lack of definition betrays the inherent subjectivity and unworkability of the proposed standard. Relatedly, Petitioners' unsubstantiated assertion that the preempted amount of taxes is "critically important" for local schools, law enforcement, healthcare, and other government services belies the argument that the tax at issue would qualify for any *de minimis* exception. Pet. 4; *see infra* Part III, C.

Finally, Petitioners cite several lower-court cases that they assert support their proposed categorical exception for *de minimis* taxes. *See* Pet. 12-13. However, none of those cases discussed whether a tax should evade preemption because of its *de minimis* amount, and they are factually and legally dissimilar in other respects as well.

Two cases involve the purchase of construction materials by non-Indian contractors from non-Indian

sellers for use in constructing or expanding Indian casinos. *See Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019); *Banora Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). Both found significant the fact that the transactions were between non-Indians, and that the materials could be used for building anything, not just casinos. *See Haeder*, 938 F.3d at 946; *Yee*, 528 F.3d at 1193. As noted by the Oklahoma Supreme Court, "the gaming equipment" Petitioners seek to tax "cannot be used for anything but gaming." Pet. App. 21-22.

Casino Resource Corp. v. Harrah's Entertainment, Inc., 243 F.3d 435 (8th Cir. 2019), involved state-law claims concerning a contract that the court found was between two non-Indian entities and not governed by IGRA. *See id.* at 440, 436-37. Here, in contrast, the Cherokee Nation uses the gaming equipment provided by VGT for gaming purposes that lie at the heart of IGRA's comprehensive regulatory scheme.

Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), in which this Court denied certiorari earlier this year,[4] supports the analysis employed by the Oklahoma Supreme Court. The Eighth Circuit held that a use tax on non-Indian purchases of amenities at a casino was preempted not because the amount exceeded some *de minimis* threshold, but because such amenities, while not directly related to the operation of gaming activities, contributed significantly to the economic success of the tribal gaming operations. *See Noem*, 938 F.3d at 936.

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[4] *See* No. 19-1056 (cert. denied May 26, 2020).

The same is true of the gaming machines here. *See* Pet. App. 15-16.

Petitioners also cite *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226 (10th Cir. 2017), but that case involved tribal gaming conducted without a state compact that the court found was unlawful under federal law, and "the State's conclusion to this effect was not an exercise of jurisdiction that IGRA preempts." *Id.* at 1236. Thus, *Bracker* was not implicated under the facts of the case.[5]

III. The Oklahoma Supreme Court Correctly Applied The *Bracker* Balancing Test To The Undisputed Facts.

Aside from a few pages devoted to the alleged conflict between the decision below and *Mashantucket,* most of the Petition is a merits-based attack on the Oklahoma Supreme Court's application of the *Bracker* test. *See, e.g.*, Pet. 13 (challenging "the Oklahoma Supreme Court's application of the *Bracker* balancing test"), 30 (contending that the decision below "erred by failing to give any weight to the purpose of the *ad valorem* tax"), 34 (asserting that when the "federal, tribal and state interests are

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[5] In support of their proposed categorical exception for *de minimis* taxes, Petitioners also claim that *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), "altered course" and "limited the scope of *Bracker* analysis in favor of bright lines in tax cases." Pet. 17 n. 3. However, *Cotton* and other cases since *Bracker* have consistently applied its multi-factored balancing test. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110-111 (2005) (citing this Court's consistent application of *Bracker*).

properly analyzed, the balancing favors Rogers County"). The state court's factbound application of that settled precedent is correct and unworthy of this Court's merits review in any event.

As noted above, the Oklahoma Supreme Court carefully considered each of the factors identified by *Bracker*—i.e., (1) the comprehensiveness of the federal regulations in place, (2) the extent to which interests protected by the federal scheme are threatened; and (3) whether the government has justified the tax other than as a generalized interest in raising revenue. *See* Pet. App. 8, 17 (citing *Bracker*, 448 U.S. at 142; *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)). The court properly concluded that all three of those factors weigh in favor of preemption here.[6]

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[6] Contrary to Petitioners' assertion, the state court's conclusion that IGRA "occupies the field" is faithful to *Bracker's* particularized preemption analysis. *See* Pet. 24-25; Pet App. 26. As this Court explained, preemption as a matter of federal Indian law requires balancing state, federal and tribal interests, and thus differs from the "standards of pre-emption that have emerged in other areas of the law." *Bracker*, 448 U.S. at 143. As in *Bracker*, the state court held that the relevant federal regulations preempt the challenged county taxes—that is, they "occupy the field" invaded by those taxes—only after applying the multi-factor balancing test. Pet. App. 26; *See Bracker*, 448 U.S. at 148 ("There is no room for these taxes in the comprehensive federal regulatory scheme."). The state court's holding does not sweep any further than the specific facts and circumstances considered in this case.

A. Federal Regulation Of Indian Gaming Is Comprehensive.

The Oklahoma Supreme Court determined that IGRA, the federal regulatory scheme burdened by the taxes at issue here, is comprehensive. *See* Pet. App. 17-21; *cf. Bracker*, 448 U.S. at 145-151. Petitioner does not seriously question this assessment, which aligns with the conclusion of other lower courts that IGRA's regulation of Indian gaming is pervasive. *See Noem*, 938 F.3d at 937; *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir. 1994); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995); *United Keetoowah Band of Cherokee Indians v. State of Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991). That consensus is justified in light of IGRA's detailed rules governing when and how federally recognized tribes may conduct casino gaming, as well as the structure for enforcing those requirements. *See, e.g.*, 25 U.S.C. §§ 2706, 2710(d), 2719; 25 C.F.R. §§ 291.1-291.15, 293.1-293.15.

B. The Preempted Taxes Threaten Federal Regulatory And Tribal Sovereignty Interests Underlying IGRA.

The state court appropriately concluded that the taxes at issue would undermine federal and tribal interests in promoting tribal independence and sovereignty through gaming because "the burden of the *ad valorem* tax will ultimately fall on [the Cherokee] Nation." Pet. App. 7; *see id.* at 18-19. This

conclusion derived from the undisputed fact that the cost of the taxes would increase the overall costs of providing the gaming machines. *See id.* Petitioners do not cite any evidence to support their contrary assertion. *Cf.* Pet. 26-27.

Furthermore, the Oklahoma Supreme Court concluded that the state's highly intrusive non-payment remedy of seizing gaming equipment in tribal casinos on tribal trust land "would directly affect the tribe, impact its gaming operation, and severely threaten the policies behind IGRA—including Nation's sovereignty over its land." Pet. App. 24. Petitioners do not even attempt to discount the grave invasion to tribal sovereignty authorized by such a seizure remedy. *Cf.* Pet. 27.

Additionally, the Oklahoma Supreme Court properly weighed in favor of preemption the comprehensive nature of the federal regulatory scheme under IGRA, which includes an interest in preventing corruption in tribal gaming operations. Pet. App. 19-20, 22; *see* 25 U.S.C. § 2702. Indeed, it would have been error not to do so, given that gaming equipment could be illegally tampered with regardless of whether it is leased or owned by a tribe.

Petitioners attempt to minimize the impact of the preempted taxes on federal and tribal interests in light of the relative success of the tribal enterprise. *See* Pet. 28. But no court has ever held that federal preemption protects only Indian gaming activity that is *unsuccessful*, much less that states may tax tribal gaming activity that actually achieves the federal policy goal of financial success. *Cf. McCulloch v.*

Maryland, 17 U.S. 159, 210 (1819) (observing that "the power to tax involves the power to destroy").

Bracker supports the Oklahoma Supreme Court's conclusion. There, the timber enterprise of the White Mountain Apache was its most successful and "by far the most important, accounting for over 90% of the Tribe's total annual profits." *Bracker* 448 U.S. at 138. This Court found the success of the enterprise made it even more important to protect as a matter of federal policy. *Id.*[7] Moreover, in *Ramah*, this Court noted that even a nominal tax burden can nevertheless "impede[] the clearly expressed federal interest." *Ramah*, 458 U.S. at 842; *see also Bay Mills,* 572 U.S. at 810 (Sotomayor, J., concurring) (noting that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions.").

C. The Challenged Taxes Serve Only A General Interest In Raising Revenue.

As the Oklahoma Supreme Court noted, the County identified only a general desire to raise revenue and offered no evidence in the record of any regulatory functions or services provided to VGT, the Cherokee Nation, or gaming operations. Pet. App. 24-

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[7] Petitioners attempt to limit *Bracker's* applicability by suggesting that tribal interests there were affected only because the tribe had agreed to reimburse the taxes at issue. *See* Pet. 15. However, this Court's analysis of the impact on tribal interests did not rely on the tribe agreeing to the reimbursement. *See Bracker* 448 U.S. at 145-152. Rather, the arrangement was relevant to the tribe's ability to join its contractor in challenging the taxes. *See id.* at 140.

25; *see supra* at 5-6. Similarly, in *Bracker*, this Court weighed in favor of preemption the fact 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," rather than simply seeking to raise revenue. 448 U.S. at 150; *accord Ramah*, 458 U.S. at 845. By contrast, if Petitioners were to have their way, a generalized interest in revenue raising for local services would always tip the government-interest prong of the *Bracker* balancing test in favor of the government, thereby rendering it superfluous.

IV. The Brief of the Amicus Curiae Confirms The Lack Of Certworthiness.

The amicus brief of the Tulsa County Assessor offers nothing new in terms of arguments, but confirms the lack of certworthiness in several respects.

First, although the amicus claims that the preempted taxes will have "widespread impact over all counties in Oklahoma that have (or will have) a tribal-owned casino," no other counties in Oklahoma have joined its cause, despite the fact that there are over 100 tribal-owned casinos across Oklahoma. Br. of Amicus Curiae Tulsa Cnty. Assessor John A. Wright at 11. *Second*, the State of Oklahoma likewise did not join, despite the petition's asserted interests in state sovereignty and uniform tax collection. *See* Pet. 31. *Third*, Tulsa County's asserted interest is general revenue raising. *See* Br. of Amicus Curiae at 13. Like Rogers County, it fails to offer any evidence that the preempted revenues would impact county services, or

that services funded by those revenues would benefit VGT, the Indian nation, or Indian gaming.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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