No. 21-1298

In the
Supreme Court of the United States

LEONARD ALBRECHT, ET AL.,
Petitioners,

v.

RIVERSIDE COUNTY, CALIFORNIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Two

BRIEF OF *AMICI CURIAE* THE TWENTY-NINE PALMS BAND OF MISSION INDIANS, THE FORT INDEPENDENCE TRIBE OF PAIUTE INDIANS, THE ALTURAS INDIAN RANCHERIA, THE SOBOBA BAND OF LUISEÑO INDIANS, AND THE INTERTRIBAL TRADE CONSORTIUM IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the Twenty-Nine Palms Band of Mission Indians, the Fort Independence Tribe of Paiute Indians, the Alturas Indian Rancheria, the Soboba Band of Luiseño Indians, and the Inter-Tribal Trade Consortium. Amicus the Inter-Tribal Trade Consortium is a group of Native American Tribes, Tribally-owned businesses and Native-owned businesses working to secure the historic right of Tribes to trade with each other and develop their economies on Tribal land free of regulation by the states and their political subdivisions. *Amici curiae* the Twenty-Nine Palms Band of Mission Indians, the Fort Independence Tribe of Paiute Indians, the Alturas Indian Rancheria, and the Soboba Band of Luiseño Indians all are federally recognized Indian Tribes located within the exterior boundaries of the State of California which share an interest in protecting their inherent sovereignty and rights to control and engage in economic development on their Tribal lands independent of state authority as a part of their exercise of self-government.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than the *amici curiae*, its members, or its counsel made such monetary contribution. In accordance with Supreme Court Rule 37.2(a), all counsel of record received timely notice of the intent to file this brief and granted written consent to its filing.

Amici curiae respectfully file this brief in support of Petitioners Leonard Albrecht et al. asking this Court to issue a writ of certiorari as this case raises critical issues regarding the sovereign rights of Native American Tribes to control their Tribal lands and engage in economic development on their Tribal lands without infringement by state and local government.

SUMMARY OF ARGUMENT

The decision issued by the Court of Appeal of the State of California improperly allows the County of Riverside and other local government entities to impose taxes on Tribal lands leased by Tribes and Tribal members to non-Indian lessees. The state court's decision infringes on the sovereign power of Native American Tribes to control the use of and economic development on their Tribal lands and frustrates the federal and Tribal laws governing the leasing of Tribal lands, which in themselves expressly prohibit taxation on Tribal lands and privileges derived from Tribal lands by states and their political subdivisions.

Amici curiae support Petitioners' request for this Court to issue a writ of certiorari, as Petitioners' Questions Presented address exceptional and fundamental legal issues affecting Tribal sovereignty and Tribal and federal control and jurisdiction over the leasing of Tribal lands by non-Indians that have not been, but should be, settled by this Court. The Court consistently has recognized the importance of upholding Tribal control of and economic development on Tribal lands in instances where states have encroached on these rights and granted certiorari in such instances. *See McGirt v. Oklahoma*, 591 U.S. ___

(2020); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 586 U.S. ___ (2019); *Herrera v. Wyoming*, 587 U.S. ___ (2019); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *United States v. Rickert,* 188 U.S. 432 (1903).

Amici curiae further support Petitioners' request as this case presents an ideal opportunity to address Tribal sovereignty and Tribal and federal control and jurisdiction over Tribal lands by non-Indians and to clarify that improper encroachment of state taxation only impedes economic investment for Tribes and Tribal members and prevents the purposes set forth in the Tribal and federal leasing framework from being fulfilled. Such issues will only increase in importance and scope as Tribes pursue land-derived economic opportunities from Indians and non-Indians alike.

REASONS FOR GRANTING THE PETITION

I. Petitioners' Questions Presented Address Exceptional and Fundamental Issues of Legal Significance Affecting Tribal and Federal Control and Jurisdiction Over Tribal Lands That Have Not Been, But Should Be, Settled by This Court.

A. The Tribal and Federal Government's Leasing Powers Over Tribal Lands Are All-Encompassing.

The real property interests held by Tribes in their lands "represent a unique form of property right in the American legal system." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.01, at 995 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S

HANDBOOK]. In general, and for purposes of this case, this property right constitutes the federal government holding lands in trust for the benefit of Tribes and Tribal individuals ("Tribal Lands"). *Id.* At present, there are approximately 56.2 million acres of land held in trust for Tribes and tribal individuals, not including land that has been set aside for Alaska Natives. *Id.*

The federal government possesses extraordinary power over Tribal Lands. COHEN'S HANDBOOK § 15.06[1], at 1027. One way in which it exercises its power is through imposition of restraints on alienation of Tribal Lands. For example, the Indian Non-Intercourse Act expressly forbids any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without federal approval. 25 U.S.C. § 177. As a result, absent specific statutory authority, property claims based on state law doctrines such as adverse possession, statutes of limitation, laches, estoppel, or voidable title are preempted. COHEN'S HANDBOOK § 15.06[5] at 1036. This includes state laws transferring title by foreclosure for a default of a mortgage, or for nonpayment of taxes or debts under a state's uniform commercial codes. *Id.*

In accordance with this power, the federal government – as only the federal government can – established a set of wide-ranging laws in the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and its implementing regulations, 25 C.F.R. Part 162. These federal laws govern all aspects of surface leasing of Tribal Land, including for non-Indians, with a specific

purpose to promote Tribal sovereignty and increase opportunities derived from the privilege of leasing such lands. Indeed, the legislative history of 25 U.S.C. § 415 demonstrates that Congress intended to maximize income to Tribes and Tribal members and encourage all types of economic development on Tribal Lands for their benefit. Sen. Rpt. No. 84–375 at 2 (May 24, 1955).

Part 162 honors this congressional intent and provides the legal framework by which lessees, including non-Indian lessees, may enter into leases on Tribal Land. Part 162 defines categories of available leases including agricultural leases, residential leases, business leases, and leasing for wind and solar resources. 25 C.F.R. § 162.002(a). Part 162 also addresses conditions under which the federal government will approve leases, how one may obtain leases, the terms and conditions required in leases, and it provides certainty as to how the federal government will administer and enforce the leases. 25 C.F.R. § 162.001(b). These federal laws set forth strict requirements before any lease on Tribal Lands will be approved.

As part of its Tribal Lands leasing laws, the federal government has recognized that the privileges derived from its ownership of the land in trust for Tribes and Tribal individuals can further empower Tribes by supporting Tribal taxation over those lands. In 25 C.F.R. § 162.017, the federal government has specifically recognized the sovereign right of Tribes to tax permanent improvements, activities, and leaseholds or possessory interest of benefits derived

from Tribal Lands. At the same time, to protect the federal government's interests and Tribal interests regarding the leasing of Tribal Lands, the federal government has expressly foreclosed the possibility of a state or a political subdivision's instituting taxes that are tied to the Tribal Lands leased. The requirements at 25 C.F.R. § 162.017 specifically state:

> (a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
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> (b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
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> (c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

Thus, the federal government has explicitly foreclosed any arguable state interest in taxation in favor of Tribal sovereignty and Tribal self-governance.[2]

The only sovereigns other than the federal government with the jurisdiction to exercise power over Tribal Lands with regard to surface leasing are Tribal governments. The federal government affirmed this Tribal control and jurisdiction in 2012, when it adopted a mechanism to transfer to Tribes the federal power to control leasing of Tribal Lands. It did so by enacting the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act), which amended the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415. The HEARTH Act established a voluntary, alternative land leasing process under which Tribes may be authorized to negotiate and enter into leases on Tribal Lands for agricultural, business, residential, recreational, religious or educational purposes without separate and additional approval of the Secretary of the Interior. Participating Tribes are required to develop Tribal leasing regulations which the Secretary

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[2] To the extent there is any ambiguity regarding this language, the Indian law canons of construction must be applied. As this Court has held, "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Instead, the Court applies the Indian law canons of construction, which require that treaties and other laws be liberally construed in favor of Indians and all ambiguities be resolved in their favor. COHEN'S HANDBOOK § 2.02[1], at 113. The Indian law canons also require Tribal property rights and sovereignty to be preserved unless Congress's intent to the contrary is clear and unambiguous. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Fisher v. Dist. Ct.*, 424 U.S. 382, 387-388 (1976).

is required to approve if they are consistent with 25 C.F.R. Part 162. There is nothing in the HEARTH Act that allows any state control of or jurisdiction over the leasing of Tribal Lands.

In sum, whether through the federal government's leasing laws for Tribal Land or a Tribe's own HEARTH Act leasing ordinances for Tribal Land, the leasing of Tribal Land is an instrumental tool in fulfilling "the traditional notions of sovereignty and [] the federal policy of encouraging tribal independence." *Bracker,* 448 U.S. at 144 (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174–75 (1973)). As recognized by the federal and Tribal governments that solely control and manage Tribal land leases, federal leasing laws not only encourage Tribes to use their land profitably for economic development, but ultimately contribute to Tribal well-being and self-sufficiency which benefits not only Tribes and Tribal members but the surrounding communities as well. *See* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72447 (Dec. 5, 2012); U.S. Dep't of Interior, *Indian Affairs Approved HEARTH Act Regulations of Five Tribal Nations in California* (Apr. 19, 2022), https://www.bia.gov/news/indian-affairs-approves-hearth-act-regulations-five-tribal-nations-california.

B. Only Tribal Governments Have the Power to Tax Non-Indians on Privileges Derived from Tribal Lands.

Taxation is "the most basic power of government." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). A government is "free to pursue its own fiscal

policies…if by the practical operation of a tax the [government] has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Id.*

The power to tax is not confined to state and federal governments; it is also possessed by Tribal governments and includes the power to tax non-Indians on Tribal Lands. Indeed, "[t]he power to tax nontribal members in Indian [C]ountry has long been recognized as one of the core aspects of tribal sovereignty." COHEN'S HANDBOOK § 8.04[2][b], at 720.

According to the Solicitor of the Department of the Interior:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the [T]ribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) (emphasis in original). As this Court has observed:

> Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest, 17 Op.Atty.Gen. 134 (1881); *** 7 Op.Atty.Gen. 174

> (1855), *including jurisdiction to tax*, 23 Op.Atty. Gen. 214 (1900)….

Id. (emphasis added). This Tribal power to tax non-Indians is especially significant when the activities or property of non-Indians is on Tribal Lands as those lands are of significant interest to Tribes and Tribal members.

For example, in *Merrion v. Jicarilla Apache Tribe*, the Court recognized the Jicarilla Apache Nation's taxation power when it upheld a Tribal severance tax imposed on oil and gas severed from Tribal Lands:

> The power to tax is an essential attribute of Indian sovereignty because it is the necessary instrument of self-government *and territorial management.* This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing government services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

455 U.S. 130, 137 (1982) (emphasis added). That the Jicarilla Apache Nation's Tribal Lands had been designated by Executive Orders did not affect the Nation's sovereign taxation powers. The Court specifically held in *Merrion* that:

> The fact that the Jicarilla Apache Reservation was established by Executive Order rather than by treaty or statute does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created.

Id. at 134 n.1.

In *Kerr-McGee Corp. v. Navajo Tribe of Indians*, the Court similarly examined taxes leveed by the Navajo Nation on Tribal Lands, which included a possessory interest tax. The Court again recognized that "[t]he power to tax members *and non-Indians* alike is surely an essential attribute of such self-government" and observed that Tribes "can gain independence from the federal government" only by financing their own government programs. 471 U.S. 195, 201 (1985) (emphasis added).

For Tribal governments, like federal and state governments, taxation power allows Tribes to provide services and improve the lives of members, non-members and visitors alike, which promotes effective Tribal government, economic self-sufficiency, and territorial autonomy. This taxation power is especially important for Tribal governments when related to Tribal Lands and their use; indeed Tribal Lands "form the basis for [Tribes'] social, cultural, religious, political, and economic life" and constitute their premier economic resource. COHEN'S HANDBOOK § 15.01, at 994. By making the informed decision to lease Tribal Lands in a consensual relationship with a Tribe and/or Tribal members, non-Indians are availing themselves of the "substantial privilege of carrying on

business" on these Tribal Lands. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 437 (1980).

II. This Case Presents the Ideal Vehicle to Address an Increasingly Important Issue That Merits This Court's Review.

The Court's jurisprudence confirming Tribal government control over Tribal Lands, particularly Tribal Lands where the Tribes and Tribal members have significant interests, is at odds with the lower court's decision in this case which wrongly allows concurrent authority of a state and its political subdivisions to exercise jurisdiction over rights derived from the lease of Tribal Lands. As Tribes and Tribal members develop and expand economic opportunities on Tribal Lands, it will become increasingly important that Petitioners' Questions Presented are finally addressed and these issues settled.

Here, the County of Riverside and other local government entities have sought to pad their public fisc by significantly interfering with federal and Tribal leasing laws and the Tribal governments' sovereign jurisdiction. These state political subdivisions have forced their own possessory interest tax and other local taxes onto Tribal Lands over which these state political subdivisions have no taxing or jurisdictional authority. The county and local entities are doing so in the face of an extensive Tribal and federal government legal leasing framework that expressly promotes a Tribe's ability to control and develop its lands for economic development purposes and tax accordingly, while expressly rejecting the intrusion of states and their political subdivisions to tax such economic land-based

development. By imposing their possessory income tax and other local taxes on Tribal Land leases, the County of Riverside and the other local entities are reaping a financial windfall from land use leases provided by the Tribes for the benefit of the Tribes and Tribal members – and without otherwise having any interest in the sovereign land base from which the opportunities and benefits derive.

Petitioners recognize – as have the Tribes, the federal government and this Court – that Tribal governments have the sovereign authority over their own lands, independent of any power by local governments to tax that exercise of authority. Allowing the Respondents to encroach on Tribal powers and Tribal Lands harm Tribes by stunting the funding of Tribal government functions through economic development of their lands – a sovereign Tribal right that this Court has recognized as essential time and again.

If allowed to take place, the encroachment of state power over the federal and Tribal leasing framework will only become more damaging as Tribes and their members work to develop new opportunities for economic development. The precedent established in the lower court's decision will impede Tribes' ability to attract non-Indian investment to Tribal Lands where such investment and participation are critical to the vitality of Tribal economies. One example of exactly how the lower court's opinion is damaging to economic development on Tribal Lands is found in the difficulty Indian Tribes and Tribal individuals already face in securing access to capital. A 2001 study by the U.S.

Department of the Treasury found that Indians' lack of access to capital and financial services is a key barrier to economic advancement. U.S. Dept. of the Treasury, Community Development and Financial Institutions Fund, The Report of the Native American Lending Study at 2 (Nov. 2001).

This case provides the Court with an opportunity to address these important issues that, if left unaddressed, will only increase in number and scope going forward as Tribes and the federal government continue to pursue leasing opportunities for both Indians and non-Indians on Tribal Lands.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' Leonard Albrecht et al.'s petition for writ of certiorari.

Respectfully Submitted,

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