NO. _____

In the
Supreme Court of the United States

LEONARD ALBRECHT, *et al.*,

Petitioners,

v.

COUNTY OF RIVERSIDE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although this Court has made clear that federal law preempts state and local governments from imposing real-property taxes on Indian lands, some of those governments have levied those very taxes on the leasehold interest when the lands are leased to non-Indians. There is sharp disagreement among the lower courts about whether those taxes are also preempted. The Eleventh Circuit and the Department of the Interior have concluded that they are preempted—while the Ninth Circuit and (in this case) the California courts have found such taxes not preempted. In areas where commercial development has extended to reservation lands, the Ninth Circuit and California position deprives Indian tribes of a major part of their tax base—crippling tribes' ability to govern their own reservations.

The questions presented are:

1. Do the federal regulations governing the leasing of Indian lands preempt state and local governments from taxing the leasehold interest conveyed by the regulated leases?

2. Does the express preemption provision of the Indian Reorganization Act of 1934—which prohibits state taxes on "any interest in lands" that the government "acquire[s] pursuant to this Act … in trust for [an] Indian tribe or individual Indian"—apply when the government acquires extended trust rights pursuant to the Act?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are approximately 500 individuals, trusts, and business entities who were the plaintiffs in two consolidated cases in the Superior Court of California, and appellants in the Court of Appeal of California. The lead plaintiff was Leonard Albrecht. A full listing of the Petitioners is provided in the Appendix at App.56 *et seq*.

There is no parent or publicly held company owning 10% or more of the stock of any petitioner, except for Petitioner MHC Date Palm, LLC. MHC Date Palm, LLC's sole member is MHC Operating Limited Partnership. 94% of MHC Operating is owned by its general partner, Equity LifeStyle Properties, Inc., whose stock trades on the New York Stock Exchange under ticker symbol ELS.

Respondent Riverside County, California was the defendant in the Superior Court and a respondent in the Court of Appeal.

Respondents Desert Water Agency and Coachella Valley Water District were intervenor-defendants in the Superior Court, and respondents in the Court of Appeal.

RELATED PROCEEDINGS

Albrecht v. County of Riverside, No. S270984 (Cal.), review denied Dec. 22, 2021.

Albrecht v. County of Riverside, No. E073926 (Cal. Ct. App.), opinion filed Aug. 13, 2021.

Albrecht v. County of Riverside, No. PSC 1501100 (Cal. Super. Ct.), judgment entered Oct. 9, 2019.

Abbey v. County of Riverside, No. RIC 1719093 (Cal. Super. Ct.), judgment entered Oct. 9, 2019.

RULE 29.4(c) STATEMENT

28 U.S.C. § 2403(b) may apply and the Attorney General for the State of California will be served.

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PETITION FOR A WRIT OF CERTIORARI

When non-Indians lease Indian lands, the law is in disarray as to whether federal law preempts state and local governments from collecting property taxes from the lessees. This Court has held that states may not tax Indian lands without congressional authorization but sometimes *may* tax non-Indians' commercial activities on reservation lands. The Court has not addressed, however, whether states may tax Indian land leased to a non-Indian, when the taxes are collected from the non-Indian lessee. The void in this Court's cases has led to an entrenched split on the question between federal courts, state courts, and the Department of the Interior. In this case, the California courts acknowledged the split and reasserted their conflicting position.

This split in the law matters, both practically and doctrinally. As a practical matter, Indian tribes on one side of the split enjoy federal protection of the tax base needed to exercise their sovereignty through effective local government. On the other side of the split, the Indian taxing authority is left unprotected against state and local governments, who crowd it out by imposing their own property taxes on Indian lands leased to non-Indians. The consequence is that, on one side of the split, land development entering a reservation *strengthens* tribal sovereignty by increasing the value of the tribe's property-tax base and enabling more effective tribal government. But on the other side of the split, such development is just another way that tribal sovereignty is undermined because the state and local governments will take the increased value for themselves.

The doctrinal split is just as significant and involves two basic questions of law that this Court has not answered. First, this Court has not addressed whether, and to what extent, the extensive federal regulation of the leasing of Indian land preempts state and local regulation of the lease terms and taxation of the leased land. The resulting void has led to lower courts and the Department of the Interior taking at least three different positions, the most extreme of which was reasserted by the California courts in this case.

Second, this Court has never addressed what "interest in lands" must be acquired in order to trigger express federal preemption under 25 U.S.C. § 5108. Section 5108 codifies the Indian Reorganization Act of 1934, as amended, and exempts from state or local taxation "any interest in lands" that is "acquired pursuant to this Act or the Act of July 28, 1955." This Court held in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155 n.11 (1973), that the terms "any interest" and "acquired" should be construed not "technically" but pragmatically, and that they extend beyond circumstances where the government purchases a fee interest expressly for the benefit of an Indian tribe. But this Court has not addressed whether the acquisition of expanded trust rights—of the kind Petitioners relied on here—falls within the "any interest" covered by the statute.

This is the case in which to answer both important questions—about the preemptive force of the federal leasing regulations, and about what kind of "interest in lands" qualifies for § 5108 preemption. The California courts are now firmly entrenched on one

side of an acknowledged split of authority. The questions are squarely presented by this case and are important to the exercise of sovereignty by Indian tribes. The Court should grant the writ, find the taxes preempted, and reverse.

OPINIONS BELOW

The order of the Supreme Court of California denying review is reproduced in the Appendix at App.1. The opinion of the Court of Appeal of California is reported at 68 Cal.App. 5th 692 and 283 Cal.Rptr.3d 716, and is reproduced in the Appendix at App.3. The Court of Appeal's order that the opinion be published is reproduced in the Appendix at App.27. The Statements of Decision and Judgment of the Superior Court of California are not reported, but are reproduced in the Appendix at App.29, App.43, and App.51, respectively.

JURISDICTION

The Supreme Court of California entered its order denying review on December 22, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The Indian Reorganization Act of 1934, as amended, provides in relevant part:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

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Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955, as amended, shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108 (citations omitted).

STATEMENT OF THE CASE

A. State And Local Property Taxes On Leased Indian Lands Put Tribes To A Cruel Choice Between Economic Development And Sovereignty.

On Indian reservations, tribal governments can "have responsibilities resembling those of county and municipal governments."[1] In most parts of our

[1] Croman & Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, at 4, Harvard Project on American Indian Economic Development and University of Arizona Native Nations Institute Joint Occasional Papers on Native Affairs, No. 2016-1 (Discussion Draft May

country, local governments fund their responsibilities in significant part by levying real-property taxes. Tribal governments have the same right to tax land within their jurisdiction: "The power to tax is an essential attribute of Indian sovereignty" because it "enables a tribal government to raise revenues for its essential services." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *see Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985) (tribes "can gain independence from the Federal Government only by financing their own police force, schools, and social programs"). Moreover, this Court has long since held that, generally speaking, state and local governments may not "tax[] Indian reservation lands … absent congressional consent." *Mescalero Apache Tribe*, 411 U.S. at 148. Federal law preempts such taxes as "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985) (citation omitted).

Still, whether a tribe really can finance its government operations through property taxes depends on the property value and on whether state and local government taxation can crowd the tribe out. Until 1934, federal policy was "to terminate tribal governments and extinguish tribal territories by dismantling the tribal land base."[2] This left tribal lands consisting of

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2016),
http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf

[2] Saunders, Note, *Tribal Taxation and Allottted Lands:* Mustang Production Co. v. Harrison, 27 N.M.L.Rev. 455, 460 (1997).

remote, scattered parcels that had little value left to be taxed. The federal Indian Reorganization Act of 1934 finally "put a halt to the loss of tribal lands," *Mescalero Apache Tribe*, 411 U.S. at 151 (cleaned up), and authorized the government to acquire lands to be held in trust for Indians. *See* 25 U.S.C. § 5108. But even then, the lands within most tribes' jurisdictions remained few, low in value, or held in trust by the federal government—leaving the tribes "largely unable to obtain substantial revenue" through property taxes. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 812 (2014) (Sotomayor, J., concurring).

For some tribes, the passing decades brought the prospect of change. The expansion of American cities led to some reservation lands becoming less remote, as economic development approached their boundaries. When they can, tribes and their members have responded by developing their own properties—but the simplest way to unlock these increasing property values often is by leasing lands within tribal jurisdiction to those who wish to develop them. This can be done even for lands held in trust by the federal government, as long as the lease agreement satisfies the conditions prescribed by the Secretary of the Interior. *See* 25 U.S.C. § 415. This creates the prospect for tribal governments to generate property-tax revenues by taxing the leaseholds. That will allow the tribe to exercise practical sovereignty over its lands by increasing regulation and services commensurate with the level of development. And if the tribe cannot provide those services or does not wish to, it can sign an inter-governmental agreement with the local city or county government to provide them in exchange for payments from the tribe.

But there is a complication: state and local governments oftentimes try to take the tax revenue for themselves. Once such lands become commercially interesting to non-Indians, some state and local governments argue that they can force the lessees to pay exactly the same amount of tax that the Indian landowners would if they were not exempt. When these claims succeed, they can form "insuperable … barriers" to the tribe's own taxation. *Bay Mills Indian Cmty.*, 572 U.S. at 810 (Sotomayor, J., concurring). Although the tribes retain the theoretical ability "to impose their own taxes on these same sources," the result would be a combined tax burden greater than that imposed on non-Indian parcels of land—and "[a]s commentators have observed, … the resulting double taxation would discourage economic growth", causing the land's value to lessees to erode or even evaporate. *Id.* at 811 (collecting citations).

The result is to put the tribe to a cruel choice between economic development and sovereignty. A tribe's members can benefit from the increasing value of their once-remote lands only if the tribe is willing to sacrifice its sovereign right to tax those lands. And if the tribe does that, its ability to provide services to the newly-developed area will be correspondingly limited—leaving the local government likely to fill the gap.

B. The Law Is In Disarray Over Whether State And Local Taxes On Leases Of Indian Lands Are Preempted.

As noted, this Court has established that state and local governments usually may not "tax[] Indian

reservation lands … absent congressional consent," *Mescalero Apache Tribe*, 411 U.S. at 148. On the other hand, this Court's precedents give state and local governments more latitude to impose sales taxes (or similar taxes) on non-Indians who do business on reservations. *See Washington v. Confederated Tribes of Colville Indian Rsrv.,* 447 U.S. 134, 151–159 (1980).

This case presents the intermediate question: may state and local governments tax Indian land when it is leased to non-Indians and the tax is collected from the non-Indian lessees?

Over time, federal courts, state courts, and the Department of the Interior have reached a state of intractable disagreement on that question.

The Ninth Circuit and the California courts decided the issue first, in decisions a few months apart in 1971, considering separate preemption challenges to the same California county tax that is at issue in this case. The Ninth Circuit upheld against preemption challenge a tax on "the full cash value of the lessee's interest in" Indian lands. *Agua Caliente Band of Mission Indians v. Riverside Cnty.*, 442 F.2d 1184, 1186 (9th Cir. 1971) (citation omitted). Similarly, the California Court of Appeal concluded that a "state … tax imposed on the leasehold interest carved from the tax exempt … fee is sufficiently indirect and remote as to be permissible" under federal law. *Palm Springs Spa, Inc. v. Cnty. of Riverside*, 18 Cal.App.3d 372, 375 (1971). The Ninth Circuit reiterated its holding in another similar decision a few years later. *Fort Mojave Tribe v. San Bernardino Cnty.*, 543 F.2d 1253, 1256 (9th Cir. 1976).

Later, however, the Department of the Interior and the Eleventh Circuit disagreed. In 2012, Interior published a lengthy analysis concluding that "[t]he Federal statutes and regulations governing leasing on Indian lands … preempt the field of Indian leasing." *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440-01, at 72,447 (Dec. 5, 2012). It therefore amended its Indian-lands-leasing regulations to mandate that, when Indian land is leased, "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." 25 C.F.R. § 162.017(c) (emphasis added).

In 2015, the Eleventh Circuit took the same view, holding that Florida is preempted from "tax[ing] commercial rent payments" for Indian lands—even though, like the California county exaction, "[t]he tax … constitutes a lien on the personal property of the lessee, and not … the land or property of the [Indian] lessor." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1326 (11th Cir. 2015). The Eleventh Circuit stated that the Secretary's finding of preemption "deserves some weight" short of formal deference, but ultimately found the tax preempted after an "independent … inquiry." *Id.* at 1338-39. The Eleventh Circuit also concluded that, to the extent the Ninth Circuit had taken a different approach, its rationale had been "obliterat[ed]" by later decisions from this Court. *Id.* at 1334.

After Interior issued its analysis and the Eleventh Circuit released its decision, the Ninth Circuit and the California courts have acknowledged the split but

reaffirmed their commitment to allowing state and local governments to tax. In 2019, the Ninth Circuit adhered to its previous view, albeit with some reluctance. In another challenge to the county tax at issue in this case, the Central District of California noted the tax's "direct conflict" with the Department of the Interior's regulation, as well as the conflict between the Ninth and Eleventh Circuits—but it stated that "[d]istrict courts are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." *Agua Caliente Band of Cahuilla Indians v. Riverside Cnty.*, 181 F.Supp.3d 725, 740-741 (C.D. Cal. 2016) (cleaned up). On appeal, the Ninth Circuit admitted that "there may be some tension between" its earlier decisions and this Court's intervening rulings, but concluded that they "are not clearly irreconcilable" and so the court of appeals' earlier decisions remained binding. *Id.*, 749 F.App'x 650, 651-652 (9th Cir. 2019).

In 2020, the California Court of Appeal likewise adhered to its view that federal law does not protect leased Indian land against state and local taxation. In *Herpel v. County of Riverside*, the Court of Appeal concluded that the "federal interest in" the Indian-lands "Leasing Regulations" is not strong enough to have preemptive effect. 45 Cal.App.5th 96, 111 (2020). The court "note[d] that this puts us in disagreement with" the Eleventh Circuit's *Seminole Tribe* decision, among others. *Ibid.* Regarding the *state* interest in the tax, the court purported to find *Seminole Tribe* "distinguishable" as involving "taxes on business activity only," while noting that the California tax also extended to "leases … for residential purposes." *Id.* at 115-116. The court also found the Department of the

Interior's views to be "incomplete, and so … not reasonable enough to warrant deference." *Id.* at 118.

C. Here, The California Courts Entrenched Themselves On One Side Of The Split.

In this case, the California Court of Appeal yet again reaffirmed its position and upheld local property taxes on Indian-lands lessees, and the California Supreme Court denied review.

1. The Agua Caliente Tribe's Efforts to Tax Reservation Lands are Crowded out by Riverside County's Property Taxes.

The Agua Caliente Reservation was established in 1876. (Cal. Ct. App. Appellants' App'x 246.) After being significantly reduced and fragmented in the first 60 years of its existence, the reservation now covers roughly 31,000 acres to the east of Los Angeles, scattered across the resort town of Palm Springs, California, and neighboring communities. App.7. These lands are "held in trust" by the United States "for the benefit of the tribe" or "one or more members of the tribe." App.7-8. By law, the United States' trust rights were set to expire in 1994.[3] In 1990, however, Congress amended the Indian Reorganization Act to provide that all the government's then-existing trust rights over Indian lands "are extended and continued until otherwise directed by Congress." 25 U.S.C. § 5102.

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[3] *See* Mission Indian Relief Act §§ 3, 5, 26 Stat. 712-713 (1891) (limiting the trust to 25 years); Act of March 2, 1917, § 3 39 Stat. 969, 976(1917) (authorizing the President to extend the trust period); 25 C.F.R. ch.1, App'x (listing trust period extensions).

The Agua Caliente tribal government provides extensive regulation and services with respect to the lands under its jurisdiction. The tribal council has enacted and enforces a land-use ordinance, a building and safety code, and an environmental policy act. (Cal. Ct. App. Appellants' App'x 253, 480-510, 752-894.) On parts of the reservation, the tribal government also maintains roads and provides flood-protection services. (*Id.* at 248-49.)

The Agua Caliente's lands are their most valuable resource. To monetize that value, the Secretary of the Interior has approved the Tribe and its members to lease more than 4000 acres of trust lands to non-Indians under some 20,000 lease agreements that are subject to extensive federal regulation. (Cal. Ct. App. Appellants' App. 247, 734-747.)[4]

Since 1967, the Agua Caliente tribal government has sought to fund its activities, in part, through a 1% tax on real-property leases within the Reservation. (*Id.* at 504-506, 895-899.) But those efforts have so far failed because lessees of these Indian lands have instead been forced to pay property taxes to non-tribal governments.

The reservation lands at issue are located within the boundaries of respondent Riverside County—which, like many counties throughout the United

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[4] The judgment below also expressly applies to lands on the Colorado River Indian Reservation, which lies further east of the Agua Caliente Reservation, along the California-Arizona border and near the route from Los Angeles to Phoenix. (Cal. Ct. App. Appellants' App'x at 255-256.) The Colorado River Indian Tribe and its members also lease trust lands to numerous non-Indians. (*Id.* at 255, 464.)

States, funds much of its operations through real-estate taxes. Stretching from the outskirts of Los Angeles to the Arizona border, Riverside County is one of the most populous in the nation, and its total annual real-estate tax revenues exceed $2.5 billion. (*Id.* at 233, 253.) A large portion of these taxes is collected from the fee simple owners of land. But California law defines taxable "real property" more broadly as including "[t]he possession of, claim to, ownership of, or right to the possession of land," Cal. Rev. & Tax C. § 104(a)—and so, when the fee interest in land is tax exempt but the land has been leased, the County levies exactly the same property tax against the lessee. (*Id.* at 720-722.)

That is what happened here. The County recognizes that it cannot tax reservation lands directly, so it demands that non-Indian lessees of the lands pay the taxes. The taxes are not tied to services to the specific leased parcels or even to reservation lands as a class. Instead, the taxes include a 1% "general revenue tax" for "funding … government agencies within the county," App.9, plus water-district and school-district taxes that total approximately 0.2%. App.9-10; *see* Cal. Ct. App. Appellants' App'x at 244-245, 268-269, 453.

The result is that, if the Agua Caliente government were to enforce its own 1% property tax, Indian lands leased to non-Indians would be subject to roughly twice the tax burden of non-Indian lands located in the same communities. "[T]o avoid double taxation," therefore, the tribe has been forced to hold its property tax in abeyance, and has not sought to collect it. (Cal. Ct. App. Appellants' App'x at 250, 252, 505; *see* App.10.) Many hundreds of lessees thus have been

required to pay property taxes to Riverside County, rather than to the tribe.

2. The California courts reject plaintiffs' preemption claims.

The plaintiffs and petitioners in this case are approximately 500 non-Indian lessees of lands within the Agua Caliente or Colorado River reservations, who paid property taxes on those leases to Riverside County. (Cal. Ct. App. Appellants' App'x 246, 255; *see* App.6-7.) They filed two lawsuits against the County in California state court, seeking tax refunds. App.6-7. The great majority of refund claims range from around $1000 up to $20,000; some are for up to $400,000, and one is for about $1.5 million. (*See* Compls., Cal Ct. App. Appellants' App'x at 42-67, 89.)

As relevant here, Petitioners' claims are that the county's taxes are preempted as to their leases by both (1) the pervasive federal regulatory scheme covering leases of Indian lands, and (2) 25 U.S.C. § 5108's express preemption of state taxes on Indian trust lands that were "acquired pursuant to" the Indian Reorganization Act.

Aside from the County, the other Respondents are two water districts who benefit from the property taxes at issue, and who intervened as defendants in the trial court. After consolidating the cases, the Superior Court entered judgment "primarily [on] stipulated facts," App.7, upholding the validity of the

taxes. *See* App.29-42 (tentative decision), App.43-50 (final decision).[5]

The Court of Appeal of California affirmed. Regarding the federal Indian-lands-leasing regulations, the court reiterated its conclusion from *Herpel* that the regulations lack preemptive force. App.19-20. The Court of Appeal also restated its "disagreement with courts that have determined otherwise," including the Eleventh Circuit in *Seminole Tribe*. App.20 n.6.

The Court of Appeal also rejected Petitioners' argument that the tax is expressly preempted by 25 U.S.C. § 5108, which provides that "any lands or rights … acquired" by the Secretary of the Interior in trust for Indians "pursuant to this Act … shall be exempt from State and local taxation." The court held that the "tribal land at issue in this case" is not protected by § 5108 because it "was [originally] set aside for the Agua Caliente and CRIT decades prior to the enactment of the IRA." App.13. Although the trust rights were set to expire until Congress amended the IRA to extend them in 1990, the Court of Appeal held that the extended trust rights did not qualify as

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[5] Before reaching the merits, the Superior Court held that Petitioners have standing to seek tax refunds. The Court noted that striking down the challenged taxes might make little practical difference to Petitioners in future years if it led the tribes to collect their own similar taxes—but even if that were the case, Petitioners would still be entitled to keep their refunds of taxes paid in past years and so have standing to seek that relief. App.31-35. The Court of Appeal saw no need to revisit this question.

"rights … acquired pursuant to" the IRA within the meaning of the statute. App.14-18.

After the Court of Appeal issued its opinion, the defendants requested that the opinion be published because it "decides issues of continuing public interest" that "have arisen in numerous cases and are of a recurring nature," and that still are not "fully settled." (Defs'. Ltr. to Ct. App. at 7-8, Sept. 1, 2021.) The Court of Appeal granted the request and ordered the opinion published. App.27-28.

The California Supreme Court denied review, App.1-2, and this Petition follows.

REASONS FOR GRANTING THE WRIT

This case is an especially clear illustration of the "tension among courts about how to apply pre-emption principles at the intersection of federal law, state law, and tribal land." *Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs., Inc.*, 141 S. Ct. 24, 25 (2020) (Thomas, J., dissenting from denial of certiorari). Moreover, it is an excellent vehicle to address that confusion on two important issues. First, does the comprehensive federal regulation of the leasing of Indian land preempt state and local governments from taxing the leased land and collecting the tax from the non-Indian lessees under the balancing analysis announced by this Court in *White Mountain Apache Tribe v. Bracker*? Second, for purposes of express tax preemption under 25 U.S.C. § 5108, are expanded trust rights an "interest in lands" whose acquisition "pursuant to [the Indian Reorganization] Act" brings the land within the plain language of the statute?

I. The Lower Courts are Intractably Split On The Preemptive Force Of Federal Indian-Lands Leasing Regulations.

This Court's precedents have "emphasized the special sense in which the doctrine of preemption is applied in th[e] context" of "State laws affecting Indian tribes." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-334 (1983). The analysis is "not limit[ed]" to "familiar principles of preemption." *Id.* at 334. In *White Mountain Apache Tribe v. Bracker*, this Court set forth a balancing preemption analysis for use "where … a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U.S. 136, 144 (1980). In such cases, the courts must conduct "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," by "examin[ing] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144-145. Under *Bracker*, if the "federal regulatory scheme" is sufficiently "pervasive" and "comprehensive," then state taxes are preempted unless they can be "justif[ied] by an even more weighty "regulatory function or service performed by the State." *Id.* at 148-149. This Court's later precedents have applied what has become known as "the *Bracker* interest-balancing test." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005) (finding *Bracker* does not apply to taxes on "a transaction that occurs off the reservation"); *see, e.g., Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982) ("comprehensive federal scheme regulating the creation and maintenance

of educational opportunities for Indian children" precluded state tax on commercial activity that was justified by "nothing more than a general desire to increase revenues"); *Mescalero*, 462 U.S. at 338-342 ("comprehensive scheme of federal and tribal management established pursuant to federal law" preempted state regulation of hunting and fishing).

With respect to state taxation of Indian-lands leaseholds, the split amongst the lower courts and the Department of the Interior is, first and foremost, a disagreement about the *Bracker* preemption analysis.

The lower courts agree that federal law regulates the leasing of Indian trust lands in great detail. From the Founding era to the present day, Congress has passed more than a dozen statutes concerned specifically with leasing Indian lands. *See Cohen's Handbook of Federal Indian Law* §§ 1.03-06, 5.02-03, 15.06-07, 17.02-04. Congress enacted most of the modern regulatory regime in 1955. *See* 25 U.S.C. §§ 415-415d. This statutory scheme requires the approval of the Secretary of the Interior for such leases and authorizes the Secretary to prescribe their terms and regulations. *Id.* § 415(a). Exercising that authority, the Secretary has promulgated regulations of Indian land leases running to several hundred numbered sections. *See* 25 C.F.R. Pt. 162. Among many other things, the regulations prescribe (1) what laws apply to leases of Indian lands; (2) what taxes apply; (3) how leases may be enforced; (4) what documents must be submitted to the BIA for approval, administration, or enforcement of leases; (5) maximum length; (6) mandatory terms; (7) the amount of rent; (8) how a lease must be recorded; and (9) whether and how a lease can be

amended or assigned.[6] The United States also has extraordinary, ongoing control over the performance and terms of Indian-land leases: the regulations authorize federal regulators to enter leased premises upon reasonable notice, to monitor and enforce the terms of the lease, to cancel the lease, and even to collect lease payments. 25 C.F.R. §§ 162.316, 162.364, 162.367. The statutes also authorize the Secretary to approve tribes to themselves administer certain leases, 25 U.S.C. § 415(h), which the Secretary has done for the Agua Caliente. (Cal. Ct. App. Appellants' App'x at 733-750.)

Although these regulations are comprehensive in nature, the lower courts disagree about what, if any, preemptive force they have.

Start with the Eleventh Circuit's *Seminole Tribe* decision. There, the court found a leasehold tax on Indian lands preempted under "the *Bracker* analysis," because "the extensive and exclusive federal regulation of Indian leasing … precludes the imposition of state taxes on that activity," and because the purpose of the tax was "raising revenue for providing statewide services generally" rather than "to compensate for any state services … related to the act of renting of commercial property on Indian land." 799 F.3d at 1339.

The Department of the Interior agrees. Its regulatory discussion of preemption expressly follows the *Bracker* analysis, concluding that "[t]he Federal statutory [and regulatory] scheme for Indian leasing is comprehensive, and accordingly precludes State taxation" because "[f]ederal regulations cover all aspects of

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[6] *Id.* §§ 162.001, 162.014, 162.017, 162.022, 162.027, 162.311, 162.313, 162.321, 162.323, 162.345-352.

leasing." *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. at 72,447.

The Ninth Circuit and the California courts have reached a contrary conclusion under *Bracker*—but for conflicting reasons. The Ninth Circuit's initial decisions upholding California county leasehold taxes came "years before *Bracker*." *Agua Caliente Band*, 749 F.App'x at 651. After *Bracker*, the Ninth Circuit held in a non-tax case that "the federal statutes authorizing the leasing of trust lands and the regulations governing such leasing … constitute a comprehensive regulatory scheme with preemptive effect on state and local laws," and so found a rent-control ordinance preempted as to leases of Indian lands. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1392 (9th Cir. 1987.) When the Agua Caliente tribe challenged the leasehold tax under *Bracker*, however, the Ninth Circuit declined to engage in a fresh *Bracker* analysis and instead held that its pre-*Bracker* decisions upholding the leasehold tax remain binding. *Agua Caliente Band*, 749 F.App'x at 651-652. Although the panel noted "some tension between" these decisions "and the balancing inquiry required under *Bracker*," it applied them anyway because it found them "not clearly irreconcilable with *Bracker*." *Ibid.* The full Ninth Circuit then denied rehearing *en banc* (with no judge requesting a vote). *Id.*, Order of Mar. 6, 2019 (C.A.9 No. 17-56003, ECF #67.) The result is that Ninth Circuit precedent gives preemptive effect under *Bracker* to the federal regime of Indian-leasing regulations, but it does not extend that effect to state and local leasehold taxes.

The California courts have agreed with the Ninth Circuit's result in upholding the taxes, but they expressly disagree with its reasoning. *Herpel* was the state courts' first post-*Bracker* analysis of a property tax levied against leased Indian lands. In that decision, the California Court of Appeal acknowledged that federal leasing regulations for Indian lands "are extensive," but it nevertheless held that their "nature" did not "strongly support preemption" at all. 45 Cal.App.5th at 110-111. The court acknowledged "that this puts us in disagreement with courts that have" found a preemptive "federal interest in … the Leasing Regulations" under *Bracker*, citing the Ninth Circuit's *Segundo* decision and the Eleventh Circuit's *Seminole Tribe* decision as examples of this disagreement. *Id.* at 111.

If there was any doubt about whether this disagreement was durable, the California courts reiterated it in this case. In adhering to *Herpel*'s version of the *Bracker* analysis, the Court of Appeal repeated its "disagreement" with *Segundo* and *Seminole Tribe*. App.20 n.6.

Given this extensive record of candid disagreement, any attempt to smooth away the conflict must fall flat. The halfhearted factual distinction offered by the *Herpel* court certainly does not hold water. It noted that *Seminole Tribe* invalidated a property tax on commercial leases—and suggested counterintuitively that Riverside County's similar tax might be valid because it "extends *more broadly* to cover residential [leases] as well," and Riverside County provides its residents with "access to public schools." 45 Cal.App.5th at 115-116 (emphasis added). But that explanation is

incoherent under the *Bracker* balancing analysis. On one side of the balance, neither *Seminole Tribe* nor *Herpel* suggested that the federal or tribal interest in preemption is stronger with respect to commercial leases of Indian lands. And on the other side, both the state tax in *Seminole Tribe* and the Riverside County tax in *Herpel* were for "the general raising of revenue," *compare* 799 F.3d at 1343 *with* 45 Cal.App.5th at 108, and nothing in the Eleventh Circuit's opinion hinted that the court somehow excluded the value of public education from its analysis of the state interests involved.

Nor can *Seminole Tribe* be explained away, as one district court tried, on the ground that Florida (unlike Riverside County) would have required "the Tribe lessor … to pay the rental tax" if the lessee had failed to do so. *Agua Caliente Band*, 2017 WL 4533698, at *16 (C.D. Cal. June 15, 2017). On appeal from that decision, the Ninth Circuit did not rely on that distinction, *see* 749 F.App'x 650, and for good reason: the plaintiffs in *Seminole Tribe* included the non-Indian lessees who had actually paid the tax, and the court struck down the tax as applied to them, not just to the tribe. *See* 799 F.3d at 1327, 1343 & n.14.

To sum up: this case has extended an acknowledged split of authority in the courts about the application of *Bracker* preemption to state and local collection of property taxes on Indian lands from non-Indian lessees. The split is compound and longstanding and, far from showing any sign of resolving itself, has solidified in recent years—including in this case. The Court should grant certiorari to resolve this confusion in the law.

II. This Court Has Yet To Clarify The Boundaries Of Statutory Express Preemption Of Taxes On Trust Lands.

The second point of confusion that this Court should resolve is the scope of the Indian Reorganization Act's express prohibition of "State and local taxation" on "any [Indian trust] lands or rights acquired" by the Secretary of the Interior "pursuant to this Act." 25 U.S.C. § 5108.[7]

There is no dispute that the "State and local taxation" prohibited by § 5108 includes property taxes on Indian land collected from non-Indian lessees. The question, instead, is over what qualifies as "rights acquired pursuant to [the] Act." Although the United States has held title to the Agua Caliente Reservation since before the IRA became law, the United States' trust rights were set to expire in 1994 until Congress amended the IRA (in 1990) to extend them and make them indefinite. Petitioners contend that these extended trust rights are "rights acquired pursuant to [the] Act." The California courts disagreed, but the trouble is that the caselaw provides little guidance for deciding the question.

Since the IRA was enacted in 1934, this Court has discussed what rights in land qualify for § 5108 protection only once, and only briefly. *Mescalero Apache Tribe* dealt mainly with the separate question of

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[7] Before the 2016 recodification of Title 25 of the U.S. Code, current § 5108 was instead § 465. *See* U.S. Code Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t25/T25-RT.pdf.

whether and when a state may tax a tribe-owned business. But in a brief discussion, the Court also held that § 5108 can protect even an interest in land that "was not technically 'acquired' 'in trust for the Indian tribe.'" 411 U.S. at 155 n.11. *Mescalero* involved a tribal ski resort "on land [that was] outside the boundaries of the Tribe's reservation," but that "was leased from the United States Forest Service." *Id.* at 146. The Court adopted a pragmatic reading of section 5108, noting that "the United States … already had title to the forest," and it would have been "meaningless … to convey title to itself for the use of the tribe," as the statute literally contemplates. *Id.* at 155 n.11 (citation omitted).

The *Mescalero* Court did not, however, announce any more general principle for determining whether an interest in land qualifies for protection under § 5108. Later courts and commentators have lamented it as "[u]nfortunate[]" that the Court "provided no explicit explanation" for its conclusion, *Herpel*, 45 Cal.App. 5th at 121, and that the Court "merely announced that section 465 applied" "without any discussion" of the underlying issues. *See* Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 Tax Law. 897, 1052 (2010).

Indeed, lower courts considering whether an interest in land qualifies for § 5108 protection frequently seem unaware of this Court's direction in *Mescalero*. The Supreme Court of South Dakota has limited § 5108 preemption to land acquired by the United States through formal "fee-to-trust transfers," without citing *Mescalero* on this point. *Pickerel Lake Outlet Ass'n v. Day County*, 953 N.W.2d 82, 89-90 (S.D.

2020). And the Washington Court of Appeals has held—also without citing *Mescalero* on this point—that when Congress authorizes the leasing of pre-existing trust lands, that right to lease the lands is not "acquired pursuant to this Act, within the meaning of § 5108." *Sifferman v. Chelan Cnty.*, 496 P.3d 329, 342 (Wash. Ct. App. 2021) (cleaned up). The only court that seems to have grappled with *Mescalero* on this issue is the Court of Appeal of California in *Herpel*—which essentially limited this aspect of *Mescalero* to its facts, concluding that it applies only to federal lands leased to Indian tribes after the IRA was enacted, or to tribal projects "developed with money provided by … the Indian Reorganization Act." 45 Cal. App.5th at 121-122.

This is too important a question to continue to go unanswered. As the South Dakota Supreme Court explained in *Pickerel Lake*, "a number of different trust landholdings exist" in a "patchwork of trust land categories." 963 N.E.2d at 89 (cleaned up); *see also Yankton Sioux Tribe v. Podhrasky*, 606 F.3d 994, 1001-02 (8th Cir. 2010) (describing a single reservation's four categories of "trust lands" and two categories of "fee lands"). As in *Mescalero*, 411 U.S. at 155 n.11, a great many of these lands arguably "w[ere] not technically 'acquired' 'in trust for the Indian tribe.'" *See Yankton Sioux Tribe*, 606 F.3d at 1001 (on one reservation, "lands … which have been continuously held in trust" predominated over "IRA Trust Lands" by a margin of nearly 5 to 1). As matters stand, neither the beneficial owners of these lands nor state taxing authorities have any way to anticipate how § 5108 may affect those lands' tax status. As the

Court of Appeal of California noted in this case, the results either way could be "dramatic." App.16.

III. The Court Should Grant Review To Resolve The Split.

Now is the time, and this is the case, for the Court to grant review and clarify the confusion in the law. As described above, the split of authority is long-standing and deepening. And the lower courts in this case squarely decided both questions presented and identified no vehicle problems or alternative grounds for resolving the case. Indeed, there could be no factual disputes, as the essential facts were all stipulated between the parties. App.7.

For the lower courts, a grant of review in this case would provide guidance on a perplexing set of questions of federal law. For Indian tribes, review would provide the hope that the approach of land development to once-isolated reservations can provide both increased economic prosperity and a greater degree of practical sovereignty over tribal lands. And for everyone, it would mean certainty and uniformity on two questions of federal law where there currently is neither.

CONCLUSION

The Court should grant certiorari and set the case for merits briefing and argument.

Respectfully submitted,

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