No. 968594

WASHINGTON STATE SUPREME COURT

EVERI PAYMENTS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

AMICUS CURIAE BRIEF OF INDIAN TRIBAL GOVERNMENTS PARTY TO TRIBAL-STATE GAMING COMPACTS

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ARGUMENT

Amici Tribes urge this Court to grant Everi Payments, Inc.'s Petition for Review ("Petition") of the Court of Appeals ("COA") Opinion issued by Division II on December 11, 2018 ("Opinion"). The COA conflated key legal principles by resting its decision on the fact that the Business and Occupation ("B&O") tax falls on Everi, rather than Indians or tribes. This "incidence of the tax" test relates to the federal common law ban on taxing Indians and tribes, but fails to address the question here—whether the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, bars taxing Everi for services that directly support Indian gaming. The COA failed to address the proper legal standards for IGRA preemption and disregarded the Washington State Department of Revenue ("DOR")'s regulation, which prohibits taxing services performed by non-Indians for tribes and tribal casinos. Amici Tribes urge this Court to accept review.

I. Legal Principles Governing Jurisdiction in Indian Country.

Tribes are distinct sovereigns subject only to the plenary power of the United States Congress. *Worcester v. Georgia*, 31 U.S. 515, 557 (1832); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). A sovereign's jurisdiction is typically determined by the territory the sovereign governs; but due to overlapping territories, jurisdiction is allocated differently in Indian country. Absent federal delegation, states

lack civil regulatory jurisdiction over tribes and Indians in Indian country. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (1973). This includes the power to tax. *Id.* At 171 ("Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress").[1]

A. Taxation of Non-Indians in Indian Country.

"Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Although states may exercise concurrent jurisdiction over non-Indians in Indian country, this may be preempted by federal law—under either common law or federal statute, such as IGRA. Federal common law also prohibits states from imposing taxes in Indian country that infringe on tribal sovereignty. *Williams v. Lee*, 358 U.S. 217 (1959).

Washington State and Washington tribes have committed to government-to-government cooperation and mutual respect. *See* Centennial Accord dated August 4, 1989.[2] RCW Chapter 43.376 requires

[1] This categorical prohibition, which applies when the "incidence" of a state tax falls on tribes or Indians in Indian country, is not at issue; it is undisputed that Everi bears the tax.
[2] The Centennial Accord is publicly available here: https://goia.wa.gov/relations/centennial-accord (last accessed Mar. 31, 2019).

state agencies to engage in government-to-government relationships with tribes. DOR complied with the government-to-government requirement when it promulgated WAC 458-20-192 ("Rule 192"). Rule 192(7) addresses state taxation of non-Indians in Indian country.

B. Indian Gaming.

The U.S. Supreme Court held that states lack inherent civil regulatory jurisdiction over Indian gaming. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). A year later, the U.S. Congress enacted IGRA "to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6 (1988).

IGRA has two key aspects: first, "to provide a statutory basis for the *operation of gaming* by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments," and second, "to provide a statutory basis for the *regulation of gaming* by an Indian tribe." 25 U.S.C. § 2702 (emphasis added). One of the express goals of gaming regulation under IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.* Thus, the regulatory and operational mandates of IGRA are inextricable, and both are integral to IGRA's core purpose and policy.

Regulation of Indian gaming under IGRA is multilayered. Tribes are the primary regulators. Tribal gaming commissions or agencies are

separate from a tribe's gaming operators. Tribes promulgate gaming ordinances to regulate day-to-day operations.[3] These are subject to review and approval by the National Indian Gaming Commission ("NIGC"), a federal regulatory body created by IGRA. 25 U.S.C. § 2710(e). IGRA's pervasive regulatory regime extends to gaming service providers, which including non-Indian vendors doing business with and providing services for tribal casinos.[4] Tribal regulatory bodies license and regulate all gaming service providers, including "non-gaming" casino vendors.

IGRA identified three types of Indian gaming, and delegated to the states *very* limited regulatory authority over only one type. That authority can be exercised only pursuant to a tribal-state gaming compact. 25 U.S.C. § 2710(d). Compacts are subject to federal approval. 25 U.S.C. § 2710(d)(8).[5] Even when the state has limited regulatory authority over tribal gaming it is secondary to the tribe as the primary regulator.

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[3] Federally approved tribal gaming ordinances are available on the NIGC's website, here: https://www.nigc.gov/general-counsel/gaming-ordinances (last accessed Apr. 1, 2019).

[4] "Gaming Services" means "the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly) in connection with the operation of Class III gaming in a Gaming facility, including equipment, maintenance or security services for the Gaming Facility." Opinion at 13 (n.9). The distinction between gaming and "non-gaming" vendors are terms of art used in Washington tribal-state compacts, which are part of IGRA's regulatory regime. All "non-gaming" vendors are still providers of "gaming services."

[5] Federally approved IGRA compacts are available on the Department of Interior's website, here: https://www.bia.gov/as-ia/oig/gaming-compacts (last accessed Apr. 1, 2019).

IGRA expressly and tightly restricts the subject matter of compacts. 25 U.S.C. § 2710(d)(3)(C). For example, states cannot tax tribal gaming revenues, except as negotiated solely to mitigate the costs and impacts of Indian gaming. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010).

Indian gaming is governmental gaming. Just as the Washington State lottery raises revenues for education, Indian gaming revenues pay for important tribal government functions, including: education, health care, environmental stewardship, language revitalization programs, community infrastructure, and elder programs.[6] State financial incursion into tribal gaming is strictly limited by IGRA in order to ensure that tribal gaming revenues are available for tribal governmental purposes.

II. Review Should Be Accepted.

A. Significant Constitutional Question: IGRA Preemption.

Review is appropriate under to RAP 13.4(b)(3) because the Opinion raises a significant question of law under the U.S. Constitution: whether the State's B&O tax on a non-Indian vendor providing services for tribal casinos is preempted by IGRA under the Supremacy Clause (Article VI) and the Indian Commerce Clause (Article I, Section 8, Clause 3).

[6] To learn more about the essential governmental services funded by Indian gaming and other tribal enterprises, visit www.washingtontribes.org.

IGRA preempts the field of "governance of gaming." *See, e.g.*, *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). The "governance of gaming" includes both operational and regulatory activities directly related to Indian gaming. *Id.* at 548-50 (IGRA preempted state-court jurisdiction over claims brought by non-Indian gaming management company against non-Indian law firm; because law firm had represented tribal regulatory body, the claims were directly related to Indian gaming); *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F.Supp.3d 910, 919-25 (D.S.D. 2017), *appeal docketed*, No. 18-1271 (8th Cir.) (IGRA preempted state tax on non-Indian consumers for purchases made not only at tribal casino but also at other tribal enterprises that directly promoted and facilitated gaming activities).

Conversely, IGRA does not preempt state laws regulating or taxing activities that are only "remotely related" to Indian gaming. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008); *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) (not every contract "peripherally associated with tribal gaming is subject to IGRA's constraints").

The COA relied on *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), an outlier in IGRA preemption cases, when it articulated the test for IGRA preemption: "whether the tax interferes with

a tribe's ability to regulate its gambling operations." Opinion at 12-13. This test improperly distinguishes tribal gaming regulation from tribal gaming operation and holds that only the former is within the "realm" of IGRA. *Id.* at 13. But the "realm" of IGRA, and therefore its preemptive effect, expressly extends to both gaming regulation and gaming operation. 25 U.S.C. § 2702 (purpose is to provide statutory basis for gaming regulation *and operation* by tribes). Cash-access services are critical to casino operations, and therefore fall within the realm of IGRA.[7]

Even if the *Mashantucket* distinction is proper, the COA failed to apply it correctly because it failed to analyze whether the B&O tax on Everi actually interferes with tribal regulation of gaming. The COA failed to examine whether Everi's services are regulated by IGRA compacts, tribal gaming ordinances, or tribal regulations and procedures. Instead, the COA concluded that because Everi's cash-advance services *could be* used by customers for activities other than gaming, they "fall outside the realm of IGRA." Opinion at 13.

In fact, it is undisputed that Everi holds licenses granted pursuant to tribes' regulatory authority under IGRA. Petition at 5-6; CP 345-427

[7] Indeed, many Washington tribes bargained for a tribal-state compact amendment to allow customers to put cash into gaming machines rather than purchase tickets from the tribes. Allowing "cash in" was a significant issue that increased net win per machine. The ability of customers to immediately access cash through ATMs located on or near the gaming floor is inextricably related to successful tribal gaming operation.

(attaching gaming licenses issued by 19 different tribes in Washington).[8] Everi's services thus fall within the "realm" of IGRA's regulatory regime, and taxing those services intrudes on the tribes' governance of gaming, a field preempted by IGRA.

Moreover, the COA's IGRA preemption analysis improperly relies on the fact that Everi bears the incidence of the tax. Opinion at 11 (tax is not targeted at gaming because it is "assessed against Everi"); *Id*. at 15, (no evidence of interference with tribal governance because "B&O tax was assessed against Everi ..., not against any of the tribes"). But it is clear under IGRA—even under *Mashantucket*—that taxes assessed against non-Indians may still violate IGRA preemption; incidence is not the test.

B. Issue of Substantial Public Interest: DOR's Rule 192.

Review is appropriate under RAP 13.4(b)(4) because the Opinion raises an issue of substantial public interest: the public, including both Washington tribes and the general population, has an interest in consistent and proper application of Rule 192, which addresses state taxation in Indian country. "It is well-settled law in Washington that public agencies must follow their own rules and regulations." *Samson v. City of*

[8] Most tribes have issued Everi "gaming" or "class III" licenses (CP 345-427). A single "non-gaming vendor license" was issued to Everi. CP 370. In any case, even if a tribe licenses Everi as a "non-gaming" casino vendor, that license would not exist but for IGRA and its regulatory regime.

Bainbridge Island, 149 Wn. App. 33, 44, 202 P.3d 334 (2009). Deviation from Rule 192 is inconsistent with the Centennial Accord, and it creates uncertainty regarding taxation of non-Indians in Indian country.

The COA's application of Rule 192 is inconsistent with its text and unsupported by the record. The COA concludes that because the tax is measured by customer cash-advance fees, it "is not applied to services Everi provides to the tribes." Opinion at 25. This simplistic analysis mistakes the nature of Everi's business and the language of Rule 192.

Cash services on the casino floor are essential to Indian gaming and casino management. Everi provides its services as part of a suite of services it markets to casinos to fulfill the casinos' operational and regulatory gaming needs. Tribal casinos play an active role in shaping the scope and provision of cash services, including the amount of the fee, ATM placement, and whether Everi has access to regulatory information such as self-exclusion lists.[9] Everi's services are available at tribal casinos based solely on contracts with tribes and licenses granted by tribal regulators. ATM withdrawals by casino patrons would not occur but for the tribal casinos and the business relationship between tribes and Everi.

[9] Self-exclusion lists are used by tribal regulators and operators to prevent individuals with gambling addictions from engaging in gaming.

Rule 192(7)(b) states that "income . . . from the performance of services in Indian country *for* tribes and tribal members is not subject to B&O. The exemption is not based on who pays for the service or whether is it provided "to" non-Indians. The fact that casino patrons may also benefit from Everi's services or pay fees does not change the essential nature of the service being provided for the tribes. Rule 192 contemplates that tribes will contract with third parties to perform necessary services that the tribe would otherwise have to provide itself. The tribes have done that here: Everi is providing services in tribal casinos "for" the tribes. The COA ignored a rule that was squarely on point by focusing on an extraneous factor—who paid the fees. This Court should address the proper application of Rule 192.

CONCLUSION

Amici Tribes urge this Court to grant Everi's Petition in order to consider whether Washington State has jurisdiction to impose a B&O tax on services provided by Everi that directly facilitate Indian gaming and whether, in any event, those services are exempt from taxation under the DOR's own regulation promulgated in furtherance of the government-to-government principles mandated by Washington's Centennial Accord.

DATED this 19th day of April, 2019.

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DECLARATION OF SERVICE

I, Nichole Barnes, hereby declare under penalty of perjury under the laws of the State of Washington that on this 19th day of April, 2019, I caused the foregoing document to be filed with the Supreme Court of Washington via electronic filing and that a true and correct copy of the same was served through the Washington State Appellate Courts' Portal.

SIGNED in Seattle, Washington on this 19th day of April, 2019.

s/Nichole Barnes
Nichole Barnes, Legal Assistant

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