No. _____

In the
SUPREME COURT OF THE UNITED STATES

EDWARD W. and TINA L. JEFFERSON
husband and wife and their minor children,
CAROLENA, CRYSTAL, and CAMPBELL
JEFFERSON,
Petitioners,

v.

COMMISSIONER OF REVENUE FOR
THE STATE OF MINNESOTA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I: Whether the State of Minnesota has the right to tax Indian Gaming and Regulatory Act-derived per capita distributions made solely to tribal members if these distributions come exclusively from tribally-owned and reservation-located businesses?

II: Whether the Indian Gaming Regulatory Act, 28 U.S.C., §2710, preempts any attempt by the State of Minnesota to tax gambling proceeds distributed per capita to individual tribal members?

III: Whether the position that enrolled Indians who reside on their tribal reservation cannot be taxed by the State of Minnesota while Indians who reside off their own reservation may be taxed on their identically-derived income violates the equal protection clauses of the federal Constitution and the implied equal protection provisions, the Uniformity Clauses, of the Minnesota State Constitution?

IV: Whether, given the fact that the Jeffersons were driven off their father's land assignment and could not return to another residence within the boundaries of their tribal reservation, the Minnesota Tax Court should have determined that the Jeffersons had not freely chosen to reside in

Minnesota but were forced to reside in Minnesota rather than on their tribal reservation-land?

V: Whether State taxation of per capita distributions from gaming interferes with tribal self-government and so violates United States Supreme Court jurisprudence?

PARTIES TO THE PROCEEDING

Petitioners

Edward W. Jefferson, Tina L. Jefferson, Carolena Jefferson, Crystal Jefferson, and Campbell Jefferson

Respondent

Commissioner of Revenue for the State of Minnesota

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Jeffersons, ask that a writ of certiorari issue to review the decision of the Supreme Court of the State of Minnesota, *Edward W. Jefferson and Tina Jefferson et al., Relators, v. Commissioner of Revenue, Respondent*, 631 N.W.2d 391 (Minn. 2001), filed of record on August 2, 2001.

OPINIONS BELOW

This Petition seeks review of a reported decision of the Supreme Court of the State of Minnesota, *Edward W. Jefferson and Tina Jefferson et al., Relators, v. Commissioner of Revenue, Respondent*, 631 N.W.2d 391 (Minn. 2001), which was filed of record on August 2, 2001; this decision has been reprinted beginning at page 1a of the Appendix here. This appellate decision affirmed the decision of the Minnesota Tax Court, the Honorable George W. Perez, presiding, *Jefferson v. Comm'r of Revenue*, Nos. 7190, 7243, 7191, 7192, 2001 WL 46248 (Minn. T.C. January 17, 2001), reprinted beginning at page 12a of the Appendix. The Tax Court decision, filed January 17, 2001, granted summary judgment in favor of the Commissioner of Revenue for the State of Minnesota.

STATEMENT OF JURISDICTION

This petition seeks to review the decision of the Supreme Court of the State of Minnesota, filed August 2, 2001. Therefore, this United States Supreme Court has jurisdiction pursuant to 28 U.S.C., §1257. This petition is timely filed within 90 days of the Minnesota Court's entry of its final decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8 [3], "[t]he Congress shall have Power...[to] regulate Commerce...with the Indian Tribes," and [18] to "make all Laws which shall be necessary and proper for carrying into Execution for the foregoing powers...or in any Department or Officer thereof." The Constitution also declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," Article VI[2].

Fourteenth Amendment, Section 1: "No State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

Indian Gaming Regulatory Act, 25 U.S.C., §2710.

Each one of these Constitutional and Statutory Provisions were brought into issue by the Jeffersons as early as the Petition in the Minnesota Tax Court or during the summary judgment hearing.

STATEMENT OF THE CASE

The Jefferson family, Edward and his wife, Tina, and their children, Carolena, Crystal and Campbell, are enrolled members of the Prairie Island Indian Community. The tribe has established its own self-government through a federally-approved Constitution. The entire Tribe has only about 550 members.

The monthly per capita distributions which the Jeffersons receive as enrolled members from the Tribal Council have their source in the tribe's gambling and hospitality operations, a federally-approved gaming operation under the Indian Gaming Regulatory Act. These businesses are conducted almost exclusively on tribal reservation land. These tribal gaming-related businesses have been approved by the United States through the Indian Gaming Regulatory Act and by the State of Minnesota through tribal-state compacts and amendments to these compacts, Tribal-State Compact for Control of Class III Video Games of Chance on the Prairie Island Indian Reservation in Minnesota, dated November 15, 1989, and its amendments; the Tribal-State Compact for Control of Class III Blackjack on the Prairie Island Indian Community Reservation in Minnesota, dated May 8, 1991.

The Prairie Island Constitution has allowed for the payment of per capita distributions to tribal members as does the Indian Gaming Regulatory Act. These federally-approved articles and statutes make no provision for the payment of State taxes.

Tribal members from the Prairie Island Indian Community have the right to a land assignment on tribal land if these are available, but the tribe did not issue any additional land assignments for any of its members for the period from 1991 to 1998. Many tribal members who wanted to reside c their own reservation, including Edward and Tina Jefferson, could not obtain housing or a land assignment or leasehold.

The Prairie Island Indian Community reservation has a very limited land base. The Jeffersons, Petitioners here, had a trailer house set up on the land assignment owned by Joseph B. Campbell, Tina Jefferson's father. The tribe also wanted

the same land assignment held by Joseph B. Campbell to construct a tribal administration building. When Joseph B. Campbell refused to hand over his land to the tribe, the tribe had him arrested for trespassing on his own land assignment and bulldozed his house, barn and outbuildings. His children and their families, including the Jeffersons, had nowhere to return. Contractors hired by the tribe hauled off the trailer owned by Edward and Tina Jefferson. The Jeffersons were threatened with arrest if they came back to this particular land assignment.

So many tribal members wanted to reside on their reservation that the tribal council determined that only a lottery would fairly allow the distribution of a very few available land assignments. The Jeffersons also participated in this tribal lottery for land assignments available on traditional tribal trust land. Tina Jefferson won a land assignment alongside the Milwaukee Road railroad. The family had a modular home placed on their land assignment. The family finally returned to their tribe's land.

The State of Minnesota assessed income taxes against the Jeffersons for the years that the family had to reside off the reservation.

The Prairie Island Indian reservation community lacks the most basic amenities: No post office, no school, no insurance agency, no grocery store, no gas station, no library, no State office where one might get a driver's license or title a vehicle or boat. Most basic services are off the Island in the cities of Red Wing and Hastings. Every tribal member who resides within the confines of the reservation has to leave the reservation for most basic services.

No Minnesota income tax or federal income tax liability presently exists with respect to the Jefferson children on account of an Internal Revenue Letter Ruling and an agreement with the State of Minnesota.

REASONS WHY THE WRIT SHOULD ISSUE

I: The State of Minnesota does not have the right to tax Indian Gaming and Regulatory Act-derived per capita distributions made solely to tribal members if these distributions come exclusively from tribally-owned and reservation-located businesses.

II: The Indian Gaming Regulatory Act, 28 U.S.C., §2710, preempts any attempt by the State of Minnesota to tax gambling proceeds distributed per capita to individual tribal members.

The State of Minnesota, in this present case, taxes as income the per capita distributions uniformly made by the Prairie Island Indian Community to each of its adult members, including Edward and Tina Jefferson, only because the Jefferson family resided off their reservation for the years in question. The primary source of these per capita distributions is a gaming operation and a hotel and restaurants, all conducted by the tribe on reservation land under federal law, namely, the Indian Gaming Regulatory Act, 25 U.S.C., §§ 2701–2721 ("IGRA").

The Minnesota Supreme Court held that because 25 U.S.C., § "2710(b)(3)(D) does not *expressly* preempt state

taxation of income received by tribal members in the form of per capita payments from reservation gaming activity [then] ...IGRA does not preclude the State of Minnesota from imposing its income tax on the Jeffersons during periods when they resided within the state but off the Prairie Island Indian Reservation. We therefore reject the Jeffersons' preemption claim," *Jefferson*, 8a (Emphasis in the original).

The Indian Gaming Regulatory Act declares that distributed per capita proceeds from reservation gaming activity may be subject to Federal income taxation, but does not mention or reference state taxation, 25 U.S.C. §2710(b)(3)(D): "Net revenues from any...gaming activities conducted...by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if — * * * the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made."

At least one court has stated that "[t]here is little doubt that IGRA preempts state laws that purport to prohibit or to regulate Indian gaming. The scope of this preemption, however, is limited to the reach of IGRA, and that statute only concerns Indian gaming that occurs on Indian lands." *AT & T Corp. v. Coeur D'Alene Tribe*, 45 F.Supp.2d 995, 1000 (D. Idaho 1998)(*citing Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir.1997) (hereinafter "*Cabazon I*"), *cert. denied*, 524 U.S. 926 (1998)); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir.1994) (Hereinafter "*Cabazon II*"). One of the purposes of IGRA is the "establishment of independent Federal regulatory authority for gaming on Indian lands...," 25 U.S.C. § 2702(3). It may be argued logically that since the distribution of proceeds and the Federal taxation of these proceeds is within

the sole ambit of IGRA, that, therefore, there is no room for state regulation or taxation of those proceeds, regardless of where the proceeds are received by Tribal members. Moreover, the *Cabezon II* court held that under IGRA, "[t]he State, however, has no jurisdiction over gaming activities that are not the subject of a Tribal-State compact [entered into pursuant to the provisions of IGRA]. Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government." *Id.*, at 1059.

The Compacts running between the Prairie Island Indian Community and the State of Minnesota make no reference whatsoever to Minnesota being permitted to tax the distributions received by tribal members from gaming activities.

Courts have stated that "in those circumstances in which there is a 'pervasive' or 'comprehensive' federal regulatory scheme governing a particular aspect of Indian affairs, the controlling federal cases made it clear that 'state laws are preempted if they appear to 'disturb and disarrange' that scheme.' " *Mattz v. Superior Court*, 250 Cal.Rptr. 278, 284 (Cal. 1988), *referring to People v. McCovey*, 685 P.2d 687 (Cal. 1984), quoting *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685 (1965). The Indian Gaming Regulatory Act is such a comprehensive regulatory scheme. *See*, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (11th Cir. 1997). "The Indian Gaming Regulatory Act ('IGRA') established a comprehensive scheme for the regulation of gaming activities on Indian land," *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 157 (D.D.C. 2000)

IGRA's language regarding *federal taxation* is clear; despite this, IGRA contains no language referencing or referring to State taxation of the same gaming proceeds.

"Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions. Thus, the silence of the legislature is telling." *Queets Band of Indians v. State*, 682 P.2d 909, 912 (Wash. 1984) (*decision rendered moot by subsequent legislation, as noted in Queets Band of Indians v. State of Washington*, 783 F.2d 154 (9th Cir. 1986)), (citing *Washington Natural Gas Co. v. PUD 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969)).

The Supreme Court, in *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 175 (1989), observed that "it is well settled that, absent express congressional authorization, a State cannot tax the United States directly. *See McCulloch v. Maryland*, 4 Wheat. 316 (1819). It is also clear that the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust." The Court also noted that

> federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity. Finally, we note that although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence.

Cotton Petroleum, 490 U.S. at 176-177 (citing *Ramah Navajo*

School Board., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982)).

The Indian Gaming Regulatory Act may also be characterized as ambiguous with respect to State taxation. This matters enormously: If a Federal statute relating to Indian interests is ambiguous, "it is to be construed generously in light of the firm federal policy of promoting tribal self-sufficiency and economic development." *Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662, 666 (Utah 1995). *See also*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") *and McClanahan v. Arizona State Tax. Comm'n*, 411 U.S. 164, 174 (1973). This controlling principle is known as the "Indian Canon of Construction." The Supreme Court, in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), held that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.' " *Id.*, at 766, n.4, (citing *Choate v. Trapp*, 224 U.S. 665 (1912)). Further,

> [w]hen state taxation is at issue, tribal interests are strongest when a tax is based on value derived from on-reservation conduct involving only tribal members and where the taxpayer is the recipient of tribal services. On the other hand, a state tax is generally valid when the tax is directed at value generated off the reservation and the taxpayer is the recipient of a state's services. In those circumstances, the state interest is at its strongest and the burden on the tribe is likely to be minimal.

Maryboy v. Utah State Tax Com'n, op. cit., at 666 (citations omitted).

In the *Maryboy* case, the Utah court concluded that because the petitioner's income as county commissioner was derived from activities conducted off the reservation and which benefitted the entire county, not just his reservation, that income could be validly taxed by the state.

The United States Court of Appeals for the Eighth Circuit has held that IGRA expressly preempts the field of State application of the States' civil laws except for agreements reached through State-tribal compacts, *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). In fact, "[e]xamination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law," *Id.* See also, S. Rep. No. 446, 100th Congress, 2d Sess. 6 (1988) or 1980 U.S.C.C.A.N, 3071, 3076. Most importantly, the Court remarked that "the only method by which a state can apply its general civil law to gaming is through a tribal-state compact." *Dorsey & Whitney*, 88 F.3d at 546.

The Prairie Island-State of Minnesota gaming compact does not reference any mutual meeting of the minds that the tribe has agreed to allow Minnesota to tax IGRA distributions to its tribal members. This silence means that the State of Minnesota has foregone its opportunity to agree with a co-sovereign that its members could be taxed on IGRA distributions. The only reference in IGRA to taxation of per capita distributions refers exclusively to federal income taxation of these distributions.

"State jurisdiction over Indians is governed by federal statutes or case law." *Minnesota v. R.M.H.*, 617 N.W.2d 55, 58 (Minn. 2000)(citing *State v. Stone*, 572 N.W.2d 725 (Minn.1997); *and National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)).

Generally, a state has no jurisdiction to tax property or activities of Indians on reservation lands without specific Congressional authority. *See Rosebud v. Johnson*, 105 F.3d 1552 (8th Cir. 1997)(citing *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973)). "It has been uniformly held that no state may levy a tax upon an Indian tribal member unless authorized by Congress to do so," *Bryan v. Itasca County*, 228 N.W.2d 249, 251 (Minn. 1975). This present case is rather like the *Bryan* case in which the United States Supreme Court held invalid a County's taxation of Indian lands.

In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the Supreme Court held that absent specific authorization from Congress, a State has no jurisdiction to tax an Indian living on the reservation, and whose income derives from reservation sources. The court in *Oklahoma Tax Comm'n v. Sac and Fox Nation* stated that "[t]he residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction.... To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member," 508 U.S. 114, 123-124 (1993), but the court did acknowledge that "a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations,

dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Id*, citing to 18 U.S.C. 1151. In *McClanahan, the Court also acknowledged that they were not faced with the question of "Indians who have left ... the reservation.*" (Emphasis added.) *Id.* at 411 U.S. 167.

The Supreme Court was later faced with this decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). The Court held that

> Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country. The Treaty between the United States and the Tribe, which guarantees the Tribe and its members that 'no Territory or State shall ever have a right to pass laws for the government of' the Chickasaw Nation, does not displace the rule, accepted interstate and internationally, that a sovereign may tax the entire income of its residents.

Id. 515 U.S. at 453, (referring to and citing the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-334).

The Court advised that "[t]he initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax," *Chickasaw Nation*, 515 U.S. at 459. Speaking of an excise tax, the court advised that if the burden falls on the Tribe or on reservation Indians inside Indian country, then there must be specific Congressional authorization for the tax. If the burden falls on

non-Indians, then the tax can be imposed without such Congressional authorization. "[I]f the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, and may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Chickasaw Nation*, 515 U.S. at 459-460, citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and, *Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994). This legal incidence test "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority," *Chickasaw Nation*, 515 U.S. at 460, and, "[J]urisdictions generally may tax only income earned within the jurisdiction...."

The Court pointedly noted that the Tribe in *Chickasaw Nation* did not argue that the State's tax infringed on tribal self-governance, rather it argued that such an imposition of state income tax in Indians off the Reservation lands would violate the Treaty of Dancing Rabbit Creek, which declared that no government "shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants ... but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws...." Treaty of Jan. 17, 1837, Art. I, 11 Stat. 573. The Tribe had argued that it was immaterial whether the Indians subject to such a tax lived on or off the reservation. The Court rejected this argument, stating,

> liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty. By its terms, the Treaty

> applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits....

Chickasaw Nation, 515 U.S. at 466.

It is interesting to note that Justice Breyer, in a dissenting opinion in which three other justices joined, disagreed, and would invalidate the state's attempt to impose income tax on Indians living off of Reservation lands, pointing out that

> because this tax (1) has a strong connection to tribal government (i.e., it falls on tribal members, who work for the Tribe, in Indian country), (2) does not regulate conduct outside Indian country, and (3) does not (as the Solicitor General points out) represent an effort to recover a proportionate share of, say, the cost of providing state services to residents, I am convinced that it falls on the side of the line that the Treaty's language and purpose seek to prohibit.

Chickasaw Nation, 515 U.S. at 471.

In addition, Justice Breyer invoked the principal that treaties must be construed in favor of the Indians for support

of his opinion that the Treaty of Dancing Rabbit Creek would likely prohibit the imposition of the tax, since the tax

> does affect 'persons,' namely, tribal members, and 'property,' namely, their wages, which members work and which wages are paid well 'within' the Nation's 'limits,' i.e., in Indian country. Admittedly, the quoted language, by itself, does not say for certain that such effects are sufficient to bring the state law within the Treaty's prohibition, but neither does it clearly make residency (rather than, say, place of employment) an absolute prerequisite. In these circumstances, the law requires us to give the Tribe the benefit of the doubt.

Id.

The Court in *McClanahan* stated a similar principle about treaties controlling questions such as taxation of Indians.

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.... [I]n almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

McClanahan, 411 U.S. at 172.

The Court then used this principle to declare that the state had no authority to impose taxes on the Navajo Indians residing on reservations within the state of Arizona. It later stated that "[s]ince appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *Id.* at 411 U.S. 180. In a situation where the "State is totally lacking in jurisdiction over both the people and the lands it seeks to tax..., the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself." *Id.* at 411 U.S. 181. It is also interesting to note that the Court concluded by noting that Tribes are necessarily made up of individuals, and that

> when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

Id. (quoting *Williams v. Lee*, 358 U.S., 217, 220 (1959)).

This Court also decided *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) in which it was also stated that different considerations would apply to activities of Indians off of reservation lands. "'State authority over Indians is yet more extensive over activities . . . not on any reservation,'" *Mescalero*, 411 U.S. at 148 (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962)). While off of reservation

lands, Indians have "generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 149. *See also Village of Kake*, 369 U.S. 60 (off-reservation activities are within the reach of state law). The Court cited to the Enabling Act of New Mexico which reserved for the state a right to tax "'any lands and other property outside of an Indian reservation owned or held by any Indian....'" *Mescalero*, 411 U.S. at 149, quoting the Enabling Act of New Mexico, 36 Stat. 557, and ultimately decided that land and property owned by Indians off the Reservation could be taxed. Referring also to the Indian Reorganization Act, 25 U.S.C. § 461, et. seq., the court declared that "[A]bsent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off- reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." *Mescalero* 411 U.S. at 156, 93 S.Ct. at 1274. The land in question in the *Mescalero* case, however, was not reservation land, but rather was land owned by the Federal Government and leased by the Mescalero Apache Tribe for operation of a ski resort. The Court stated that it was consistent with the intent of the Indian Reorganization Act to tax the income generated by the operation of the ski resort on this land.

The Minnesota Supreme Court relied on its previous decision in *Brun v. Comm'r of Revenue*, 549 N.W.2d 91 (Minn. 1996), to decide that the State possessed the right to tax the Jeffersons. In *Brun*, a husband and wife, both members of the Red Lake Band of Chippewa Indians, challenged Minnesota's ability to collect income taxes on income earned from on-reservation activities, for the period of time that the couple lived off the reservation. The Court decided that the ultimate question was "did the taxpayers

demonstrate that they resided within the boundaries of the reservation during the tax years in question and that, accordingly, the state lacked the authority to impose a state income tax on their income earned on the Reservation," *Brun*, 549 N.W.2d at 92. Since the couple had resided off of the reservation for a period of ten years, though they earned their income from employment on the reservation, that income was subject to state income tax. The court stated that the question of domicile unnecessarily confused the issue and was unimportant to the ultimate resolution.

IGRA per capita distributions were not at issue in the *Brun* case; instead, these individuals earned salaries from teaching school.

The Indian Gaming Regulatory Act does mention that per capita distributions from reservation gaming activity may be subject to Federal income taxation, but this legislation does not mention or reference state taxation, 25 U.S.C. §2710(b)(3)(D).

18 U.S.C. §1162 (Public Law 280) has been interpreted by the State of Minnesota to allow state taxation of Indians when not on reservations or otherwise in "Indian country." *See*, *Bryan v. Itasca County*, 426 U.S. 323 (1976). In *Bryan*, this Court explored the scant legislative history of Public Law 280 and stated that "[t]he only mention of taxation authority is in a colloquy between Mr. Sellery, Chief Counsel of the Bureau of Indian Affairs, and Congressman Young during House committee hearings on Pub.L. 280. That colloquy strongly suggests that Congress did not mean to grant tax authority to the States...," *Id*, at U.S. 381. The Court determined that because of the lack of any substantive discussion of the taxation issue, the thrust of Public Law 280

seems to be "primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes," *Id.* at U.S. 383. Ultimately, the United States Supreme Court decided that

> rather than inferring a negative implication of a grant of general taxing power in s 4(a) from the exclusion of certain taxation in s 4(b), we conclude that construing Pub.L. 280 in pari materia with [the various Termination Acts] shows that if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so.

Id. at U.S. 390.

The United States Supreme Court in the *Bryan* case, however, dealt with an Indian living on the reservation.

In the present *Jefferson* case, the Minnesota Supreme Court used the lack of any express language precluding the State from taxing per capita, IGRA-derived proceeds paid to individual tribal members to determine that Minnesota could, in fairness, tax these proceeds. The analysis uses the often questionable "negative implication."

The State of Minnesota has executed a gambling compact with the Prairie Island Indian Community. This Compact belies any claim that Minnesota has the stated right or any agreement to tax income received by its enrolled tribal

members from tribal businesses. IGRA specifically relates that tribal members who receive distributions from gambling operations will pay federal income taxes. Given that IGRA takes into account that income and earnings from tribal businesses are not taxable by the United States, the State-Prairie Island Indian Community Compacts could have asked that all the members of the Prairie Island Indian Community could be assessed State income taxes as part of the Compact. It did not. After the fact, by judicial fiat the State now attempts to assess taxes on distributions which came specifically from a tribal business and which went solely to tribal members.

For all these reasons, the State of Minnesota cannot tax the distributions made by the Prairie Island Indian tribe to its enrolled members, the Jeffersons, whether they reside on or off the reservation, so long as the per capita distributions were gotten primarily from IGRA-derived activities which were conducted exclusively on the reservation.

III: The State of Minnesota has taken the position that enrolled Indians who reside on their tribal reservation cannot be taxed by the State while Indians who reside off their own reservation may be taxed on the identically-derived tribal income ; this position violates the equal protection clauses of the federal Constitution and the implied equal protection provisions, the Uniformity Clause, of the Minnesota State Constitution.

IV: Given the fact that the Jeffersons were driven off her father's land assignment and

could not return to another residence within the boundaries of their tribal reservation, the Minnesota Tax Court should have determined that the Jeffersons had not freely chosen to reside in Minnesota but were forced to reside in Minnesota rather than on their tribal reservation-land.

The equal protection clause of the Fourteenth Amendment to the United States Constitution states, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." In addition, the "uniformity clause" of the Minnesota Constitution states that "[t]axes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes...." Minn. Const. Art. X, §1. The Minnesota Supreme Court has established that the uniformity provision of the state constitution is no more restrictive upon the legislature's power to tax or classify than is the equal protection clause of the Fourteenth Amendment to the United States Constitution, *Kuiters v. County of Freeborn*, 430 N.W.2d 461, 463 (Minn. 1988). The same test is used for both analyses, *Brainerd Area Civil Ctr. v. Commissioner of Revenue,* 499 N.W.2d 468, 472 (Minn. 1993).

In order to prevail on a facial challenge to a statute on equal protection grounds, a taxpayer must prove, beyond a reasonable doubt, "that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified," *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980).

The first two parts of this test are relatively easy to establish. With regard to those who receive income from

gambling operations conducted pursuant to the Indian Gaming Regulatory Act, there are three different classifications of Native Americans who live within the borders of Minnesota. The first classification includes those Native Americans who are adults living on a reservation inside Minnesota's borders. The second classification includes those Native Americans living within Minnesota who do not live on a reservation. The third classification includes those Native Americans who are children, without regard to where they reside within Minnesota.

The second part of this test can also be proven since the classifications are actually treated differently under the statute. Of the three classifications described above, only the adult Native Americans living in Minnesota but not within the borders of a reservation are subject to Minnesota state income taxes on IGRA per capita distributions.

The third part of this test is more involved. The equal protection clause of the United States Constitution and the uniformity clause of the Minnesota Constitution require that persons similarly situated be treated alike unless a rational basis exists for distinguishing among them, *Little Earth of United Tribes, Inc. v. County of Hennepin*, 384 N.W.2d 435, 441 (Minn. 1986). A statutory classification violates these clauses if the classification is clearly arbitrary and has no reasonable basis, i.e. is not rationally related to legitimate legislative goals. *In re Estate of Mathews*, 558 N.W.2d 263, 266 (Minn. Ct. App. 1997). *See also Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Minnesota's decision to tax gambling related income of adult Native Americans who do not live on reservations while not taxing the same income of Native American

children and Native Americans who live on the reservations is clearly arbitrary and lacks a reasonable basis. It is unreasonable to tax those Native Americans who are not fortunate enough to find land available on the minuscule tracts of land that have been granted to certain tribes. A substantial windfall is enjoyed by those Native Americans fortunate enough to find available living space on their reservations, particularly those members of the Prairie Island tribe who live on the reservation and are still situated only a short distance from the cities of Red Wing or Hastings. These persons gain every advantage of residing on the reservation, particularly the advantage of not paying State income taxes, and are still closely situated to businesses, educational opportunities, and governmental and medical services.

This point is driven home by the situation in which the Jefferson's found themselves. They were forced off the reservation by the Prairie Island Tribal Council when the Council decided to build a new administrative building on the property where the Jeffersons were living with their father. There was absolutely no other available land on a reservation that is only 538 acres in size. For several years the Jeffersons were forced to live off the reservation. During this entire time they worked diligently to find a way back onto the reservation. Finally, they were able to move back to the reservation when Tina Jefferson won a lottery-based tribal land assignment.

Minnesota may argue that it is fair to tax Native Americans not living on the reservation because they have access to benefits generated by the state. The reasoning fails logically. Residents of reservations located within the borders of Minnesota also enjoy the majority of these very same

benefits. All Native Americans are able to drive Minnesota's roads. All Native Americans are entitled to have police protection or to call upon the fire department no matter where they reside.

The equal protection provisions of our federal and State's Constitutions require that per capita distributions should remain untaxed by the State of Minnesota whether a tribal member resides on or off a reservation.

V: Taxation of tribal per capita distributions derived from federally-approved gaming interferes with tribal self-government and so violates United States Supreme Court jurisprudence.

With respect to the Prairie Island Indian Community, Minnesota has no qualms about demanding that the tribal government withhold State income taxes and pay these over to Minnesota. This constitutes direct interference with a separate community's affairs. "Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona*, [411 U.S. 164, 93 S.Ct. 1257 (1973)]," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

In *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir.1994) ("*Cabezon II*"), the court analyzed section 2710(d)(4) of IGRA which states "nothing in this section shall be interpreted as conferring upon a State ... authority to impose any tax, fee, charge, or other assessment

upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." The court held that while this language did not expressly prohibit state taxation of gaming, "[t]he absence of an express prohibition on the State's power to tax does not end our inquiry." *Cabazon II*, at 433. There must be a balancing of state, Federal and tribal interests. "In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; 'it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.' "*Id.* (citing *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir.1987), aff'd, 484 U.S. 997 (1988)). And, as stated previously, ambiguities in the statutes must be resolved in favor of the Indian. *See Cotton Petroleum v. New Mexico*, 490 U.S. 163, 177 (1989). The Federal interest is stated in IGRA, 25 U.S.C. §2701(4), "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." With regard to the Tribe's interest, the *Cabazon II* court stated that the question was whether the imposition of the state taxes would ultimately fall on and economically burden the Tribe. *Cabazon II*, 37 F.3d. at 434. In addition, a court must also "consider the nature of the taxed activity." *Id.* "'That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference.'" *Id.* at 434-435 (*quoting Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1410 (9th Cir.1992)). *See also Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995). The *Cabazon* court concluded that "the Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the

reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others." *Id.*, at 435.

As Chief Justice Marshall wrote, "The power to tax is the power to destroy," *M'Culloch v. Maryland*, 4 Wheat 316 (1819). But, thankfully, Justice Holmes answered that "The power to tax is not the power to destroy while this Court sits," *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 . In the present *Jefferson* case, the State of Minnesota wants to tax proceeds to which the State has no right. This is the same Minnesota which wanted to tax land in *Bryan* and the same Minnesota which has had no intention of respecting the hunting-and-fishing treaty obligations owed the Chippewa bands.

The United States Supreme Court has acknowledged that as late as 1995, that it had not decided the question of "whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country," *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 464-65 (1995). *Chickasaw Nation* did not raise this issue in the lower courts and under the case and controversy requirements of the United States Supreme Court, the issue could not be raised as a new matter. The matter is clearly before this Supreme Court of the United States now.

The State of Minnesota must concede that its taxation of another sovereign's people interferes in the self-government of the Prairie Island Indian Community. One can imagine the protests of the State of Minnesota if the same

Tribe taxed the gambling proceeds of winners at the tribal casino where these same winners were citizens or domiciliaries of the State of Minnesota.

CONCLUSION

For all these reasons, this case should be remanded to Minnesota Supreme Court with an order to reconsider its decision in the *Jefferson* action based on a holding by this Supreme Court of the United States that IGRA on its face preempts the taxation of per capita distributions of federally-approved gaming proceeds conducted on tribal land and paid out to tribal members; alternatively, this Court may hold that Minnesota's taxation of these gaming proceeds violates the Equal Protection Clause of the Constitution of the United States and the Uniformity Clause of the Minnesota Constitution. This Court may also hold that taxation of IGRA proceeds distributed per capita to enrolled members interferes directly with tribal self-government and so is unconstitutional.

Dated at St. Paul, Minnesota, this 30th day of October, 2001.

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