

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
R. GARCIA and M. GARCIA,) OTA NO. 20076335
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 APPELLANT.)
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TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, August 25, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings,
taken in the State of California, commencing
at 2:16 p.m. and concluding at 3:17 p.m. on
Wednesday, August 25, 2021, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOHN JOHNSON

Panel Members: ALJ SHERIENE RIDENOUR
ALJ TOMMY LEUNG

For the Appellant: LESTER MARSTON
LYDIA TURANCHIK

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

MARIA BROSTERHOUS
CHRISTOPHER TUTTLE

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-9 were received at page 7.)

(Department's Exhibits A-K were received at page 8.)

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California; Wednesday, August 25, 2021

2:16 p.m.

JUDGE JOHNSON: We're going on the record for the Appeal of Garcia with OTA Case Number 20076335. It is 2:16 on August 25th, 2021. This appeal is being conducted electronically lead by myself, Judge Johnson, here in Sacramento, California.

While I am the lead ALJ for purposes of conducting this hearing, it's the panel that will decide this portion of the appeal. So at this point let me say good afternoon to my fellow co-panelists.

Good afternoon, Judge Ridenour. All right. I think you're on mute at that point. That's okay.

JUDGE RIDENOUR: This is Judge Ridenour. Good morning -- good afternoon, everybody.

JUDGE JOHNSON: All right. And good afternoon, Judge Leung.

JUDGE LEUNG: Good afternoon. I have my button on the mute, so I'm ready.

JUDGE JOHNSON: Thank you.

This is Judge Johnson again. As a reminder the Office of Tax Appeals is not a court. This is an independent appeals body. The office is staffed by tax experts and is independent of the State's tax agencies.

1 We do not engage in any ex parte communications between
2 either party. So our decision is going to be based on the
3 arguments and evidence provided by the parties on appeal
4 and conjunction with an appropriate application of the
5 law.

6 We read the briefs and examined the submitted
7 evidence and exhibits up to this point. And we're looking
8 forward to your arguments today. I know it's taken many
9 steps to get to this point, so we appreciate the parties'
10 efforts. We fully respect the importance of a decision to
11 be made on this appeal.

12 Let me have the parties introduce themselves for
13 the record. We'll begin with the Appellant's side.

14 MR. MARSTON: Lester Marston with the Law Firm of
15 Rapport and Marston on behalf of Rico Garcia.

16 MS. TURANCHIK: Lydia Turanchik, also on behalf
17 of Rico Garcia.

18 MR. GARCIA: Rico Garcia.

19 JUDGE JOHNSON: Thank you.

20 And Ms. Turanchik, if you can make sure that you
21 get a little bit closer to the mic. Sometimes when you're
22 talking, you got a little bit soft on that one.

23 Let me turn to Respondent Franchise Tax Board.
24 Introduce yourselves.

25 MS. BROSTERHOUS: Maria Brosterhous for

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Respondent.

MR. TUTTLE: Topher Tuttle for Respondent.

JUDGE JOHNSON: Thank you.

Judge Johnson again. Issues in this appeal have been severed. Today's hearing will only involve the jurisdictional issues, which include, generally, constitutional issues; federal preemption arguments; the Colville, C-O-L-V-I-L-L-E, apportionment issue; the underground regulations/Administrative Procedure Act, APA issues. These were the categories of issues discussed at the prehearing conferences and based on the briefing, but the parties may clarify or pinpoint a specific jurisdictional question at issue during their arguments.

After today's hearing, the panel will issue an opinion on the question of OTA's jurisdiction. And based on that opinion, additional development on the remaining issues on appeal will ensue.

We're going to enter into the record Appellant's Exhibits 1 through 9 and Franchise Tax Board's Exhibits A through K. Parties have stated they have no objections to these exhibits, and the exhibits hereby admitted as evidence into the record.

(Appellant's Exhibits 1-9 were received in evidence by the Administrative Law Judge.)

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(Department's Exhibits A-K were received in evidence by the Administrative Law Judge.)

At this point we're ready to hear the parties' presentations.

Let me ask Appellant, do you have any questions, or are you ready to begin your 15 minutes?

MR. MARSTON: This is Lester Marston. I'm ready to proceed.

JUDGE JOHNSON: Please proceed when you're ready.

PRESENTATION

MR. MARSTON: The facts in this case that are necessary for this Board or this -- or for the Judges to decide whether they have jurisdiction in the case, are not in dispute. Rico Garcia is an enrolled member of a federally recognized Indian Tribe. That Indian Tribe is the San Manuel Band of Indians.

The San Manuel Band of Indians is the beneficial owner of the San Manuel Indian Reservation, the title of which is owned by the United States Government in trust for the Tribe and, therefore, is Indian Country within the meaning of Title 18 of the United States Code Section 1151.

Indian Country is relevant because it determines what governments have jurisdiction over Indians, Indian

1 Tribes, and non-Indians who are within Indian Country.
2 And absent of federal statute that expressly grants to
3 states the authority to enforce their laws against Indian
4 Tribes or Indians on the reservation. The states lack
5 no -- lack authority to be able to do so.

6 Mr. Garcia, during the time in question, the
7 taxable years in question, maintained his principal
8 residency on the reservation. During that period of time,
9 he also resided for a good portion of the time in the
10 State of New York where he went to school. The San Manuel
11 Indian reservation is not sufficient in size to be able to
12 provide the infrastructure necessary to provide its
13 members with the full range of governmental programs,
14 benefits, and services.

15 In order to be able to provide services, you have
16 to have those infrastructure improvements. So for
17 example, you can't provide water and sewer service on the
18 reservation unless you have the actual land available to
19 construct the water treatment plant and a sewer treatment
20 plant. Likewise, the Tribal government can't provide
21 educational services on the reservation because it doesn't
22 have the space sufficient to be able to construct a
23 college or a university.

24 And, therefore, Tribal members, particularly
25 members of the San Manuel Band of Mission Indians,

1 including Mr. Garcia, have to go off the reservation in
2 order to be able to utilize those services. And that's
3 exactly what Mr. Garcia did during the taxable years in
4 question. He left the reservation. He took up temporary
5 residency in New York, and he went to college. He went to
6 school. In addition, Mr. Garcia maintains a part-time
7 residency off of the reservation in the State of
8 California. He maintains a house in San Juan Capistrano
9 and also in Long Beach.

10 During the period of time, the taxable years in
11 question, the San Manuel Band made what are called
12 per-capita payments. And so the facts that are relevant
13 pertaining to the Tribe are as follows: First of all, in
14 1988 Congress enacted the Indian Gaming Regulatory Act in
15 order to regulate gaming activities engaged by Indian
16 Tribes within their own Indian Country. Pursuant to that
17 act, the San Manuel Band enacted a comprehensive gaming
18 ordinance regulating gaming activities on the reservation.

19 In addition, the -- pursuant to the federal
20 statute, Congress created the National Indian Gaming
21 Commission, and that National Indian Gaming Commission
22 also has promulgated regulations regulating gaming
23 activities on the reservation.

24 In addition, in order for the Tribe to engage in
25 certain types of gaming activities, what are called

1 Class III gaming activities, which are the playing of the
2 more lucrative type of Nevada-type games, the San Manuel
3 Band has to have what's called a Tribal-State compact with
4 the State of California. And the Band has, in fact,
5 entered into and has in effect, and was in effect during
6 the taxable years, a Tribal-State Class III gaming
7 compact, under which the both the Tribe and the State
8 regulate gaming activities.

9 In addition, under the Tribe's gaming ordinance,
10 the Tribe has established a Gaming Commission and
11 authorized that Gaming Commission to promulgate
12 regulations, once again, regulating gaming activities that
13 occur on the reservation.

14 Also pursuant to the -- to the Tribe's compact,
15 the State of California and the Tribe's Gaming Commission
16 participated in an association which promulgates joint
17 Tribal-State regulations, like CGCC-8, which establish
18 minimum internal control standards for the regulation of
19 gaming activities on the reservation.

20 Finally, the Tribe -- Tribal gaming agency --
21 Gaming Commission has also adopted, pursuant to its
22 regulations, minimum internal control standards, which
23 also regulate gaming activities on the reservation.
24 Finally, the National Indian Gaming Commission has
25 promulgated specific regulations dealing with the content

1 and approval of what are called Revenue Allocation Plans.

2 The IGRA comprehensively regulates how gaming
3 revenue is -- is wagered; how those -- how those wages are
4 collected from losers; how the revenue that's collected is
5 counted; how the revenue is accounted for, in other words,
6 how books and records of account are maintained; how the
7 revenue can be spent, what the uses are that the Tribal
8 governments can make of the revenue. Tribal governments
9 can't take gaming revenue and just spend it on anything
10 they want.

11 The IGRA actually dictates to the Tribe what they
12 can spend the revenue on. And one of the items that
13 Congress has stated right in the statute that the Tribes
14 can spend the revenue on, is making per-capita payments,
15 but only to a Revenue Allocation Plan that has been
16 prepared by the Tribe, submitted to the National Indian
17 Gaming Commission and approved by the chairman of the
18 Commission. And in the preparation of those Revenue
19 Allocation Plans, the Commission -- the National Indian
20 Gaming Commission has comprehensively regulated Revenue
21 Allocation Plans.

22 And the Revenue Allocation Plans set forth real
23 specific criteria that the plans have to meet in order for
24 the plans to be approved by the chairman of the Commission
25 and the Tribe being able to make those per-capita

1 payments. There's absolutely no doubt. It's undisputed
2 that during the taxable years in question, the Garcias
3 received per-capita payments from their Tribe. Those
4 per-capita payments were received during the period while
5 the Garcias were residing on the reservation. I mean,
6 physically on the reservation, physically in New York, and
7 sometimes physically off the reservation in their summer
8 homes in San Juan Capistrano and then in Long Beach.

9 So those are the facts of the case. The question
10 now becomes, does this panel -- do you as Judges have the
11 authority to entertain the arguments that the Garcias are
12 making in this case. Because we are making a straight
13 constitutional attack on the ability of this -- U.S.
14 Constitutional attack on the ability of the State to
15 impose these taxes on the Garcia's per-capita payments.
16 And we are also making a straight preemption argument.

17 And that is that the IGRA, and all of the
18 regulations and laws that are enacted regarding the IGRA,
19 preempt the field and preclude the ability of the State
20 Franchise Tax Board to impose and collect the tax. Now,
21 the issue of jurisdiction is, as I understand it, there's
22 a state -- the state legislature has enacted a law. And
23 also, Office of Tax Appeals has promulgated a regulation
24 that basically says that you are precluded, absent a
25 decision of the California Court of Appeals or, obviously,

1 the California Supreme Court, you're precluded from
2 holding that a federal law preempts or oust a state tax
3 law.

4 We, in response to that, we believe you have
5 jurisdiction to decide this case. And we're basing that
6 on two arguments: One, the Supremacy Clause of the United
7 States Constitution, and number two, the California Court
8 of Appeals Decision in the Sharp Image Case. The
9 Supremacy Clause of the United States Constitution Article
10 6 Clause 2 state as follows: This Constitution and the
11 laws of the United States, which includes the IGRA, which
12 shall be made under the authority of the United States,
13 shall be the supreme law of the land. And the Judges --
14 including Administrative Law Judges, and there's good case
15 law that holds that -- and the Judges, which are you, in
16 every state, which is California, shall be bound thereby,
17 and things in the Constitution or laws of any state to the
18 contrary notwithstanding.

19 So the first argument I would make is regardless
20 of what the state legislature has said, and regardless of
21 your own regulation, those -- that's state law, and that
22 regulation is void of ab initio. It's been preempted
23 specifically by the Constitution of the United States.
24 And under the Constitution of the United States, you as
25 judges have a responsibility to ignore those state laws

1 that are in conflict with federal law.

2 You have the right, in the first instance, to
3 determine your own jurisdiction. And you, in the first
4 instance, have to make a determination as to whether or
5 not that -- that State Statute and that regulation
6 conflict with the Supremacy Clause. And if they do, then
7 you must ignore them, and you must follow the Constitution
8 of the United States. You have taken a solemn oath to
9 uphold and defend the Constitution of the United States.
10 And that means following the constitution, even if the
11 state legislature and administrative agency of the state
12 have enacted laws to the contrary.

13 I mean, could you imagine if we were coming
14 before you right now to argue that a state law enacted by
15 the Franchise Tax Board imposing a tax on Indians simply
16 because they are racially Indians? If we were coming to
17 you and arguing that that law was void because it violated
18 the Equal Protection Clause of the 14th Amendment of the
19 United States Constitution? If you could not hold that a
20 state law was racially discriminatory and violated the
21 Constitution because the state legislature has enacted a
22 law saying that you can't consider that issue?

23 I mean, that's the equivalent of -- that's what
24 happened with segregation in the South when the states
25 enacted laws that discriminated on the basis of race. And

1 they argue that the federal statutes, the 14th Amendment
2 under the Supremacy Clause didn't preempt those laws. You
3 have the right under the Supremacy Clause to ignore the
4 State Statute. You have the right under the Supremacy
5 Clause to ignore the regulations because they conflict
6 with the Constitution of the United States and are void ab
7 initio.

8 In addition, even if, let's just assume for
9 argument's sake that the Supremacy Clause doesn't --
10 doesn't oust, doesn't preempt that State Statute and that
11 state regulation. The California Court of Appeals in the
12 Sharp Image Case has expressly held that, and I quote,
13 "The Indian Gaming Regulatory Act so dominates the field
14 of regulated Indian gaming that it not only completely
15 preempts the field of Indian gaming but also preempts" --
16 and in this case, the state contract law that was at issue
17 in that case. The quote goes on to say, "Indeed the
18 legislative history is quite clear on Congress' intent to
19 occupy the field."

20 That's what the California Court of Appeals have
21 said about the IGRA. In addition, the Court of Appeals
22 held that the IGRA preempts, and I quote, "All state law
23 regulating," and I quote, "gaming activities," quote,
24 "examination of the text and structure of IGRA, its
25 legislative history, and its jurisdictional framework

1 indicates that Congress intended it to completely preempt
2 state law."

3 So we're not arguing that the state's tax law is
4 unconstitutional. What we are arguing is that the Indian
5 Gaming Regulatory Act preempts any state law that imposes
6 a burden on gaming activities or frustrates or impedes the
7 goals of purposes for which Congress enacted the Indian
8 Gaming Regulatory Act. So in deciding whether you have
9 jurisdiction, the first question you have to decide is
10 whether or not the per-capita payments at issue in this
11 case are gaming activities within the meaning of the
12 statute. If you find that they are, then the Sharp Image
13 Case clearly applies because it says, in no uncertain
14 terms, that the IGRA preempts the field. It preempts all
15 state law that burden gaming activities.

16 So what are gaming activities under the statute?
17 Well let's take a look at the statute. It's interesting.
18 Congress uses the term gaming activities no less than 28
19 times under the statute. But nowhere in the statute do
20 they define gaming activities. But taking a look at the
21 statute as a whole, I think it's very clear what gaming
22 activities are. We -- we automatically think, oh, well,
23 gaming is, you know, shuffling of the cards and the roll
24 of the dice. No. Gaming activities are the revenue.

25 It's very clear. The very purposes for which

1 Congress enacted the statute wasn't just to allow Indians
2 to game, it was to allow Indians to game so they could
3 generate revenue. Okay. It's the revenue that is the
4 essential element of the IGRA. And it's the revenue that
5 the Congress comprehensively regulates.

6 First of all, you take a look at the statute and
7 all of the other implements of the statute; the gaming
8 ordinance, the Tribal-State Compact, the revenue
9 allocation plan, the Tribal gaming regulations, the
10 minimum internal control standards of the State, the
11 minimum internal control standards of the Tribe. If you
12 take a look at that, it is a comprehensive scheme that
13 regulates not just the playing of the games but the
14 revenue and what the revenue can be spent on.

15 It requires that the revenue be counted. It
16 requires that the revenue be accounted for. It requires
17 that the revenue be audited. It requires that the revenue
18 can only be spent for very specific purposes. It
19 expressly authorizes the revenue to be used for per-capita
20 payments. But it comprehensively regulates the per-capita
21 payments by specifying that the payments can only be made
22 pursuant to a Revenue Allocation Plan and only for
23 purposes specifically set forth in the Revenue Allocation
24 Plan. The IGRA --

25 JUDGE JOHNSON: Mr. Marston. Sorry. This is

1 Judge Johnson here. I don't want to interrupt you
2 midstream there, but we're definitely at the end of that
3 15 minutes. Would you want to borrow some time from your
4 rebuttal, another 5 minutes, to finish up?

5 MR. MARSTON: Yes, please.

6 JUDGE JOHNSON: Okay. Please do that then.

7 MR. MARSTON: So I don't think there's any doubts
8 that the IGRA comprehensively regulates the revenue. And,
9 therefore, because it does, and because the State is
10 trying to impose a tax on that revenue, the Sharp Image
11 Decision applies and grants you jurisdiction to hear this
12 case. Keep in mind that the very purposes for which the
13 IGRA was enacted was to promote Tribal economic
14 development and to promote Tribal self-government.

15 A government can only operate if it has money.
16 And the very purposes of government are to provide
17 governmental services. In this case, San Manuel can't
18 provide the full range of services to its members -- that
19 its members need because of its limited land space, like,
20 higher education. And, therefore, it makes a per-capita
21 payment. It gives Mr. Garcia money so that he has that
22 revenue, and he in his discretion could go out and
23 purchase the very services that he needs. And in this
24 case, those services were to pay for his college
25 education.

1 So the very purpose of the IGRA is to generate
2 revenue for the Tribes to be able to provide governmental
3 services, and that's exactly what San Manuel did here.
4 They adopted a Revenue Allocation Plan to provide services
5 to its members. And in its sole discretion, made the
6 determination that the best way to provide those services
7 was to move money from the Tribe to -- directly to the
8 Tribal members in the form of per-capita payments.

9 And what is the State of California trying to do?
10 They're trying to take a portion of that revenue away from
11 Mr. Garcia so it's no longer available for him to be able
12 to buy the services that he needs. I can't think of a
13 greater frustration of purpose -- a frustrating purpose of
14 the IGRA than that. Because that's what the statute is
15 all about. It's to allow the Tribes to generate the
16 revenue to fund essential governmental services so those
17 services can be provided to their members.

18 It's all about the money and moving the money to
19 Tribal governments and to Tribal members. And what the
20 State of California wants to do is take that money away.
21 In doing so they are violating the IGRA. The IGRA
22 prohibits the imposition of a tax on gaming activities.
23 And the State is already paid. The Tribe has already paid
24 the tax in the form of reimbursing the State all of its
25 regulatory cost that it incurs in administering and

1 regulating gaming activities. So allowing the State to
2 come in at this point and impose a tax on the tax that the
3 Tribe has already paid on these revenues results in a
4 multiple tax burden that discriminates against Indian
5 Commerce.

6 So I'll reserve the remainder of my time for
7 rebuttal. But I don't think there's any doubts. You have
8 jurisdiction. You have jurisdiction under the Supremacy
9 Clause, and you have jurisdiction under the Sharp Image
10 Decision because what the State is trying to do is tax
11 gaming activities, the revenue generated from gaming. And
12 the California Court of Appeals has expressly held that
13 those types of state laws are preempted by the
14 comprehensive regulatory scheme that Congress enacted by
15 adopting the IGRA.

16 Thank you.

17 JUDGE JOHNSON: This is Judge Johnson. Thank
18 you.

19 We will now turn it over to Franchise Tax Board
20 who has 10 minutes to present their arguments.

21

22 PRESENTATION

23 MS. BROSTERHOUS: Good afternoon. My name is
24 Maria Brosterhous, and I'm representing Respondent
25 Franchise Tax Board. With me is Topher Tuttle, also with

1 Franchise Tax Board.

2 The question today is whether the OTA has
3 jurisdiction over the following matters. The
4 Constitutional arguments set forth in Appellant's brief,
5 the federal preemption argument being made under the
6 Indian Gaming Regulatory Act, the issue of apportionment
7 of Appellant's income based on where they lived during the
8 years at issue, under Washington v. Confederated Tribes of
9 Colville Indian Reservation, and, lastly, whether such
10 apportionment is in violation of the Administrative
11 Procedures Act.

12 First, I would like to take one of these items
13 off the table. The FTB does not dispute jurisdiction as
14 to the apportionment of Appellant's income under Colville.
15 However, we strongly contest jurisdiction as to the other
16 three matters.

17 As provided by Article III Section 3.5 of the
18 State Constitution, an administrative agency, including an
19 administrative agency created by the Constitution or an
20 initiative statute, has no power to A, declare a statute
21 unenforceable, or refuse to enforce a statute, on the
22 basis of it being unconstitutional unless an appellate
23 court has made a determination that such statute is
24 unconstitutional; B, to declare a statute
25 unconstitutional; C, to declare a statute unenforceable,

1 or to refuse to enforce a statute on a basis that federal
2 law or federal regulations prohibit the enforcement of
3 such statute, unless an appellate court has made a
4 determination that the enforcement of such statute is
5 prohibited by federal law or federal regulations.

6 Furthermore, your own regulations limit
7 jurisdiction as follows. OTA's jurisdiction is set forth
8 in statute. Areas where OTA does not have jurisdiction
9 include but are not limited to the following: Whether a
10 California statute is invalid or unenforceable under the
11 United States or California Constitutions unless a federal
12 or California Appellate Court has already made such a
13 determination.

14 Before I dig into each issue, I would like to
15 clarify exactly which statute is at issue in regard to
16 constitutionality and federal preemption. Appellants seek
17 to find Revenue & Taxation Code Section 17041, which
18 provides for the taxation of California resident invalid
19 or not unenforceable as to the per-capita distributions of
20 Tribal members. Further, Appellant seek to do so without
21 the authority of an appellate court decision finding the
22 statute invalid or unenforceable.

23 With that in mind, will now turn to the
24 constitutional issue. Jurisdiction over whether a statute
25 is unconstitutional is specifically prohibited by Article

1 III Section 3.5(a) and (b) of the State Constitution. In
2 addition, it is prohibited by OTA Regulation
3 Section 30104(a). As there is no appellate court decision
4 declaring Section 17041 unconstitutional as to the
5 taxation of per-capita distributions of a Tribal member,
6 there is no authority for the OTA to review this issue.

7 Next is the issue of federal preemption under the
8 Indian Gaming Regulatory Act. OTA jurisdiction over an
9 issue of federal preemption is explicitly prohibited by
10 Article III Section 3.5(c) of the State Constitution, as
11 well as OTA Regulation Section 30104(a). Furthermore, the
12 case Appellant relies on to bestow jurisdiction on this
13 panel is fully distinguishable and irrelevant to the case
14 at hand. The Sharp Image Gaming decision involved a
15 question of subject matter jurisdiction for a breach of
16 contract dispute involving an equipment lease that was
17 specifically regulated by IGRA.

18 The Revenue & Taxation Code particularly the
19 taxation of California Residence under Section 17041 is
20 not implicated or discussed, nor is any portion of it
21 determined to be preempted. As such, there's no case of
22 appellate court jurisdiction finding Section 17041
23 preempted by federal law, in particular IGRA.

24 Finally, there is the issue of whether the OTA
25 has authority to review possible violations of the

1 Administrative Procedures Act. As set forth in your
2 precedential decision in Liljestrand Irrevocable Trust,
3 your jurisdiction is limited by the enabling legislation
4 that establish the OTA and by your own regulations.
5 Additionally, your predecessor tribunal determined that
6 OTA cannot validly act in excess of the jurisdiction
7 conferred upon it.

8 Here, the enabling legislation, the Taxpayer
9 Transparency and Fairness Act of 2017, does not expressly
10 grant jurisdiction over violations of the APA.
11 Additionally, there is no expressed grant of jurisdiction
12 within your regulations, specifically, within Regulation
13 Section 30103, which details the matters OTA has
14 jurisdiction over. And it makes no reference to the APA.

15 Therefore, as there's no expressed statutory --
16 or excuse me. There is no expressed statement providing
17 jurisdiction. The OTA does not have authority to make
18 determinations as to the violation the APA.

19 In closing, the State Constitution and your own
20 regulations are clear. There's no jurisdiction here for
21 matters of constitutionality or federal preemption.
22 Furthermore, the OTA's jurisdiction is limited to matters
23 it has expressly been granted jurisdiction by its enabling
24 legislation and its own regulations. Since neither have
25 granted explicit authority over violations of the APA,

1 there's no jurisdiction for this issue.

2 Thank you. And I'm happy to take your questions.

3 JUDGE JOHNSON: This is Judge Johnson. Thank
4 you.

5 We may save our questions for the end just to
6 hear all the arguments first. So let me turn back to
7 Appellant.

8 Appellant you have little more than five minutes
9 left for your rebuttal whenever you're ready.

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11

CLOSING STATEMENT

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MR. MARSTON: Well, first, the Franchise Tax Board has not offered a single case or explained how a State Constitutional provision or a State Statute or an administrative state regulation, which directly conflicts with the Supremacy Clause of the United States Constitution is valid. Just the opposite. There's overwhelming case law. That is the law of the land.

I mean, we're gonna -- are we really going to say that we're going to ignore the Constitution of the United States and the Constitution of the United States Supremacy Clause is unambiguous and absolutely clear. You as Judges are not to enforce a state law that conflicts with the Constitution or overwhelming federal law. And you have a responsibility to follow the supreme law of the land,

1 regardless of what the people of the State of California
2 in the enactment of the State Constitution or the state
3 legislature enacts. I mean, that's exactly what happened
4 in the South. And you can find to this day State
5 Constitutions that allow for slavery.

6 So the Franchise Tax Board has not met its burden
7 of being able to establish that you have a responsibility
8 to follow a State Constitutional provision or a state
9 statute or administrative regulation that conflicts with
10 the Constitution of the United States. The second thing
11 is their argument -- their whole argument with the Sharp
12 Image decision doesn't apply because the California Court
13 of Appeals did not expressly hold that the IGRA preempts
14 per-capita payments.

15 Well, dare I say, you don't need to be a rocket
16 scientist to know that when the California Court of
17 Appeals says that the IGRA is comprehensive and it
18 preempts all state laws that seek to regulate or impose
19 burdens on gaming activities, that it doesn't matter what
20 the state law is, whether it's a state contract law or a
21 state tax law. It -- it the IGRA either preempts the
22 field, or it doesn't.

23 And so if you find that this state tax burdens
24 gaming activities, that gaming revenues are a part of the
25 gaming activities that are comprehensively regulated by

1 the IGRA, then the Sharp Image opinion applies and holds
2 that the -- that -- those state laws, including this tax
3 law at issue in this case, is preempted.

4 Furthermore, we're not seeking to hold that the
5 state tax laws at issue in here are unconstitutional. I
6 mean, we'll stipulate that they're constitutional. What
7 we're saying is that constitutional valid state law in
8 this instance cannot be enforced against this taxpayer.
9 And that's because the state law places a burden on the
10 comprehensive regulatory scheme that Congress has
11 established -- that Congress never intended. And the
12 imposition of that burden frustrates the very purposes for
13 which the IGRA was enacted. So again, we believe that you
14 have jurisdiction.

15 Regarding the Colville apportionment argument, I
16 would just say that Colville clearly stands for the
17 proposition that the State has to apportion its tax
18 between Mr. Garcia's on-reservation and off-reservation
19 activity. And the failure to apportion, which would
20 result in any amount of Mr. Garcia's on-reservation
21 activities being taxed, precludes the State from imposing
22 any tax on any of the per-capita income. The Colville
23 case is not authority for the State to be able to -- the
24 state agency, here the Franchise Tax Board, to develop
25 it's apportionment formula.

1 And the Franchise Tax Board has been unable to
2 point to any State statute that authorizes it to
3 promulgate a regulation or a rule that would allow it to
4 develop a criteria or formula to apportion its tax between
5 a reservation Indian's on and off-reservation income. So
6 it most certainly is an underground regulation. They have
7 to go through formal rule making. They don't just
8 willy-nilly get to pull criteria out of the air or borrow
9 criteria from another regulation and apply it in this
10 instance.

11 The whole purpose of the Administrative Procedure
12 Act is because the agency is affecting people's rights.
13 And the right here that Mr. Garcia has, is the right to be
14 free of state regulation and control and state taxation, a
15 right that he has under the Constitution and under federal
16 common law. And they can't -- if they're going to take
17 his rights away, if they're going to take a portion of his
18 per-capita payments away, then they need to go through
19 formal rule making.

20 They need to promulgate the regulation. They
21 need to give notice. They need to allow people to comment
22 on it. They need to send it to the Office of
23 Administrative Law. They need to have them review it and
24 their attorneys review it to see that it's legal and
25 constitutional. And they need to get approved. And they

1 haven't done that in this case.

2 And as a result, they don't apportion their tax,
3 and the imposition of the tax is taxing a portion of Mr.
4 Garcia's on-reservation income, which the United States
5 Supreme Court in the McClanahan Case and in Colville said
6 the State cannot do.

7 Thank you.

8 JUDGE JOHNSON: This is Judge Johnson. Thank
9 you.

10 I'll turn it over now to questions from the
11 co-panelists. I'll start with Judge Leung.

12 JUDGE LEUNG: Yes. Thank you, Judge Johnson.

13 This is Judge Leung. I've got several questions
14 for both Garcias and for the Franchise Tax Board. I'll
15 start with the Garcias first. And let me start with this.
16 Was Mr. Garcia's per-capita distribution subject to
17 federal tax?

18 MR. MARSTON: Yes. Because the IGRA expressly
19 provides for that, which is a good point that you raised.
20 Because isn't it interesting that the IGRA expressly
21 authorizes federal taxation of those per-capita payments
22 and contains a statement that specifically prohibits the
23 State from imposing a tax on the Indian Tribe or any of
24 the Tribes' gaming activities. So again, we would argue
25 that, although, the IGRA doesn't define gaming activities,

1 under the -- tremendous amount of Supreme Court precedent.

2 And what Congress specified in the legislative
3 history of the IGRA is that they have commanded that
4 courts and administrative agencies interpret all
5 ambiguities in the IGRA, in the statute as the Indians
6 understand it. So if you go through and you're trying to
7 determine whether the prohibition contained in the IGRA
8 prohibiting the states from imposing taxes on gaming
9 activities, includes Mr. Garcia's per-capita payments, you
10 have to interpret the statute as including the per-capita
11 payments and finding that the prohibition applies in this
12 case.

13 JUDGE LEUNG: Okay. So how was that income
14 characterized on the federal return? Was it, for
15 instance, a dividend? A capital gain? Or how was that?

16 MR. MARSTON: I think it was taxed as ordinary
17 income.

18 JUDGE LEUNG: Not salary, right?

19 MR. MARSTON: Not as a salary. These aren't
20 salaries.

21 JUDGE LEUNG: So different income?

22 MR. MARSTON: It's in the nature of -- it's a
23 governmental benefit.

24 JUDGE LEUNG: Like Social Security?

25 MR. MARSTON: Like Social Security, exactly.

1 Exactly like Social Security. It's a Tribal governmental
2 program, just like Social Security is a governmental
3 program. And just like Social Security, I know you just
4 think I'm young and handsome, but I'm actually old and
5 decrepit. I'm over 65. I will not give to you my exact
6 age, but I receive social security. And I have to declare
7 that on my income tax, and I have to pay federal taxes on
8 it.

9 JUDGE LEUNG: Okay. During the year in question
10 when Mr. Garcia was a student at Columbia, was he
11 full-time student.

12 MR. MARSTON: Yes.

13 JUDGE LEUNG: So you basically -- my recollection
14 is Columbia is on a semester type of curriculum of fall
15 semester, spring semester. So he's basically there for
16 the fall and spring of the year?

17 MR. MARSTON: Since I have Mr. Garcia here and
18 present, if you would indulge me --

19 JUDGE JOHNSON: Yes.

20 MR. MARSTON: -- I would allow him to answer that
21 question.

22 JUDGE LEUNG: I think --

23 JUDGE JOHNSON: This is Judge Johnson. I've cut
24 you off there, Judge Leung.

25 But before you answer, if you want to answer

1 something as to a fact, something we can rely on, I'll go
2 ahead and swear you in, if that's okay?

3 MR. GARCIA: Rico Garcia. Are you speaking to
4 me, Judge?

5 JUDGE JOHNSON: I am. Sorry, Mr. Garcia. Yes.

6 MR. GARCIA: Yes. Okay. Go ahead.

7 JUDGE JOHNSON: Okay. Let's -- raise your right
8 hand.

9 R. GARCIA,
10 produced as a witness, and having been first duly sworn by
11 the Administrative Law Judge, was examined and testified
12 as follows:

13

14 JUDGE JOHNSON: Thank you very much. You may
15 proceed.

16

17 WITNESS TESTIMONY

18 MR. GARCIA: To your question, Judge, yes. I was
19 a full-time student. It is a fall and spring semester
20 schedule. There is also a summer session, although, I
21 wasn't partaking in that.

22 JUDGE LEUNG: So you're a full-time student. So
23 we're guessing about two-thirds of the year was spent in
24 New York.

25 MR. GARCIA: If I may interject.

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JUDGE LEUNG: Yes.

MR. GARCIA: I was a full-time student for those two semesters per year. However, majority of the summer season we would also stay in the city.

JUDGE LEUNG: In which city?

MR. GARCIA: In New York City.

JUDGE JOHNSON: Oh, okay. Okay. So you would stay there for the entire year in --

MR. GARCIA: Pretty much, yes. Other than maybe a couple of weeks we'd come back and visit then.

JUDGE LEUNG: Okay. Did you perform any services for the casino at all?

MR. GARCIA: At the time of being enrolled at --

JUDGE LEUNG: The years in question.

MR. GARCIA: No, I wasn't.

MR. MARSTON: Well, let me --

MR. GARCIA: Well, let me -- I'll -- I'll -- let me --

MR. MARSTON: Let me --

MR. GARCIA: Let me clarify that. As a general council member -- as a voting member of the general council, I did have monthly meetings that I was a voting member of.

MR. MARSTON: So let me just explain. So under the Tribe's Constitution and Gaming Ordinance, management

1 decisions about the operation of the gaming facility are
2 made by the business council and also by the general
3 council. Mr. Garcia, all during that time, was a voting
4 member of the general council. And they were constantly,
5 during both of the taxable years, decisions that were
6 brought to the general council regarding the management
7 and operation of the casino.

8 JUDGE LEUNG: This is Judge Leung again.
9 Mr. Marston, when you say "council", you mean council,
10 C-O-U-N-C-I-L, not C-O-U-N-S-E-L?

11 MR. MARSTON: That is correct, C-I-L. It's
12 the --

13 JUDGE LEUNG: Okay.

14 MR. MARSTON: They are like the business council,
15 kind of like a city council, and the general council is
16 composed of all the members of the Tribe 18 years of age
17 or older. So it's in the nature of -- as if there was
18 a -- here in California when we do an initiative measure,
19 only they don't have to -- they don't vote by paper
20 ballot. They attend a general council meeting, and
21 they -- and they vote by hand.

22 JUDGE LEUNG: Okay. Mr. Garcia, during your two
23 years in New York City attending Columbia University, did
24 you file New York State income tax returns?

25 MR. GARCIA: No.

1 JUDGE LEUNG: Okay. And respect to your
2 properties in California, outside of Indian Country, do
3 you pay property taxes on those properties?

4 MR. GARCIA: Yes, we do.

5 JUDGE LEUNG: And did you pay sales tax when you
6 purchase items outside of Indian Country?

7 MR. GARCIA: Absolutely. Yes.

8 MR. LEUNG: Okay. For the Franchise Tax Board, I
9 want to clarify some certain things. The only statute
10 we're talking about here is 17041; correct?

11 MS. BROSTERHOUS: Correct. That is the code
12 section that provides for the taxation of California
13 residents.

14 JUDGE LEUNG: So there's no standalone Revenue &
15 Taxation Code section that deals with earnings by Native
16 Americans from per-capita distributions? It's under the
17 term of --

18 MS. BROSTERHOUS: There is --

19 MR. LEUNG: Go ahead. I'm sorry.

20 MS. BROSTERHOUS: Sorry. There -- there is a
21 code section that -- regarding Native Americans regarding
22 earned income, but there is no such statute regarding
23 per-capita distributions.

24 JUDGE LEUNG: Okay. So in order -- according to
25 FTB's position, in order for us to find -- or in order for

1 us to violate Article III Section 3.5 of the California
2 Constitution, we have to declare the whole of 17041
3 invalid. That would be your position?

4 MS. BROSTERHOUS: My position is that there is no
5 appellate court case that finds that code section
6 unconstitutional as to Tribal members receiving per-capita
7 distribution, nor is there any appellate court decision
8 that finds that section preempted by federal law.

9 JUDGE LEUNG: Let me put the question to you this
10 way. Is there a difference between finding the statute
11 inapplicable or invalid versus finding Franchise Tax
12 Board's application of the statute improper?

13 MS. BROSTERHOUS: No.

14 MR. MARSTON: Who are you asking of that of --
15 who are you asking of that, Your Honor? This is Les
16 Marston.

17 JUDGE LEUNG: I'm with the Government right now,
18 Mr. Marston. So please let Ms. Brosterhous answer this
19 question. Thank you.

20 MS. BROSTERHOUS: No. There's not a distinction.
21 There's no jurisdiction as to -- for the OTA to determine
22 that code section is unenforceable here.

23 JUDGE LEUNG: So in your -- under your
24 perspective then, is there any federal law that would say
25 something is not taxable, but 17041 exist just because the

1 taxpayers of California residents, 17041 applies over
2 anything else until an appellate court rule otherwise?

3 MS. BROSTERHOUS: Correct.

4 JUDGE LEUNG: Okay. Now, when the Constitution
5 says an appellate court, it has to be a California
6 appellate court?

7 MS. BROSTERHOUS: No. It can be any court of
8 appellate of jurisdiction. So federal court said that as
9 well.

10 JUDGE LEUNG: So it could be -- pardon me. I
11 didn't mean to cut you off. And so it could be the Eighth
12 Circuit, not just the Ninth Circuit. How about another
13 state court?

14 MS. BROSTERHOUS: I don't believe that would be
15 applicable to California. It would be persuasive perhaps,
16 though. But I don't believe another state court would be
17 looking to whether California Code Section 17041 is
18 preempted or unconstitutional in the first place.

19 JUDGE LEUNG: So the court would have to actually
20 specifically talk about 17041, not a similar statute.
21 Although, I'm sure many states have statutes that say,
22 saying residents are taxable on all their income, but that
23 decision has got to refer to Revenue & Tax Code Section
24 17041?

25 MS. BROSTERHOUS: Yes, I believe so.

1 JUDGE LEUNG: Even if it's a federal circuit
2 court, it has to be that particular section?

3 MS. BROSTERHOUS: I -- yes.

4 JUDGE LEUNG: Okay. Even a U.S. Supreme Court,
5 it has to be Section 17041?

6 MS. BROSTERHOUS: Yes. Because the challenge
7 would be to California's taxation, and it could reach the
8 federal court. It could reach the Supreme Court. Yes.

9 JUDGE LEUNG: Thank you.

10 That's all I have right now, Judge Johnson. I'll
11 turn it back to you.

12 JUDGE JOHNSON: This is Judge Johnson. Thank
13 you, Judge Leung.

14 And Judge Ridenour, did you have any questions?

15 JUDGE RIDENOUR: This is Judge Ridenour. I do
16 not have any questions. Thank you so much.

17 JUDGE JOHNSON: This is Judge Johnson. Thank
18 you.

19 I do have a couple of questions or possibly just
20 one line of questioning. It's going back to the Sharp
21 Image and the preemption regarding IGRA. I kind of want
22 to close the loop. I know, Appellant, on your rebuttal
23 you mentioned that Franchise Tax Board hasn't provided
24 authority for its position that 17041 applies in this
25 situation. I may go back to Franchise Tax first. And not

1 to bury it, I want to talk about Angelina Mike.

2 I know FTB, you cited Angelina Mike in your
3 brief. This is a California Court of Appeal decision that
4 did end up finding that per-capita distributions were
5 taxable to California. Franchise Tax Board, do you want
6 to discuss that case or discuss how that supports your
7 position or whether you think that's distinguished here?

8 MS. BROSTERHOUS: In Angelina Mike, the Appellant
9 Ms. Mike, she resided on a reservation that was not her
10 own Tribe's reservation, and she disputed the California's
11 taxation of her per-capita distribution. In that case,
12 the appellate court found that California's tax of
13 Ms. Mike was proper because she was residing off her own
14 reservation. And what they looked at was whether
15 California's tax was interfering with her Tribe's
16 self-governance over her.

17 And in that case, they found that because she
18 resided off the reservation, she was not fully within the
19 sphere of her own Tribe's sovereignty. And, therefore,
20 California would not be interfering with it in taxing
21 Ms. Mike. And, therefore, the tax was proper.

22 JUDGE JOHNSON: This is Judge Johnson. Thank
23 you. And over to Appellant's side. Of course, yes, you
24 get your turn, of course. But I want to sort of preface
25 this first that, you know, I understand that we're going

1 to still be looking at federal preemption when we come to,
2 sort of, state interpretation of the laws and all that.

3 But if you could focus, sort of, your discussion
4 of Angelina Mike, on Sharp Image and Angelina Mike, and
5 whether you think that Angelina Mike being more specific
6 to the facts of the situation and income at issue,
7 compared to as that to be explained the Sharp Image
8 dealing with other activities, not per-capita gaming
9 activities. How would you interpret Angelina Mike and how
10 it applies to these facts?

11 MR. MARSTON: So let me start with the Mike case.
12 So first of all, the argument was never raised and,
13 therefore, it was never briefed, nor was it ever argued
14 that the Indian Gaming Regulatory Act comprehensively
15 regulated per-capita payments and premeditated the ability
16 of the State to impose its income tax on Ms. Mike's
17 income. That wasn't an issue in the case.

18 As opposing Counsel said, Ms. Mike was an
19 enrolled member of a federally recognized Indian Tribe,
20 but she married a member from the 29 Palms Band of Indians
21 and was living with her husband on the 29 Palms Band
22 reservation, which was not her reservation. And she was
23 simply arguing that because she was a member of a
24 federally recognized Indian Tribe residing within Indian
25 Country, even though it wasn't her own Tribe's Indian

1 Country, that that precluded the State from imposing her
2 tax.

3 So the case is clearly distinguishable, both on
4 the facts of this case and on the applicable law, the
5 issues that we're raising here, just we're not briefed,
6 argued, or raised in the Mike case. Regarding the Sharp
7 Image Case, I'd like to go back to the questions that
8 were -- were raised by the other Judge.

9 Our position is there's a fundamental distinction
10 between coming in and asking you to strike down a state
11 tax as being unconstitutional and preempted, so that the
12 tax law itself is invalid, as opposed to what we're doing
13 here. Which is to say, we're not asking you to strike
14 down the tax law as being unconstitutional or invalid.
15 The state income tax law is valid. The provisions of the
16 Franchise Tax Board are valid. We're not seeking to
17 strike them down.

18 What we're saying is that how they are applied by
19 the Franchise Tax Board in this case is prohibited by
20 state law -- I mean, federal law. And -- and that is --
21 it's a fine line, but it's a distinction to be made.
22 Neither side has briefed this issue, but if the Judges
23 would like briefing on this issue, I'd be happy to do it
24 because this is not a novel or new issue. This has been
25 raised in other jurisdictions, for example, in the State

1 of Minnesota.

2 The State of Minnesota has a constitutional
3 provision very similar to the constitutional provision
4 that California has, which prohibits administrative
5 agencies from declaring state laws unconstitutional or
6 preempted. And so they've had to look at this issue, and
7 they have drawn -- said there is legally a distinction
8 between the two. And have held that where -- where you're
9 going in and asking to strike down the statute as being
10 unconstitutional and invalid, as opposed to arguing that
11 it's valid but can't be enforced, that Administrative Law
12 Judges have jurisdiction to decide those issues in the --
13 in the latter instance. So if the Judges want briefing on
14 those issues, we'd be happy to brief it.

15 Sharp Image is directly on point because it deals
16 with the very law that is at issue in this case and deals
17 with the effect that the enactment of that law has on
18 state laws. And, yes, I can see the fact that it didn't
19 hold that the state couldn't tax per-capita payments
20 because the IGRA preempted. But as I stated before, it
21 did hold that A, the IGRA is comprehensive. It regulates
22 the field of Indian gaming activities, and it holds that
23 the IGRA preempts all state law. It was not limited in
24 its holding.

25 It said it preempts state law that places

1 additional burdens on or interferes with the
2 accomplishments of the goals of the IGRA. And you don't
3 need to find a direct conflict. All you need to find is
4 that the statute is comprehensive and regulates the field.
5 And the imposition of the tax will either frustrate the
6 purposes of the statute, or the imposition of the tax will
7 add an additional burden on the regulatory scheme that
8 Congress has enacted, that Congress never contemplated.

9 Now, if you can find a direct conflict between
10 the federal statute and the state law -- and we think
11 there is. We think there is the prohibition against state
12 taxation -- then fine. It's also invalid on that purpose.
13 But I don't --

14 JUDGE JOHNSON: Thank you, Mr. Marston. This is
15 Judge Johnson again. If I can kind of capsule that,
16 maybe just to get a clear statement. So your position
17 here is that the imposition of taxation on per-capita
18 gaming income is imposition on -- or a state regulation
19 act -- regulatory act on the gaming activities of the
20 Tribe; is that accurate?

21 MR. MARSTON: It -- yes, it frustrates the
22 purposes for which the statute was enacted.

23 JUDGE JOHNSON: Okay. And you followed us down
24 that trail. I just want to make sure I got that clear.
25 I'm not going to misunderstand your position on that

1 point.

2 I do want to turn back to Franchise Tax Board.
3 In your arguments, you noted that the FTB does not dispute
4 jurisdiction as to the apportionment question under
5 Colville?

6 MS. BROSTERHOUS: Correct.

7 JUDGE JOHNSON: Can you briefly state what
8 jurisdiction we do have when it comes to apportionment in
9 that Colville issue?

10 MS. BROSTERHOUS: Well, what jurisdiction you
11 have here is whether to -- is over determining whether
12 FTB's assessment was correct based on Appellant's --
13 Appellant-husband's residency on the reservation, which,
14 of course, we will reach in the future hearing because
15 that's the substantive issue. And I believe you have
16 jurisdiction to review if -- under Colville, whether it is
17 improperly apportioned based on where he lived during the
18 years at issue.

19 JUDGE JOHNSON: Okay. Thank you. That's all the
20 questions I have.

21 This is Judge Johnson again. Let me ask my
22 co-panelists one more time.

23 Judge Ridenour, do you have any questions?

24 JUDGE RIDENOUR: This is Judge Ridenour. No
25 questions. Thank you very much.

1 JUDGE JOHNSON: And, Judge Leung, do you have any
2 questions?

3 JUDGE LEUNG: I'm good. Thank you.

4 JUDGE JOHNSON: All right. Thank you very much.

5 So the evidence has been admitted into the
6 record. We have the arguments and your briefs as well as
7 oral arguments presented today and the testimony from Mr.
8 Garcia.

9 Thank you for being here.

10 We now have a complete record with regard to the
11 jurisdictional issues on appeal from which to base our
12 decision. Do we have any final questions before we
13 conclude this hearing on this appeal today?

14 Appellants?

15 MR. MARSTON: None from the Appellants. This is
16 Lester Marston.

17 JUDGE JOHNSON: Thank you.

18 I'm Judge Johnson again. Any final questions for
19 Franchise Tax Board before we conclude?

20 MS. BROSTERHOUS: No. Thank you, though.

21 JUDGE JOHNSON: Thank you.

22 Judge Johnson again.

23 JUDGE LEUNG: Judge Johnson, this is Judge Leung.
24 Did you want to -- was there mention about 15 days to file
25 additional briefing earlier on this hearing? Did somebody

1 want to do that?

2 JUDGE JOHNSON: Absolutely. Yeah. So I think we
3 have, kind of, two questions that were raised here. One
4 is the stipulations, if those could be provided the
5 parties. And the other one was the mention of potentially
6 briefing, sort of, the distinction between striking down
7 the statute altogether or whether preemption applies, and
8 we don't have to strike down the entire statute.

9 As to additional briefing, the panel will confer
10 after the hearing to determine whether or not that's
11 something that we need in order to decide the matter
12 before us. And as to the stipulation, we'll issue an
13 order after this hearing. I'm just asking the parties,
14 that if they are able to within 15 days, provide us a
15 stipulation of fact. And that will go into the record for
16 the appeal.

17 Any questions on those two items from Appellants?

18 MR. MARSTON: None. This is Lester Marston.

19 JUDGE JOHNSON: Thank you.

20 And Franchise Tax Board?

21 MS. BROSTERHOUS: No questions.

22 JUDGE JOHNSON: All right. Thank you,
23 Judge Leung.

24 John Johnson again. I want to thank both parties
25 for their efforts thus far on appeal.

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This concludes the hearing on the severed issues regarding jurisdiction on this appeal. The parties should expect our written opinion no later than 100 days from today.

With that, we're now off the record. This concludes this hearing for the Appeal of Garcia and OTA's hearings for the day.

Thank you everyone.

(Proceedings adjourned at 3:17 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 17th day of September, 2021.

ERNALYN M. ALONZO
HEARING REPORTER