UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 11-7005

MUSCOGEE (CREEK) NATION,
Appellant,

v.

SCOTT PRUITT, Attorney General of Oklahoma,
THE OKLAHOMA TAX COMMISSION,
THOMAS KEMP, JR., Chairman, Oklahoma Tax Commission,
JERRY JOHNSON, Vice-Chairman, Oklahoma Tax Commission and
DAWN CASH, Secretary, Oklahoma Tax Commission,
Appellees.

Appeal from United States District Court
for the Eastern District of Oklahoma
Honorable James Payne, Presiding
Dist. Ct. No. 10-CV-019-JHP

OPENING BRIEF FOR APPELLANT

Oral Argument Requested

May 6, 2011

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STATEMENT OF RELATED APPEALS

This Court heard an appeal in a related case in *Muscogee (Creek) Nation v. Oklahoma Tax Commission*, which resulted in a published decision reported at 611 F.3d 1222 (10th Cir. 2010). That appeal sought an injunction preventing the State of Oklahoma from conducting searches and seizures of tobacco products being transported by the Muscogee (Creek) Nation into and within its Indian country. While some of the underlying facts in this case are the same, the Muscogee (Creek) Nation seeks different relief in the case, namely a prospective declaratory judgment and injunction attacking the constitutionality and legality of two statutory schemes in the Oklahoma Statutes relating to taxation and "Master Settlement Agreement" escrow payments applied to tobacco sold in Indian country.

This particular case was also appealed once before after the district court issued an order declining to grant a preliminary injunction against the Defendants. (Appeal No. 10-7026). That appeal was voluntarily dismissed by agreement of the parties on May 6, 2010, before briefing was required.

JURISDICTIONAL STATEMENT

Appellant, Muscogee (Creek) Nation ("the Nation"), brought suit in the United States District Court for the Eastern District of Oklahoma, alleging that the district court had federal question jurisdiction, under 28 U.S.C. §§1331, 1345, 1362 and *Ex parte Young*. The suit sought to enjoin the enforcement by certain Oklahoma officials of two different statutory schemes in the Oklahoma Statutes that tax and regulate tobacco sales. (Apx. at 49-51.) All of the defendants moved to dismiss, claiming Eleventh Amendment immunity and that the complaint fails to state a claim. (Apx. at 53-155.)

The district court entered an Order on December 30, 2010, which ruled that the court lacked subject matter jurisdiction because the defendants enjoy Eleventh Amendment immunity and that the Nation had failed to state a claim. (Apx. at 376-408.) Accordingly, the district court entered a Judgment dismissing this case in its entirety. (Apx. at 409.) The Nation timely appealed the Order and Judgment to this Court as a "final decision" on January 28, 2011. 28 U.S.C. § 1291; Fed. R. App. Proc. 4(a)(1). (Apx. at 410-411.)

STATEMENT OF THE ISSUES

1. The district court erred in ruling that it lacked subject matter jurisdiction over the defendants because the OTC has waived its Eleventh

Amendment immunity, and the Nation states a valid claim pursuant to *Ex parte Young* against the individual defendants.

2. The district court erred in dismissing this case when the record shows that the Oklahoma Tax Commission ("OTC") is unfairly enforcing its own tax "stamp" laws as to the Nation.

3. The district court committed legal error in dismissing this case without using the "*Bracker*" test to analyze the impact of the State's tobacco taxation and escrow laws on the Nation's sovereign rights to engage in commerce with its own citizens.

4. The Order incorrectly interprets the Nation's claim pursuant to the Indian Trader Statutes.

5. The Order's ruling that the tobacco "Master Settlement Agreement" escrow laws at issue do not apply to intra-tribal transactions is legal error.

STATEMENT OF THE CASE

The Nation brought this suit against (1) then-Governor Brad Henry, (2) then-Attorney General W.A. "Drew" Edmonson, and (3) the Oklahoma Tax Commission and its three commissioners, Thomas Kemp, Jr., Jerry Johnson, and Constance Irby.[1] All individual defendants were sued in their official capacities.

[1] Pursuant to Fed. R. App. Proc. 43(c)(2), Mr. Edmonson is automatically substituted in this appeal by the current Attorney General, Scott Pruitt, who assumed office after the district court's final decision, but before this appeal was filed. Ms. Irby is substituted by her replacement, Dawn Cash.

(Apx. at 22-23.) The Nation voluntarily dismissed Governor Henry from this case on May 6, 2010. (Apx. at 13.)

The complaint brought multiple claims raising federal questions that challenge the validity of two Oklahoma statutes regulating the sale of tobacco. (Apx. at 28-51.) The first statute, 68 Okla. Stat. §349.1, taxes and regulates sales of tobacco products by Indian tribes when they do not have a tobacco "compact" with Oklahoma. A second series of statutes, known in shorthand as the "Escrow Statute," 37 Okla. Stat. §§600.21-600.23, and the "Complimentary Act", 68 Okla. Stat. §§360.1-360.9, require tobacco manufacturers who are not parties to the tobacco "Master Settlement Agreement" with Oklahoma to register with the Attorney General of Oklahoma and pay into an "escrow" account or their products are deemed "contraband". In the complaint, the Nation alleges that these laws improperly regulate the Nation's sales of tobacco products to its own members and places improper burdens on its sale of tobacco products to non-members. (Apx. At 29-30).

All of the defendants filed motions to dismiss claiming that the district court lacked subject matter jurisdiction because they enjoyed Eleventh Amendment immunity and, alternatively, that the complaint failed to state a claim. (Apx. at 53-155.) The motions were fully briefed and the district court heard oral argument from the parties on August 4, 2010. (Apx. at 7, 10-11, 15.) The district court

entered an Order on December 30, 2010, which agreed with all of the defendants' arguments, and dismissed this case in its entirety for lack of subject matter jurisdiction and failure to state a claim. (Apx. at 376-408.)

STATEMENT OF FACTS

The Nation is a federally recognized Indian tribe, which maintains a Trade and Commerce Authority on the Nation's tribal complex in Okmulgee, Oklahoma that engages in commercial enterprises. Among those enterprises is the wholesaling and distribution of tobacco products to Nation-owned travel plazas, and retail "smoke shops" operated by the Nation's Chartered Communities and its citizens within the territorial boundaries of the Nation. (Apx. at 22-23, 26-27.) *See also* Musc. (Creek) Nat. Code Ann., tit. 37 §5-105(A) (included in Appendix B to this brief). The Nation imposes an excise tax on tobacco products that it sells through its retail "smoke shops" and travel plazas. *Id.* §§5-107 to 5-108.

A. Oklahoma's passage of taxation laws relating to tobacco products sold by "non-compacting" Indian tribes.

Oklahoma imposes a "stamp excise tax" on tobacco products, which is paid for by the wholesaler of such products, but "passed down" to the consumer. 68 Okla. Stat. §§ 302-304, 402-403. Oklahoma's Tax Code provides two distinct chapters of laws governing the sale of cigarettes and other tobacco products in tribally owned or licensed stores. *Id.* §§ 346-352, 424-429.

In 2009, the Oklahoma Legislature enacted a law, that went into effect on January 1, 2010, which is codified at 68 Okla. Stat. §349.1 and entitled "Tobacco taxes on noncompacting tribes or nations – Conditions for exception—Native American tax free stamps". That law (hereinafter "section 349.1"), made sweeping changes to the way Oklahoma seeks to impose tobacco excise taxes on tobacco products sold by Indian tribes that have not otherwise entered into a "compact" governing state versus tribal taxation of tobacco products sold in "Indian country". The Nation has not had a tobacco compact with Oklahoma since 2005. (Apx. at 34.)

Primarily, section 349.1 allows Indian tribes (and tribally-licensed retailers) to sell tobacco products to the tribe's own members in "Indian country" [2]free of Oklahoma excise tax, but imposes the full State tobacco excise tax on tobacco products sold by a non-compacting Indian tribe (and its tribally licensed retailers) to "nonmembers" of that Indian tribe. *Id.* §349.1(B). To document that a pack of cigarettes are intended for *intra*-tribal purchase, section 349.1(C) requires that the

[2] "Indian country" is defined in 18 U.S.C. §1151 as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." Oklahoma's Tax Code expands this definition to include "land held in trust by the United States of America for the benefit of a federally recognized Indian tribe or nation[.]" 68 Okla. Stat. §348(3).

pack bear a "Native American tax free stamp." Those Native American tax-free stamps are distributed by the OTC *only to State-licensed wholesalers*, i.e., there is no provision allowing their distribution to tribal-licensed wholesalers such as the Nation's Trade and Commerce Authority. *Id.* §349.1(C)(5). Thus, the State requires that an Indian tribe submit to its unilaterally devised licensing scheme as a prerequisite to the tribe's ability to distribute tobacco products to its own members free from state taxation.

Next section 349.1(C) places an annual quota on the number of stamps that may be distributed to document state excise tax-free sales by a non-compacting Indian tribe, such as the Nation, to its own members. That quota is based on the OTC's unilateral determination of the "probable demand" for such stamps. *Id.*

There are different provisions provided in section 349.1(D) for the tax-free sale of other tobacco products (e.g., cigars, chewing tobacco). In the case of other products, OTC-licensed wholesalers must pay the state excise tax on all sales to Indian tribes and tribally licensed retailers up-front, and then may apply for refunds from the OTC based on the OTC's "probable demand" formula. *Id.; see id.* §427. That refund is limited to the *lesser* of (1) the actual tax free sales made to Indian retailers or (2) 1/12 of the annual probable demand formula. *Id.* §349.1(D)(5). Thus, if a State-licensed wholesaler sells more than 1/12 of that wholesaler's annual estimated probable demand to a non-compacting Indian tribe in any given

month, the wholesaler is denied an otherwise eligible refund by the OTC for the difference. There is no provision in the Oklahoma revenue laws allowing tribally licensed wholesalers to assume this role.

Cigarettes that do not bear the excise stamp, whether taxed or tax free, are deemed "contraband." *Id.* §348(7). Section 349.1(H) also imposes criminal penalties on "any person" who ships, possesses or sells contraband cigarettes, and no exception is provided as to Indians who perform these acts in their own Indian country.

Similarly, any other tobacco products for which the excise tax is not paid are deemed "contraband" and subject to seizure. *Id.* §§425(6)-(7), 428. The State also imposes criminal penalties on "any person" who ships, possesses or sells contraband tobacco products, again without any exception for any Indians who perform these acts in their own Indian country. *Id.* §426(B).

Shortly after section 349.1 took effect, the Nation's Tax Commissioner requested that the OTC provide to the Nation the tax-free stamps for cigarettes to be sold in the retail smoke shops to Nation members. The OTC would not allow the Nation's wholesale operation to have the stamps because the Trade and Commerce Authority is not licensed by the OTC. (Apx. at 113.) At the hearing on the OTC's motion to dismiss, its counsel admitted that the only way the OTC will

provide the stamps to the Nation is if the Trade and Commerce Authority obtains a wholesaler's license from the OTC. (Apx. at 456.)

B. Oklahoma's passage of the "Escrow Statute" and "Complementary Act".

In 1998, Oklahoma entered into a "Master Settlement Agreement" (the "MSA") with several major tobacco manufacturers in the United States. The MSA requires those manufacturers to make annual settlement payments to Oklahoma to cover the health costs generated by tobacco use among Oklahoma residents. During the negotiations of the MSA, the manufacturers involved alleged that "non-participating manufacturers" would receive a competitive advantage over the MSA participants because the costs of complying with the MSA would require the participants to increase their consumer prices. That concern resulted in provisions in the MSA addressing how to avoid this alleged competitive advantage to non-participating manufacturers. (Apx. at 28-29.) *See also* 37 Okla. Stat. §600.21 (explaining this history as Legislative policy).

As a result of these provisions, the Oklahoma Legislature amended the "Prevention of Youth Access to Tobacco Act" (codified at *id*. §600.1, et seq.), in 1999 to add provisions requiring non-participating manufacturers, annually, to pay specified amounts of money into a "qualified escrow fund" and certify to the Attorney General of Oklahoma that this payment has occurred. *Id.* §§ 600.22-600.23. These provisions are generically referred to as the "Escrow Statute".

The Oklahoma Legislature enacted additional laws in 2004 known as the "Master Settlement Agreement Complementary Act" (the "Complementary Act"), 68 Okla. Stat. §§360.1-360.9, which declared that violations of the Prevention of Youth Access to Tobacco Act threatened "the fiscal soundness of the state, and the public health." *Id.* §360.2. That law, in part, required non-participating manufacturers to provide additional information in the certification process. *Id.* §360.4.

Most important to this case, the Complementary Act declares that any cigarettes sold, offered for sale, or possessed for sale in Oklahoma in violation of the Complementary Act (i.e., because the manufacturer has not listed with the Attorney General), are deemed "contraband" and are subject to seizure and forfeiture. *Id.* §360.7(B). Further, the State reserves the right to sue any person violating the Complementary Act to disgorge "any profits, gain, gross receipts, or other benefit" earned from the alleged violation, plus attorney fees and costs. *Id.* §360.8(F), (G). The OTC and the Attorney General are currently suing certain officials of the Nation's wholesale operation, and employees of the Nation's Chartered Communities that operate the retail smoke shops, in the District Court for Tulsa County. That suit, *inter alia*, claims alleged violations of the Complementary Act, and seeks injunctive relief and monetary damages as set forth in section 360.8(F), (G).

The Attorney General has stated in this case that the Escrow Statute and Complementary Act only apply to cigarettes sold in Oklahoma that bear the excise tax stamp of the state. (Apx. at 134.) *See also* 37 Okla. Stat. §600.22(10) (defining "units sold" under the Escrow Statute as the number of cigarettes sold by a manufacturer "as measured by excise taxes collected by the state on packs … bearing the excise tax stamp of the state"). Thus, non-participating manufacturers do not owe Escrow Statute payments on cigarettes intended for tax-free, *intra*-tribal purchases.

That position, however, is only half of the picture. As explained below, the Complimentary Act nonetheless intrudes upon sales of non-participating, non-escrow compliant manufacturers' products in Indian country through a multitude of provisions that make no exceptions for intra-tribal sales. Further, the only way those intra-tribal sales can proceed without the cigarettes being deemed contraband is for the cigarette pack to bear a Native American tax-free stamp issued by the OTC. As noted above, the OTC will not allow the Nation direct access to those stamps, thereby creating a "Catch-22" in which the Nation's officials and members cannot comply with the Complementary Act, and, thus, cannot acquire cigarettes or distribute them to its members, without giving up its sovereign right to operate a tobacco wholesale enterprise free of licensure and complete regulation by Oklahoma.

C. The Nation's purchase of Native American manufactured cigarettes.

In 2006, after its tobacco compact with Oklahoma expired, the Nation began ordering cigarettes manufactured by other Indian tribes or tribal enterprises. (Apx. at 39.) Initially, the manufacturers of those cigarettes contributed to the MSA, but apparently stopped doing so in 2007 or thereafter. Since that time, the State has engaged in seizures of those cigarettes while in transit to the Nation's Trade and Commerce Authority at the tribal complex in Okmulgee, or between the Trade and Commerce Authority and Indian-owned retail facilities situated in the Nation's Chartered Communities (which function like chartered counties of a state). (Apx. at 35, 42). As noted above, the State has also brought suit against various Nation officials and the operators of the retail smoke shops in state court demanding disgorgement of profits for selling the Native American cigarettes and payment of excise taxes on those cigarettes and other tobacco products.

The Nation filed this suit seeking declaratory relief allowing it the ability to transact in these tobacco products on the basis of an Indian Nation-to-Nation commercial relationship. The Nation moved for a preliminary injunction from the enforcement of section 349.1 and the Complimentary Act against the Nation-to-Nation tobacco transactions, which the district court denied. The Nation initially appealed that decision to this Court, but voluntarily dismissed that appeal.

The complaint also alleges that section 349.1 and the Complimentary Act, and the method through which the State is enforcing those laws, interfere with the Nation's sovereign right to sell the Native American manufactured cigarettes to the Nation's own members. At the hearing on the defendants' motions to dismiss this case, the Nation indicated that it would focus this matter on that theory going forward. (Apx. at 429-430.)

SUMMARY OF LEGAL ARGUMENT

The district court incorrectly ruled that it lacked subject matter jurisdiction over this case. Based on the pleading standards discussed by this Court in *Muscogee (Creek) Nation v. Oklahoma Tax Commission*, 611 F.3d 1222 (2010), the Nation has pleaded for direct relief from state excise taxation within the Nation's Indian country, which invokes federal jurisdiction under 28 U.S.C. §1362. The Nation also pleaded sufficient allegations against the various Oklahoma officials named as defendants under the standards set forth in *Ex parte Young*, 209 U.S. 123 (1908). As such, the district court erred in proceeding with evaluating the merits of the case at the motion to dismiss stage, and ruling there was no "plausible" claim against the Oklahoma officials.

Even if this Court determines that it was proper for the district court to proceed with an evaluation of the merits alleged in the complaint, that evaluation was flawed in its legal analysis. First, in ruling that section 349.1, the Escrow

Statute and the Complimentary Act have no impact on the Nation's tobacco sales to its own members, the district court misinterpreted those laws and failed to consider evidence *submitted by the OTC* that shows the State is unfairly withholding the excise tax "stamps" necessary for the Nation to comply with those laws. Further, in reviewing the series of United States Supreme Court precedents concerning State taxation of tobacco products in Indian County, the district court failed to make any evaluation of the balance between state and tribal interests as required in the panoply of Supreme Court opinions discussing state taxation and regulation of tobacco in Indian country. The district court also misinterpreted the Nation's claims pursuant to the Indian Trader Statutes and did not evaluate certain arguments raised by the Nation that show those laws may actually preempt the Escrow Statute and Complimentary Act. Finally, the Order completely misconstrues the impact of the Escrow Statute and Complimentary Act on sales of tobacco products by Indians, including intra-tribal sales, which is legal error.

LEGAL ARGUMENT

I. The district court clearly has subject matter jurisdiction over this case.

A. Standard of review

Issues related to immunity are threshold questions of law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). Accordingly, the legal underpinnings of questions

of immunity and subject matter jurisdiction are reviewed by this Court *de novo*. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1293 (10th Cir. 2008).

B. Jurisdiction exists over the OTC under 28 U.S.C. § 1362 and the OTC's statutory waiver of immunity.

In a brief 2-page discussion, the district court's Order dismisses the Nation's claims against the OTC based on Eleventh Amendment immunity. (Apx. at 385-386.) As the Order notes, however, Eleventh Amendment immunity does not apply when the State waives that immunity. (*Id.* at 385 (citing to *Kentucky v. Graham,* 473 U.S. 159, 167 (1985)).

The Order was simply incorrect that the OTC has not waived its immunity. In fact, the OTC ***has*** waived its sovereign and Eleventh Amendment immunities as to suits that challenge the application of Oklahoma's tax laws:

> (a) In addition to the right to a protest of a proposed assessment as authorized by Section 221 of this title, a right of action is hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax; however, such remedy shall be limited as prescribed by subsection (c) of this section.
> …
> (c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law only in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, *or the collection thereof violative of any Congressional Act or provision of the Federal Constitution, or in cases where*

> *jurisdiction is vested in any of the Courts of the United States*. In all actions brought hereunder … the Tax Commission shall be the sole, necessary and proper party defendant in any such suit[.]

68 Okla. Stat. §226 (emphasis added). Section 226(c) expressly authorizes suit against the OTC in a federal court when federal jurisdiction exists.

In this case, although the district court disagreed, jurisdiction is vested in the federal courts by virtue of 28 U.S.C. §1362. In fact, last year, this Court heard an appeal in a related case involving Oklahoma's efforts to search and seize tobacco products pursuant to the same tobacco laws at issue in this case, when those products were being shipped into the Nation's "Indian country" or between its various tobacco enterprise-related facilities, which sit on Indian land. *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n,* 611 F.3d 1222 (10th Cir. 2010). This Court ultimately held that §1362 did not abrogate the OTC's immunity in that case because the Nation had not brought a claim to enjoin state taxation "within the tribe's territorial boundaries" or to "adjudicate the validity of Oklahoma's cigarette tax as applied to MCN's lading." 611 F.3d at 1230.

In reaching this conclusion, this Court reiterated the Supreme Court's holding in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), that §1362 bestowed Indian tribes with the ability to sue states in federal courts in the same manner that the United States can bring federal questions in federal courts against States on a tribe's behalf. *Id.* As further explained by this Court in *Nation*

v. OTC, the Supreme Court later curtailed *Moe*'s reasoning in *Blatchford v. Native Village*, 501 U.S. 775 (1991), which held that a suit by a tribe invoking jurisdiction pursuant to §1362 must bring a direct challenge "to the imposition of a state tax within Indian country." 611 F.3d at 1231. *See also Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 571-573 (10th Cir. 2000) (holding that a federal court has jurisdiction to hear a federal question challenge filed by an Indian tribe against state taxes imposed on motor fuel distributed to the tribe's retail fueling stations).

The complaint at issue in this appeal ***pleads the precise type of claim discussed*** in *Nation v. OTC* and *Pierce* that may be validly pursued pursuant to §1362. In fact, the complaint's first paragraph specifically alleges that the defendants, including the OTC, "impermissibly burden Indian commerce through their attempt to unilaterally impose State mandated restrictions on the sale of tobacco products *in Indian Country*[.]" (Apx. at 19(Emphasis added)). Further, at its core, the complaint seeks the relief of a declaratory judgment preventing the enforcement of 68 Okla. Stat. §349.1, the Complimentary Act and the Escrow Statute with the "Nation's Indian country". (Apx. at 49-50.) The balance of the complaint is laden with similar claims. (*See* Apx. at 19-21, 35-48.)

In sum, the district court's Order, in hastily dealing with the issue of jurisdiction over the OTC, simply overlooked and misinterpreted the effect of this Court's holding in *Nation v. OTC* on the complaint in this case. The Nation sues to

prevent the enforcement of State taxation laws within its Indian country, which is permissible under 28 U.S.C. §1362. The finding of Eleventh Amendment immunity for the OTC should, accordingly, be reversed.

C. The Nation pleads viable claims against the OTC Commissioners and the Attorney General pursuant to *Ex parte Young*.

The Eleventh Amendment does not bar federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908). *See also Green v. Mansour,* 474 U.S. 64, 68 (1985). The *Young* "exception" to Eleventh Amendment immunity recognizes that a state official sued for prospective equitable relief is generally not regarded as "the state" for Eleventh Amendment purposes. *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1188 (10th Cir. 1998), *overruling recognized on other grounds in* 545 F.3d 906 (10th Cir. 2008).

The United States Supreme Court, in 2002, reviewed the standards for pleading a case pursuant to the *Young* exception in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002). In that case, the federal district court ruled that the individual commissioners of the Public Service Commission of Maryland could not be sued pursuant to *Young*, and that ruling was affirmed by the Fourth Circuit. *Id.* at 640.

The Supreme Court disagreed. Initially, the Court noted that Verizon had alleged in its complaint that the state commission, in issuing a certain order, had

violated a specific federal law and regulatory decision. The Court reasoned that, without a doubt, "federal courts have jurisdiction under [28 U.S.C.] §1331 to entertain such a suit." *Id.* at 642. Further, the Court opined that "absence of a valid … cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." *Id.* at 643. In other words, a federal court has subject matter jurisdiction to hear a suit when it must construe the Constitution or federal laws to either sustain or defeat the plaintiff's claims, unless the federal question claim raised in the pleading "is wholly insubstantial and frivolous." *Id.*

As such, the Supreme Court ultimately held that, in "determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into **whether the complaint alleges an ongoing violation of federal law** and seeks relief properly characterized as prospective." *Id.* at 645 (quotations and internal alterations omitted) (emphasis added). Thus, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id*. at 646. *Accord Nation v. OTC,* 611 F.3d at 1232; *Hill v. Kemp*, 478 F.3d 1236, 1262 (10th Cir. 2007). Further, as the Federal Circuit has noted, "[w]hen there is an actual controversy and a declaratory judgment would settle the legal relations in dispute and afford relief from uncertainty or insecurity, in the usual circumstance the declaratory judgment

is not subject to dismissal." *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1383 (Fed. Cir. 2007).

The Order does exactly what the Supreme Court cautioned against in *Verizon Maryland*, i.e., the Order barely mentions the text within the four corners of the complaint and, instead, proceeds into a lengthy evaluation of the merits of the claims, at one point even weighing factual evidence submitted by the OTC with its motion to dismiss.[3] (Apx. at 403-404.) As noted, the only exception mentioned in *Verizon Maryland* is when the allegation that an official is violating the Constitution or federal law is "wholly insubstantial and frivolous" and appears to be a thinly veiled effort to invoke federal jurisdiction. The Order, however, does not find that the Nation's claims are "wholly insubstantial and frivolous", and nor could it when the Court considers the reasoning discussed below. On this basis alone, the Court should reverse the Order and allow the Nation to proceed with its case before the district court.

[3] In stating that it can take this step and determine if "no violation of federal law is demonstrated," the district court cites to *Yakama Indian Nation v. State of Wash. Dep't of Rev.*, 176 F.3d 1241, 1248 (9th Cir. 1999). (Apx. at 387.) There are two obvious problems with this citation. First, *Yakama* pre-dates the clear instructions set forth in *Verizon Maryland*. Second, in *Yakama*, the only defendant was the State of Washington itself, i.e., there was no state official being sued and, therefore, clearly no properly pleaded claim based on the *Young* exception.

II. The district court's evaluation of the Nation's claims is legally flawed.

A. Standard of review

This Court reviews a district court's dismissal of a case via Fed. R. Civ. Proc. 12(b)(6) de novo. *E.g., Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir. 2009)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal,* __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

B. The complaint sufficiently pleads that the State's tobacco legislation and the State's enforcement mechanisms of those laws conflict with the Constitution and federal laws.

As the Order discusses at length, the Supreme Court has repeatedly addressed the federal questions that arise between the competing state and tribal interests over regulating and taxing tobacco products sold in Indian country. While the Supreme Court has generally held that states may tax the sale of tobacco products between an Indian tribe and "non-members" of that tribe, the Supreme Court has also held that states may not tax such transactions when they are intra-tribal. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980) ("*Colville*"); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976). Not discussed at all in the Order,

however, is that the Supreme Court precedents also require that, when the taxation of non-members occurs in Indian country, federal courts must weigh the state's sovereign interests versus the Indian tribe's sovereign interests to ensure that the state uses "minimal burdens" to collect and enforce that tax. *See Colville*, 447 U.S. at 151; *Moe*, 425 U.S. at 483; *accord Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980).

In fact, the Order treats *Moe* and *Colville* as having provided Oklahoma with an unfettered right to regulate reservation cigarette sales to non-members. This is simply incorrect. In order to determine "the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation," a court must apply a balancing of state, federal and tribal interests. *Bracker*, 448 U.S. at 137, 144-145. As *Bracker* explains, this balancing test does not allow for a categorical determination:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a *particularized inquiry into the nature of the state, federal, and tribal interests at stake*, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. (emphasis added). This balancing test must be utilized in making a determination whether a state may properly regulate reservation cigarette sales to non-Indians. *Colville*, 447 U.S. at 151 (ruling state's interest "outweighs" tribal

interest); *accord Department of Taxation & Finance v. Milhelm Attea & Bros., Inc*, 512 U.S. 61, 73 (1994) (ruling state's interest "outweighs" tribal interest). As explained below, the Order fails to provide any such analysis or balancing.[4]

1. The complaint pleads claims pursuant to these authorities.

In the complaint, the Nation provided the district court with several plausible reasons why section §349.1 and the Escrow Statute and Complementary Act are preempted by the Constitution and federal law based on this the legal framework set forth in the above-cited Supreme Court cases. First, section 349.1(C)-(D) requires the Nation and its citizens to purchase tobacco products from OTC-licensed wholesalers, none of whom are known to the Nation to be owned by the Nation, its citizens or even any Nation-affiliated enterprises.[5] Thus, section 349.1 forces the Nation to deal with non-Indian and non-member wholesalers against its wishes even when it seeks to obtain tax-exempt stamps for tobacco products that will be sold to the Nation's members. (Apx. at 32.)

Otherwise, section 349.1(C)-(D) requires the Nation's sovereign-operated wholesale enterprise to be licensed by the OTC in order for that enterprise to receive the tax-free stamps necessary for the Nation to sell tobacco products its

[4] Ironically, the Order cites language from *Colville* and *Milhelm Attea* in which the Court wrote that there was a finding that the state's interest "outweigh[ed]" tribal interest. (Apx. at 380, 383.)

[5] The Nation owns and operates its own wholesale tobacco enterprise.

own members. In fact, an exhibit to the OTC's motion to dismiss shows that the OTC will not provide any tax-exempt stamps directly to the Nation unless it submits to the State's jurisdiction by obtaining a license – a fact that the OTC further admitted in the briefs and at the hearing on its motion to dismiss. (Apx. at 113, 456.) The United States Supreme Court and the Oklahoma Supreme Court have both held that any such licensing requirement is unconstitutional. *See Moe*, 425 U.S. at 480; *State v. Bruner*, 1991 OK 77, ¶¶13-14, 815 P.2d 667, 669-70. Accordingly, on this specific allegation alone, the Nation more than met the threshold pleading requirements of Fed. R. Civ. Proc. 12(b)(6).[6]

Second, section 349.1(C) restricts the number of Native American tax-exempt stamps that wholesalers may obtain from the OTC. (Apx. at 32-33.) While this tax-free stamp and quota procedure was accepted on its face by the Supreme Court in *Milhelm Attea*, *supra*, the Court also left open the possibility that Indian tribes could challenge a state's application of the tax-exempt stamp quota scheme, including the "wrongful withholding or delay of approval" of the quota or

[6] As the OTC knows, the Nation is immune from suits to enforce its tobacco laws, including suits seeking payment of any excise taxes that the OTC claims are owed on tobacco products sold to non-members, unless the Nation consents to suit in a tobacco compact. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). Given this precedent, it appears that the OTC's position that the Nation must obtain a state license to function as a tobacco wholesaler is an effort to make an "end run" around the Nation's sovereign immunity by imposing full State regulation and enforcement authority on the Nation. That position, however, contradicts the clear holdings in *Moe* and *Bruner*.

stamps. 512 U.S. at 75-76. As noted above, the OTC will not allow the Nation direct access to the tax-exempt stamps, which generates a viable claim against the OTC under various federal provisions for violating the Nation's sovereign rights to trade with its own members, and to tax that trade. (Apx. at 113.)

Third, section 349.1(D) requires the entire excise tax to be paid by the wholesaler without regard to the Indian status of the ultimate consumer or the situs of the retail transaction. As with cigarettes, the wholesaler must be State-licensed, i.e., the Nation's tribally licensed wholesaler is effectively barred from selling tobacco products to its Creek retailers without State interference or taxation. Further, those State-licensed wholesalers are only able to obtain the lesser of 1/12 of the "probable demand" amount or actual cost of the other products sold to non-compacting retailers. Thus, if a State-licensed wholesaler sells more than 1/12 of the probable demand in any month, the wholesaler will not be reimbursed by the OTC for the difference. This prohibition places a clear financial disincentive on State-licensed wholesalers to do business with the Nation or any Creek retailers operating in Indian country.

Finally, as to both laws, the OTC and the Attorney General are enforcing section 349.1 and the Complementary Act through seizures of *all* cigarettes the State finds en route to the Nation, or between the Nation's wholesale and retail facilities, without accounting for the estimated portion of those products that the

Nation would have sold to its own members free of state excise taxes and Escrow Statute payments. (*See* Apx. at 42.) As explained to the district court, the State seizes these cigarettes because they do not have the OTC-issued stamp that indicates the cigarettes are tax-exempt for intra-tribal distribution and sale, which the Attorney General admits *also makes them exempt from the Escrow Statute and Complementary Acts*. (Apx. at 134.)

At the same time, however, the OTC will not provide the tax-exempt stamps to the Nation's wholesale operation. (Apx. at 113.) That refusal places the Nation's tobacco enterprise in a "catch-22" whereby the OTC will not provide the Nation with the necessary means (the stamps) to make their intra-tribal tobacco distribution and sales legal under section 349.1 or the Complementary Act, and then seizes tobacco products that are intended for intra-tribal distribution on the basis that these products lack a tax stamp. The OTC and Attorney General's counsel did not dispute this argument at the hearing before the district court. (Apx. at 443-444, 456.)

The district court essentially "brushed aside" this argument in the Order by ruling that forcing the Nation to use State-licensed wholesalers to obtain the tax free stamps does not place an impermissible burden on the Nation's wholesale operation. (Apx. at 404-405.) Clearly, it does place such a burden on the Nation because it renders the Nation's tobacco wholesale enterprise inoperable, unless it

obtains a wholesaler license from OTC. In fact, as noted above, *Milhelm Attea* specifically states that, while an Indian tribe, in theory, is not burdened by the stamp and quota process, an Indian tribe can sue a state when the "application" of these regulations present a burden on the tribe, including the *wrongful withholding* of the stamps or quota. 512 U.S. at 75-76. This case is that hypothetical case discussed in *Milhelm Attea*. As such, it was legally incorrect for the district court to rule that the Nation has failed to allege any burden on the Nation's interests, such that it cannot state a claim under the Due Process Clause, the Indian Commerce Clause, or the Indian Trader Statute.

2. Even if section 349.1 and the Complementary Act create only "minimal burdens" on the Nation, the district court failed to weigh those burdens against the Nation's sovereign interests.

As discussed above, even if section 349.1 and the Escrow Statute and Complementary Act can be construed to place allowable burdens on the Nation's dealings with non-members on Indian land, the district court was still required to conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," which, as repeatedly noted to the district court, simply cannot be performed at the pleading stage. *Id.* at 145, 100 S. Ct. at 2584. (*See* Apx. at 359-360, 431.)

The Order, however, barely mentions *Bracker* and certainly does not make any effort to analyze the "particularized inquiry" required in that decision. Rather,

as noted above, the Order assumes – incorrectly – that Oklahoma has *carte blanche* power to use any regulatory or police power it wishes to enforce its excise taxes, and the Escrow Statute and Complimentary Act payment provisions against the Nation, when it sells tobacco products to non-members in its own Indian country. The Court thus imposes an impermissible *per se* rule that States may always tax and regulate tribal transactions with non-members in Indian Country. The District Court thus obviated the requirement of balancing the competing interests of states and tribe that is required by numerous Supreme Court cases. *See, e.g., Chickasaw Nation,* 515 U.S. at 459*; Bracker,* 448 U.S. at 144-145. As such, the Order makes no factual findings as to the weighing of the State's interests versus the Nation's interests. And, given that the district court was ruling on Rule 12(b) motions, it would have been inappropriate for the district court to make those factual findings in the first place.

This Court addressed an analogous situation in *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000), in which the Kansas federal district court issued an injunction preventing Kansas from imposing a state tax on motor fuel distributed to an Indian tribe's retail gas stations. In doing so, the district court had weighed the State versus tribal interests in favor of the tribe. This Court reversed that decision, noting that, unlike the "downstream" tobacco excise tax at issue in *Colville* and this case, the Kansas motor fuel tax was imposed

"upstream" on the distributor before the fuel was distributed to the Indian-owned gas stations. *See id.* at 583-585. Based on that reasoning, the Court ultimately determined that the district court's *factual* record was deficient to address how much impact the state tax had on the tribe's sovereign interests and remanded for further proceedings. *Id.* at 585.

In this case, the Nation was not given the opportunity to present this type of evidence to the district court because the case was merely in the pleading stage. The Order essentially rules that the Nation has no interests at stake because section 349.1 does not tax intra-tribal transactions, the Escrow Statute does not require payments to be made on those transactions by manufacturers, and the Complimentary Act does not impermissibly impact Indian sales. This ignores that the State refuses to provide the tax-free stamps that would allow the Nation to sell cigarettes tax-free and escrow payment-free to its own members, a fact which the Nation was not allowed to present. The Nation also never got the chance to put facts into the record as to the burden that the tax and refund system in section 349.1(D) places on the Nation's sovereign interest in selling other tobacco products. The complaint certainly alleges such burdens exist. (Apx. at 19, 33, 35, 42.)

At a minimum, it was error for the district court to issue such a ruling at this stage of the case, before the Nation had an opportunity to present evidence of the

burdens and their effect on the Nation. As such, it was inappropriate for the district court to dismiss this case, and the Order dismissing this case should be reversed.

C. The Indian Trader Statutes and related regulations support a viable claim by the Nation and may pre-empt the Escrow Statute and Complimentary Act in Indian country.

The district court also made fundamental legal errors in ruling, or at least implying, in the Order that the Indian Trader Statutes, 25 U.S.C. §§261-264, are not applicable to the Nation's claims because the complaint does not allege (1) any federally licensed trader is involved or (2) that any such licensed trader does business on a Creek "reservation". First, this ruling overlooks that the purpose of the Indian Trader Statutes is to protect Indian *buyers* from fraud. *Milhelm Attea*, 512 U.S. at 70. For this reason, the Supreme Court has held that the Indian Trader Statutes have pre-emptive effect regardless of whether the seller at issue is a licensed trader. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164-65 (1980). Second, this Court has previously rejected the view that Indian Trader Statutes only apply to transactions where "first contact" is made on a reservation or only to traders who frequent Indian country because 25 U.S.C. §264 expressly applies to any "attempt … to introduce goods" into Indian country. *United States v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978, 980-981 (10th Cir. 1978). Third, the Indian Trader Statutes only require people who are not full-

blooded Indians to obtain a license to trade with Indians and, more important, the Indian Trader Statutes do not require *anyone* to be licensed to trade with members of the Five Civilized Tribes of Oklahoma, including the Creeks. 25 U.S.C. §264; *see also* 25 C.F.R. §140.3. Thus, in the Nation's case, there is clearly no need to plead or show that any trader of tobacco is federally licensed or does business on a "reservation."

In addition, the Escrow Statute is codified as part of the Oklahoma Prevention of Youth Access to Tobacco Act, which, as the name implies, restricts tobacco sales to minors and regulates marketing methods to prevent such sales. See 37 O.S. §§ 600.3-600.4. The federal regulations that implement the Indian Trader Statutes, which have preemptive effect, also prohibit tobacco sales to all Indian minors. 25 C.F.R. §140.17. Thus, the Indian Trader Statute regulations arguably preempt the Prevention of Youth Access to Tobacco Act to the extent that law regulates tobacco sales to Indian minors of any tribe. *See Central Machinery Co.*, 448 U.S. at 164-65.[7]

Finally, the Complimentary Act, which represents the enforcement mechanism for the Escrow Statute, authorizes the State to seize and forfeit cigarettes made by manufacturers that do not comply with the Escrow Statute. 68

[7] The district court completely ignored this argument, which was raised in the Closing Argument submitted by the Nation as requested by the district court at the conclusion of the motions hearing. (Apx. at 361-363.)

Okla. Stat. §360.7. The Indian Trader Statutes, however, reserve to the President the power "to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe[.]" 25 U.S.C. §263; *see also* 25 C.F.R. §140.2. Thus, at least to the extent the Complementary Act attempts to prevent the introduction of non-escrow compliant tobacco products into the Nation's "Indian country," the Indian Trader Statutes and regulations pre-empt such police power.

This case clearly falls within the exception set forth in *Milhelm Attea* for the type of claim that can be asserted under the Indian Trader Statutes. Further, the Order cites to no previous cases that have addressed the effect of the Indian Trader Statutes on MSA-related laws such as the Escrow Statute and Complimentary Acts. As such, the district court simply erred in ruling that the Nation has not pleaded a "plausible" claim that the Indian Trader Statutes may pre-empt the OTC's efforts to force the Nation into State licensure, and Escrow Statute and Complimentary Act to the extent they regulate intra-tribal sales of tobacco. Accordingly, the district court should be reversed.

D. The Order is laden with legal errors in interpreting the effect of the Complementary Act.

The district court's Order granting the defendants' motions to dismiss must also be reversed because it is underpinned by an incorrect understanding of the operation of the Complimentary Act. The district court, throughout its decision, labors under the incorrect legal premises that: (1) the Complimentary Act does not

apply to untaxed cigarette sales to Indians in Indian country; and (2) it imposes only "minimal" burdens upon Indian retailers' sales to non-Indians. To the contrary, the Complimentary Act bars sales of "non-directory" cigarette brands even to tribal members made on their reservations and dictates to Indian- or tribal-owned retailers the type of brands they may sell, and even prevents individual Indians from possessing non-directory brands for their personal use. The district court's misapprehension of how the Complimentary Act works permeates its Order.

This misapprehension of the Complimentary Act is initially stated on page 2 of the Order: "Because this Complimentary Act is designed to aid in the enforcement of the Escrow Statute, and because the Escrow Statute does not apply to sales to the Nation's members, the Complimentary Act is also not applicable to non-taxed sales to the Nation's members." (Apx. at 377.) The district court incorrectly asserts that because there is no Escrow Statute obligation on untaxed sales to tribal members, the Complimentary Act's prohibitions do not apply to these sales.[8] This is a mistake of law that is relied on throughout the Order. (*See*

[8] The primary compliance obligation under the Escrow Statute falls on the manufacturer of the cigarette sold. 37 Okla. Stat. §600.23. The district court is correct that the Escrow Statute only applies to cigarettes upon which the state collects taxes. *See* 37 Okla. Stat. §§600.22(10) & 600.23(2). Thus, a manufacturer will not have an Escrow Statute compliance obligation for an untaxed sale made to tribal members. As explained fully herein, however, the prohibition on sales in Indian country under the Complimentary Act is impacted by much more than just untaxed sales to Indians.

Apx. at 390 (Complimentary Act does not "interfere with the Nation's sale of tobacco products to its tribal members because the sales to tribal members are tax-free"); *id.* at 391 (the Complimentary Act "appl[ies] only to sales upon which tax has been collected."); *id.* at 392 (the Complimentary Act does not "apply to sales to tribal members."). The district court is incorrect in its assertion that the Complimentary Act does not affect the sale of cigarettes to tribal members and that its prohibitions are similar to "minimal" state law obligations on Indian sellers in Indian country that have been approved in the past by the Supreme Court.

The Complimentary Act requires those non-participating cigarette manufacturers ("NPMs") to register annually with the OTC and the Oklahoma Attorney General. The primary focus of this registration requirement is that NPM must certify that it is in full compliance with the Escrow Statute. 68 Okla. Stat. §360.4(A)(1)(b). The Complimentary Act also requires the submission of a sundry of information regarding the NPM's identification, an agent for service on the NPM in the state and other such matters that allow the state to keep track of the NPM and its sales. *See id.* §360.4(A)(2)-(6). The NPM must also pay an annual fee of $1,000.00 at the time of registration. *Id.* §360.4(10). Importantly, the Complimentary Act requires the NPM to provide a list of *all* of the NPM's "brand families" of cigarettes sold in the state. *Id.* §360.4(A)(3)(a).[9]

[9] Brand family is a defined term that essentially means any cigarettes that share trademarked packaging and are differentiated from one another by modifiers such as

The Complimentary Act requires the Attorney General to create a directory listing all of the NPMs, with their individual brand families that have properly certified pursuant to the Complimentary Act. *Id.* §360.4(B)(1). Any NPM that has failed to make an escrow deposit pursuant to the Escrow Statute for *any sales made anywhere in the state* cannot be listed in the directory. *Id.* §360.4(B)(3)(a). There is no exception in the Complimentary Act for sales made in Indian country or to tribal members. Failure to comply with the Escrow Statute for *any sales* will result in the NPM being ineligible for listing on the directory. *Id.*

The prohibition on sale and possession of cigarettes not listed in the directory is absolute. No person may "sell, offer, or possess for sale, in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer [NPM] or brand family not included in the directory." *Id.* §360.4(C)(2). Non-directory cigarettes, even those held for personal consumption, "shall be deemed contraband pursuant to the [Complimentary Act]. Those cigarettes shall be subject to seizure and forfeiture." *Id.* §360.7(B). The district court focused only on the prohibition on stamping non-directory cigarettes contained in section 360.4(C)(1). But, as is obvious from reading the entire Complimentary Act, the prohibition is much broader than just stamping; even the possession for personal consumption is prohibited. *Id.* Again, there is no

"100s" or "Kings." *Id.* § 360.3(1).

exception for sales made in Indian country land or to tribal members. Thus, the Complimentary Act constitutes a direct state regulation of the type of cigarettes that the Nation can acquire for sale to its own members.

The district court's entire decision is based upon its misreading of the Complimentary Act. The Order labors under an incorrect analysis that the Complimentary Act does not affect the sales of cigarettes to or by tribal members. To the contrary, the Complimentary Act creates a categorical prohibition on sales of cigarettes not listed in the directory. Thus, it directly impacts upon sales to tribal members within their Indian country. As the Supreme Court has opined: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State law shall apply." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170-71 (1973). It has also held that *only* in "exceptional" circumstances may a state regulate Indians acting in their own Indian country. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). The district court provided no such analysis in its decision, as it was operating under the mistaken belief that the Complimentary Act did not impact sales to tribal members in Indian country. This was legal error by the district court and is fatal to its decision.

Additionally, the prohibitions on sales are not the type of "minimal" burdens that have been reviewed and approved by the United States Supreme Court in

regard to a state's ability to regulate reservation retailers. The Supreme Court has approved certain state law regimes involving requirements that an Indian retailer collect taxes on sales to non-tribal members and file reports with the state. *See, e.g., Moe*, 425 U.S. 463; *Colville*, 447 U.S. 134; *Milhelm Attea*, 512 U.S. 61 (collectively referred to as the "smoke shop" cases). None of these cases involved a state regulatory regime wherein the mere possession by an Indian tribe or a tribal member of an entire brand of cigarettes was illegal. The Supreme Court in *Milhelm Attea* specifically pointed out that the taxing regime approved in that case did not dictate the "kind" of goods that an Indian retailer could sell. *Milhelm Attea*, 512 U.S. at 75.

The Complimentary Act does just that. The Act's prohibitions dictate the type of products that the tribally owned wholesaler can acquire *for resale to reservation retailers*, and also the type of products that a reservation retailer can have on its shelves and offer for sale *to tribal members*. 68 Okla. Stat. §360.4(C)(2). The Complimentary Act is an entirely different creature than the taxing and reporting regimes that have been approved by the Supreme Court. No such regime has ever been approved by the Supreme Court. Furthermore, as the district court was simply incorrect in its reading of the Complimentary Act, it did not even consider whether the Complimentary Act creates only a "minimal" burden on Indian retailers. This too is fatal to its decision.

The district court's misapprehension of the Complimentary Act's application to Indians is fatal to its decision. It analyzes the Nation's claims under the incorrect legal premise that the Complimentary Act simply does not apply to non-taxed intra-tribal sales. This is incorrect. A cigarette may be barred from listing in the directory for reasons that have nothing to do with tribal sales. However, once not listed, the entire brand becomes contraband and cannot be sold, or even possessed for personal consumption, anywhere in Oklahoma. There is no exception for sales in Indian country or possession by Indian consumers. This creates a direct regulation of Indian tribes and Indians, and dictates the type of products that a tribally-owned wholesaler or retailer in Indian country may sell to tribal members. Failure to analyze the Nation's claims on this legal footing was error and the Order must be corrected.

CONCLUSION

The district court clearly had subject matter jurisdiction over this case because (1) the OTC has waived its immunity under state law; (2) 28 U.S.C. §1362 applies; and (3) the Nation sufficiently pled, under *Young*, that the state laws at issue conflicted with several provisions of federal law and the Constitution. According to *Verizon Maryland*, the district court's evaluation of the complaint for "plausibility" was simply legal error.

Further, even if it was appropriate to perform, the district court's evaluation of the merits of the Nation's claims is impaired by various legal errors as discussed above. The Court should reverse the decision of the district court and remand with instructions to proceed with this case.

Respectfully Submitted,

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Certificate of Compliance

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 9,172 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 15 in Times New Roman 14-point font.

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Certificate of Service

This is to certify that on this, the 6th day of May 2011, a true, correct, and exact copy of the above and foregoing instrument was sent via ECF to:

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