UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY,

Plaintiff,

v.

NICK A. KHOURI, et al.

Defendants.

File No. 16-cv-00121

Hon. Paul L. Maloney

PLAINTIFF THE KEWEENAW BAY INDIAN COMMUNITY'S OPPOSITION TO DEFENDANTS' SECOND MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendants Khouri, Fratzke, Croley, Grano, and Sproull (together, "Defendants") are engaged in an unlawful crusade to enforce the Michigan Tobacco Products Tax Act ("TPTA") against the Keweenaw Bay Indian Community ("the Community"), a federally-recognized Indian tribe. On December 11, 2015, Michigan State Troopers seized a truck, trailer, and tobacco products owned by the Community. On February 9, 2016, Troopers confiscated tobacco products owned by the Community from two different truck-and-trailer rigs operated by common carrier XPO Logistics Freight, Inc. The Department of Treasury is in the process of assessing taxes and penalties against the Community for the seized tobacco, and the State filed criminal charges against two Community members for their involvement in the Community's tobacco commerce. Defendants' actions violate federal law as alleged in the Third Amended Complaint.

Defendants attempt to sidestep the Community's claims by arguing that an earlier case, *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007) ("*Rising*") (arising out of tobacco product seizures in 2002), precludes the Community from bringing any further challenges to Defendants' enforcement of the TPTA. Defendants take this position even though *Rising* concerned facts—namely, different tax enforcement actions involving different tax periods—and legal issues different from the ones at stake now. As explained in detail below, Defendants' motion for judgment on the pleadings should be denied for three principal reasons.

First, Defendants' claim that the Community's tobacco tax-related claims are barred by the doctrine of res judicata has no merit. It is black letter federal law that res judicata – claim preclusion – does *not* apply to tax-related claims that arise in a different tax period. Accordingly, Defendants' res judicata claims must be rejected as a matter of law.

Second, Defendants' implicit suggestion that collateral estoppel applies to the Community's tobacco tax-related claims is incorrect. Collateral estoppel – issue preclusion –

precludes assertion of an issue only if it was actually litigated and decided in a prior proceeding. The Community's tobacco tax claims were not actually litigated or decided in *Rising*.

Finally, Defendants cannot plausibly claim that the *Rising* decision entitles them to qualified immunity from the Community's claims for damages and attorneys' fees under 42 U.S.C. §§ 1983 and 1988. *Rising* did not address the critical questions in this case—including whether the tobacco tax is preempted by federal law under the balancing test established in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 145 (1980), the Indian Commerce Clause, or the Interstate Commerce Clause—and therefore Defendants could not reasonably rely on *Rising* to believe that their conduct was legal.

For all of these reasons, the Court should deny Defendants' motion.

CLARIFICATION OF THE RECORD

Defendants' characterization of *Rising* omits material facts and does not accurately describe the issues that were actually litigated and decided. The Community therefore provides the following summary of the actual proceedings in *Rising*.

In 2003, the Community commenced a lawsuit seeking declaratory and injunctive relief from imposition of Michigan's tobacco products tax arising out of January 2002 seizures of untaxed tobacco products from a U.S. Post Office by state officials. May 29, 2003 Compl. ¶ 1 (2:03-cv-00111 PageID.1). The First Amended Complaint contained 12 claims for relief:

- Count I asserted that any attempt to impose the TPTA against the Community was *per se* invalid because the legal incidence of the tax fell on the Community;
- Count II asserted that the TPTA was *per se* invalid under the Indian Trader Statutes to the extent the legal incidence of the tax fell on the wholesale seller of tobacco products to the Community;
- Count III asserted that the TPTA was *per se* invalid to the extent the legal incidence of the tax fell on individual purchasers because there was no mechanism to ensure Community members could purchase tobacco products free of tax;

- Count IV asserted that the TPTA was invalid because the federal and tribal interests in avoiding the TPTA tax outweighed the state's interests in imposing the tax;
- Count V asserted that enforcement of the TPTA tax with respect to the Community's purchases and sales of tobacco products infringed on the rights of tribal self-government and violated the Community's inherent sovereign right to make its own laws and be ruled by them;
- Count VI asserted that imposition of the TPTA tax impermissibly interfered with commerce with the Indian tribes, and therefore violated the Indian Commerce Clause;
- Count VII asserted that any attempt to treat the Community's tobacco products as "contraband" while the products are in the possession of the U.S. Postal Service violated the federal government's exclusive control over the U.S. mails;
- Count VIII sought damages against two state law enforcement officers who carried out the seizures that were at issue in that case under 42 U.S.C. § 1983;
- Count IX asserted that the defendants' seizure of the Community's tobacco products violated the Community's sovereign immunity;
- Count X asserted that the seized tobacco products were impermissibly identified as "contraband" within the meaning prescribed by Michigan law;
- Count XI sought a permanent injunction prohibiting Defendants from enforcing the TPTA against the Community, based on the claims asserted in Counts I to X; and,
- Count XII sought attorneys' fees pursuant to 42 U.S.C. § 1988. (2:03-cv-00111 PageID.67-99); *see also* Sept. 30, 2004 Op. at 4-5 (PageID.873-74).

Defendants moved to dismiss the Community's claims regarding the legal incidence of the TPTA tax claim for damages. *See* Sept. 30, 2004 Op. at 5 (2:03-cv-00111 PageID.874). The Community moved for partial summary judgment on whether the legal incidence of the TPTA tax fell on the Community for its retail sales. *Id.* at 6-7 (PageID.875-76).

On September 30, 2004, the district court held that, even though the TPTA would make the Community liable for paying the tax, the legal incidence of the TPTA tax fell on consumers rather than on the Community (or its wholesalers). *See id.* at 17 (PageID.880-81, 886). Based on this holding, the court dismissed Claims I, II, and III of the Complaint. *See id.* After issuing this opinion, the district court granted the Community leave to amend its complaint and

voluntarily dismiss certain claims, resulting in the operative Second Amended Complaint filed on March 24, 2005. *See generally* Mar. 24, 2005 Second Am. Compl. (2:03-cv-00111 PageID.1580 *et seq.*) (Exhibit A to the Declaration of James K. Nichols).

As the court later noted, the Second Amended Complaint "consolidated the claims with respect to the 1842 Treaty and dropped claims based on infringement of tribal self-government and the Indian Commerce Clause." *See* Sept. 12, 2005 Op. at 8 (2:03-cv-00111 PageID.6606). The Community's causes of action and allegations changed as follows:

- The Community voluntarily dismissed its claims based on tribal self-government and sovereignty infringement and the Indian Commerce Clause (former Counts V, VI);
- The Community replaced Count IV's balancing of interests claim with a claim that Defendants' prepay/refund system placed more than the "minimal burdens" that permissibly may be imposed on an Indian tribe, and was therefore invalid as a matter of federal law, *see* Second Am. Compl. at ¶ 55 (2:03-cv-00111 PageID.1600-01); and
- The Community's claims based on the 1842 Treaty were limited to allegations that the TPTA was unenforceable in the area ceded by the 1842 Treaty because it infringed upon controlling "federal Indian trade and intercourse laws," namely "the Indian Trader Statutes, which preempt the field of Indian commercial intercourse in the ceded area in a manner that precludes the imposition of a state tax that would burden such intercourse," *id.* at ¶ 59 (2:03-cv-00111 PageID.1602).

The parties filed cross-motions for summary judgment on certain claims asserted by the Community in the Second Amended Complaint. *See* May 16, 2005 Defs.' Summ. J. Br. (2:03-cv-00111 PageID.2156 *et seq.*); May 16, 2005 Pl.'s Summ. J. Br. (2:03-cv-00111 PageID.2717 *et seq.*). In its briefing, the Community pointed out that the *Bracker* balancing of interests test controlled the legality of the tax "[w]hen the legal incidence of a state tax falls upon a non-Indian for transactions within Indian country." Pl.'s Summ. J. Br. at 21 (PageID.2736). The Community did not argue that the tax was preempted under *Bracker* balancing, however; the Community argued *only* that the prepay/refund system exceeded the minimal burdens that would be permitted under federal law *if* the tax were legal. *See id.* at 21-28 (PageID.2736-2743). As

noted above, the Community had already dismissed the *Bracker* balancing claim. The Community's argument and claim based on the 1842 Treaty was similarly narrowed to specific federal laws alleged to preclude enforcement of the TPTA—the Indian Trader Statutes. *See id.* at 28 (PageID.2743).

The district court issued an opinion on September 12, 2005, finding that the State's prepay/refund system does not impose more than minimal burdens on the Community. (2:03-cv-00111 PageID.6618). The district court also found that the 1842 Treaty "plainly makes federal law applicable to the Ceded Area," but denied the Community's claim that the tobacco tax was preempted by the Indian Trader Statutes. *Id*. at 22 (PageId.6620). The Court also found that the January 2002 seizures of the Community's tobacco products did not violate the Community's sovereign immunity. *Id*. at 34 (PageID.6632).

The Community appealed, and the Sixth Circuit:

- Affirmed the district court's holding that "the legal incidence of the tax falls on non-tribal consumers and not on the Community." *Rising*, 477 F.3d at 890.
- Found "the refund system to be a permissible means of requiring the Community 'aid the State's collection and enforcement' of valid taxes imposed on non-tribal members." *Id*. at 893 (citations omitted).
- Confirmed that federal law, not state law, applies to the Community in the Ceded Area, but found that the federal law arguments presented by the Community did not establish that the tax was unlawful—the legal incidence did not fall on the Community or its members, and the TPTA did not impose more than minimal burdens with respect to collection of the tax from non-members. *Id*.
- Found that it "appears that sovereign immunity only provides immunity from suit, not from seizures." *Id.* at 895.

STANDARD OF REVIEW

In ruling on Defendants' motion for judgment on the pleadings, this Court must "construe the complaint in the light most favorable to" the Community and accept its factual allegations as true. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007).

ARGUMENT

Rising does not give Defendants any legal basis for foreclosing the Community's tobacco tax claims in this action. First, Defendants' res judicata argument fails because litigation of tobacco tax claims arising from seizures in 2002 cannot, as a matter of law, foreclose litigation of tobacco tax claims arising from seizures in 2015 and 2016. Second, Defendants' implicit collateral estoppel argument fails because the factual and legal issues in this case are very different from those litigated and decided in *Rising*. Finally, Defendants cannot rely on *Rising* to establish a qualified immunity defense. *Rising* did not resolve the legality under federal law of imposing the TPTA on the Community, and Defendants therefore cannot plausibly claim that *Rising* offered any reasonable basis for their alleged belief that their actions were legal.

I. Res Judicata (Claim Preclusion) Does Not Apply To Tax Claims Like Those Brought By The Community.

It is well-established that as a matter of federal law, res judicata does not apply to tax claims unless the question of liability *for the same tax period* is raised again in a subsequent action. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Moreover, this basic rule is not limited to tax claims; it applies to causes of action arising from any matter that may recur. *E.g.*, *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327–329 (1955) ("[E]ssentially the same course of wrongful conduct," may frequently give rise to multiple causes of action, and prior judgments "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."); *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 383 (2d Cir. 2003) ("Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts representing a continuance of the same 'course of conduct' . . . . ."); *Cellar Door Prods., Inc. v. Kay*, 897 F.2d

1375, 1378 (6th Cir. 1990) (each time an allegedly anticompetitive arrangement harmed the plaintiff, a new cause of action accrued). Because the Community is challenging Defendants' civil and criminal enforcement of the TPTA as it affects tax periods and conduct separate from and subsequent to those considered in *Rising*, Defendants cannot establish an identity of causes of action or, that the Community's claims were, or could have been, litigated in *Rising*—and therefore cannot establish the elements of res judicata for the Community's claims.[1]

In *Sunnen*, a case not cited by Defendants, the United States Supreme Court affirmed the rule that, with respect to tax-related claims, a distinct and new liability and hence a new cause of action arises in each tax period. *Sunnen*, 333 U.S. at 598; *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) (*Sunnen* is "controlling" where tax claims arose in different tax years); *see also Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 771 (9th Cir. 2003) (*Sunnen* "establish[ed] that litigation concerning different tax years is subject not to claim preclusion."). Because tax claims relating to a later tax period represent a new cause of action, the *Sunnen* Court held, res judicata does not apply and "the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." *Sunnen*, 333 U.S. at 598; *see also Golden v. Commissioner*, 548 F.3d 487, 495-96 (6th Cir. 2008) (quoting *Sunnen*, 333 U.S. at 598). The tax period distinction is a necessary one; "it makes sense that res judicata would not apply to suits involving different tax years because the applicable laws and facts pertaining to distinct tax years are ever-changing." *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1289 (11th Cir. 2015).[2] It would be inequitable to allow taxing authorities to use res judicata to

[1] Federal, not state, law governs the scope of preclusion where a party challenges a state tax based on federal claims. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361 (1984).
[2] The rationale for the holding was that the tax in question was "a matter which may recur" and

establish perpetual tax liability for a particular taxpayer. *Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d at 770-71.

The rule established in *Sunnen*, as recognized and applied by the cases cited above, precludes Defendants' argument that res judicata applies to the Community's present challenge to Defendants' civil and criminal enforcement of the tobacco tax. *Sunnen* broadly forbids the application of claim preclusion to tax-related claims—everything from litigation regarding the amount of liability to whether the tax applies at all. *Sunnen*, 333 U.S. at 598. Indeed, the "taxpayer" in *Sunnen* argued that he was not subject to a tax and did not pay it, just as the Community does in this case. *Id.*[3] The Community's claims address seizures of different tobacco products, in different places, under different circumstances, and in different tax periods than the tax-related seizures considered in *Rising*:

- In *Rising*, the Community challenged January 2002 seizures of unstamped tobacco products purchased for resale on the Reservation and trust lands. *Rising*, 477 F.3d at 885. The products were transported by mail and were seized from a post office. *Id.*
- In this action, the Community challenges seizures, and related enforcement measures, of unstamped tobacco products in December 2015 and February 2016. Third Am. Compl. ("TAC") ¶¶ 60-106 (ECF No. 58). In December 2015, Defendants seized tobacco products, a truck, and trailer owned by the Community, and in February 2016, Defendants seized tobacco products that were being transported by XPO Logistics, an interstate commerce carrier. *Id*. The Community makes no claims relating to the 2002 seizures.

Rejecting Defendants' res judicata argument is consistent with decisions reached by

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the determination of liability or non-liability in one instance should not necessarily control future instances. *Sunnen*, 333 U.S. at 598. Monthly and transactional taxes are also matters that recur, and it would be inequitable for the determination of liability or non-liability in one instance control future instances for the same reasons stated in *Sunnen* and the cases following it.

[3] Defendants cannot avoid *Sunnen* by arguing that the Community is not a "taxpayer" or is not bringing "tax claims." The tobacco products at issue were seized, criminal prosecutions commenced, and assessments initiated, because the Community did not pay the tobacco tax. Under Defendants' interpretation of the TPTA, the Community would be required to pay the tax to obtain tobacco products, and any products in the possession of the Community or its officials would be required to bear a tax stamp. *See* Mich. Comp. Laws §§ 205.426a, 205.422(p).

courts across the country on similar issues. Courts routinely reject res judicata arguments and permit litigants to challenge the applicability of tax laws to particular circumstances—even if there are prior decisions involving some of the same legal questions, facts, and parties, but different tax periods or transactions. Indeed, a federal court recently rejected a res judicata argument and allowed claims regarding an Indian tribe's sale and possession of untaxed cigarettes to proceed, even though nearly-identical claims had already been litigated (or could have been litigated), because the later claim arose from a "different underlying factual transaction" than the earlier claim. *New York v. Mountain Tobacco Co.*, 2016 U.S. Dist. LEXIS 95329, at *44-45 (E.D.N.Y. July 21, 2016); *see also Limbach*, 466 U.S. at 362-63 (holding that res judicata and claim preclusion do not apply because "[t]he years involved in this tax case, however, are not the same tax years at issue in *Hooven I*"); *Agua Caliente Band of Cahuilla Indians v. Riverside Cnty.*, 181 F. Supp. 3d 725, 746 (C.D. Cal. 2016) (denying motion for judgment on the pleadings because res judicata does not bar a tribe from challenging a tax, even though it challenged the same tax, for a different year, in prior litigation).

Because the Community's tobacco tax claims arise from different tax periods and different seizures than the claims in *Rising*, the claims cannot be subject to res judicata, and the Court must deny Defendants' motion for judgment on the pleadings on this issue.

II. Collateral Estoppel (Issue Preclusion) Does Not Bar The Community's Claims.

Not only do Defendants fail to show that res judicata applies to the Community's claims arising out of Defendants' present enforcement of the TPTA, they also fail to show that the narrower doctrine of collateral estoppel bars any of these claims. Though collateral estoppel (issue preclusion) *may* apply to tax-related claims in some limited circumstances, its application requires a rigorous showing—far beyond what Defendants can muster—with respect to what was litigated in *Rising*, and the preclusive effect is limited to issues that were actually litigated and

decided, and "necessary and essential to a judgment on the merits in the prior litigation." *Hickman v. Commissioner*, 183 F.3d 537 (6th Cir. 1999); *see also Disabled Am. Veterans v. Commissioner*, 942 F.2d 309, 313 (6th Cir. 1991).[4]

Courts proceed cautiously in applying collateral estoppel to tax cases out of concern for creating vested rights that are impervious to changes in the legal or factual landscape. *Agua Caliente Band*, 181 F. Supp. 3d at 746 Thus, "if the relevant facts in the two cases are separable, even though they [may] be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." *Sunnen*, 333 U.S. at 601. For issue preclusion to apply, Defendants would have to establish *each* of the following four conditions:

- The issue "in the subsequent litigation is identical to that resolved in the earlier litigation." *Hickman*, 183 F.3d at 537. For tax-related claims, the matter raised in the second suit must be "identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen*, 333 U.S. at 599-600).

- The issue must have been "actually litigated and decided in the prior action." *Hickman*, 183 F.3d at 537. For tax-related claims, "[i]f the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." *Kennedy v. Commissioner*, 876 F.2d 1251, 1257 (6th Cir. 1989) (quoting *Sunnen*, 333 U.S. 599-600).

- The issue must have been "necessary and essential to a judgment on the merits in the prior litigation." *Hickman*, 183 F.3d at 537.

- The party to be estopped must have been a party to the prior litigation or "in privity with such a party." *Id*.

Defendants do not, and cannot, satisfy these conditions for any of the Community's tobacco claims.

A. Count IX – *Bracker* Balancing

The Community alleges in Count IX that the TPTA, as applied in the circumstances of

[4] In contrast, res judicata bars claims arising from the same transaction that the parties reasonably could have raised. *Abbott v. Mich.*, 474 F.3d 324, 331 (6th Cir. 2007).

this case, is preempted under the balancing test set forth in *Bracker*. Defendants contend that this claim was "actually litigated" in *Rising*, but as shown below, it was not.

Community's Claim in the Current Litigation	Count IX – *Bracker* Balancing "Under the factual circumstances of this case [*i.e.*, the December 2015 and February 2016 seizures], the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products within the Reservation and trust lands, and the seizure and forfeiture of the Community's property in connection with such sales, is preempted under the *Bracker* Balancing Test." TAC ¶¶ 147-149.
Community's Claim in *Rising*	The Community initially pled a *Bracker* balancing claim with respect to the January 2002 seizures, but voluntarily dismissed the claim before it was litigated. Mem. Mot. Leave to File SAC at 4 (2:03-cv-00111 PageID.1430). In connection with its legal argument relating to other claims in *Rising*, the Community noted that the *Bracker* balancing analysis controlled the legality of the tax "[w]hen the legal incidence of a state tax falls upon a non-Indian for transactions within Indian country" and if the State was permitted to impose the tax under *Bracker*, that "the [S]tate may impose . . . 'minimal burdens' [on Indian retailers] . . . to collect and remit . . . taxes collected from non-Indian customers." (2:03-cv-00111 PageID.2736 (quotations and citations omitted).) The Community *only* argued that the State's prepay/refund system exceeded the minimal burdens that would be permitted under federal law *if* the tax were legal. *See id.*
Disposition in *Rising*	The Court found that "the State's refund system does not impose more than minimal burdens on the tribe." (2:03-cv-00111 PageID.6617). Although this finding was dispositive of the Community's Count IV - Burdens Imposed by the Refund System, the district court went on to discuss the *Bracker* balancing analysis even though the Community had voluntarily dismissed the claim. (2:03-cv-00111 PageID.6611, 6618). The Sixth Circuit did not mention *Bracker* at all, and did not address the question whether the tobacco tax was lawful under *Bracker* balancing. In fact, the Sixth Circuit expressly noted that the Community did not "challenge the conclusion that the state may impose a minimal burden on the tribe in collecting taxes from non-tribal members based on the balancing of interests, but instead argue[d] that the TPTA impermissibly imposes more than a minimal burden." *Rising*, 477 F.3d at 890 n.3.

Because the Community voluntarily dismissed its *Bracker* balancing claim in *Rising*, the claim was not "actually litigated and decided" as required for collateral estoppel. Thus, the conditions

for applying collateral estoppel to Count IX cannot be met. *Hickman*, 183 F.3d at 537.

None of Defendants' arguments and evidence show that collateral estoppel applies to the Community's *Bracker* balancing claim. First, Defendants erroneously rely on the Community's original complaint in *Rising* and other non-germane material as evidence that *Bracker* balancing was litigated in *Rising.* Defendants claim that the "Community invoked the *Bracker* test in *Rising* by alleging that federal and tribal interests in tribal sovereignty and self-government 'outweighed' Michigan's interest in imposing the tax and enforcing the TPTA for the Community's sales." Def. Mem. Jdgmt. Pldgs. at 8 (citing 2:03-cv-00111 PageID.15-16 (Count III), 88-89 (Count IV), 873). Defendants, however, cite to the original Complaint, First Amended Complaint, and a recitation of counts in a 2004 order of the Court in *Rising*. Def. Mem. Jdgmt. Pldgs. at 8-9. Defendants do not acknowledge the operative complaint—the Second Amended Complaint, filed on March 24, 2005—which did not include any *Bracker* balancing claim. *See generally* 2005 Sec. Am. Compl. (2:03-cv-00111 PageID.1580-1612). Nor do they address the fact that the Sixth Circuit in *Rising* expressly recognized that the Community did not assert a *Bracker* balancing claim.

Second, Defendants misrepresent the parties' motions for summary judgment in *Rising* as a litigation of *Bracker* balancing. Def. Mem. Jdgmt. Pldgs. at 8-9 (citing 2:03-cv-00111 PageID.2170-2180, 2736-2743, 4007-4010). Defendants' own citations show, however, that *Bracker* balancing was not actually litigated. The state officials' brief addressed whether "the State's refund system tailored to conform with the Supreme Court's decisions" in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and subsequent cases. (2:03-cv-00111 PageID.2157). Though the state officials maintained that the state had strong interests in imposing and collecting the tax, they did not seek judgment on that issue. (2:03-cv-00111

PageID.2170-2180). The Community's summary judgment brief, on its part, noted that the Community had voluntarily dismissed its *Bracker* balancing claim and argued only that the prepay/refund system exceeded the minimal burdens that would be permitted under *Moe* and *Milhelm Attea* if the tax were legal. (2:03-cv-00111 PageID.2736-2743). The Community mentioned the *Bracker* test only to demonstrate that even if a state tax is permitted under the *Bracker* test (which it did not concede), the state may impose only "minimal burdens" on "Indian retailers within Indian country to collect and remit to the state excise taxes collected from non-Indian customers," which it argued was not the case with the Michigan tobacco tax collection scheme. (*Id*. at PageID.2736). The parties' mere mention of *Bracker* balancing falls well short of actually litigating *Bracker* balancing—that calls 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." *Bracker*, 448 U.S. at 145 (emphasis added). For any balancing claim to actually be litigated there would have to be a factual record regarding the specific state, federal, and tribal interests at stake. *Id.* The parties did not conduct discovery on the interests relevant to balancing, and thus there was no record before the district court on the factual issues that would have to be considered if the balancing test were actually litigated. (2:03-cv-00111 PageID.2718-2726; 2160-2165 (statements of undisputed facts).) Thus, though the *Bracker* balancing test was *mentioned* in briefs and the court's decision in *Rising*, *Bracker* balancing was not actually litigated.

Finally, contrary to Defendants' claim, the district court in *Rising* did not decide any *Bracker* balancing claims. To the extent that the district court discussed *Bracker* balancing in its opinion in *Rising*, such discussion was purely hypothetical dicta, since no *Bracker* balancing claim was before the court, and clearly was not "necessary and essential to a judgment on the

merits" as required for application of collateral estoppel. *Hickman*, 183 F.3d at 537; *see also United States v. Tucker*, 28 F.3d 1420, 1429 n.1 (6th Cir. 1994) ("Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point[.]"). For this reason, the Sixth Circuit did not even mention *Bracker* or *Bracker* balancing in its decision; it noted, in fact, that although the district court had discussed the balancing test, the Community was not litigating the question whether the TPTA was preempted under *Bracker* balancing. *Rising*, 477 F.3d at 890 n.3, 886-92.

B. Count X – Self-Government and Sovereignty Infringement

The Community alleges in Count X that the tobacco tax, as applied in the circumstances of this case, infringes on the Community's rights of self-government and sovereignty. As shown in the chart below, this claim was not actually litigated and decided in *Rising*.

Community's Claim in the Current Litigation	Count X – Self-Government and Sovereignty Infringement "Under the factual circumstances of this case [*i.e.*, the December 2015 and February 2016 seizures], the tax imposed by the Tobacco Products Tax Act, with respect to the Community's sales of tobacco products within the Reservation and trust lands, and the seizure and forfeiture of the Community's property in connection with such sales, infringes on the rights of self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them and, therefore, is invalid as a matter of federal law and violates the Supremacy Clause . . . ." TAC ¶¶ 150-152.
Community's Claim in *Rising*	The Community's Second Amended Complaint did not include any self-government or sovereignty infringement claims.
Disposition in *Rising*	The district court noted that the Community had "dropped claims based on infringement of tribal self-government." (2:03-cv-00111 PageID.6606). The court mentioned self-government only in its discussion of the "minimal burdens" analysis. (*Id*. at PageID.6617-18).

Because the Community voluntarily dismissed its self-government and sovereignty infringement claims in *Rising*, these claims were not "actually litigated and decided" as required for collateral

estoppel to apply to Count X. *Hickman*, 183 F.3d at 537.

Defendants' arguments fail to support the application of collateral estoppel. First, Defendants rely almost entirely on documents filed by the Community *before* it dismissed its self-government and sovereignty infringement claims. Def. Mem. Jdgmt. Pldgs. at 9-10 (citing 2:03-cv-00111 PageID.13-15, 18-19 (Counts I-III, VI *of the original complaint*), 83, 86-87, 89-90, 94-95 (Counts I, II, V, IX *of the First Amended Complaint*)). The few citations in Defendants' brief that refer to the operative Second Amended Complaint in *Rising* either do not mention self-government or sovereignty infringement or mention it only in passing:

- Second Amended Complaint (2:03-cv-00111 PageID.1596) (no mention);
- Second Amended Complaint (*Id*. at PageID.1599)) (no mention);
- Second Amended Complaint (*Id*. at PageID.1606, 1608) (mentioned only in passing).

Second, Defendants erroneously claim that self-government and sovereignty infringement claims were litigated because self-government and sovereignty are the "backdrop of every Indian tax case." Def. Mem. Jdgmt. Pldgs. at 9. The fact that Indian self-government and sovereign principles may be a "backdrop" of Indian law cases, however – because Indian tribes are governments – does not mean that claims of self-government and sovereignty *infringement* are litigated claims in a proceeding. Actual litigation and decision, not "backdrop," are required for collateral estoppel to apply to a claim. *Hickman*, 183 F.3d at 537.

Finally, Defendants flatly misrepresent the decision of *Rising* with respect to the self-government and sovereignty infringement claims, claiming that the defendants in *Rising* "won each of these claims" in this Court and in the Sixth Circuit. Def. Mem. Jdgmt. Pldgs. at 10. There was no such holding by the district court or the Sixth Circuit in *Rising*, and Defendants' contention that "[t]his claim has been litigated" is therefore a bald assertion that contradicts the

record. *Id*. The Community invites Defendants in their reply brief to point this Court to the actual page cites in the court opinions that support their bald contention – none exist.

C. Count XI – The Indian Commerce Clause

The Community alleges in Count XI that the tobacco tax, as applied in the circumstances of this case, is preempted under the Indian Commerce Clause. Defendants contend the claim was actually litigated in *Rising* (Def. Mem. Jdgmt. Pldgs. at 11), but as shown below, it was not.

Community's Claim in the Current Litigation	Count XI – Indian Commerce Clause "Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products within the Reservation and trust lands, and the seizure and forfeiture of the Community's property in connection with such sales, is preempted under the Indian Commerce Clause of the United States Constitution." TAC ¶¶ 153-155.
Community's Claim in *Rising*	The Community's Second Amended Complaint did not include any Indian Commerce Clause claim.
Disposition in *Rising*	The district court noted that the Community "dropped claims based on . . . the Indian Commerce Clause." (2:03-cv-00111 PageID.6606). The Court did not otherwise address the Indian Commerce Clause.

Because the Community voluntarily dismissed its Indian Commerce Clause claims in *Rising*, the claims were not litigated, and collateral estoppel does not apply. *Hickman*, 183 F.3d at 537.

None of Defendants' arguments demonstrate that collateral estoppel applies to the Indian Commerce Clause claim. First, Defendants once again rely exclusively on documents filed prior to the Community's amendment of its original complaint in *Rising* to support their contentions. Defendants cite only the original complaint, and other documents referring to the original complaint—which was superseded by the Second Amended Complaint which did not include an Indian Commerce Clause claim. Def. Mem. at 10 (citing 2:03-cv-00111 PageID.90-91, 737,

874). Defendants' argument that the Community's claim for injunctive relief in *Rising* was based on Defendants' violation of "the Indian Commerce Clause, as well as other federal laws" is therefore pure fiction. Def. Mem. 10 (citing 2:03-cv-00111 PageID.18-19, 90-91, 1608-1609). The Community's Second Amended Complaint contains no Indian Commerce Clause claim and mentions the clause only in passing. (2:03-cv-00111 PageID.6606).

Second, Defendants erroneously claim that the district court "rejected" an Indian Commerce Clause claim. Def. Mem. Jdgmt. Pldgs. 10 (citing 2:03-cv-00111 PageID.886-888, 6609, 6615, 6617-6618). None of Defendants' citations to pages in the district court's opinion, however, support this contention. The cited pages in the district court's September 30, 2004 do not mention the Indian Commerce Clause, (2:03-cv-00111 PageID.886-888), and the cited page in the district court's September 12, 2005 order refers to the Indian Commerce Clause only to state that the Community was not asserting such a claim (2:03-cv-00111 PageID.6606).

Finally, Defendants erroneously claim that the "Sixth Circuit reached the same conclusions and affirmed" on the Indian Commerce Clause claim. Def. Mem. Jdgmt. Pldgs. 11 (citing *Rising*, 477 F.3d at 892). The district court issued no decision on an Indian Commerce Clause claim, so the Sixth Circuit could not and did not affirm such a decision. The Sixth Circuit decision does not mention the Indian Commerce Clause at all. *Rising*, 477 F.3d at 892.

D. Count XII – Interstate Commerce Clause

The Community's Interstate Commerce Clause claim (Count XII) in this case raises issues that were neither litigated nor decided in *Rising*. Indeed, Defendants do not claim otherwise. Def. Mem. Jdgmt. Pldgs. at 13. Yet, Defendants argue that res judicata should bar the Community's Interstate Commerce Clause claim in this case. *Id*. at 13. Because res judicata does not apply to tax claims like those of the Community, however, no claim preclusion applies to issues that "could have been and should have been litigated" in *Rising*. Accordingly, the

Community's Interstate Commerce Clause claim is not subject to res judicata.[5]

E. Count XIII – The 1842 Treaty Ceded Area

The Community alleges that the tobacco tax, as applied in the circumstances of this case, violates its federal law rights established by the 1842 Treaty. As shown in the chart below, the Community's claim does not call for relitigation of any issue actually decided in *Rising*.

Community's Claim in the Current Litigation	Count XIII – 1842 Treaty Ceded Area "Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products in the Ceded Area, and the seizure and forfeiture of the Community's property in connection with such sales, and the criminal prosecution of Community members involved in the Community's tobacco commerce activities, is unlawful under Article II of the 1842 Treaty because the Ceded Area must be treated as if it is Indian country under Article II and, therefore, among other reasons, (a) the tax is invalid under the *Bracker* Balancing Test, (b) the tax infringes on the rights of tribal self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them, and (c) the tax unlawfully interferes with commerce with the Indian tribes and, therefore, violates the Indian Commerce Clause . . . ." TAC ¶ 161.
Community's Claim in *Rising*	The Community argued that "Article II of the 1842 Treaty required the continued enforcement of the federal trade and intercourse laws within the area ceded pursuant to the 1842 Treaty as if it were Indian country. . . . [T]hus, within the ceded area, the federal trade and intercourse laws continue in force with respect to the trade and intercourse of the Community with its members, with members of the other signatory bands of the 1842 Treaty, and non-Indians. This treaty provision guarantees the continuation in the ceded area of, among other federal Indian trade and intercourse laws, the Indian Trader Statutes . . . [and] creates rights that cannot be burdened with a state tax." 2005 Sec. Am. Compl. ¶ 59 (2:03-cv-00111 PageID.1602).
Disposition in *Rising*	The district court held that "[t]he 1842 Treaty plainly makes federal law applicable to the Ceded Area" but this "does not limit the State's ability

[5] In an apparent attempt to establish some similarity between issues that were litigated in *Rising* and issues that are being litigated in this case, Defendants argue that various *state law* claims relating to the transit of tobacco were litigated in *Rising*. Def. Mem. Jdgmt. Pldgs.at 12-14. But the question in this case is whether Defendants' seizure of tobacco in transit—including from a common carrier—interferes with interstate commerce. This issue was not addressed in *Rising*.

	to impose minimal burdens on the Community to assist in the collection of the State's cigarette taxes." (2:03-cv-00111 PageID.6620.) The Sixth Circuit affirmed that federal law, not state law, applies to the Community in the Ceded Area, but found that the Community did not establish that the tax was unlawful under the particular federal law claims at issue—the Act was not *per se* invalid as a matter of federal law, and did not impose more than minimal burdens on the Community in collecting the tax from non-members. *Rising*, 477 F.3d at 892-93.

As noted in the chart above, one aspect of the Community's Treaty claim in this action was actually litigated in *Rising*—and the Community prevailed. The district court held, and the Sixth Circuit affirmed, that in the Ceded Area, federal law, not state law, applies to the trade and intercourse of the Community with its members, with members of the other signatory bands of the 1842 Treaty, and non-Indians. (2:03-cv-00111 PageID.6620); *Rising*, 477 F.3d at 893. The district court and Sixth Circuit went on to find that the legal incidence of the tax did not fall on the Community or its members, and did not impose more than minimal burdens on the Community with respect to collection of the tax from non-members—but neither court addressed the federal law arguments that the Community is raising in this action. *Id*. As set forth in detail in parts II.A-E, above, the Community alleges that under the factual circumstances of this case, Defendants' enforcement of the TPTA violates federal law because the tobacco tax is preempted by federal law under *Bracker* balancing, the Indian Commerce Clause, and the Interstate Commerce Clause. Parts II.A-E, above, also show that these issues were not litigated in *Rising*. If the Community prevails on these claims with respect to enforcement of the TPTA on the Reservation and trust lands, the same rule would apply to the Ceded Area. Such an outcome would be consistent with—and actually required by—the holding in *Rising*. 477 F.3d at 893.

F. Count XIV – Sovereign Immunity from Seizure

The Community alleges that Defendants violated the Community's sovereign immunity

by carrying out seizures, purportedly pursuant to the TPTA, on December 11, 2015 and February 9, 2016. TAC ¶¶ 164-69. The Community made a similar claim in *Rising*, that the seizures at issue in that case violated the "sovereign immunity enjoyed by the Community." (2:03-cv-00111 PageID.1606 ¶ 74). That the Community's claim in this case is similar to a claim in *Rising* does not mean that the current claim is precluded—that doctrine is "confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen*, 333 U.S. at 599-600). The Community's claim in this action is based on facts—the December 2015 and February 2016 seizures—that arose nearly ten years after *Rising* concluded and are very different from the facts litigated in *Rising*.

The Community also contends that the Sixth Circuit misapplied the law of sovereign immunity established in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), and that *Rising* should therefore be overturned to the extent that it might be interpreted to apply to the December 2015 and February 2016 seizures. The Community violates no principle of claim preclusion by doing so. Every litigant has the right to argue that prior decisions should be overturned—just as Defendants will argue that the earlier decision should be followed.

G. Count XVII – Injunctive Relief

Defendants argue that the Community's claim for injunctive relief should be barred because it "articulates the legal theories alleged in the other counts" on which Defendants are seeking judgment on the pleadings. Def. Mem. Jdgmt. Pldgs. at 15-16. As shown above, Defendants cannot show that they are entitled to judgment on the pleadings for any of the Community's tobacco tax claims. Accordingly, Defendants are not entitled to judgment on the

pleadings on the accompanying claim for injunctive relief.

H. The Tobacco Tax Claims in the Third Amended Complaint are Based in Part on Allegations that Arose After the Second Amended Complaint was Filed

The Community's Third Amended Complaint adds allegations regarding: (1) criminal charges that were filed in state court against two Community members arising from the December 2015 cigarette seizure; (2) the Michigan State Police's conduct of surveillance and investigations on the Community's Reservation; and (3) the Department's attempts to assess taxes on the shipments of cigarettes that were seized. TAC ¶¶ 101-106. In granting the Community's motion for leave to file the Third Amended Complaint—over Defendants opposition, no less – this Court found that "Plaintiff could not have included these new claims in the [S]econd [A]mended [C]omplaint because the conduct that led to the claims occurred after the [S]econd [A]mended [C]omplaint was filed." PageID.790. Nevertheless, Defendants contend that all claims arising from the very same allegations were "actually litigated or could have been litigated in" *Rising*. Def. Mem. Jdgmt. Pldgs. at 16-17.

Defendants' argue that because the Community litigated *some* issues related to criminal and civil liability for the Tobacco Tax in *Rising*, the Community may never litigate any issue related to the Tobacco Tax again—no matter what Defendants or their successors might do. But, as Defendants are forced to admit, *Rising* merely found that the specific "federal law principles [the Community] cited" in that litigation were insufficient to establish the unlawfulness of the Tobacco Tax. There is no bar to the Community's claims regarding events in 2015 through 2017, even if those events are similar to events at issue in an earlier case. *Sunnen*, 333 U.S. at 601; *Disabled Am. Veterans*, 942 F.2d at 313; *Cellar Door Prods.*, 897 F.2d at 1378.

III. Defendants Are Not Entitled To Qualified Immunity Because *Rising* Did Not Resolve The Legality Of Applying The TPTA To The Community.

The Community alleges in Count XVI that Defendants Khouri, Fratzke, Croley, Grano,

and Sproull are personally liable under 42 U.S.C. §1983 for "planning, authorizing, and conducting" the seizures at issue and depriving the Community of clearly established federal rights of which a reasonable person would have known. TAC ¶ 179. Those rights include:

- the rights, under the circumstances of this case, to purchase and sell tobacco products within the Community's Reservation and trust lands and within the Ceded Area, and to purchase, acquire, possess, and transport tobacco products for or in connection with such sales, free of state taxation and regulation, as secured by the 1842 Treaty, the Indian Commerce Clause of the United States Constitution, and other federal law;

- the right to be free of state law enforcement investigations on the Reservation and in the Ceded Area and seizures by state law enforcement officers within the Ceded Area that are made pursuant to state law, as secured by the 1842 Treaty; and

- the right to possess and transport cigarettes in interstate commerce free of state taxation and regulation under the Interstate Commerce Clause. TAC ¶¶ 103, 179.

The Community also requests that the Court order Defendants to pay the Community's reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988, which permits fee awards in Section 1983 actions. TAC ¶ 191.

Defendants contend that they are entitled to qualified immunity from liability for damages under Section 1983 because they reasonably believed that their conduct complied with federal law and are therefore entitled to judgment on the pleadings on the Community's Section 1983 and 1988 claims. Def. Mem. Jdgmt. Pldgs. at 21. Defendants' argument fails because the "reasonableness" of their belief is inherently a question of fact that can only be resolved after discovery. The one argument that Defendants put forward to establish the reasonableness of their belief is that their conduct was permitted by *Rising*, but, as explained above, Defendants' conduct—unlawful surveillance and other investigatory activity as alleged in TAC ¶¶ 103-106, interference with the Community's right to purchase and sell untaxed tobacco as alleged in Counts IX, X, and XI, among others, and interference with interstate commerce as alleged in Count XII—is outside the scope of anything determined to be lawful in *Rising*.

Public officials have no immunity from liability for civil damages if their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). It is well-established that, because the question whether qualified immunity applies is fact-intensive, it is generally not appropriate to resolve qualified immunity at the pleading stage—rather, the parties should conduct discovery on the issue and it should be decided on summary judgment. *Wesley v. Campbell*, 779 F.3d 421, 433-34 (6th Cir. 2015); *see also Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring) (fact-intensive nature of qualified immunity defense makes it "difficult for a defendant to claim qualified immunity on the pleadings before discovery").

Addressing a qualified immunity defense on a motion for judgment on the pleadings is particularly inappropriate in this case. The parties have not yet taken discovery regarding the events leading up to the December 2015 and February 2016 seizures, or regarding the seizures themselves. Establishing this record is critical to testing Defendants' qualified immunity defense. For example, Defendants have refused to provide discovery regarding the scope of their law enforcement activity on the Reservation (a matter that this Court may need to resolve in the near future), but the Community has learned from materials disclosed in the criminal prosecutions of its members that Defendants did engage in extensive surveillance and investigations of the Community and its members on the Reservation and that the December 2015 and February 2016 seizures were a direct result of on-Reservation surveillance and investigation. Nichols Decl. Ex. B at 53-54 (Tr. Prelim. Exam.) It is well-established that State officers cannot conduct criminal investigations or other law enforcement operations against

Indians in Indian country, even if the alleged offense was committed off-Reservation, or the investigation began off-Reservation. *State v. Cummings*, 679 N.W.2d 484, 487-488 (S.D. 2004); *United States v. Peltier*, 344 F. Supp. 2d 539, 546-48 (E.D. Mich. 2004) (state police officers cannot conduct an on-Reservation search even with a warrant); s*ee also, Saginaw Chippewa Indian Tribe v. Granholm*, 2011 U.S. Dist. LEXIS 53765 (E.D. Mich. May 18, 2011) (endorsing the view that *Cummings* properly articulated the scope of state police authority in the Indian country); *Moses v. Dep't of Corr.*, 274 Mich. App. 481 (Mich. Ct. App. 2007) (Michigan police generally do not have jurisdiction to conduct investigations or make arrests Indian country). Defendants could not have reasonably believed they were lawfully enforcing the TPTA if the enforcement actions were the product of violating the Community's established rights under federal law.

Similarly, Defendants' Answer puts in dispute key facts regarding whether they knew, or should have known, that the February 2016 seizures were executed on a commercial carrier licensed to operate in interstate commerce. It is a violation of *both* the TPTA and the Interstate Commerce Clause to seize unstamped tobacco products from a commercial carrier. MCL § 205.422(y) (licensed interstate commerce carriers are not "transporters" as defined in TPTA and therefore are not subject to TPTA licensing and other regulations); MCL § 205.426a (only "wholesalers" and "unclassified acquirers," not "transporters" or licensed interstate commerce carriers, are obligated to affix stamps to packages of cigarettes).[6] Defendants could not possibly have reasonably believed that they were enforcing the TPTA as permitted by *Rising* if their conduct was not permitted under the TPTA itself. Accordingly, there are clearly issues of fact

[6] Pursuant to the parties' September 12, 2016 Stipulation, the Community dropped its state law claims from this action so that they could be litigated in state court. However, the legality of Defendants' actions under the TPTA is still relevant in this action to the extent that Defendants' defense is the belief that their actions complied with the TPTA as determined in *Rising*.

awaiting discovery with respect to Defendants' conduct and its reasonableness under the circumstances, and the qualified immunity issue therefore, in accordance with the general rule, cannot be resolved on a motion for judgment on the pleadings. *See Wesley*, 779 F.3d at 433-34.

Defendants cannot change this result with their purported reliance on *Rising* as grounds to "'reasonably' believe that their 'conduct complie[d] with the law.'" Def. Mem. Jdgmt. Pldgs. at 21. *Rising* did not fully litigate the legality of enforcing the TPTA requirements against the Community. In fact, *Rising* only actually decided a few isolated issues relating to enforcement of the TPTA. Based on *Rising*, Defendants might reasonably believe that their implementation of the refund system did not violate federal law *if* the tobacco tax were not preempted by federal law. But in assessing the legality of the tax *Rising* only addressed the questions whether the legal incidence of the tax fell on the Community or its wholesalers and, therefore, was *per se* invalid as a matter of federal law—just two of several grounds for preemption under federal law. Defendants could not reasonably rely on *Rising* as the basis for believing that the tax is permitted under *Bracker* balancing, the Indian Commerce Clause, and the Interstate Commerce Clause—*Rising* very clearly did not decide those issues, as explained in detail above.

CONCLUSION

For all of these reasons, the Court should deny Defendants' motion for judgment on the pleadings.

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