17-3198(L)

17-3222 (XAP)

In the United States Court of Appeals
for the Second Circuit

STATE OF NEW YORK,
Plaintiff - Appellee-Cross-Appellant,
v.

MOUNTAIN TOBACCO COMPANY, DBA KING MOUNTAIN TOBACCO COMPANY INC.,
Defendant - Appellant-Cross-Appellee,

MOUNTAIN TOBACCO DISTRIBUTING COMPANY INC., DELBERT WHEELER, SR.,
Defendants.

On Appeal from the United States District Court for the Eastern District of New York, Case No. 12-cv-6276 (Hon. Joanna Seybert)

RESPONSE AND REPLY BRIEF
OF DEFENDANT–APPELLANT-CROSS-APPELLEE

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INTRODUCTION

The State's brief in support of its appeal of the district court's entry of summary judgment for King Mountain on the State's CCTA and PACT Act claims is dismissive, if not insulting ("crabbed and acontextual"), of the district court opinion; it also ignores clear statutory language in favor of reading what it divines the words of these statutes must mean, in order to reach its desired result. The State's arguments in opposition to King Mountain's appeal of the permanent injunction entered by the district court ignore the uncontroverted record of the State's discriminatory enforcement of its cigarette tax laws. And, coloring all of the State's arguments, is the justification of the ills of cigarettes and smoking, which are undisputed, as well as threats of unprosecutable terrorists and traffickers, all while disdaining the rights of Indians.

* * *

STATE'S CROSS-APPEAL

STATEMENT OF THE ISSUES

Whether the district court correctly held that King Mountain's shipments of cigarettes from the Yakama Nation within the exterior boundaries of Washington State to Indian country within the exterior boundaries of New York was not "interstate commerce" as defined in the Prevent All Cigarette Trafficking Act.

Whether the district court correctly held that King Mountain, a corporation entirely owned by an Indian, organized under the laws of an Indian tribe, and

located on an Indian reservation, is an "Indian in Indian country" under the Contraband Cigarette Trafficking Act, and thus may not be subject to a CCTA civil suit brought by a state.

RESPONSE TO THE STATE'S STATEMENT OF THE CASE

The facts relevant to the State's cross-appeal are set forth in King Mountain's opening brief in the lead appeal. (*See* King Mountain Br. at 4-16.)

SUMMARY OF THE ARGUMENT

The PACT Act, 15 U.S.C. § 375, *et seq.*, is a federal criminal and civil statute that also permits civil enforcement by a State Attorney General. Among other things, the PACT Act imposes record keeping requirements on any person who ships cigarettes in "interstate commerce." The Act defines "interstate commerce" as: 1) "commerce between a State and any place outside the State," 2) "commerce between a State and any Indian country in the State," or 3) "commerce between points in the same State but through any place outside the State or through any Indian country." 15 U.S.C. § 375(9)(A). The Act separately defines "State" and "Indian country." The district court correctly held that King Mountain's sales of its cigarettes from Indian country (the Yakama Reservation, located within the boundaries of Washington) to Indian country (Indian reservations within the boundaries of New York) were not in "interstate commerce" as defined by the PACT Act.

The CCTA, 18 U.S.C. § 2341, *et seq.*, is a federal criminal and civil statute directed at large quantities of cigarettes that do not bear evidence of payment of State taxes, that permits, in certain circumstances, civil enforcement by a State Attorney General, but prohibits state civil enforcement against "an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). The statute does not define "Indian." The district court correctly held that King Mountain, a corporation formed and organized under the laws of the Yakama Indian Nation, wholly owned by a member of the Yakama Tribe, and located on the Yakama Indian Nation, is an "Indian in Indian country" under the CCTA.

STANDARD OF REVIEW

The standard of review of the State's cross-appeal is set forth in King Mountain's moving brief in the lead appeal. (*See* King Mountain Br. at 19-20.)

ARGUMENT

I. The District Court Correctly Held that the PACT Act Does Not Apply to Sales of Cigarettes Between Indian Country

The district court correctly held that King Mountain's shipments of cigarettes from the Yakama Reservation to Indian reservations within the boundaries of the State of New York were not "interstate commerce" as defined by the PACT Act, and its grant of summary judgment should be affirmed.

A. The PACT Act

The PACT Act, signed into law in 2010, amended the Jenkins Act, and was aimed at, among other things, "requir[ing] Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers," "provid[ing] government enforcement officials with more effective enforcement tools to combat tobacco smuggling," "increas[ing] collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco," "mak[ing] it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities," and "prevent[ing] and reduc[ing] youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales." Pub. L. No. 111-154 § 1(c); *see also* DOJ Amicus at 3. To accomplish these goals, the PACT Act "imposes strict restrictions on the 'delivery sale' of cigarettes and smokeless tobacco." *Red Earth LLC v. United States*, 657 F.3d 138, 141 (2d Cir. 2011) (per curiam).[1] A delivery sale is the sale of cigarettes "to a consumer" when the buyer and seller are not in the same physical location, such as a sale over the phone, mail, or internet. 15 U.S.C. § 375(5).

[1] This Court in *Red Earth* enjoined the United States from enforcing some provisions of the PACT Act inapplicable to this action. 657 F.3d at 145-46 (upholding preliminary injunction of requirement that out-of-state delivery sellers comply with all local laws, including collecting and paying state and local taxes prior to sales, because the provisions likely violate the due process clause); *see also Gordon v. Holder*, 721 F.3d 638, 652 (D.C. Cir. 2013) (same).

The State did not allege that King Mountain violated the delivery sale provisions of the PACT Act; it only alleged violations of certain filing and recordkeeping requirements.[2] *See* A-86-87 (Am. Compl. ¶¶ 82-85). The PACT Act filing requirements which King Mountain allegedly violated apply to:

> Any person who sells, transfers, or ships for profit cigarettes . . . in interstate commerce, whereby such cigarettes … are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes . . ., or who advertises or offers cigarettes . . . for such sale, transfer or shipment . . . .

15 U.S.C. § 376(a). The PACT Act defines "interstate commerce" as:

> commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

15 U.S.C. § 375(9)(A). The PACT Act also defines the terms "State" and "Indian country": "State" is "each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States," 15 U.S.C. § 375(11); "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . all dependent Indian communities … [and] all Indian allotments . . . ," 15 U.S.C. § 375(7) (referencing 18 U.S.C. § 1151). Finally, the PACT Act provides that sales, shipments, or transfers of cigarettes that are made in

[2] There are no monetary penalties applicable to the PACT Act claim alleged by the State. *Compare* 15 U.S.C. § 377(b).

interstate commerce "shall be deemed to have been made into the State, place, or locality in which such cigarettes . . . are *delivered*." 15 U.S.C. § 375(9)(B) (emphasis added). Thus, if a shipment is delivered to a location within "Indian country," it will have occurred to and in Indian country; if a shipment is delivered to a non-Indian location in a State, it will have occurred to and in that State.

B. The PACT Act Does Not Apply to King Mountain's Sales of Cigarettes

The district court held that the PACT Act's filing requirements did not apply to King Mountain's sales of cigarettes to Indians in Indian country, because those sales did not occur in "interstate commerce" as defined by the Act, and it correctly granted summary judgment to King Mountain on the Second Claim for Relief.

It was undisputed in the district court that, except for one sale not applicable to this appeal,[3] all cigarettes shipped by King Mountain were sent from Indian country (the Yakama Reservation, located within the exterior boundaries of Washington) to Indian country (various Indian Reservations, located within the exterior boundaries of New York). A-118-119.[4] A transaction from the Yakama

[3] The district court found that there was a genuine issue of material fact about whether a single sale in 2010 from King Mountain to a licensed New York State Cigarette Stamping Agent and Wholesale Dealer of Cigarettes, whom King Mountain admitted was located within New York State, occurred before or after the June 29, 2010, effective date of the PACT Act. SPA-26-27. The State subsequently abandoned any claim predicated upon this transaction. A-717.

[4] It was also undisputed that King Mountain did not file PACT Act reports for the transactions at issue in this litigation, and that it makes filings required by the

Reservation to, for example, the Onondaga Reservation, is not one of the three instances of "interstate commerce" provided for in the PACT Act.

The first type of transaction that the PACT Act defines as "interstate commerce" involves "commerce between a State and any place outside the State." 15 U.S.C. § 375(9)(A). A sale in this instance applies only to transactions that either begin or end in a location in a State as defined by the Act, such as a sale from a reservation outside the boundaries of New York to a grocery store in Manhattan. *See* 15 U.S.C. § 375(11). A sale from the Yakama Reservation to an Indian tribe within the boundaries of New York State did not begin or end in "a State"; instead, the sale was between two points in "Indian country."

The second type of transaction in the PACT Act's definition of "interstate commerce" is "commerce between a State and any Indian country in the State." 15 U.S.C. § 375(9)(A). An example of this type of transaction is commerce between a location within the State of New York and any Indian reservation within boundaries of the State of New York, such as a New York consumer's internet purchase of cigarettes from a store located on an Indian reservation situated within New York State. *See, e.g.*, *City of New York v. Gordon*, 1 F. Supp. 3d 94, 99-101 (S.D.N.Y. 2013) (PACT Act claim alleged where New York City investigator ordered cigarettes on the internet from a company on the Allegany Reservation of

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PACT Act with the applicable state governments in those instances when it makes open market sales. A-130, 136.

the Seneca Nation of Indians in New York). King Mountain's sales did not fit this definition of "interstate commerce," because its cigarette manufacturing factory, warehouse, and distribution facility are all located on the Yakama Indian Reservation, and the sales at issue were made to Indian reservations within New York's borders.

The final type of PACT Act, "interstate commerce" transaction is "commerce between points in the same State but through any place outside of the State or through any Indian country." 15 U.S.C. § 375(9)(A). This commerce stream begins and ends within the same State, and passes through Indian country; again, neither the starting location nor the delivery location occurs in Indian country, and it was therefore inapplicable to King Mountain's sale of cigarettes from the Yakama Reservation to Indians located on Indian reservations within the boundaries of New York State.[5]

The district court scrutinized the three types of transactions that are contained within the definition of "interstate commerce" in the PACT Act, and correctly found that each did not apply to King Mountain's sales in this case. As to the first two types of transactions, the district court held that the PACT Act "expressly require[s] that one point of commerce be in a 'state,'" and because

[5] The Department of Justice admits that these latter two definitions of "interstate commerce" could not apply to King Mountain's transactions. (*See* DOJ Amicus at 7.)

"King Mountain's subject sales were from one Indian reservation to other Indian reservations, they do not fall within the first two methods of interstate commerce [as] the sales did not originate or conclude in a 'state.'" SPA-22. As to the third type of transaction, the district court found that it also did not apply, because "the subject transactions did not take place in a 'state'—and undisputedly did not take place in the *same* state . . . ." *Id.*; *see also* A-710 (demonstrative King Mountain introduced at oral argument before district court visualizing the three types of transactions covered by the PACT Act's definition of "interstate commerce").

The State lambasts the district court for interpreting the plain text of the statute: it says the court "excused [King Mountain's] abject reporting failure"; rested its holding "on a crabbed and acontextual view of the relevant provisions"; and "provide[s] a roadmap for the transport of unstamped cigarettes." (State Br. at 61, 70.) The State's anger and threat are unfounded. The district court simply read the plain text of the statute and found that King Mountain's shipments did not meet the definition of interstate commerce as defined, without ambiguity, in the PACT Act. In so doing, the district court adhered to the Supreme Court's instruction that courts must "start, as always, with the language of the statute," *Dean v. United States*, 556 U.S. 568, 572 (2009) (citation and internal quotation marks omitted),

and should "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).[6]

Rather than focus on the clear statutory text, the State argues that the "aim of statutory interpretation is to ascertain legislative intent, for which the statute's language is the starting point." (State Br. at 61 (citing *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013)).) The State is incorrect: there is a "strong presumption that the plain language of the statute expresses congressional intent," and that presumption "is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (citations and internal quotation marks omitted); *see also Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent"). And, in fact, the State misconstrues *Nwozuzu*, which states that "[i]f the statutory terms are unambiguous, we construe the statute according to the plain meaning of its words," and that this Court only considers legislative history or other tools of statutory construction if "the terms are ambiguous or unclear." 726 F.3d at 327. Because the text of the PACT Act is unambiguous and does not apply to King Mountain's transactions, "no further

[6] The State also accuses the district court of going "awry in construing other definitional provisions of the PACT Act as evincing Congressional intent to exclude reservation-to-reservation shipments from the Act's reporting mandate." (State Br. at 64.) The State does not cite – and King Mountain cannot locate – the district court's discussion of other PACT Act "definitional provisions."

inquiry is necessary," and the district court's reading of the statute must be affirmed. *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (citations and internal quotation marks omitted)).

The State devotes page after page of its brief to the "ordinary" meaning of the defined words "State," "Indian country," and "interstate commerce." (*See* State Br. at 63-67.) But Congress explicitly defined "State," "Indian country," and "interstate commerce" in the PACT Act, and "[s]tatutory definitions control the meaning of statutory words in the usual case." *Burgess v. United States*, 553 U.S. 124, 129 (2008) (alteration, citation, and internal quotation marks omitted). *See Tanvir v. Tanzin*, No. 16-1176, -- F.3d --, 2018 WL 3096962, at *9 (2d Cir. May 2, 2018, as amended June 25, 2018) (rejecting "request to apply a natural reading of the term [at issue] in this case where [statute] includes an explicit definition";

"[w]hen a statute includes an explicit definition, we must follow that definition" (citation and internal quotation marks omitted)).[7]

For example, the State writes that "Congress could not have intended for these additional definitions [of State and Indian country] to displace the judicial and commonsense understanding that Indian reservations are located within States," and quotes this Court's decision in *In re Air Cargo Shipping Services Antitrust Litigation*, 697 F.3d 154 (2d Cir. 2012), for the proposition that "even express 'statutory definitions' may 'yield to context.'" (State Br. at 65.) In *Air Cargo*, plaintiffs sued foreign air carriers under state law. The Federal Aviation Act separately defined "air carriers" as U.S. citizens and "foreign air carriers" as non-U.S. citizens, but preempted only state law claims against "air carriers." The plaintiffs argued that their claims were not preempted, because the preemption provision applied only to "air carriers" and not to "foreign air carriers." This Court held that this was the "unusual case in which the statutory definitions do not have compulsory application" because, while there were some places in the Federal Aviation Act where Congress clearly distinguished between the two terms, in other places "Congress was not so careful and used the term 'air carrier' generically to reference air carriers, both domestic and foreign," and as a result, the term "air

[7] *Compare United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000) (looking to "ordinary, common-sense meaning of the words" where "Congress provided no definitions of the terms").

carrier" standing alone "is necessarily ambiguous." *Id.* at 158-59 (citation and internal quotation marks omitted).

The instant case could not be more different from *Air Cargo.* The PACT Act is a discrete law, primarily amending five relatively short sections in Title 15 of the U.S. Code. In contrast, "air carrier" appears in over 200 separate statutes in Title 49 (Transportation) in the United States Code, where the relevant provisions of the Federal Aviation Act are located. In addition, Congress specifically defined the terms "State" and "Indian country" in the PACT Act, and then used those terms to define "interstate commerce," all in 15 U.S.C. § 375; it did not inconsistently use defined terms and create ambiguity. If Congress wanted the PACT Act to apply to "commerce between Indian country in one State and Indian country in another State," or for a State to encompass and include Indian country, it would have said so. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); *Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (courts must "not alter the text in order to satisfy the policy preferences of the [government]").

The State also argues that the transactions at issue are interstate commerce because of the "accepted understanding that 'an Indian reservation is considered part of the territory of the State' where the reservation sits." (State Br. at 63-64 (quoting *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001)); *see also* DOJ Amicus at 7 (citing *Hicks* as support for this "ordinary rule").) The reliance on this out-of-context quote is misplaced. *Hicks* addressed whether federal courts or tribal courts had jurisdiction to hear a 42 U.S.C. § 1983 claim against state officers who executed state and tribal court search warrants for an off-reservation violation of state law, and in considering that question, the Court recounted precedent that the laws of the State within which an Indian reservation sits can in some instances apply to on-reservation activities. *See* 533 U.S. at 361-65. It has no bearing on the subject of Indian or state commerce, the PACT Act, or the definitions for "State," "Indian country," and "interstate commerce."[8] *See Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only

[8] The State's claim that 15 U.S.C. §§ 375(9)(A) and 376(a)(3) of the PACT Act "confirm[] the geographic reality that reservations exist within state boundaries" is a misreading of the cited provisions. (State Br. at 66-67.) 15 U.S.C. § 375(9)(A)'s definition of "interstate commerce" as "commerce between a State and any Indian country *in the State*" merely informs that an *intrastate* shipment beginning or ending in Indian country within the exterior boundaries of the State is interstate commerce, not that Indian country is included within the definition of a State. And § 376(a)(3)'s mandate that a report may need to be filed with both a State and an Indian tribe confirms that States are entitled to reports of shipments in "interstate commerce" from another State into Indian country within the boundaries of the State, and does not alter the unambiguous text that "commerce between a State and any place outside the State" does not include shipments from "Indian country" to "Indian country."

what we think is necessary to achieve what we think Congress really intended"); *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").[9]

The State contends that the district court's holding contradicts the statute's purpose of making "it *more* difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities." (State Br. at 71 (citation and internal quotation marks omitted).) First, because the text is clear, reliance on the statute's purported purpose is inapt. *See Palahnuk v. C.I.R.*, 544 F.3d 471, 474 (2d Cir. 2008) (per curiam) ("'Legislative intent' is ordinarily examined only where the words of a statute are ambiguous."); *see also Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text."). Second, given that the PACT Act was enacted to combat cigarette smuggling and internet sales of cigarettes ("delivery sales"), it is consistent with the statute's purpose that sales by an Indian manufacturer, on an Indian Nation, to another Indian on another Indian Nation, do not come within the ambit of the statute. New York City, for

[9] The district court firmly rejected the argument that "Indian country" is considered part of a "State," writing that this interpretation "is belied by a plain reading of the statute." SPA-20-21; *see also* SPA-21 ("[A]ny purported general rule that Indian reservations are a part of the states in which they are located is not applicable given the PACT Act's distinct definitions of 'state,' 'Indian country,' and 'interstate commerce.'").

example, has found numerous occasions to enforce the PACT Act consistent with the PACT Act's purpose. *See, e.g.*, *City of New York v. Wolfpack Tobacco*, No. 13 Civ. 1889 (DLC), 2013 WL 5312542, at *1 (S.D.N.Y. Sept. 9, 2013) (City PACT Act claims against Indian retailer selling tax-free cigarettes by mail and telephone to consumers located off reservation); *Gordon*, 1 F. Supp. 3d at 98 (City PACT Act claims against Indian retailer selling tax-free cigarettes on the internet to consumers located off reservation).

The State also contends that Congress "expand[ed]" the definition of "interstate commerce" by the addition of the second and third prongs of "interstate commerce," and could not have intended to "contract" the definition. (State Br. at 65; *see also* DOJ Amicus at 13.) It is not for the State to assume what makes sense where the text of the statute is clear, and it also makes sense that Congress wanted to expand the traditional notion of interstate commerce (*e.g.*, from within a State to Indian country within that State, or vice versa) except where the transaction is Indian to Indian.

At bottom, the State and the DOJ attempt to intimidate the Court, claiming that affirming the district court's decision would allow terrorist organizations (it twice names Hezbollah) to use Indian nations to raise funds (State Br. at 70), create a "sizeable loophole in the PACT Act" (DOJ Amicus at 1), and circumvent Congress's purpose of making it more difficult for "traffickers to engage in and

profit from their illegal activities." (State Br. at 71.) The State provides no explanation for how King Mountain, a federally licensed cigarette manufacturer with fifty Yakama and non-Yakama employees, could or did provide any assistance to terrorist organizations. With respect to the boundaries of New York, King Mountain only sold its cigarettes to companies owned by Indian nations or Indians (not to consumers), maintained detailed records of its sales (that were produced in discovery), and did not "smuggl[e]" or "traffic[]" in cigarettes.[10]

Finally, the State argues that its reading of the statute is consistent with that of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), which "has long taken the position that 'transportation between two separate reservations would be in interstate commerce' under the Act." (State Br. at 71 (quoting A-530-31, an informal November 2010 summary of comments ATF received from tribal leaders and ATF's responses ("ATF Summary")); *see also* DOJ Amicus at 6.) As an initial matter, the State takes ATF's seemingly helpful quote completely out of context. In fact, the summary states:

> Interstate Commerce is defined at 15 U.S.C. § 375(9) to include commerce between points in the same State through any Indian Country. Therefore, as defined by the statute, *intrastate transportation* between two separate reservations would be interstate commerce.

[10] The State also claims that King Mountain "evaded[d] New York's excise taxes for years." (State Br. at 70.) As the district court found, King Mountain was not responsible for paying New York cigarette excise taxes, SPA-42-46, and the State did not appeal that ruling.

A-530-31 (emphasis added). DOJ in its amicus brief admits that King Mountain's transactions "do not satisfy the second or third prong of the Act's definition of interstate commerce" – that is, the prong interpreted in the ATF Summary. (DOJ Amicus at 7.) The ATF Summary cited by the State is irrelevant.[11]

Because King Mountain's sales of cigarettes did not constitute "interstate commerce" under the PACT Act, the district court's granting of summary judgment to King Mountain on the Second Claim for Relief should be affirmed.

II. The District Court Correctly Held That the CCTA Prohibits State Enforcement Against King Mountain Because King Mountain is an Indian in Indian Country

The district court correctly held that King Mountain is an "Indian in Indian country" as concerns the CCTA, and its grant of summary judgment should be affirmed.

[11] Even if ATF did speak directly to this issue in its informal summary, neither the State nor DOJ ask the Court to give deference to the agency's views. At most, agency interpretations "which lack the force of law" may be entitled to the more "limited standard" of *Skidmore* deference, where "the weight [] accord[ed to] an agency interpretation depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Boykin v. KeyCorp*, 521 F.3d 202, 208 (2d Cir. 2008) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (additional citations and internal quotation marks omitted)). The State does not dispute the finding of the district court that the November 2010 informal ATF Summary "fails to warrant *Skidmore* respect based on its lack of demonstrated validity." SPA-24.

A. The CCTA

Codified among other federal criminal statutes in Title 18 of the United States Code, the CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco." 18 U.S.C. § 2342(a). "Contraband cigarettes" is defined in the CCTA as:

> a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp . . . to evidence payment of cigarette taxes, and which are in the possession of any person other than –
>
> > (A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products . . .; [.]

18 U.S.C. § 2341(2). While there is no limitation in the CCTA on the United States prosecuting a CCTA court action, state enforcement of the CCTA may only occur under the following circumstances:

> A State, through its attorney general, [or] a local government, through its chief law enforcement officer (or a designee thereof) . . . may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person (or by any person controlling such person) . . . . No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151).

18 U.S.C. § 2346(b)(1).[12] Section 1151 defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . all dependent Indian communities … [and] all Indian allotments . . . ." 18 U.S.C. § 1151. The statute does not define the word "Indian."

B. The State May Not Enforce the CCTA Against King Mountain

Because the CCTA explicitly prohibits state or local enforcement of the statute against an Indian in Indian country, the district court correctly granted King Mountain summary judgment.

It was undisputed in the district court that King Mountain was 1) a corporation formed and organized under the laws of the Yakama Indian Nation; 2) wholly owned by a member of the Yakama Tribe; 3) situated – its offices, warehouse, distribution facility, and tobacco farm – on the Yakama Reservation; and 4) the Yakama Reservation is "Indian country" as defined in 18 U.S.C. §§ 2346(b)(1) and 1151. A-116-118.

The district court found that King Mountain was an "Indian in Indian country," held that Congress "did not limit the 'Indian in Indian country' exemption to individuals," and rebuffed the State's argument that, because

[12] 18 U.S.C. § 2346(b)(2) also provides: "Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe."

Congress had provided distinct definitions of Indian and Indian-owned business in other statutes, Congress had limited "Indian" to individuals in the CCTA. SPA-14-15. According to the district court, "the converse of the State's argument is more persuasive," because the fact that Congress had limited "Indian" in other statutes to individuals and did not do so in the CCTA evidenced Congressional intent to not limit the definition of Indian in the CCTA. *Id.*[13]

To support its analysis, the district court analogized to the Dictionary Act, 1 U.S.C. § 1, and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). SPA-12-15. In *Hobby Lobby*, for-profit, closely held corporations alleged that the Religious Freedom Restoration Act of 1993 ("RFRA") did not permit the U.S. Department of Health and Human Services to demand that those corporations, in violation of their religious beliefs, provide health-insurance coverage for contraceptives. The RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). Although the RFRA

[13] The district court limited its holding to "Indian-owned companies organized under the laws of an Indian Nation or tribe," and made "no determination as to whether an Indian-owned corporation organized under state law is an 'Indian' pursuant to the CCTA." SPA-18.

does not define the term "person," the Dictionary Act provides definitions of words for "any Act of Congress, unless the context indicates otherwise," and 1 U.S.C. § 1 states that "person" "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." As relevant to this appeal, the Supreme Court held that "nothing in RFRA [] suggests a congressional intent to depart from the Dictionary Act definition," and found that the for-profit corporations could bring a challenge – because they were "persons" – under the RFRA. 134 S. Ct. at 2768.

In support of its conclusion that King Mountain was an Indian in Indian country, the district court stated:

> Further, while the Dictionary Act does not define the term "Indian," that term is akin to the term "person," which, as previously noted, encompasses corporations and companies as well as individuals. 1 U.S.C. § 1. As King Mountain is organized under the laws of the Yakama Nation, it is an "Indian" just as a corporation organized under the laws of the State of Delaware is a "citizen" of Delaware.

SPA-15. The district court also concluded that the "principles of corporate 'personhood' support the notion that King Mountain is an 'Indian' for purposes of the CCTA." SPA-12. The court noted that the Supreme Court in *Hobby Lobby* found that "'[a] corporation is simply a form of organization used by human beings to achieve desired ends . . . [and] [w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.'" SPA-14 (quoting *Hobby Lobby*, 134 S. Ct at 2768, 2774) (alterations in original).

The State contends that the word "Indian" in the CCTA must be read to mean an "individual" member of a tribe and does not include Indian-owned businesses formed under tribal law because, in other statutes, Congress defined "Indian" to mean an individual enrolled member of an Indian tribe and separately defined "Indian-owned business." (State Br. at 76-77.) However, "identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). The express definition of "Indian" in unrelated statutes has no relevance to the definition of "Indian" in the CCTA. As the district court correctly observed, that Congress chose to *limit* the definition of "Indian" in other statutes, but did not do so in the CCTA, evidences Congress' intent to not limit the term "Indian" to an individual person in the CCTA. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. . . . The absence of this language in [the statute] instructs us that Congress did not intend to disregard structural ownership rules."); *see also Whitfield v. United States*, 543 U.S. 209, 216-17 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. Where Congress has chosen

not to do so, we will not override that choice based on vague and ambiguous signals from legislative history.").

The State does not cite a single case for the proposition that if Congress defined a term in one statute, but failed to define that term in a separate, unrelated statute, the defined term in one statute controls the meaning in the different statute. In fact, there are other provisions of Title 18 that suggest that "Indian" extends to an Indian-owned corporation formed under Indian law and situated on Indian land. *Cf. United States v. Doe*, 572 F.3d 1162, 1167-68 (10th Cir. 2009) (held that "other person" in 18 U.S.C. § 1153 ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses") includes corporations). The State's reading of the CCTA would improperly re-write 18 U.S.C. § 2346(b)(1) to add the word "individual" before the word "Indian." *See Energy E. Corp. v. United States*, 645 F.3d 1358, 1362 (Fed. Cir. 2011) ("This court cannot simply add phrases or words that do not appear in the statute").

The district court's reading of the statute is also the most straightforward and avoids an "absurd result." *See Dauray*, 215 F.3d at 264 ("A statute should be interpreted in a way that avoids absurd results."). First, it would be illogical for Congress to explicitly exempt individual Indians from being sued under the CCTA for sales of over 10,000 cigarettes, but not their wholly-owned corporations formed under Indian law; it is logical that Indians would use the corporate form to engage

in the business of manufacturing or otherwise selling over 10,000 cigarettes, and that the use of the term "Indians" in the CCTA applies to corporations formed under the laws of an Indian Nation and wholly owned by an Indian. Reading the CCTA to exempt only individual Indians from state suits would require Indians to either forgo use of the corporate form – an option available to all other Americans – or give up an explicit Congressional protection from state enforcement granted to Indians.

Second, "[a]s a practical matter, . . . criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (citations and internal quotation marks omitted); *see also* Brief for the United States as Amicus Curiae Supporting Respondents, *Duro v. Reina*, 495 U.S. 676 (1990), 1989 WL 1126957 (Oct. 6, 1989) ("Congress has consistently operated on the premise that, absent congressional action, the States have no jurisdiction over offenses involving Indians in Indian country."). Congress followed that tradition in the CCTA, by only allowing states or local governments to bring a civil action to enforce the CCTA against non-Indians, and reserving to the federal government the power to bring CCTA criminal and civil actions against any person or corporation,

regardless of Indian status. *See* 18 U.S.C. § 2346(a); *see also* DOJ Amicus Brief at 2 n.1 (stating that CCTA bar on suits against Indians in Indian country "does not apply to the federal government" and the "resolution of [this] question does not directly affect the interests of the United States"). Given the prohibition of state enforcement of criminal laws on Indian land absent Congressional authorization, it is illogical to allow state enforcement of the CCTA against corporations wholly owned by an Indian, formed under Indian law, and situated on Indian land, but prohibit enforcement against the Indian owner of that Indian corporation. *Cf. Hobby Lobby*, 134 S. Ct. at 2768 ("Corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all." (internal quotation marks omitted)).

Not surprisingly, it does not appear that the CCTA has ever been extended to an Indian-formed Indian-owned corporation in a civil enforcement action. For example, in *City of New York v. Wolfpack Tobacco*, No. 13 Civ. 1889 (DLC), 2013 WL 5312542 (S.D.N.Y. Sept. 9, 2013), New York City alleged various claims against Indian businesses, individual Indians, a non-Indian business, and non-Indian individuals. New York City brought a CCTA claim only against non-Indian individuals and a non-Indian corporation, and not against the individual Indians or the Indian businesses. *See id.* at *2 & n.1. In its memorandum of law in support of a motion for a preliminary injunction, the City noted that "The Wolfpack

Defendants [which encompassed three businesses owned by Indians and located on the Allegany Reservation] violate the CCTA as well. However, an 'Indian in Indian Country,' . . . may not be the subject of a civil CCTA action. See 18 U.S.C. § 2346 (b)(1)." Memorandum of Law in Support of the City of New York's Motion for a Preliminary Injunction, *City of New York v. Wolfpack Tobacco*, No. 13 Civ. 1889 (DLC), 2013 WL 5312542 (S.D.N.Y. Sept. 9, 2013), 2013 WL 1703508 (Mar. 26, 2013).

The State tries to further re-draft the CCTA by arguing that, even if King Mountain is an Indian in Indian country, § 2346's bar on state actions "was intended at most to preserve existing sovereign protections against state regulation." (State Br. at 78.) Apparently, according to the State, the phrase "Indian in Indian country" merely confirmed that the statute does not void sovereign immunity protections for tribes. The district court correctly rejected the State's interpretation as "founded in a misreading of the statute." SPA-15.

It was well-settled prior to the passage of § 2346(b)(1) that individual members of a tribe do not enjoy tribal sovereign immunity, *see Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171-72 (1977), and while the CCTA provides that nothing in the statute will be "deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe," 18 U.S.C. § 2346(b)(2), the CCTA in a separate sub-paragraph also precludes suits by states

against an "Indian tribe or an Indian in Indian country . . . ." 18 U.S.C. § 2346(b)(1). To adopt the State's argument – that 18 U.S.C. § 2346(b)(1) is meant only to convey protection of pre-existing tribal sovereign immunity – is to discard the phrase "Indian in Indian country"; if Congress wanted to only protect sovereign immunity, precluding suits against Indian tribes would have been sufficient, and there would have been no need to also preclude suits against Indians in Indian country. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (alterations, citations, and internal quotation marks omitted)). Instead, by Congress using two separate terms – "Indian tribe" and "Indian in Indian country" – and by placing an "or" between those terms, the sentence can only be read as prohibiting suits against both an "Indian tribe" and an "Indian in Indian country." *See Loughrin v. United States*, 134 S. Ct. 2384, 2389–90 (2014) (rejecting interpretation of statute that reads "two entirely distinct statutory phrases that the word 'or' joins as containing an identical element"; "As we have recognized, that term's ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings." (citation and internal quotation marks omitted)).

The State tries to advance its reading of the CCTA by citing legislative history. (*See* State Br. at 78-80.) Any use of legislative history, in the face of the

CCTA's unambiguous text, is error. *See United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013) ("We will resort to legislative history and other tools of statutory interpretation only if we conclude that the text is ambiguous."); *see also Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear" even where there are "contrary indications in the statute's legislative history"). Moreover, the legislative history the State cites provides it little assistance. The State quotes House floor debate that added some of the language at issue and, indeed, several legislators applauded the amendment's protection of tribal sovereignty. That amendment, however, did not simply add the phrase, "Indian in Indian country"; it added all the relevant language in 18 U.S.C. §§ 2346(b)(1), as well as the provision in § 2346(b)(2), that the statute should not be construed as abrogating or waiving tribal sovereign immunity. That some legislators welcomed the amendment's explicit protection of tribal sovereign immunity[14] does not undermine the fact that

[14] A handful of legislators – even bill sponsors – should not receive deference in the face of unambiguous statutory text or a failure to address the issue in more reliable legislative history, such as a committee report. *See Monterey Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 743 F.2d 589, 598 (7th Cir. 1984) ("To give decisive weight to remarks, [which "squarely support" the position rejected by the Court, of the bill sponsor and chief House conferee in conference committee]—in the absence of textual support or additional indications in the legislative history—would be to run too great a risk of permitting one member to override the intent of Congress as expressed in the language of the statute."); *see also United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) ("The most enlightening source of legislative history is generally a committee report, particularly a conference committee report, which we have identified as among the

the amendment also prohibited state suits against Indians. As the district court found, one of the legislators even recognized that the amendment would prohibit "enforcement against tribes *or in Indian country*," an interpretation that is at odds at with the State's invented rationale that the "Indian in Indian country" language only protects tribal sovereign immunity. SPA-17 (citation and internal quotation marks omitted); *see also id.* ("the legislative history indicates that Congress differentiated between enforcement against tribes and enforcement in Indian country, and, thus, intended for the exemption to apply in both circumstances" (citing 151 Cong. Rec. H6273-04, 2005 WL 1703380)).[15]

Finally, any ambiguity about whether "Indian in Indian country" includes an Indian-owned, Indian-formed, and Indian country located corporation, must be resolved in King Mountain's favor, because the § 2346(b)(1) amendment was

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most authoritative and reliable materials of legislative history." (citation and internal quotation marks omitted)).

[15] The State concludes that the "Indian in Indian country" language was added to "ensure[] that, no matter the defendant, the CCTA would not be viewed as federal authorization for States to pursue excise taxes on cigarette sales that previously would not have been subject to those taxes: i.e., sales of 'cigarettes to be consumed on the reservation by enrolled tribal members.'" (State Br. at 81 (quoting *Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 64 (1994)).) The State provides no support in the text, or even in the legislative history, for this argument. *See Magwood*, 561 U.S. at 334 ("We cannot replace the actual text with speculation as to Congress' intent"). The State's contention is also inconsistent with the text of the statute, which unambiguously precludes all CCTA actions by states against all Indians in Indian country. As the district court recognized in response to the State's policy-driven arguments, "the Court is not empowered to legislate; its sole charge is to interpret and apply the CCTA as drafted by Congress." SPA-18.

added for the benefit of the Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("the standard principles of statutory construction do not have their usual force in cases involving Indian law"; "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001).

Because King Mountain is an "Indian in Indian country" as concerns the CCTA, the district court's grant of summary judgment as to the First Claim for Relief should be affirmed.[16]

[16] In the district court, King Mountain presented three alternative arguments for why summary judgment on the First Claim for Relief should be granted in its favor: 1) the CCTA exempts from the definition of "contraband cigarettes" any cigarettes in the possession of a licensed cigarette manufacturer, and King Mountain holds a permit issued pursuant to Chapter 52 of the Internal Revenue Code of 1986 (26 U.S.C. § 5713) as a manufacturer of tobacco products; 2) the CCTA does not apply to King Mountain's sales of cigarettes to Indian nations situated within New York's boundaries, because those cigarettes were not required, under New York law, to bear tax stamps at the time of King Mountain's sales, and therefore, were not "contraband cigarettes" as defined in 18 U.S.C. § 2341(a); and 3) the treaty between the Yakama people and the United States guarantees the Yakama the right to travel and trade, including trade with and sell cigarettes to other Indians without State restriction. (ECF No. 195-1 at 14-16.)

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KING MOUNTAIN'S APPEAL

I. The State's Discriminatory Enforcement Practices Violated the Dormant Commerce Clause

The State's opposition to King Mountain's dormant commerce clause challenge contains a glaring omission: the failure to mention or acknowledge that the unchallenged record before the district court established that the only tribal cigarette manufacturers that the State had ever brought CCTA, PACT Act, or New York State Tax Law claims against were King Mountain (situated within the boundaries of Washington State) and Grand River (a First Nations manufacturer situated in Canada); it has never brought such a lawsuit against the numerous tribal manufacturers situated within the boundaries of New York. (*See* ECF No. 228 at 2-4; ECF No. 229.) Also ignored are that vast quantities of unstamped New York tribal manufactured cigarettes were observed by State Investigators, during their investigation of King Mountain, on Indian land side-by-side with unstamped King Mountain cigarettes and, in one instance, being unloaded from a truck parked adjacent to a State Investigator's vehicle (caught on videotape by the Investigator).[17]

[17] In a footnote, the State writes that "King Mountain no longer independently relies on the fact that undercover investigators made controlled purchases only of cigarettes made by King Mountain and Grand River, but not of brands manufactured in the State." (State Br. at 49 n.20.) That statement is inaccurate. In its moving brief, King Mountain did not change the evidence it relies upon.

The State points to its litigations against UPS and FedEx as evidence that it does not discriminate against out-of-State Indian manufacturers. (*See* State Br. at 50-51.) The State's argument is preposterous: FedEx is a Delaware corporation headquartered in Tennessee, UPS is a Delaware corporation headquartered in Georgia, and in both of those actions the State did not add as a codefendant a single New York tribal cigarette manufacturer who used FedEx or UPS to deliver unstamped cigarettes. If it is accurate, as the State contends, that all cigarettes sold to companies owned by Indian nations or Indians on Indian reservations in New York must first be sold to a State-licensed stamping agent, then why have none of the Indian entities who used UPS and FedEx to deliver unstamped cigarettes been investigated and prosecuted by New York?[18]

Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005), and *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), did not, as the State contends, address the "mundane and ministerial matter of economic permitting." (State Br. at 46-47.) They were cases, like here, about whether an out-of-state company was disadvantaged vis-à-vis in-state companies by reason of state enforcement of non-discriminatory statutes. (*See* King Mountain Br. at 26-28.) As much as the State tries, King Mountain does not contend that

[18] The State claims that its litigations against FedEx and UPS "disrupted the distribution chain of major in-state Indian cigarette traffickers . . . ." (State Br. at 51.) The State did not argue this in the district court, and has not on appeal introduced any evidence to support this statement.

New York's cigarette statutes unduly burden interstate commerce or create a "protectionist regime." (State Br. at 47.) What King Mountain contends, and what it proved in the district court, is that New York's discriminatory enforcement of federal and New York Tax Laws against out-of-State Indian manufacturers violated the Commerce Clause of the U.S. Constitution and should have precluded the district court's entry of an injunction. *See Florida Transp.*, 703 F.3d at 1257 (dormant commerce clause violated if government official's "application" of a statute "directly discriminated against interstate commerce by regulating participation in the interstate [] market on the basis of . . . local versus out-of-state origin").

II. King Mountain Is Not Liable Under New York Tax Law Section 471

A. Res Judicata Bars The State's Third Claim for Relief

The State advances four arguments for why the entirety of the Third Claim for Relief is not barred by res judicata. (State Br. at 39-43.) Because none of these arguments were raised in the district court, the Court should not consider them on appeal.[19] *See Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006). In any event, each of the State's new arguments lacks merit.

[19] In the district court, the State primarily argued that King Mountain could not satisfy the elements of claim preclusion because 1) the New York State Attorney General and the New York State Department of Taxation and Finance were not the same party and were not in privity with each other; 2) the facts underlying the

First, the State's reliance on N.Y. Tax Law § 2010(5) is misplaced. That statute precludes ALJ decisions in Tax Proceedings from having precedential value or force or effect in other proceedings in the State; it has no bearing on the applicability of claim preclusion. *See* Brief for Respondents, *Caprio v. New York State Dep't of Taxation & Fin.*, 117 A.D.3d 168 (N.Y. App. Div. 1st Dep't 2014), 2013 WL 12139658 (Oct. 2, 2013) (New York Attorney General wrote that § 2010(5) was enacted to remedy "the problem of ALJ decisions potentially upholding new, unwarranted tax loopholes and otherwise adopting erroneous interpretations of law"); *In re the Petition of The Humphrey House, Inc.*, DTA Nos. 813375 and 813376, 1996 WL 467000, at *11 (N.Y. Division of Tax Appeals Aug. 1, 1996) (citing § 2010(5), rejected petitioner's argument that an ALJ's decision supports its position; finding that the ALJ's decision "has no precedential value in determining the present case").

The State does not cite a single case to support its interpretation of § 2010(5) of the Tax Law. Instead, in a footnote, it references *People v. Campbell*, 98

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seizure of King Mountain cigarettes were not part of the same transaction or series of transactions as the instant litigation; and 3) King Mountain waived this defense by not including it in its Answer. (*See* ECF No. 201 at 15-25; *see also* ECF No. 197-1 at 31-33.) The district court rejected the first argument, allowed King Mountain to amend its Answer because this defense was unavailable at the time King Mountain filed its Answer and the State did not establish prejudice to an amendment, and held that res judicata barred the State's Section 471 claim as to the seized cigarettes but not the part of the claim based on the purchase of cigarettes on November 6, 2012. SPA-28-42. The State's appeal does not challenge any aspect of the district court's ruling.

A.D.3d 5 (2d Dep't 2012), where the Appellate Division held that Family Court Act § 381.2 – which precludes a juvenile delinquency proceeding, and any statements made therein, from being "admissible as evidence against [the defendant] or his interests in any other court" – prevents the New York State Board of Examiners of Sex Offenders from considering, in a civil Sex Offender Registration proceeding, a juvenile delinquency adjudication. *Campbell* did not involve res judicata, and the text of Family Court Act § 381.2 has no resemblance to N.Y. Tax Law § 2010(5).

Second, the argument that the cigarettes purchased on November 6, 2012, could not have been raised in the NYSDTF proceeding – because King Mountain initiated the administrative proceeding and that proceeding concerned only the cigarettes listed in the Notice of Determination – is improperly formulaic. Undoubtedly the State initiated its administrative legal process by seizing unstamped King Mountain cigarettes and then assessing, by formal notice, taxes owed by King Mountain pursuant to Article 20 of the Tax Law (where § 471 resides) and providing a procedure for King Mountain to contest that assessment in the New York Division of Tax Appeals. When it filed the December 20, 2012, Notice of Determination concerning the December 3, 2012, seizure of unstamped King Mountain cigarettes, the State had all the facts available to also include its November 6, 2012, purchase of unstamped King Mountain cigarettes.

Third, although the State is correct that res judicata does not apply to cigarettes shipped after the filing of the State's Complaint, King Mountain has never argued to the contrary (*see* King Mountain Br. at 37-38), because none of those post-Complaint cigarettes were at issue in the Third Claim for Relief. The State did not include those cigarettes in its February 12, 2013, Amended Complaint, and the State never sought to file a Second Amended Complaint after the close of discovery. *Cf.* Fed. R. Civ. P. 15(b) (allowing a party to amend its complaint during trial if "a party objects that evidence is not within the issues raised in the pleadings"). In fact, the district court found that the State's § 471 claim was predicated only upon the November 6, 2012, purchase and the December 3, 2012, seizure. SPA-40-42.

Finally, the State's argument that res judicata cannot apply here because the NYSDTF lacked the power to issue an injunction is misplaced. The State did not seek an injunction on this Claim, *see* A-90-91 (Am. Compl. at 25-26) (seeking injunctive relief on the CCTA, PACT Act, N.Y. Tax Law § 480-b, and N.Y. Exec. Law § 156-c claims, but not seeking any specific relief on N.Y. Tax Law § 471); SPA-48 ("The Court notes that the Amended Complaint does not expressly specify the relief that the State is seeking with respect to its third cause of action."); instead, it repeatedly argued that it was entitled to payment of taxes (monetary relief) pursuant to § 471. (*See* ECF No. 197-1 at 29 (State's memorandum of law

in support of motion for summary judgment states Amended Complaint alleged "violation of Tax Law §§ 471 and 471-e (failure to pay cigarette excise tax, and failure to affix tax stamp)"); ECF No. 206 at 6 (State argued King Mountain "is responsible for paying the excise tax due on each pack of cigarettes").) Moreover, King Mountain is only appealing the district court's determination that the November 6, 2012, purchase was not part of the same transaction or series of transactions as the December 3, 2012, seizure, and the district court's subsequent denial of summary judgment to King Mountain on the Third Claim for Relief on res judicata grounds; whether the New York ALJ could have issued an injunction is irrelevant to this contention. The district court held that res judicata barred the State's Third Claim for Relief as to the cigarettes seized during the December 3, 2012, seizure.[20] If the district court also held that the November 6, 2012 purchase was barred by res judicata, then King Mountain would have been granted summary judgment on the Third Claim for Relief, and the State would not have been entitled to any remedy on this Claim.

[20] In its discussion of why res judicata does not bar the Third Claim for Relief (State Br. at 39-43), the State fails to mention that the district court found that, even with respect to the November 6, 2012, purchase of King Mountain cigarettes, that King Mountain satisfied two of the three elements of res judicata – that there was a judgment on the merits rendered by a court of competent jurisdiction and that the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was. SPA-30-38.

Because the State had all the facts necessary when it filed the Notice of Determination to also seek relief under Section 471 for the unstamped King Mountain cigarettes it purchased on November 6, 2012, that purchase could have and should have been raised in the prior proceeding. *See Waldman v. Vill. Of Kiryas Joel*, 207 F.3d 105, 111 (2d Cir. 2000). Accordingly, the district court's conclusion that res judicata does not bar the Third Claim for Relief should be reversed.

B. The District Court Erred in Holding that King Mountain Violated Section 471 by Selling Cigarettes Nation-to-Nation

Even if the State's Section 471 claim is not barred by res judicata, the district court still erred in holding that King Mountain violated this statute by not selling its cigarettes directly to a State-licensed stamping agent.

As an initial matter, the State's incredulousness at King Mountain continuing to sell cigarettes during the pendency of this lawsuit (*see* State Br. at 33) is baffling, given that the State waited three months from the filing of the original Complaint to serve an Amended Complaint and seek a preliminary injunction, and given that the State then abandoned its motion for a preliminary injunction at the outset of the litigation. (*See* ECF Nos. 76 & 79.)

The State quotes from dicta in this Court's decision in *Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), for the proposition that "licensed stamping agents are 'the only entry point for cigarettes into New York's stream of

commerce.'" (State Br. at 35 (quoting 645 F.3d at 158).) But the State fails to address King Mountain's argument in its moving brief that this dicta is misplaced, because the regulation relied on by the Court, N.Y. Comp.Codes R. & Regs. tit. 20, § 74.3(a)(1)(iii), only sets forth a presumption and the requirements for the avoidance of a presumption of a "taxable event," and does not mandate that out-of-state manufacturers only ship cigarettes directly to a State-licensed stamping agent. (*See* King Mountain Br. at 42-43.)

The State also fails to address King Mountain's argument that the only liability in New York Tax Law § 471 is for (i) consumers, who bear the ultimate incidence of the tax; (ii) agents, as defined in Section 470(11), who are liable for the collection and payment of the tax; and (iii) persons "in possession" of unstamped cigarettes, who bear the burden of proof that the unstamped cigarettes are not taxable. Whatever proscriptions are provided by § 471-2 (which, as discussed in King Mountain's opening brief, is limited to "wholesalers" and not "wholesale dealers") or § 471-e, those statutes do not impose liability on an out-of-state manufacturer selling cigarettes to wholesalers and retailers. Nothing in the law precludes King Mountain from selling to Indian Nations, or companies owned by Indians on Indian Nations, who could then sell those cigarettes to New York-licensed stamping agents

The district court's granting of partial summary judgment to the State on the Third Claim for Relief should be reversed.

III. The District Court Erred When It Held That New York Can Regulate Commerce Between an Indian Outside the Boundaries of New York And Indians Within the State's Boundaries

The State contends that King Mountain forfeited its argument that Section 471 liability may not be imposed due to federal Indian law because it was not raised in the district court. (State Br. at 52-53.) Although it was not extensively briefed, the argument was raised in response to the district court's request for supplemental briefing. (*See* King Mountain's Mem. of Law in Response to Court's May 4, 2016 Order, ECF No. 212 at 8 ("Finally, federal law (*e.g.*, the Indian Commerce Clause of the U.S. Constitution, the federal Indian Trader Statutes, 25 U.S.C. § 261, *et seq.*, the 1855 Yakama Treaty, 12 Stat. 951) preempts New York State from imposing monetary liability on King Mountain 'for sales of unstamped cigarettes to Indian nations and/or Native American-owned companies that are not licensed stamping agents'" (quoting the district court's Order requesting supplemental briefing)).)[21] In any event, even if King Mountain had not raised the argument below, the Court should still consider it, because the argument involves an important question regarding the relationship between states' power to

[21] King Mountain's briefing was focused on monetary liability under § 471 because, as discussed *supra*, the State's Third Claim for Relief was predicated upon King Mountain's "possession" of unstamped cigarettes and appeared to be seeking New York State cigarette excise taxes.

regulate and the rights of Indians to freely trade, and because it "presents a question of law and there is no need for additional fact-finding." *Allianz Insurance Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (citation and internal quotation marks omitted); *see also Shukla v. Sharma*, 586 F. App'x 752, 754 (2d Cir. 2014) (summary order) (considering issue not raised below and vacating relevant portion of district court's award); *Deegan v. City of Ithaca*, 444 F.3d 135, 144 (2d Cir. 2006) ("Although equitable factors do not weigh heavily in favor of discretionary review of a belated argument . . . , we will exercise our discretion to review its merits because the question presented is purely legal and requires no further development of the record." (alteration, citation, and internal quotation marks omitted)).

As detailed in King Mountain's opening brief (King Mountain Br. at 45-47), the State's attempt to impose regulatory requirements that prohibit an Indian holding a federal license to manufacture a legal product from selling that product directly to other Indians violates the Indian Commerce Clause, because only Congress can regulate commerce occurring between Indians in Indian country. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). The State does not point to any federal law or regulation of Indian to Indian trading that supersedes the Indian

Commerce Clause, and the State does not address the Supreme Court's long-standing admonition that, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting that "[m]ore difficult questions arise" where a "State asserts authority over the conduct of non-Indians engaging in activity on the reservation").

The State's apparent contention that the identity of the parties does not matter when determining whether the State can impose its regulatory requirements (*see* State Br. at 55-56) is wrong. In the Indian law context, the identity of the parties involved (Indian versus non-Indian) and the location of the activity at issue (Indian country versus the State) are the pivotal factors that dictate when state law can apply. *See Bracker*, 448 U.S. at 144-45; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976).

The State's citation to *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), for the proposition that "States may enforce their excise tax laws and related requirements on cigarette sales by reservation Indians to purchasers other than members of the same tribe" (State Br. at 54) is misleading, because *Colville* only upheld a recordkeeping requirement on Indian Tribes where the Tribes presented "no evidence" in the district court as to why the

requirement should be invalid. At issue for King Mountain is a requirement that a cigarette manufacturer sell its cigarettes only to non-Indian State-licensed stamping agents, thus prohibiting all Indian to Indian trade. The State also relies heavily on *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), where the Court permitted the State to impose reasonable burdens on Indians trading with non-Indians, including requiring reservation retailers to collect tax on sales to non-Indian consumers. *Milhelm*, however, does not support the conclusion that the State has the extraterritorial power to force an Indian outside the boundaries of New York to only make sales of a product it manufactures to a non-Indian licensed by State authorities, thereby prohibiting commerce between Indians in Indian country. The burden to collect tax on sales to non-Indians is not comparable to the prohibition of trading between two Indian parties; a finding by this Court that King Mountain's Indian to Indian trade cannot be banned by the State would not overrule the State's legitimate right to tax and regulate sales from Indians to non-Indian consumers.

The State's attempt to distinguish the Yakama Treaty's right to travel and right to trade ignores established law. (*See* State Br. at 57.) The Ninth Circuit's decision in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), does not sweep as broadly as some of the language quoted by the State: the holding in that case was limited to an escrow requirement on sales Washington

State had the power to tax – that is, not sales between Indians in Indian country. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the Ninth Circuit found that the Yakama Treaty prohibited imposition of the state's regulatory pre-conditions on the Yakama people's treaty right to engage in the transport and trade of tobacco products with other Indians outside of the State of Washington. *Id.* at 1266-67 ("whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively . . . render the Right to Travel provision truly impotent"); *see also Salton Sea Venture, Inc. v. Ramsey*, No. 11CV1968-IEG WMC, 2011 WL 4945072, at *7 (S.D. Cal. Oct. 18, 2011) (Yakama Treaty precluded enforcement of California import taxes on fuel sold by corporation owned by Yakama tribal member to Indians on reservations in California).

Finally, the fact that King Mountain did not possess cigarettes within the boundaries of New York State does not mean that its Yakama Treaty rights were not violated by the district court's permanent injunction; the State's argument (*see* State Br. at 57-58) would lead to the absurd result that Yakama Treaty rights are only enforceable to the extent an Indian business does not use a common carrier or non-tribal member to transport its goods to market. The Treaty does not cut so narrowly. *See Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1235 (E.D.

Wash. 1997) ("treaty language must be construed as the Indians would naturally have understood such terms, with doubtful or ambiguous expressions resolved in the Indians' favor"), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

CONCLUSION

For the reasons set forth above and in King Mountain's opening brief, King Mountain respectfully requests that this Court affirm the district court's grant of summary judgment to King Mountain on the First and Second Claims for Relief, reverse the district court's grant of partial summary judgment to the State on its Third and Fifth Claims for Relief and summary judgment on its Fourth Claim for Relief, and reverse and vacate the district court's imposition of a permanent injunction.

Respectfully submitted,

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