17-3198(L)

17-3222(XAP)

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

BRIEF FOR PLAINTIFF–APPELLEE–CROSS-APPELLANT

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PRELIMINARY STATEMENT

In this civil enforcement action brought under federal and state law, the State of New York seeks monetary and injunctive relief against cigarette manufacturer Mountain Tobacco Company—commonly known as King Mountain—for its systematic bulk deliveries over many years of untaxed cigarettes to unauthorized recipients in this State. New York law demands that all cigarettes possessed for sale within this State bear tax stamps and, accordingly, that all cigarettes delivered into the State for resale be sent initially to state-licensed stamping agents. King Mountain indisputably failed to comply with these and other legal requirements governing cigarette sales in New York, and those violations continued during this litigation.

The United States District Court for the Eastern District of New York (Seybert, J.) permanently enjoined King Mountain from violating several provisions of New York State law, but granted summary judgment to King Mountain on the State's claims for violations of the federal Contraband Cigarette Trafficking Act (CCTA) and Prevent All Cigarette Trafficking (PACT) Act. This Court should affirm the permanent injunction,

vacate the award of summary judgment to King Mountain, and remand the case for further proceedings on the federal claims.

Although the particulars vary, King Mountain's defenses mostly boil down to the unsupportable assertion that its status as an Indian-owned company located on an out-of-state Indian reservation shields it from liability for flooding the New York market with untaxed and otherwise legally noncompliant cigarettes. For example, King Mountain invokes its out-of-state location in arguing that this civil law-enforcement action amounts to economic protectionism in favor of in-state Indian cigarette manufacturers, in violation of the U.S. Constitution's Commerce Clause. But as the district court correctly observed, there is no legal support for the idea that judicial enforcement of facially neutral public-health and safety laws can violate the Commerce Clause, and there is no factual support for the claim that the State has enforced its cigarette laws in a discriminatory manner here. Nor does this enforcement action violate principles of Indian tribal sovereignty—an argument raised for the first time on appeal, and one that controlling decisional law forecloses. The U.S. Supreme Court and this Court have squarely upheld New York's authority to tax and

otherwise to regulate cigarette transactions between Indian-run businesses on one reservation and counterparties on another: precisely the kind of sales by King Mountain at issue in this suit.

Despite appropriately awarding relief under state law, the district court erred in denying relief to the State under the federal CCTA and PACT Act. Congress enacted these statutes decades apart to address widespread cigarette tax evasion—including, as relevant here, by means of illegal tax-free sales from Indian reservations. The CCTA penalizes the delivery of more than 10,000 cigarettes lacking applicable state tax stamps; and the PACT Act requires anyone who delivers cigarettes in interstate commerce to file detailed reports with state tax administrators. King Mountain did the former (thus violating the CCTA) and failed to do the latter (thus violating the PACT Act). And each of these federal laws explicitly authorizes States to bring civil enforcement suits against violators in federal court.

King Mountain's defenses to liability under the CCTA and PACT Act depend on a misreading of the language of the relevant provisions. Specifically, the court below accepted the argument that King Mountain's interstate cigarette shipments did not meet the PACT Act's definition of

"interstate commerce"—and were thus not reportable under that law—because the shipments began and ended on Indian reservations (located within the States of Washington and New York). *See* 15 U.S.C. § 376(a). That holding was incorrect; nothing in the PACT Act displaces the judicially recognized, commonsense rule that Indian reservations are part of the States where situated. Consistent with the federal government's view, the PACT Act therefore required King Mountain to report its interstate cigarette deliveries between different Indian reservations. The district court further held the State's CCTA claim against King Mountain to fall within a statutory provision barring States from enforcing the CCTA against "an Indian in Indian country." *See* 18 U.S.C. § 2346(b)(1). That holding too was error; the quoted exemption applies solely to individual tribal members doing business with others on the same reservation, and not to cross-border cigarette shipments by an Indian-owned business entity. The district court's holdings thus provide King Mountain with a sweeping and unearned immunity from liability for trafficking in millions of unstamped and unreported cigarettes, when the federal regimes at issue directly target, and preclude, that conduct.

ISSUES PRESENTED

1. Did the district court properly enjoin King Mountain's ongoing shipments of unstamped and otherwise legally noncompliant cigarettes to unauthorized recipients in New York State?

2. Did the district court appropriately conclude that the U.S. Constitution's Commerce Clause poses no bar to this civil law-enforcement action?

3. Does the application of New York State law to King Mountain's cigarette deliveries from the Yakama Indian Reservation in Washington to off-reservation purchasers who are not Yakama tribal members contravene tribal sovereignty?

4. Did the district court err in concluding that King Mountain's interstate cigarette shipments between different Indian reservations were not reportable "interstate commerce" under the PACT Act?

5. Did the district court err in holding that the State's CCTA claim based on King Mountain's cross-country cigarette shipments falls within a statutory bar on CCTA enforcement by States against an "Indian in Indian country"?

STATEMENT OF THE CASE

A. New York's Legal Restrictions on Cigarette Sales and Purchases in This State

1. The enormous public-health costs of smoking in New York

The deleterious effects of cigarette smoking and the associated costs to public health are enormous. Cigarette smoking is the leading cause of preventable death in the United States, killing almost half a million people annually.[1] Tobacco use kills almost 30,000 people per year in New York, surpassing deaths from alcohol, car accidents, firearms, and HIV/AIDS combined.[2] New Yorkers' annual healthcare costs associated with tobacco use exceed $10 billion, a third of which Medicaid pays.[3]

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[1] U.S. Office of Surgeon General, The Health Consequences of Smoking—50 Years of Progress (Surgeon General Report) 11, 678 (2014), http://www.surgeongeneral.gov/library/reports/50-years-of-progress.

[2] N.Y.S. Dep't of Health, Bureau of Tobacco Control, Tobacco is the Leading Cause of Preventable Death, StatShot Vol. 8, No. 3 (Apr. 2015), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume8/n3_tobacco_leading_cause.pdf.

[3] N.Y.S. Dep't of Health, Cigarette Smoking and Other Tobacco Use, https://www.health.ny.gov/prevention/tobacco_control (visited May 2018); RTI Int'l, 2014 Independent Evaluation Report of the New York Tobacco Control Program (RTI Report) 25 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

To deter cigarette use and defray some of the healthcare costs that smoking causes, the State of New York—like the federal government, every other State, the District of Columbia, and the City of New York—imposes excise taxes on cigarettes. *See* Tax Law § 471. New York's cigarette taxes serve two aims. *First*, the taxes deter cigarette usage by making cigarettes more expensive and thus reducing demand.[4] *Second*, the taxes allow the State to recoup some (though nowhere close to all) of the healthcare costs of cigarette smoking.[5] But these public policies are achieved only insofar as the taxes are collected and paid, and New York's cigarette taxes are subject to widespread evasion. A recent study concluded that 60% of cigarettes consumed in New York were subject to tax evasion, resulting in an estimated loss of tax revenue exceeding $2 billion annually.[6]

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[4] Surgeon General Report, *supra*, at 788; RTI Report, *supra*, at 22.

[5] N.Y.S. Sen. Majority, Fin. Comm., Economic & Revenue Review (FY 2016) 7–8 (Feb. 2015) (identifying roughly $1.3 billion in annual tobacco taxes collected), https://www.nysenate.gov/sites/default/files/articles/attachments/Rev_Forecast_FY_16.pdf.

[6] RTI Report, *supra*, at 25.

2. The pertinent New York cigarette regulations, including the tax-stamping mandate

The State Department of Taxation and Finance (DTF) precollects applicable state and local cigarette excise taxes, as well as a portion of the state and local sales tax, through a stamping system established by statute and regulation. Under that system, state-licensed stamping agents buy and affix tax stamps, incorporate their value into the sale price, and pass the cost along down the chain to the consumer, who bears the ultimate liability for the tax. *See* Tax Law § 471(2); 20 N.Y.C.R.R. §§ 74.2–74.3. During the relevant period, these taxes have been $4.35 per pack of cigarettes, and a higher amount for packs of cigarettes sold in New York City. *See* Tax Law § 471(1); 20 N.Y.C.R.R. § 74.1(a)(2).

New York's Tax Law reflects legislative intent to impose cigarette excise taxes to the broadest permissible extent. The law thus "impose[s]" and requires to "be paid a tax on all cigarettes possessed in the state by any person for sale," and "presume[s] that all cigarettes within the state are subject to tax until the contrary is established" by "the person in possession thereof." Tax Law § 471(1).

But the Tax Law also honors the limited, federally recognized exemption from state taxation of certain on-reservation cigarette sales

for Indian tribal members' personal use. *See Department of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 72–73 (1994); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160–61 (1980). The Tax Law provides that "no tax shall be imposed on cigarettes sold under such circumstances" where New York "is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation." Tax Law § 471(1). By contrast, excise taxes are imposed "on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." *Id.* Evidence of payment of taxes on sales to non-tribal-members and non-Indians "shall be by means of an affixed cigarette tax stamp." *Id.* §§ 471(a), 471-e(1)(a).

New York's Legislature has crafted a pair of alternative mechanisms to implement the limited tax exemption for on-reservation sales to tribal members. The first permits state-licensed stamping agents to deliver fixed quantities of cigarettes to reservation-based retailers and receive refunds from DTF for the prepaid taxes; the second allows an Indian nation or tribe, at its election, to receive tax-exemption coupons from DTF, which the Indian nation or tribe then provides to a licensed

stamping agent to obtain cigarettes without the payment of tax.[7] *See id.* §§ 471(5), 471-e; 20 N.Y.C.R.R. § 74.6(c)–(d); *see also Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 168–72 (2d Cir. 2011) (discussing history and features of these alternative tax-collection mechanisms). Each of these systems contemplates that the untaxed cigarettes sold to the Indian nation or tribe will not exceed the "probable demand" for cigarettes to be consumed by that nation's or tribe's members. Tax Law §§ 471(5)(b), 471-e(2)(b); *see also* 20 N.Y.C.R.R. § 74.6(e)(1) (published quarterly probable demand numbers by tribe or nation).[8] And in any event, "*all cigarettes* sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation *must bear a tax stamp*." Tax Law § 471(2) (emphasis added); *see also id.* § 471-e(3)(d) (stating that "[w]holesale dealers shall sell only tax-stamped cigarettes to

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[7] Indian tribes also may enter into agreements with the State "regarding the sale and distribution of cigarettes on the nation's or tribe's qualified reservation," the terms of which, if approved by the Legislature, "shall take precedence." Tax Law § 471(6).

[8] The limit under the coupon system also includes an additional "amount needed for official nation or tribal use." Tax Law § 471-e(2); *see* 20 N.Y.C.R.R. § 74.6(e).

Indian nations and tribes, reservation cigarette sellers and all other purchasers"); *id.* § 471-e(6) (same); 20 N.Y.C.R.R. § 74.6(a)(3) (same).[9]

Two other New York cigarette regulations underlie the district court's permanent injunction here. *First*, the Executive Law prohibits cigarettes from being "sold or offered for sale in this state unless the manufacturer thereof has certified in writing" that the cigarettes meet state-prescribed fire-safety performance standards. Executive Law § 156-c(3). And *second*, the Tax Law requires any manufacturer "whose cigarettes are sold for consumption in this state" to certify annually that the person (i) "is a participating manufacturer" under the State's 1998 Master Settlement Agreement (MSA), providing for payments by cigarette makers to defray the future healthcare costs of smoking; or (ii) has made certain escrow payments as an alternative. Tax Law § 480-b(1) (cross-referencing Public Health Law § 1399-pp(2)); *see also Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 42 (2d Cir. 2010) (discussing MSA).

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[9] The Tax Law defines a "wholesale dealer" to include anyone who "sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale," including to "a reservation cigarette seller on a qualified reservation." Tax Law § 470(8).

B. Federal Legislative Efforts to Curb Trafficking in Untaxed Cigarettes

1. The Contraband Cigarette Trafficking Act (CCTA)

Unlawful cigarette sales have long garnered federal attention, given both "the relationship between smuggling and the rise of racketeering," and the "large scale loss of revenue by the States" from illicit cross-border shipments. S. Rep. No. 95-962, at 9 (1978). As Congress observed decades ago, the States collectively were "losing an estimated $400 million per year in evaded cigarette taxes," led by New York, which suffered a $72 million tax loss back in 1975 alone. H.R. Rep. No. 95-1629, at 4, 6 (1978). Congress also recognized that cigarettes were being diverted "'through tax-free outlets,'" such as "'Indian reservations.'" *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129 (2d Cir. 2001) (quoting S. Rep. No. 95-962, at 6).

In 1978, Congress enacted the Contraband Cigarette Trafficking Act (CCTA), which established criminal and civil penalties for trafficking in untaxed cigarettes. *See* 18 U.S.C. § 2341 *et seq.* With exceptions not relevant here, the CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband

cigarettes." *Id.* § 2342(a). The Act defines "contraband cigarettes" to mean "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."[10] *Id.* § 2341(2)(b).

In 2006, Congress "enhance[d] the provisions of the CCTA to enable law enforcement to prosecute more of these schemes." 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (statement of House sponsor); *see* Pub. L. 109-177, § 121(a), 120 Stat. 192, 221 (2006). The amendment granted States authority to bring federal actions to seek "appropriate relief for violations" of the CCTA, including "civil penalties, money damages, and injunctive or other equitable relief." 18 U.S.C. § 2346(b)(2). Such remedies are expressly made available "in addition to any other remedies under Federal, State, local, or other law." *Id.* § 2346(b)(3). To preserve existing tribal sovereignty protections, however, Congress also provided that a State could not civilly enforce the CCTA "against an Indian tribe or an Indian in Indian country." *Id.* § 2346(b)(1). As this brief will demonstrate,

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[10] The quantity threshold for contraband cigarettes was originally 60,000, but has since been lowered to 10,000. *See* Pub. L. 109-177, § 121(a), 120 Stat. 192, 221 (2006).

the district court incorrectly held the latter proviso to bar the State's CCTA claim against King Mountain.

2. The Prevent All Cigarette Trafficking (PACT) Act

Despite the penalties imposed by the CCTA, illegal cigarette trafficking persisted. Evidence before Congress in 2007 revealed that "cigarette smuggling investigations ha[d] been linked to Hamas, Hezbollah, al Qaeda, and other designated foreign terrorist organizations." S. Rep. No. 110-153, at 4 (2007). To support the need for action, Congress highlighted the case of a Hezbollah associate who had pleaded guilty to federal crimes for obtaining "low-tax cigarettes from the [Seneca] Cattaraugus Indian Reservation in New York" and selling them "for a substantial profit" off-reservation. *Id.*

In 2010, Congress passed the Prevent All Cigarette Trafficking (PACT) Act to "create strong disincentives to illegal smuggling of tobacco products" and to "make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities." Pub. L. 111-154, § 1(c)(2), (c)(4), 124 Stat. 1087, 1088 (2010).

Among other things, the PACT Act requires cigarette delivery sellers to comply with applicable state and local tax requirements, 15 U.S.C. § 376a(a)(3); strict recordkeeping duties, *id.* § 376a(a)(2), (c); and restrictions such as age verification and conspicuous labeling, *id.* § 376a(b), (d). With limited exception, the PACT Act also bars common carriers from transporting packages for noncompliant cigarette sellers identified by the federal government on what is known as the "non-compliant list." *See id.* § 376a(e)(2)(A).

This appeal specifically concerns King Mountain's noncompliance with the PACT Act's reporting requirements. Under the PACT Act, "[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce" must file reports with federal and state tax administrators (including DTF). 15 U.S.C. § 376(a). The mandated reports include a registration document with the seller's name, address, and contact information; and the State also must receive specified information about "each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month into such State." *Id.* § 376(a)(2).

To expand the reporting requirements' reach, the PACT Act defines "interstate commerce" not only as "commerce between a State and any place outside the State," but also as "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."[11] *Id.* § 375(9)(A). Since 2010, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)—the federal agency responsible for implementing the PACT Act—has taken the position that "transportation between two separate [Indian] reservations would be in interstate commerce" under the statute. (Joint Appendix (A.) 530–531.) As a result, sellers of cigarettes between Indian reservations must register with the federal government and report those sales to state administrators, or risk being placed on the PACT Act non-compliant list: just as ATF did to King Mountain in 2015. (A. 529.)

Like the CCTA, the PACT Act empowers States to bring actions in federal court to secure "appropriate relief" for violations, "including civil

[11] "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the [U.S.] Government." *See* 15 U.S.C. § 375(7)(A) (incorporating definition in 18 U.S.C. § 1151).

penalties, money damages, and injunctive or other equitable relief." 15 U.S.C. § 378(c)(1)(A). Such remedies are available "in addition to any other remedies available under Federal, State, local, tribal, or other law." *Id.* § 378(c)(4)(A). The district court denied relief under the PACT Act as a matter of law for King Mountain's undisputed failures to report its interstate deliveries into New York of millions of cartons of unstamped cigarettes. This brief will explain why that conclusion was wrong.

C. King Mountain's Systematic Bulk Shipments of Unstamped Cigarettes into New York State

1. King Mountain's sales of vast quantities of unstamped cigarettes to New York purchasers

King Mountain is a for-profit corporation formed under the laws of the Yakama Indian Nation and based on that Nation's reservation in the State of Washington. (A. 186, 223, 503.) From 2007 until his recent demise, Delbert Wheeler, Sr., a member of the Yakama Nation, was King Mountain's president, chairman, and sole owner. (A. 186–187, 220, 232.) The Yakama Nation does not own or operate King Mountain, which is not an arm or division of the tribe. (A. 207, 503.) Nor is King Mountain a tribal member. (A. 353–354, 1100.)

King Mountain is a federally licensed manufacturer of cigarettes, which are sold throughout the United States. (A. 188, 216, 347.) The cigarettes are sold in packs of twenty, with ten packs to a carton and sixty cartons—or 12,000 cigarettes—in a case. (A. 188–189, 340.)

In several States, King Mountain engages in what the company calls "open market" sales. (A. 234.) As explained by King Mountain's principals, "open market" sales are those for which King Mountain has filed reports with state administrators and ensured compliance with applicable tax and escrow requirements. (A. 234, 1076.) Where necessary, King Mountain will deliver these cigarettes to licensed tax-stamping agents. (A. 1079.)

King Mountain treats New York State differently. Records produced in discovery confirm that, from 2010, the company has flooded New York with at least *two-and-a-half million cartons* of unstamped cigarettes. (A. 1016–1021.) King Mountain receives the purchase orders by phone or fax (A. 231, 343) and dispatches the unstamped cigarettes from its facility in Washington to this State by common carrier (A. 343, 1084). Except for a single sale to an off-reservation retailer, these shipments were made to distributors based on various New York State

Indian reservations. (*See* A. 1016–1021.) Most of these shipments have comprised tens of thousands of cartons of unstamped cigarettes each. (A. 1016–1020.)

Deliveries of unstamped cigarettes to distributor ERW Wholesale (based on the Seneca Reservation) and to the Onondaga Nation Smoke Shop (on the Onondaga Reservation) continued through July 2014—a year and a half into this lawsuit—if not later. (A. 201, 233, 332, 484–485, 1074.) Such shipments routinely have contained approximately 50,000 cartons of unstamped cigarettes apiece, with the largest single shipment containing approximately *30 million* unstamped cigarettes. (A. 1016–1017, 1020.)

King Mountain does not collect any state excise taxes on the company's cigarette sales into New York (A. 240–241), nor does King Mountain send these cigarettes to licensed stamping agents (A. 1079). King Mountain also has not filed any PACT Act reports with DTF for cigarette deliveries into this State. (A. 332, 484.) And King Mountain has not filed certifications under either Tax Law § 480-b—regarding MSA participation and escrow payments—or Executive Law § 156-c—regarding cigarette fire-safety compliance. (A. 483–484.)

The reason for this differential treatment is that, as Mr. Wheeler testified, King Mountain uses profits from the non-tax-paid "New York sales to keep our company operating." (A. 225.) As Mr. Wheeler explained, other "native companies that are selling cigarettes" in New York tend to "keep the price down pretty low." (A. 226.) Thus, King Mountain delivers only unstamped cigarettes into New York "to compete with that market at that price range." (A. 226.) Mr. Wheeler testified that he did not "know who the end users" of the cigarettes are. (A. 234.)

The undisputed record evidence confirms that unstamped King Mountain cigarettes are being sold to the general public. For example, the quantity of unstamped cigarettes delivered to distributors on the Seneca and Onondaga Reservations exceeded the estimated yearly probable demand for cigarettes of members of those respective tribes by up to a factor of twelve. (*See* A. 1023–1024 (contrasting annual delivery totals with probable demand figures in 20 N.Y.C.R.R. § 74.6(e)(1).) Moreover, on multiple days in May and June 2013, undercover state investigators made controlled buys of unstamped King Mountain cigarettes from vendors on the Poospatuck Reservation, on Long Island, and the Cayuga Reservation, near Syracuse. (A. 111, 387–402.)

Investigators "purchased cartons of cigarettes" from "randomly picked" smoke shops (A. 388), while observing dozens more cartons of King Mountain cigarettes for sale at many locations (A. 392, 397, 402).

2. The tax deficiency proceeding based on a single seizure of King Mountain cigarettes in December 2012

On December 3, 2012, on Interstate 87 north of Albany, a state trooper observed a commercial truck fail to stop at a mandatory checkpoint. (A. 428.) The trooper initiated a traffic stop, performed a safety inspection, and uncovered approximately 8,000 cartons of unstamped King Mountain cigarettes in the vehicle. (A. 428.) The driver, of ERW Enterprises, was transporting the cigarettes from the Oneida Indian Reservation, in Central New York, to the Ganienkeh Territory, in the State's northeast corner. (A. 428.) The State Police seized the cigarettes and turned them over to DTF. (A. 428–429, 661–663.)

DTF issued a notice of tax determination to King Mountain, imposing a penalty of $1,259,250 for the unlawful possession of cigarettes in this State. (A. 431.) King Mountain petitioned the Division of Tax Appeals for an administrative hearing. (A. 537–547.) DTF and King Mountain then entered a Stipulation of Discontinuance resolving the

matter for no liability. (A. 445.) In November 2014, the presiding Administrative Law Judge (A.L.J.) so-ordered the stipulation, which "cancelled" the assessment against King Mountain and discontinued the proceeding "with prejudice."[12] (A. 448.)

D. This Civil Enforcement Action

1. The State's lawsuit, alleging violations by King Mountain of federal and state law

The State initiated this civil action against King Mountain in December 2012 and filed an amended complaint in February 2013. (A. 41–91.) The operative complaint asserts claims against King Mountain for violating (i) the CCTA, by delivering more than 10,000 cigarettes lacking the required state tax stamps; (ii) the PACT Act, for failing to file required reports with DTF; (iii) Tax Law § 471, both for failing to pay excise taxes on cigarettes delivered into this State, and for failing to ship

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[12] DTF also separately issued notices of determination in the amount of $1,259,250 against ERW Enterprises and its owner, Eric White, for unlawfully possessing the unstamped cigarettes involved in the December 2012 seizure. In March 2018, a different A.L.J. in the Division of Tax Appeals upheld these penalty assessments. *See Matter of ERW Enters., Inc.*, DTA Nos. 827209, 827210 (Mar. 15, 2018), https://www.dta.ny.gov/pdf/determinations/827209.det.pdf. ERW and White have appealed that decision to the Tax Appeals Tribunal.

those cigarettes to state-licensing stamping agents; (iv) Executive Law § 156-c, for failing to certify to cigarette fire-safety compliance; and (iv) Tax Law § 480-b, for failing to certify to MSA participation or the making of escrow payments.[13] (A. 85–89.)

For the violations, the complaint seeks injunctive and monetary relief under both federal and state law. (A. 90–91.)

2. The district court's award of partial summary judgment to each side

By written decision issued in July 2016, the district court (Seybert, J.) awarded each side partial summary judgment on certain of the State's claims and reserved the rest for trial. (Special Appendix (SPA) 1–55.)

CCTA. The court awarded summary judgment to King Mountain in full on the State's claim under the federal CCTA. (SPA 11–19.)

Specifically, the court held this claim to fall within the statutory bar on CCTA enforcement by a State "'against an Indian tribe or an

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[13] Also named as defendants were King Mountain's owner, Delbert Wheeler, and affiliated entity Mountain Tobacco Distributing Company. The district court dismissed the claims against Wheeler for lack of personal jurisdiction (Dist. Ct. ECF No. 193), and the State voluntarily dismissed the claims against Mountain Tobacco Distributing Company (Dist. Ct. ECF No. 45).

Indian in Indian country.'" (SPA 12 (quoting 18 U.S.C. § 2346(b)(1)).) In so holding, the district court rejected the State's argument that the phrase "Indian in Indian country" refers only to individual enrolled tribal members, a class that excludes business entity King Mountain. (SPA 13–16.) The court also disagreed with the State's point that the provision in question was meant to be coextensive with existing tribal sovereignty rights, which do not independently exempt King Mountain's cross-border deliveries from the reach of New York's tax laws. (SPA 16–18.)

PACT Act. The district court granted partial summary to King Mountain on the State's claim for reporting violations under the federal PACT Act. (SPA 19–28.)

The court noted that the reporting requirement extends to deliveries in "interstate commerce," but held nearly all of King Mountain's interstate sales not to meet that description. (SPA 19–22.) The reason given was that each of the PACT Act's "three different" definitions of interstate commerce required "that one point of commerce be in a 'state,'" and King Mountain's shipments were made between Indian reservations. (SPA 22.) In so concluding, the court repudiated ATF's long-held position

that the PACT Act's reporting requirements extend to cigarette deliveries between separate Indian reservations. (SPA 22–25.)

The district court identified a factual issue regarding whether a lone shipment of King Mountain cigarettes to an off-reservation retailer, in Chautauqua County, was reportable under the PACT Act, and reserved that claim for trial. (SPA 25–26.)

State law. The district court awarded summary judgment to the State on each of three claims for violations of New York State law.

First, the court held as a matter of law that King Mountain violated the tax-stamping mandates of the Tax Law. (SPA 42–48.) As an initial matter, the court ruled that the stipulation between DTF and King Mountain dismissing a tax-deficiency proceeding based on a December 2012 seizure of cigarettes (see *supra* at 21-22) precluded any claim under the Tax Law based on that seizure—but not tax claims arising from distinct cigarette shipments (SPA 38–42). On the merits, the court declined to hold King Mountain liable under Tax Law § 471(1) for "possess[ing]" cigarettes for sale in New York, when the cigarettes were

possessed by a third-party common carrier.[14] (SPA 43–46.) But the court held that King Mountain breached the legal requirement to deliver its cigarettes to state-licensed stamping agents. (SPA 46–48.)

Second, the district court held that King Mountain violated Tax Law § 480-b, by undisputedly failing to certify that King Mountain is either (i) a participating manufacturer under the MSA, or (ii) making escrow payments outside of the MSA. (SPA 48–51.)

Third, the court below concluded that King Mountain violated Executive Law § 156-c, by undisputedly failing to certify that its cigarettes sold in New York met state fire-safety standards. (SPA 51–52.) The court separately held that the evidence raised a triable issue on whether King Mountain's cigarette packages had complied with fire-safety labeling requirements. (SPA 53–54.)

3. The district court's entry of a permanent injunction against King Mountain

After the summary judgment ruling, the State withdrew the remainder of the PACT Act claim and the state law claim for inadequate

[14] The State does not pursue this monetary claim on appeal.

fire-safety labeling. (*See* SPA 59.) The district court then resolved the question of remedies on the parties' submissions and permanently enjoined King Mountain from violating the state tax-stamping and certification requirements outlined above. (SPA 56–87.)

King Mountain argued that injunctive relief was unavailable because the State's enforcement action discriminated against out-of-state Indian cigarette manufacturers, in violation of the "dormant" aspect of the U.S. Constitution's Commerce Clause. Without deciding whether official enforcement of facially neutral laws could violate the Commerce Clause (SPA 70), the district court rejected King Mountain's claim of discriminatory enforcement as lacking adequate factual support. (SPA 72–74.) The court likewise found that King Mountain had "failed to demonstrate an undue burden on interstate commerce" from civil enforcement, in light of the State's valid interests in decreasing cigarette use, tax evasion, and cigarette fires. (SPA 73.)

The district court did, however, accept King Mountain's argument that the proposed injunction was overbroad, in seeking to authorize the seizure of unstamped King Mountain cigarettes wherever found. (SPA 75–79.) The court omitted that term from the injunction. (SPA 80.)

STANDARD OF REVIEW & SUMMARY OF ARGUMENT

This Court reviews the district court's issuance of a permanent injunction for abuse of discretion. *See Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). In doing so, the Court reviews de novo the district court's legal interpretations, while respecting any factual findings unless clearly wrong. *See id.* By contrast, this Court reviews de novo the district court's entire grant of summary judgment, including any underlying exercises in statutory interpretation. *See Walsh v. New York City Hous. Auth.*, 828 F.3d 70, 74 (2d Cir. 2016); Fed. R. Civ. P. 56(c).

King Mountain's appeal. The district court permissibly enjoined King Mountain's ongoing violations of multiple New York statutes governing cigarette sales into and within this State. Those regulations include, but are not limited to, the Tax Law's requirement that *all* cigarettes delivered into New York—even to Indian reservations—bear tax stamps, or else be sent initially to state-licensed stamping agents.

Contrary to King Mountain's assertion, the prior stipulated dismissal of a tax deficiency proceeding arising from a single seizure of unstamped cigarettes in 2012 does not preclude the State from pursuing injunctive relief against King Mountain here. The U.S. Constitution's Commerce

Clause likewise provides no basis for overturning the injunction: the district court did not commit clear error (or any error) in rejecting King Mountain's unsupported attempt to cast this civil enforcement action as a form of economic protectionism in favor of in-state Indian cigarette traffickers. And King Mountain's contention that the injunction contravenes principles of Indian tribal sovereignty equally fails: not only is this argument forfeited for not having been raised below, but it is foreclosed by settled decisional law affirming States' power to regulate even on-reservation cigarette sales by Indians to purchasers who are not members of the same tribe.

The State's cross-appeal. The district court misconstrued two federal statutory regimes—the CCTA and PACT Act—to exempt King Mountain's cigarette shipments from these laws' prohibitions.

As relevant here, the PACT Act demands that sellers of cigarettes in "interstate commerce" file detailed reports with state tax administrators. The district court excused King Mountain's total noncompliance with this requirement on the theory that King Mountain's cross-country cigarette deliveries were not "interstate commerce" under the PACT Act. But that law defines "interstate commerce" expansively to include not only

shipments between different States—as were King Mountain's deliveries here—but also purely *intrastate* deliveries that begin on, end on, or pass through any Indian reservation. *See* 15 U.S.C. § 375(9)(A). There is no basis for construing the PACT Act's broad definition of "interstate commerce," with its explicit focus on Indian reservations, to exclude interstate sales by King Mountain to purchasers on Indian reservations.

The CCTA separately prohibits the delivery of more than 10,000 cigarettes lacking applicable state tax stamps, and permits States to enforce this proscription by bringing federal civil suits against violators. The district court mistakenly held this action to fall within a statutory provision barring States from enforcing the CCTA against "an Indian in Indian country." 18 U.S.C. § 2346(b)(1). That is so for two reasons. *One*, "Indian" as used therein refers to individual enrolled tribal members, not business entities like King Mountain. *Two*, the exception was intended solely to ensure that allowing States to enforce the CCTA would not be viewed as abrogating existing tribal sovereignty rights against state taxation of certain on-reservation cigarette sales. It was not intended to create a shield against CCTA enforcement based on transactions, like those here, that States may otherwise regulate.

ARGUMENT

POINT I

THE DISTRICT COURT APPROPRIATELY ENJOINED KING MOUNTAIN FROM VIOLATING MULTIPLE NEW YORK STATE CIGARETTE REGULATIONS

The district court acted well within its discretion in permanently enjoining King Mountain from violating several New York State regulations governing the delivery and sale of cigarettes. As against the award of injunctive relief, King Mountain's res judicata defense is misplaced and meritless; its Dormant Commerce Clause defense was appropriately rejected as unsubstantiated; and its Indian Commerce Clause defense is waived and, in any event, foreclosed by controlling decisional law. The injunction should thus be affirmed.

A. The Injunction Permissibly Targets Ongoing Violations of New York State Law.

Although the district court held King Mountain to have violated three state laws governing cigarette sales, King Mountain takes issue on appeal only with the ruling that its bulk cigarette sales into this State

violated New York's Tax Law.[15] As demonstrated below, King Mountain's state law challenges to that holding lack merit.

1. The district court correctly held King Mountain's ongoing bulk sales of unstamped cigarettes to violate the Tax Law.

New York's Tax Law sets forth two ways in which tax-exempt cigarettes may be purchased by, and delivered to, members of an Indian nation or tribe on a New York State Indian reservation. The first method—which applies by default—allows purchasers to buy cigarettes from wholesalers who have received DTF's prior approval, and who then may claim refunds from DTF for prepaid taxes on the sales. *See* Tax Law § 471(5). The second method—available at an Indian nation's or tribe's election—involves a system of tax-exemption coupons issued by DTF to the governing body of the nation or tribe, which presents the coupons to a licensed dealer to purchase cigarettes without the payment of tax. *See*

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[15] King Mountain has thus abandoned any challenge to the court's holdings regarding Tax Law § 480-b (MSA certification) and Executive Law § 156-c (fire-safety certification), on which the court also based the injunction (SPA 82). *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

id. § 471-e. Both of these methods expressly require that the cigarettes be tax-stamped in the first instance. *See id.* §§ 471(2), 471-e(3)(d); 20 N.Y.C.R.R. § 74.6(a)(3). And in general, both cap the quantities available for tax-exempt sale to a given Indian nation or tribe to the probable demand for cigarettes to be consumed by that nation's or tribe's members. *See* Tax Law § 471(5); 20 N.Y.C.R.R. § 74.6(e)(1).

King Mountain purports to have invented a third method of selling untaxed cigarettes to buyers on New York Indian reservations: simply flood the reservations with millions of unstamped cigarettes, for tax-free resale to anyone and everyone. As the uncontroverted proof shows, these deliveries of unstamped cigarettes by King Mountain were undeterred by the filing in 2012 of this civil enforcement action. In 2013, for example, undercover state investigators made three controlled buys of cartons of unstamped King Mountain cigarettes from randomly chosen smoke shops on Indian reservations located upstate and on Long Island (A. 111, 387–402; SPA 4), while observing dozens more cartons of King Mountain cigarettes for sale at many locations (A. 392, 397, 402). And in 2014, King Mountain repeatedly shipped unstamped cigarettes to retailers located on the Seneca and Onondaga Reservations, in lots of nearly 50,000

cartons at a time. (*See* A. 1017, 1020.) These sales were, by King Mountain's telling, a means of exploiting the demand for tax-free cigarettes in New York and providing working capital for the company's nationwide operations. (A. 225–226.) The deliveries violated New York law and were properly enjoined.

Tax Law § 471-e is crystal clear that "[w]holesale dealers shall sell *only tax-stamped cigarettes* to Indian nations and tribes, reservation cigarette sellers and all other purchasers." Tax Law § 471-e(3)(d) (emphasis added); *accord id.* § 471-e(6). Tax Law § 471 reinforces the point, mandating that "all cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation *must bear a tax stamp*." *Id.* § 471(2) (emphasis added). And DTF's regulations likewise provide that "[a]ll cigarettes sold by agents and wholesale dealers to Indian nations or tribes or reservation cigarette sellers located on Indian reservations *must bear a tax stamp*." 20 N.Y.C.R.R. § 74.6(a)(3) (emphasis added).

King Mountain "concede[s]" that it meets "the definition of 'wholesale dealer' under the statute." Br. for Def.-Appellant (Br.) at 40. Nor would there be any colorable argument otherwise: the Tax Law

defines a "wholesale dealer" to include anyone who "sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale." Tax Law § 470(8). And the definition extends to those who sell cigarettes "to a reservation cigarette seller on a qualified reservation." *Id.*; *see also id.* § 470(17) (defining "reservation cigarette seller" to include Indian tribes, enrolled tribal members, and entities owned by either). Thus, even if King Mountain's deliveries truly were "nation-to-nation" (Br. at 6, 47, 50)—a dubious label for sales by, and between, private companies owned by individual tribal members—that fact would not place the sales beyond the Tax Law's reach.

As this Court has observed, the above-quoted provisions mean what they say: "Whether taxable or tax-free, all cigarettes must bear a tax stamp." *Oneida Nation*, 645 F.3d at 160 n.8. As a consequence, licensed stamping agents are "the only entry point for cigarettes into New York's stream of commerce." *Id.* at 158. It is thus no answer to posit, as King Mountain does, that the recipients of its unstamped cigarettes could themselves have decided to "sell those cigarettes to New York-licensed stamping agents" (which they did not). Br. at 43. Rather, as outlined above, New York law demands that unstamped cigarettes be shipped

initially to licensed stamping agents to affix the tax stamps, before the cigarettes' next transfer. *See also* Tax Law § 471(4)(a) (forbidding sales of unstamped cigarettes to agents who cannot offer proof of state licensure). The initial recipients of King Mountain's unstamped cigarettes—for example, ERW Wholesale based on the Seneca Reservation, or the Onondaga Smoke Shop on the Onondaga Reservation—were not licensed stamping agents, as King Mountain admits. *See* Br. at 6. The district court thus concluded that King Mountain violated New York law "by admittedly failing to sell its unstamped cigarettes to licensed stamping agents," and the court appropriately enjoined that misconduct.[16] (SPA 47.)

King Mountain now argues that it conceded only that it is a "wholesale dealer" under the Tax Law; and that the district court, in imposing liability, cited a subsection extending the tax-stamping mandate to "wholesalers." *See* Br. at 38–40 (citing Tax Law § 471(2)). This semantic distinction offers no aid, for several reasons.

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[16] Despite King Mountain's suggestion (Br. at 41 n.14), this remedy was faithful to the amended complaint, which alleges noncompliance with the legal requirement that unstamped cigarettes be sent only to state-licensed stamping agents, and seeks injunctive relief for this and other state law violations (A. 85–86, 90–91).

First, King Mountain waived any argument about the purported difference between a "wholesaler" and "wholesale dealer" by conceding below that this general element of the delivery prohibition was met. Indeed, King Mountain mentioned its status as a "wholesale dealer" in discussing the "undisputed material facts" related to the Tax Law claim. (Dist. Ct. ECF No. 202, at 20.) *See Handberry v. Thompson*, 446 F.3d 335, 343 (2d Cir. 2006) (rejecting party's attempt to change position on appeal, after having conceded element in district court briefing).

Second, King Mountain does not—and cannot—dispute its own violation of the parallel legal requirement that a "wholesale dealer" refrain from sending unstamped cigarettes to reservation cigarette sellers. *See* Tax Law § 471-e(3)(d); 20 N.Y.C.R.R. § 74.6(a)(3). That violation forms a sufficient basis on which to affirm the injunction. *See, e.g.*, *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (reiterating Court's power to "affirm on any basis for which there is a record sufficient to permit conclusions of law" (quotation marks omitted)).

Third, in any event, there is no difference between a "wholesaler" and "wholesale dealer" for purposes of the prohibition on shipping unstamped cigarettes to in-state recipients besides licensed stamping

agents. That much is apparent from the use of these similar terms interchangeably in overlapping proscriptions. The lack of a separate statutory definition of "wholesaler" (Br. at 40) undermines, rather than supports, King Mountain's argument, particularly when King Mountain does not propose a definition of "wholesaler" that would exempt its cigarette sales from the tax-stamping requirements at issue. A manufacturer (like King Mountain) may sell its products wholesale or retail, just as either manufacturers or their downstream distributors may be wholesalers. Indeed, in DTF's experience, "unstamped packages of cigarettes are introduced into New York State *primarily by manufacturers of cigarettes* and by dealers having exclusive distribution privileges." 20 N.Y.C.R.R. § 74.3(a)(1) (emphasis added). King Mountain's newfound reliance on an imagined distinction between "wholesalers" and "wholesale dealers" supplies no reason for overturning the injunction on King Mountain's noncompliant shipments of unstamped cigarettes into New York State.

2. The district court correctly rejected King Mountain's res judicata defense.

There is likewise no merit to King Mountain's argument that the injunction violates principles of claim preclusion. *See* Br. at 33–38.

King Mountain bases this argument on the prior favorable resolution of an administrative tax proceeding regarding a single shipment of approximately 8,000 cartons of unstamped King Mountain cigarettes that the State Police seized in December 2012. See *supra* at 21-22. DTF issued a notice of tax determination for $1,259,250 to King Mountain, which petitioned the Division of Tax Appeals for a hearing. That proceeding resulted in a so-ordered stipulation resolving the matter for no liability and dismissing the administrative proceeding "with prejudice." (A. 448.)

From these events, King Mountain wrongly concludes that res judicata bars "the entirety of" the State's Tax Law claim. Br. at 32. This Court gives the administrative tax dismissal the preclusive effect that a New York State court would. *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 265 (2d Cir. 1997). And although a stipulated dismissal with prejudice can give rise to preclusion, *see Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000), New York takes a pragmatic

approach to whether any administrative decision garners preclusive effect, *see Matter of Josey v. Goord*, 9 N.Y.3d 386, 390 (2007) (asking whether doctrine's application "would be inconsistent with the necessities of the case and the nature of [the agency's] functions"). Here, res judicata poses no obstacle to the State's claim for prospective relief under the Tax Law, for at least four reasons.

First, New York law absolutely prohibits the use in judicial actions of decisions rendered by Administrative Law Judges in tax proceedings. *See* Tax Law § 2010(5) ("Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state."). That fact alone disposes of King Mountain's res judicata defense, which depends on the "force" and "effect" of an A.L.J.'s order dismissing a tax proceeding. (*See* A. 448.) Because this decision cannot be introduced in state court for any purpose, the decision could not inform the outcome of a state court action.[17] By extension, the A.L.J.'s order cannot dictate

[17] *Cf. People v. Campbell*, 98 A.D.3d 5, 12 (2d Dep't 2012) (applying statutory provision barring admission of juvenile delinquency adjudications

the outcome of this proceeding on a theory of res judicata, which hinges on how a state court would treat the prior determination.

Second, even if the A.L.J.'s dismissal order could support claim preclusion, that decision would not bar the State's Tax Law claim in its "entirety." *See* Br. at 32. King Mountain's argument to the contrary misapprehends the limited scope of administrative tax proceedings. The proceeding here, as all are, was initiated by the taxpayer—King Mountain—to contest a specific penalty assessment in a notice of tax determination issued by DTF. The Tax Law delimits the matters that DTF may raise in response to such a petition, none of which includes levying additional assessments for other taxable events not mentioned in the underlying notice of determination. *See* Tax Law § 2006(5). It is not apparent how a claim for taxes for any cigarette shipment besides the December 2012 seizure "could have been raised" in a tax proceeding regarding that specific assessment. *Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 72 (2018). The district court therefore

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in later judicial actions to preclude their consideration in sex-offender registration proceedings).

correctly declined to construe the tax proceeding "as an umbrella that encompasses all claims regarding untaxed cigarettes," even those arising "out of a different underlying factual transaction."[18] (SPA 42.)

Third, the record contains undisputed proof of shipments of unstamped King Mountain cigarettes to, and purchases of such cigarettes on, New York Indian reservations between mid-2013 and 2014. The district court's opinion cites some of this evidence (SPA 4), as did King Mountain's brief in opposition to injunctive relief (A. 765–775). Under settled law, res judicata does not apply to these transactions, which postdate the amended complaint's February 2013 filing. *See, e.g.*, *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996) ("If the

[18] Moreover, tax claims based on controlled purchases by investigators—such as those in November 2011 and the spring of 2013—and one based on the seizure of cigarettes after an inspection at a public checkpoint are not sufficiently connected to be part of the same transaction for claim-preclusion purposes. *See, e.g.*, *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100–01 (2005) (claim preclusion requires events to be "related in time, space, origin, or motivation," such that unitary trial would "conform[] to the parties' expectations" (quotation marks omitted)). Requiring the State to have pursued all of these tax deficiencies at once, as King Mountain demands (Br. at 37–38) would have risked prematurely exposing an ongoing confidential investigation.

second litigation involve[s] different transactions, and especially subsequent transactions, there generally is no claim preclusion.").

Fourth, at any rate, res judicata cannot bar the issuance of an injunction in this case when that equitable remedy is unavailable in administrative tax proceedings. *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (holding that res judicata will not apply to claim for relief that was unavailable in prior action). An administrative tax proceeding in the Division of Tax Appeals "determine[s] the liability of [a] taxpayer for taxes" assessed in a particular deficiency notice. Tax Law § 478; *see also id.* § 2000. Directly contrary to King Mountain's assertion (Br. at 18), and as the district court observed (SPA 40), the State in this action has not sought to recover taxes on the specific cigarettes involved in the prior tax proceeding and December 2012 seizure. But whatever the monetary relief available for King Mountain's violations, the State always remained free to seek to restrain King Mountain's ongoing and prospective violations of New York law.

B. The Injunction Complies with the Dormant Commerce Clause.

As a rule, "Native Americans going beyond the reservation boundaries must comply with state laws as long as those laws are non-discriminatory and otherwise applicable to all citizens of that State." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014) (alterations and quotation marks omitted). King Mountain tries to sidestep this rule by arguing that application of New York's tax and certification laws to King Mountain's cigarette shipments discriminates against out-of-state Indian cigarette manufacturers, in violation of the "dormant" aspect of the U.S. Constitution's Commerce Clause. *See* Br. at 23–30. The district court appropriately rejected this claim of discrimination, and this Court should do the same.

Congress's power "[t]o regulate Commerce . . . among the several states," U.S. Const. art. I, § 8, impliedly prevents States from regulating in a way that "operates as a form of economic protectionism," *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007). A State violates the Commerce Clause by, in the absence of Congressional authorization, regulating purely extraterritorial commercial activity; discriminating

against out-of-state economic interests in favor of in-state interests; or burdening interstate commerce out of proportion to legitimate local needs. *See, e.g.*, *id.* at 192–94. The onus of proving a Commerce Clause violation rests on the challenger. *See USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995).

Here, King Mountain has no colorable claim of extraterritorial regulation and does not argue that state enforcement unduly burdens interstate commerce.[19] *See* Br. at 29–30 (calling interest-balancing "inapplicable"). Rather, King Mountain alleges solely "discriminatory enforcement" of the State's cigarette regulations (*id.* at 3, 20, 24, 28)—none of which facially distinguishes between manufacturers based in New York and elsewhere, *see* Tax Law § 471 (directing that "[a]ll cigarettes" bear tax stamps); *id.* § 480-b (requiring certifications by "[e]very tobacco manufacturer"); Executive Law § 156-c (stating that "no

[19] The district court rejected such an "impermissible burden" theory anyway, concluding that King Mountain had "failed to demonstrate an undue burden on interstate commerce" from state enforcement, given the State's legitimate goals of decreasing cigarette use, tax evasion, and cigarette fires. (SPA 74.) Indeed, the "balance of state, federal, and tribal interests in this area" allows "more room for state regulation than in others." *Milhelm Attea*, 512 U.S. at 73 (quotation marks omitted).

cigarettes shall be sold" without fire-safety certifications). The district court concluded that King Mountain had offered inadequate proof to sustain a claim of discriminatory enforcement. (SPA 72–74.) King Mountain does not come close to establishing that this finding was error, let alone the clear error required to annul the injunction.

No available authority supports the idea that allegedly unequal prosecutorial enforcement of public-health and safety laws can violate the Commerce Clause. *See* Br. at 26–30. To the contrary, the U.S. Supreme Court has "consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause," as long as state law draws no "geographical distinctions between entities that are otherwise similarly situated." *General Motors Corp. v. Tracy*, 519 U.S. 278, 306–07 & n.15 (1997). Nothing in Commerce Clause jurisprudence requires that King Mountain be granted *de facto* immunity from civil enforcement unless and until the State first neutralizes an indeterminate number of King Mountain's in-state competitors in the market for untaxed cigarettes.

In arguing otherwise, King Mountain principally relies on a pair of federal appellate decisions that involve, rather than civil enforcement,

the more mundane and ministerial matter of economic permitting. In *Walgreen Co. v. Rullan*, the First Circuit held that a Puerto Rico certificate-of-need law violated the Commerce Clause by allowing existing local businesses to object to the construction of new pharmacies nearby, thereby relegating proposed out-of-state competitors to "costly and time-consuming administrative" procedures to obtain a certificate. 405 F.3d 50, 56 (1st Cir. 2005). And in *Florida Transport Services v. Miami-Dade County*, the Eleventh Circuit held that Miami's permitting practices for stevedores impermissibly burdened interstate commerce, through authorities' "[r]ubber-stamping all renewal permit applications" by local incumbents "and automatically denying all new permit applications" by others. 703 F.3d 1230, 1261 (11th Cir. 2012).

To the extent relevant here, these prior decisions have required a demonstrable pattern of unequal regulation or other "discriminatory effect[]" that exposes the challenged law itself as a "protectionist regime." *Walgreen*, 405 F.3d at 56; *see id.* at 55–57 (concluding that certificate-of-need law "discriminate[d] against commerce" because it "excused an almost entirely local class of [existing] pharmacies from the certificate requirement" and gave those existing pharmacies "substantial

influence in the enforcement of the certificate requirement against proposed new pharmacies"); *see also Florida Transp.*, 703 F.3d at 1257–58 (noting "protectionist motivation" behind permitting scheme "clearly designed and intended to protect incumbent stevedores"). The threshold for that showing is appropriately high where, as here, a claim assails prosecutorial decisionmaking, which entails consideration of numerous discretionary "factors" that are "particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

King Mountain falls short of the kind of showing required by the decisions on which it relies. The State has not "effectively shut out" King Mountain from the New York cigarette market, or "made entry impossible." *Florida Transp.*, 703 F.3d at 1258. Similarly, the State has not subjected King Mountain to "costly and time-consuming" prerequisites for cigarette sales that local sellers need not endure. *Walgreen,* 405 F.3d at 56.

Nor did the district court clearly err in concluding that King Mountain has otherwise failed to "establish that the State is engaging in economic protectionism" through civil enforcement. (SPA 72.) Indeed, King Mountain has not made the barest showing of disparate treatment. The State's current tax regime for cigarettes took effect in the middle of

2011. *See Oneida Nation*, 645 F.3d at 158–63 (discussing statutory amendments and preceding enforcement policy). Since then, as the district court observed, the State has brought two enforcement cases against Indian-owned cigarette sellers operating from Indian reservations: (i) this action against King Mountain; and (ii) an action in the Western District of New York against a cigarette manufacturer, Grand River Enterprises, and its sole U.S. distributor, Native Wholesale Supply. (SPA 71.) And although King Mountain is based in Washington and Grand River in Canada, Native Wholesale Supply is based in New York and owned by a New York resident. (*See* Compl. ¶¶ 9–10, *New York v. Grand River Enters.*, No. 14-cv-910 (W.D.N.Y. Mar. 4, 2013), ECF No. 1.)

Given these facts, the district court reasonably concluded that the State's civil-enforcement practices do not amount to discrimination in favor of in-state Indian businesses.[20] (SPA 72.) Moreover, these two actions do not tell the whole enforcement story. With co-plaintiff the City

[20] 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 this State. *See* Br. at 24–25. As an investigator testified, he simply "zeroed in" (A. 389) on what he was told to buy in these investigations that ripened into enforcement suits (A. 385–386).

of New York, the State also has brought federal enforcement cases against common carriers United Parcel Service (UPS) and Federal Express (FedEx), to halt and remedy those carriers' delivery of unstamped cigarettes for sellers on New York Indian reservations. *See New York v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583 (S.D.N.Y.) (imposing liability after trial), *appeal filed*, No. 17-1993(L) (2d Cir. 2017); *City of New York v. FedEx Ground Package Sys., Inc.*, 91 F. Supp. 3d 512, 516 (S.D.N.Y. 2015) (denying in part and granting in part motion to dismiss). Featuring prominently in the case against UPS are two of that carrier's now-former clients, cigarette factories located on the St. Regis Mohawk Reservation in upstate New York. *See United Parcel Serv.*, 253 F. Supp. 3d at 643–47 (outlining evidence relating to these in-state manufacturers, Mohawk Spring Water and Jacobs Tobacco).

Consistent with the Commerce Clause, New York may treat in-state and out-of-state cigarette manufacturers "differently," if in-state commercial interests are not favored. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). The State's suing a cigarette manufacturer directly versus disrupting its distribution chain are merely different means of "enforc[ing] its laws against" those

manufacturers.[21] Br. at 28. That the State has disrupted the distribution chain of major in-state Indian cigarette traffickers further defeats any notion "that the State is attempting to benefit tribal or Indian-owned manufacturers located in New York State by tacitly permitting their non-compliance with" state law. (SPA 72–73.)

Finally, a May 2013 compact between the State and the Oneida Indian Nation governing cigarette taxation adds nothing to King Mountain's claim of discrimination. *See* Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison & the County of Oneida (Agmt.).[22] That agreement was reached under Tax Law § 471(6), which permits Indian nations or tribes to contract with the State to create a mutually acceptable regime of cigarette taxation that, if legislatively approved, will supersede the Tax Law's requirements. As King Mountain observes (Br. at 10), the Oneida agreement contains a provision allowing that Nation to purchase cigarettes directly from

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[21] Either method may be effective: as a King Mountain executive testified, for unexplained reasons, the company has ceased using FedEx for cigarette deliveries into New York State. (A. 1084.)

[22] *Available at* https://www.tax.ny.gov/pdf/publications/oin_settlement_agreement.pdf.

federally licensed manufacturers, without having to go through state-licensed stamping agents (*see* Agmt. § V.A.5). But that term is part of an integrated contractual framework that also requires the Oneida Nation to abide by minimum resale prices for cigarettes, inclusive of an excise-tax-like component payable to the Nation itself. *See id.* § V.A.1–6. By contrast, King Mountain is not an Indian nation, has not contracted with the State, does not adhere to a pricing floor, distributes its cigarettes to New York with the intent for resale without payment of anything resembling excise taxes, and uses the profits for private gain. The State is accordingly entitled to treat the Oneida Nation and King Mountain "differently." *See Grand River*, 425 F.3d at 169. In sum, the district court appropriately rejected King Mountain's unsupported claim of economic discrimination.

C. The Injunction Complies with the Indian Commerce Clause.

In the alternative, King Mountain now asserts—for the first time in this litigation—that the State's enforcement action also violates the Indian Commerce Clause and what King Mountain terms the "federal legal protections of Indian Nation to Indian Nation sales." Br. at 44; *see*

id. at 44–52. But the district court hardly erred by "ignor[ing] the Indian Commerce Clause" (*id.* at 45) when King Mountain never asserted such a defense to state enforcement below. Instead, at the summary judgment stage, King Mountain assured the district court that the scope of "Indian tribal immunity" from state regulation was not "relevant" to this case. (Dist. Ct. ECF No. 195-1, at 6.) And in opposition to injunctive relief, King Mountain raised only a Dormant Commerce Clause defense, which was rejected, and an overbreadth objection, which was accepted. (A. 730–744, 891–899.) Reliance on federal Indian law is forfeited.

Even if preserved, King Mountain's federal Indian law defense to state regulation would be meritless. In general, such a claim requires consideration of the relevant federal, state, and tribal interests, paying special attention to statements of Congressional intent. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980). In the context of cigarette sales, however, the balance has conclusively been struck. Although King Mountain's founder, Delbert Wheeler, testified that Indians are "not like normal people" and are "structured as untaxable" (A. 220), the U.S. Supreme Court has already rejected the idea that Indians are "'super citizens'" free to "trade in a traditionally

regulated substance free from all but self-imposed regulations," *Rice v. Rehner*, 463 U.S. 713, 734 (1983). Under settled precedent, 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. *See, e.g.*, *Colville*, 447 U.S. at 155–58; *Oneida Nation*, 645 F.3d at 165. King Mountain's cross-border cigarette shipments into New York meet that description. Moreover, there is no merit to King Mountain's assertion that federal law exempts its "Nation-to-Nation" sales of Indian-brand cigarettes from state taxation and regulation after the cigarettes have left the boundaries of the Yakama Reservation. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012) (holding that States may require tribes to purchase cigarettes from state-licensed wholesalers).[23]

In *Department of Taxation and Finance v. Milhelm Attea & Brothers*, the U.S. Supreme Court specifically upheld New York's predecessor tax and recordkeeping regime for on-reservation cigarette sales against a federal Indian law challenge. As King Mountain does

[23] Sales by King Mountain would not be "Nation-to-Nation" sales in any event because King Mountain is not an Indian nation or tribe.

here, the on-reservation wholesaler in *Milhelm Attea* claimed that federal policy, as embodied in the Indian Trader Statutes, 25 U.S.C. § 261 *et seq.*, prevented New York from enforcing its cigarette regulations on sales to purchasers on other Indian reservations. *Compare* 512 U.S. at 70, *with* Br. at 45–46. The Supreme Court rejected this claim of preemption, observing that New York's "interest in ensuring compliance with lawful taxes that might easily be evaded through" illicit purchases "outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Milhelm Attea*, 512 U.S. at 73. That conclusion controls.

King Mountain unsuccessfully attempts to distinguish *Milhelm Attea* as involving a "non-Indian cigarette wholesaler" (Br. at 49), in contrast to Indian-owned King Mountain. But *Milhelm Attea*'s holding did not depend on the identity, or lineage, of the person wishing to transport cigarettes to New York Indian reservations unburdened by state regulation. To the contrary, *Milhelm Attea* noted that "a State *could* impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members." 512 U.S. at 74 (emphasis added). And this Court has since upheld New York's current, "substantially

similar" tax regime against a challenge by in-state Indian tribes, given New York's "demonstrated need to prevent tax evasion by non-Indian purchasers." *Oneida Nation*, 645 F.3d at 169–70. The State's tax regime and certification edicts for cigarettes apply equally to an out-of-state supplier that is not an Indian tribe, but merely a company owned by an individual tribal member.

King Mountain has no legitimate interest in helping distant tribes and their members "market an exemption from state taxation" to yet other nonmembers. *See Milhelm Attea*, 512 U.S. at 72 (quotation marks omitted); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (noting that Indian tribes' sovereign interests do not extend to nonmembers' activities). Indeed, King Mountain's arguments ring especially hollow given the undisputed evidence that King Mountain deluged New York with unstamped cigarettes in lots of tens of thousands of cartons: quantities greatly outstripping the probable demand for cigarettes of the purchasers' Indian tribes. (A. 1021–1024.) In trafficking on this scale, King Mountain's "actions went far beyond the sort of conduct that might be in any area of ambiguity." *United States v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012).

Finally, King Mountain's cigarette trafficking gains no cover from the Yakama Nation Treaty of 1855. *See* Br. at 51–53. King Mountain relies on *United States v. Smiskin*, in which the Ninth Circuit construed the Yakama Treaty provision guaranteeing members' right to travel on public highways to preclude enforcement of "the State of Washington's requirement that individuals give notice to state officials prior to transporting unstamped cigarettes." 487 F.3d 1260, 1262 (9th Cir. 2007). But a treaty right to travel on public roads is not pertinent here. First and foremost, King Mountain fails to explain how the State's certification and tax-stamping requirements "condition" anyone's "right to engage in transport" of cigarettes. *See* Br. at 52. Rather, those requirements govern cigarette *sales*, or what King Mountain calls "Indian-to-Indian trade." *Id.* at 50. As the Ninth Circuit made clear in limiting *Smiskin*, "there is no right to trade in the Yakama Treaty." *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) (upholding enforcement of state escrow requirements on King Mountain's cigarette sales). In addition, King Mountain has consistently taken the position that it did *not* travel on New York's public roads with these cigarettes, which were instead under the control of an unaffiliated common carrier. *See* Br. at

40. The court below accepted that contention in holding that King Mountain could not itself be liable for excise taxes under Tax Law § 471(1), which imposes tax liability on persons who "possess[]" unstamped cigarettes for sale in New York.[24] (SPA 43.) While disagreeing with that ruling, the State does not pursue its monetary claim under the Tax Law on appeal. But whatever the ultimate merit of King Mountain's position that it did not possess these cigarettes while in transit, King Mountain cannot now turn around and contend that its own alleged treaty right to transport cigarettes has simultaneously been violated.

[24] Of note, King Mountain did not invoke, and the district court did not rely on, the statutory limitation on tax-related penalties applicable to "common or contract carriers" that are "engaged in lawfully transporting . . . unstamped packages of cigarettes." Tax Law § 481(2)(b). And that provision does not apply here: King Mountain neither is a common carrier nor was engaged in lawfully transporting unstamped cigarettes, which were not delivered to state-licensed stamping agents.

POINT II

THE DISTRICT COURT IMPROPERLY AWARDED SUMMARY JUDGMENT TO KING MOUNTAIN ON THE STATE'S PAIR OF FEDERAL STATUTORY CLAIMS

Although the district court appropriately entered injunctive relief against King Mountain under state law, the court erred in denying relief against King Mountain under federal law. The district court's grant of summary judgment to King Mountain on the State's claims under the federal PACT Act and CCTA turned on a misinterpretation of the relevant statutory provisions. Both of these rulings were reached as a matter of first impression, both contravened Congress's intent, both should be vacated, and further proceedings should be directed on the federal claims.

A. The PACT Act's Reporting Requirements Extend to King Mountain's Interstate Cigarette Sales.

In 2010, Congress enacted the PACT Act to strengthen existing laws targeting the increasingly widespread problem of trafficking in untaxed cigarettes. The PACT Act thus places a set of restrictions on what the statute calls "delivery sales" of cigarettes—i.e., those made via online, telephonic, or mail-order purchases, or delivered by common carrier. *See* 15 U.S.C. § 375(5). The PACT Act demands that the sellers

in such transactions ensure the collection of applicable state and local excise taxes; conspicuously label the packages with required information; and maintain detailed sale records, open to inspection by federal or state taxing authorities. *See id.* § 376a(a).

The State's cross-appeal concerns a discrete PACT Act requirement that promotes enforcement of the Act's other restrictions, but which the district court erroneously held not to apply to King Mountain's bulk sales of unstamped cigarettes. Specifically, the PACT Act requires "any person" who delivers cigarettes in "interstate commerce" to file reports with the federal government and with tax administrators of the relevant State, locality, and Indian country into which the deliveries are made. *See id.* § 376(a); *see id.* § 376(a)(1)–(2) (describing mandated reports, including initial registration statement and detailed information about each subsequent delivery).[25]

King Mountain undisputedly failed to file reports with DTF for any of the millions of unstamped cigarettes that King Mountain delivered

[25] As a corporate entity, King Mountain is a "person" to whom this reporting mandate applies. *See* 15 U.S.C. § 375(10) (defining "person" under PACT Act to include "corporation").

into this State after the PACT Act's effective date. (A. 332, 484.) The district court excused this abject reporting failure on the rationale that King Mountain's interstate cigarette shipments did not meet the PACT Act's definition of "interstate commerce." (SPA 20–25.) That conclusion strips the pertinent language of its context, conflicts with the PACT Act's explicit purposes, and ignores the available legislative history. A correct interpretation of "interstate commerce" under the PACT Act—one that makes King Mountain's interstate sales reportable—honors each of these sources of statutory meaning.

1. The PACT Act's language confirms that King Mountain's interstate sales are "interstate commerce" under the statute.

The aim of statutory interpretation is to ascertain legislative intent, for which the statute's language is the starting point. *See Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013). Here, the district court concluded that a "plain reading" of the PACT Act, including its specific definitional provisions, excluded King Mountain's interstate sales from the "interstate commerce" to which the reporting rule extends. (SPA 21.)

The district court's holding rested on a crabbed and acontextual view of the relevant provisions. The PACT Act defines "interstate

commerce" to mean "[i] commerce between a State and any place outside the State, [ii] commerce between a State and any Indian Country in the State or [iii] 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 further defines a State as "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," *id.* § 375(11); and defines "Indian Country" to include "all land within the limits of any" federally recognized Indian reservation, *see id.* § 375(7)(A) (incorporating definition from 18 U.S.C. § 1151).

The district court reasoned from the "separate definitions" of State and Indian Country that Congress could not have intended for the former (State) to "subsume[]" the latter (Indian Country) within the definition of "interstate commerce." (SPA 19–21.) Under that view, the phrase "commerce between a State and any place outside the State," as used in the PACT Act, 15 U.S.C. § 375(9)(A), would not encompass interstate sales that begin and end on an Indian reservation (SPA 21–22). And by that same logic, the PACT Act's reporting requirements would not attach

to King Mountain's cigarette shipments from the Yakama Reservation in Washington to recipients on Indian reservations in New York.

Such an interpretation fails, however, to read the relevant provisions as a coherent whole. When interpreting any statute, the language must be "viewed in context." *United States v. Colasuonno*, 697 F.3d 164, 173 (2d Cir. 2012). This principle requires considering "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Statutory language should thus not be construed "in a vacuum"; and a correct reading normally will align with "common sense." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014).

King Mountain's interstate sales are "interstate commerce" under the ordinary and well-accepted understanding of the phrase, which includes "[t]rade and other business activities between those located in different states." *Black's Law Dictionary* (10th ed. 2014); *see also* 18 U.S.C. § 10 (defining "interstate commerce" as "commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia"). That conclusion is reinforced by the accepted understanding that "an Indian reservation

is considered part of the territory of the State" where the reservation sits. *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (quotation marks omitted); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962).

The primary definition of "interstate commerce" in the PACT Act—"commerce between a State and any place outside the State," 15 U.S.C. § 375(9)(A)—tracks this standard conception. "Congress is presumed to legislate with familiarity of the legal backdrop for its legislation." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 114 (2d Cir. 2017); *accord United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014). Under this standard definition of "interstate commerce," as well as the reservation-in-state rule of *Hicks* and *Kake*, which were controlling when the PACT Act was adopted and are controlling now, King Mountain's deliveries from a location within the State of Washington to points outside of that State are reportable under the PACT Act.

The district court went 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. *See generally United States v. Davis*, 690 F.3d 127, 136 (2d Cir. 2012) (noting that statutory definition can supplant ordinary meaning of phrase).

Besides invoking the traditional definition of "interstate commerce," the PACT Act defines "interstate commerce" also to include two forms of *intrastate* activity: (i) "commerce between a State and any Indian Country in the State"; and (ii) "commerce between points in the same State," if the shipment passes "through any Indian Country." 15 U.S.C. § 375(9)(A). The PACT Act's further definitions of "State" and "Indian Country" aid in the construction of these provisions: a State is any "of the several States," *id.* § 375(11), and "Indian Country" includes all land within a recognized reservation, *see id.* § 375(7).

Congress could not have intended for these additional definitions to displace the judicial and commonsense understanding that Indian reservations are located within States. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 158 (2d Cir. 2012) (observing that even express "statutory definitions" may "yield to context"). In the PACT Act's second and third definitions of "interstate commerce," Congress augmented the reservation-in-state rule to *expand* the reporting requirement, to reach certain cigarette deliveries that never leave a single State—not to *contract* the requirement by excluding significant numbers of deliveries that cross state lines. Without those additional

prongs of the definition, within-state deliveries to, from, or passing through Indian reservations would not be "interstate commerce," and would not be reportable, under the PACT Act.

Rather than leaving large swaths of Indian commerce untouched, the language of the PACT Act's definitional provisions thus demonstrates Congress's intent to sweep in as much Indian-related cigarette commerce as possible. And King Mountain's contrary interpretation would lead to inexplicable results. Most glaringly, a transaction touching just one State and one Indian reservation would be reportable "interstate commerce," whereas a delivery traversing more than ten States and two Indian reservations—as King Mountain's shipments did—would not be. *See Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (statutes are to be construed to avoid internal inconsistencies and absurdities).

Indeed, the PACT Act's definition of "interstate commerce" refers to "Indian country *in the State*," 15 U.S.C. § 375(9)(A) (emphasis added), confirming the geographic reality that reservations exist within state boundaries. Moreover, the reporting requirements themselves contemplate that a delivery may simultaneously be made into a State *and* a locality

or Indian reservation in that State. In such cases, copies of the same reports must be "filed with [the] State" and also, as appropriate, with the "chief law enforcement officers of the local governments and Indian tribes operating within the borders of the State." *Id.* § 376(a)(3).

King Mountain's "either/or" view of States and Indian Country would nullify this language. And the PACT Act's separate definitions of State and Indian Country do not otherwise suggest that Congress intended for these naturally overlapping terms "to be mutually exclusive." *United States v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016) (reaching this conclusion in analyzing sentencing provisions). The definition of State does not itself carve out Indian reservations, a result that would have been easy enough to achieve. For example, the PACT Act's definition of a cigarette expressly "does not include a cigar," 15 U.S.C. § 375(2)(B), and that of a consumer expressly "does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer," *id.* § 375(4)(B).

If Congress had desired to grant "an extraordinary exemption" from the PACT Act's reporting requirement for shipments between different Indian reservations, then it could have, and would have, "ma[de] that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*,

474 U.S. 494, 501 (1986). The more so given Congress's "plenary authority" to regulate even on-reservation Indian affairs. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The terms of the PACT Act fashion no such reporting exemption. Given the long-settled law that States have the authority to tax transactions between members of different Indian nations or tribes, *Colville*, 447 U.S. at 161, Congress's failure explicitly to exempt reservation-to-reservation shipments from the PACT Act's requirements can mean only that the PACT Act does not exempt these shipments.

2. King Mountain's proffered interpretation of "interstate commerce" contravenes the PACT Act's history and purpose.

The PACT Act's history and purpose further reinforce that King Mountain's interstate sales are reportable "interstate commerce." *See, e.g.*, *Exxon Mobil Corp. v. Comm'r*, 689 F.3d 191, 199 (2d Cir. 2012) (consulting these sources to assess statutory meaning).

Prior to 2010, the federal Jenkins Act governed reporting of interstate cigarette deliveries. This statutory scheme mandated reports to States of taxable cigarette sales by "[a]ny person who sells or transfers for profit cigarettes in interstate commerce," with no separate definition

of "interstate commerce" or reference to Indian Country. 15 U.S.C. § 376 (eff. until June 30, 2010). As the legislative history confirms, the PACT Act was intended to "benefit State, local, and tribal governments," both "by expanding their authority to collect cigarette taxes through the Jenkins Act" and by "enhanc[ing] the existing reporting requirements." H.R. Rep. No. 111-117, at 23–25 (2009). In addition, Congress observed that "cigarette smuggling investigations" had been linked to "foreign terrorist organizations," highlighting a Hezbollah member's criminal conviction for buying "low-tax cigarettes from the [Seneca] Cattaraugus Indian Reservation in New York" and selling them "for a substantial profit" off-reservation. S. Rep. No. 110-153, at 4 (2007); *see United States v. Hammoud*, 556 F. Supp. 2d 710, 712 (E.D. Mich. 2008).

The PACT Act updated the Jenkins Act to require, among other things, that every remote cigarette sale comply with all applicable "State, local, tribal, and other laws," 15 U.S.C. § 376a(a)(3), and that cigarette deliveries in "interstate commerce"—defined to include even intrastate commerce entering or leaving any Indian reservation—be reported to the relevant state, local, and tribal officials, *see id.* § 376(a)(2)–(3). A correct interpretation of "interstate commerce," as encompassing deliveries between

Indian reservations, thus aligns with Congress's avowed intent of enhancing reporting requirements and deterring cigarette smuggling from Indian reservations. By contrast, King Mountain's interpretation diminishes the reporting requirement's utility by excluding a category of potentially problematic interstate shipments that would presumptively have been reportable under the Jenkins Act's earlier, ordinary usage of "interstate commerce."

If affirmed by this Court, the district court's constraint on the PACT Act would provide a roadmap for the transport of unstamped cigarettes with no attendant federal reporting obligations. Under this approach, unstamped cigarettes could be shipped from one Indian reservation to another until a final in-person, on-reservation sale. And a faraway purchaser (such as the Hezbollah member cited above) would not have to cross state lines to obtain unstamped cigarettes, but rather could have the cigarettes delivered to a nearby Indian reservation for easy pickup. None of these shipments would be "interstate commerce"; no reports would be necessary under the PACT Act; and the resulting tax evasion would be that much harder to detect. This example describes the setup that King Mountain used to evade New York's excise taxes for years. See

supra at 17-21; *cf. Abramski*, 134 S. Ct. at 2268–69 (rejecting proffered interpretation of gun-sale regulations that would allow buyers "easily [to] bypass the scheme").

In the PACT Act, Congress sought to "make it *more* difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities." Pub. L. 111-154, § 1(c)(4), 124 Stat. at 1088 (emphasis added). King Mountain's interpretation would alleviate that burden by gutting the registration and reporting requirements. And a statutory definition should not be applied in "mechanical fashion" where doing so would "create obvious incongruities" and "destroy one of the [law's] major purposes." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949); *see also United States v. Turkette*, 452 U.S. 576, 589 (1981) (declining to construe RICO to place core misconduct beyond law's scope, in conflict with its "declared purpose").

ATF—the federal agency responsible for implementing the PACT Act—has long taken the position that "transportation between two separate reservations would be in interstate commerce" under the Act. (A. 530–531 (Nov. 2010 memorandum guidance).) Delivering cigarettes in "interstate commerce" without first registering with the federal

government merits placement on the PACT Act "non-compliant list" (NCL): and common carriers are almost totally barred from delivering *any* packages for an NCL entity, effectively putting the company out of the shipping business until it achieves legal compliance.[26] *See* 15 U.S.C. § 376a(e)(2)(A). Besides depriving States of crucial information about cigarette deliveries, the district court's interpretation also undermines the NCL's utility as a federal enforcement tool. For these reasons, this Court should vacate the award of summary judgment to King Mountain on the State's PACT Act claims.

B. The State May Enforce the CCTA Against King Mountain.

The CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," 18 U.S.C. § 2342(a), and defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes," *id.* § 2341(2). In

[26] In September 2015, ATF notified King Mountain of its placement on the NCL due to inadequately reported reservation-to-reservation sales of unstamped cigarettes into the State of California. (A. 520–529.)

addition, the CCTA authorizes States to bring civil enforcement suits for "appropriate relief" in federal court, *id.* § 2346(b)(2), except that no such civil action may be brought "against an Indian tribe or an Indian in Indian country," *id.* § 2346(b)(1); *see id.* § 1151(a) (defining "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

The district court held the State's CCTA claim against King Mountain to fall within the bar on suit against "an Indian in Indian country." *Id.* § 2346(b)(1). Thus, the district court awarded summary judgment to King Mountain on this claim. (SPA 11–19.) That ruling was error, for two independent but related reasons. *One*, the "Indian in Indian country" exception benefits only individual enrolled tribal members, not business entities like King Mountain. And *two*, Congress intended the exception to extend only to such activity as would otherwise be protected from state regulation under established federal Indian law principles, which provide no refuge for King Mountain's cross-border cigarette shipments.

1. Business entity King Mountain is not an "Indian in Indian country" under the CCTA's exemption from civil suits by States.

The provision authorizing civil enforcement by States was added to the CCTA in 2006, as part of an amendment "to enable law enforcement to prosecute more" cigarette-trafficking "schemes." 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (statement of House sponsor). The CCTA's limitation on civil suits by States "against an Indian tribe or an Indian in Indian country," 18 U.S.C. § 2346(b)(1), was simultaneously added.

King Mountain indisputably is not itself an Indian tribe or a division or arm of an Indian tribe. (A. 207, 503.) Nor is King Mountain itself an enrolled tribal member (A. 353–354); as its CEO explained, "[o]nly individuals can be members of the Yakama Nation."[27] (A. 1099.) Rather, King Mountain is a for-profit company formed under tribal law. (A. 186, 223, 503.) And for that reason, King Mountain is not an "Indian in Indian Country" under the CCTA's civil-suit limitation.

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[27] *See also Muscogee (Creek) Nation v. Henry*, 867 F. Supp. 2d 1197, 1207 (E.D. Okla. 2010) ("[B]ecause a corporation is an entity separate from its shareholders, the fact that a tribal member owns all the stock of a corporation does not make the corporation a tribal member for sovereignty purposes."), *aff'd*, 669 F.3d 1159.

The Congress that amended the CCTA in 2006 imported the concept of an "Indian in Indian Country" from already existing provisions of Title 18 of the United States Code. Enacted in 1948, the Indian Major Crimes Act provides for exclusive federal jurisdiction over enumerated offenses committed by "[a]ny Indian" against "another Indian or other person . . . within the Indian country." 18 U.S.C. § 1153(a). Under that law, "federal courts retain their exclusive jurisdiction to try *individuals* for major federal crimes committed by or against Indians in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993) (emphasis added). This section "ordinarily is pre-emptive of state jurisdiction when it applies." *United States v. John*, 437 U.S. 634, 651 (1978). And in 1953, Congress restored a handful of States' "jurisdiction over offenses committed by or against Indians in the Indian country." 18 U.S.C. § 1162.

As in these preexisting statutes governing *criminal* prosecution, the CCTA's analogous reference to "Indian[s] in Indian Country" exempts certain individual tribal members from *civil* prosecution by States—thus preserving that power over individual liberty in the federal government, which bore initial, exclusive authority to enforce the CCTA. *See* 18 U.S.C. § 2346(a).

The district court erred in looking to decisions construing the word "person" to include corporations as "support [for] the notion that King Mountain is an 'Indian' for purposes of the CCTA." (SPA 12–13 (citing, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014)). To begin with, "where a phrase in a statute appears to have become a term of art," as is the case here, "any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990). But even viewed piecemeal, Congress's chosen language defeats the district court's analogy.

However "akin" the word "Indian" is to "person" (SPA 15), the CCTA's civil-suit limitation does not apply to "persons" in Indian Country. The exemption references "an Indian"—a term that Congress repeatedly has defined elsewhere to mean an individual enrolled "member of an Indian tribe." 25 U.S.C. § 1801(a)(1).[28] By contrast, Congress has used the phrase "Indian-owned business" to refer to a business or entity

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[28] *Accord, e.g.*, 16 U.S.C. § 1722(5); 18 U.S.C. § 1159(c)(1); 20 U.S.C. §§ 80q-14(7), 1401(12), 4402(4), 7491(3); 25 U.S.C. §§ 305e(a)(1), 1903(3), 2101(1), 2511(3), 3103(9), 3703(8), 4103(10), 5304(d); 29 U.S.C. § 705(19); 42 U.S.C. §§ 3002(26), 9911(e)(2), 12291(a)(13), 12511(19); 43 U.S.C. § 2401(3).

owned or operated by Indians. *See, e.g.*, 25 U.S.C. § 4302(5). The same statutes often expressly distinguish between an "Indian"—i.e., "a person who is a member of an Indian tribe"—and an "Indian-owned business"—i.e., "an entity organized for the conduct of trade or commerce," with a threshold level of Indian ownership. 25 U.S.C. § 4302(2), (5); *see* 25 U.S.C. § 1452(b), (e). That Congress knows the difference between an "Indian" and an "Indian-owned business" further undermines any alleged entitlement of King Mountain, an Indian-owned business, to a liability exemption that applies solely to "an Indian." 18 U.S.C. § 2346(b)(1).

Indeed, King Mountain would not be an "Indian" even under the laws of the tribe of the company's founder, Delbert Wheeler. (A. 186–187, 220, 232.) Section 2.01.07 of the Yakama Nation Law & Order Code provides that "an Indian shall be defined as" (i) an enrolled member of an Indian tribe (including the Yakama Nation); or (ii) someone who "is considered an Indian by the traditions, customs, culture and mores of the Yakama Nation." (A. 553.) The record contains no evidence that King Mountain meets any of the criteria to be a Yakama "Indian" under the Yakama Nation's own laws. *Cf. Poodry v. Tonawanda Band of Seneca*

Indians, 85 F.3d 874, 897 (2d Cir. 1996) (noting Indian tribes' presumptive right "to determine questions of tribal membership").

2. King Mountain's shipments to nonmember, off-reservation purchasers do not qualify for the CCTA's civil-suit exemption.

Even if a business entity could be an "Indian in Indian country" for purposes of the relevant CCTA exemption, that provision still would not shield King Mountain from this civil suit by the State.

As the legislative history makes clear, the CCTA's bar on civil suits by States "against an Indian tribe or an Indian in Indian country," 18 U.S.C. § 2346(b)(1), was intended at most to preserve existing tribal sovereign protections against state regulation. And those principles, which the CCTA honors, have long allowed States to enforce their tax laws on "sales by Indians to nonmembers of the Tribe," particularly when the purchasers are located "off-reservation." *Colville*, 447 U.S. at 156–57; see also *supra* at 52-58.

In the absence of Congressional authorization, Indian tribes are generally immune from nonconsensual civil lawsuits by States. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). And, as relevant here, "Indians and Indian property on an Indian reservation

are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973) (quotation marks omitted).

At both the CCTA's inception and amendment, Congress recognized the possible effect on these tribal sovereignty principles of federalizing state tax enforcement, and intended for the CCTA not to override any otherwise existing sovereign protections against state regulation. A 1978 Conference Report noted concerns that the CCTA might "inadvertently extinguish[] rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of State taxation." H.R. Rep. No. 95-1778, at 9 n.7 (1978). But the report clarified that "nothing in" the CCTA was "intended to affect" any "legally established rights" against state taxation "held by any Indian or Indian tribe." *Id.* Congress so ensured by defining "contraband cigarettes" to mean those lacking "applicable" state tax stamps. *See id.*; 18 U.S.C. § 2341(2). And the CCTA also made clear from the start that "[n]othing in" the law "shall be deemed to abrogate" the "sovereign immunity of a State or local government, or an Indian tribe." 18 U.S.C. § 2346(b)(2).

A similar concern arose again decades later when Congress amended the CCTA to vest enforcement authority in States, which some commenters feared might "reverse[]" established "Federal Indian policy" in the area. 151 Cong. Rec. H6284 (daily ed. July 21, 2005) (statement of House sponsor). In response to that concern, the CCTA's drafters inserted the provision at issue here, barring civil enforcement by States "against an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). As the legislative history reveals, this "modification" addressed "question[s] of tribal sovereignty," 151 Cong. Rec. H6284 (statement of Rep. Sensenbrenner), by ensuring that the 2006 CCTA amendment would have "*no impact* on tribal sovereignty," *id.* (statement of Rep. Cantor) (emphasis added). Because the "entire legislative history" of the 2006 amendment "is confined to the [floor] debate," these statements "of individual legislators carry substantial weight, especially when they reflect a consensus as to the meaning and objectives of the proposed legislation." *Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 169–70 (1985).

Congress thus intended two results in prohibiting civil CCTA enforcement suits by States against (i) "an Indian tribe," or (ii) "an Indian

in Indian country." 18 U.S.C. § 2346(b)(1). The former language ("Indian tribe") confirmed that vesting CCTA enforcement authority in States did not constitute Congressional authorization for States to sue tribes themselves. *See Kiowa*, 523 U.S. at 758. By contrast, the latter language ("Indian in Indian country") ensured 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." *Milhelm Attea*, 512 U.S. at 64. In other words, Congress sought to avoid future attempts to use the CCTA to recover state taxes on cigarette sales, made on-reservation to enrolled tribal members, that would previously have enjoyed Indian sovereign protection from state taxation. *See, e.g.*, *Bracker*, 448 U.S. at 144–45 (noting that statements of Congressional policy may broadly inform States' ability to regulate on-reservation Indian affairs); *McClanahan*, 411 U.S. at 170–71. King Mountain's massive sales of unstamped cigarettes into New York did not enjoy such protection from state taxation before the CCTA's amendment, and they do not enjoy protection from CCTA enforcement now.

This construction does not, as the district court suggested, "conflate the 'Indian in Indian country' exemption with the concept of sovereign immunity." (SPA 15.) Rather, the limitation in § 2346(b)(1) may apply "in both circumstances" (SPA 17), with each prong having independent effect. King Mountain is not an "Indian tribe." 18 U.S.C. § 2346(b)(1). And for these purposes, King Mountain's cigarette deliveries no longer were "*in* Indian country," *id.* (emphasis added), once these shipments exited the Yakama Reservation. Because New York has long been able to tax such cigarette transactions, they are civilly actionable in a suit by the State under the CCTA.[29]

[29] Insofar as King Mountain may raise other defenses to CCTA liability, those arguments are properly left for the district court on remand and may, if necessary, be addressed in any cross-reply brief.

CONCLUSION

This Court should affirm the award of permanent injunctive relief against King Mountain under state law, vacate the grant of summary judgment to King Mountain on the two federal statutory claims, and remand the case for such further proceedings on the federal claims as may be necessary.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Max Kober, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 15,933 words and complies the typeface requirements of Rule 32(a)(5)-(6), and length limits of Local Rule 28.1.1.

/s/ Max Kober