IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE ex rel. XAVIER BECERRA as ATTORNEY GENERAL, Plaintiff-Respondent, **v.** **ARDITH HUBER, individually and dba HUBER ENTERPRISES,** Defendant-Appellant.	Case No. A144214

Humboldt County Superior Court, Case No. DR110232
Hon. W. Bruce Watson, Judge

PEOPLE'S SUPPLEMENTAL REPLY BRIEF

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SUMMARY OF ARGUMENT

The People's brief retains the three-question structure posed by the Court for supplemental briefing. However, the issues and arguments have become convoluted. On the one hand, the position of the parties has moved closer, specifically regarding Public Law 280 (PL 280) and whether any federal statute prohibits or mandates state subject matter jurisdiction. On the other, Appellant Huber introduced a new argument regarding subject matter jurisdiction, one that envelopes both subject matter jurisdiction (the focus of the Court's rehearing order) and regulatory jurisdiction (a major focus of initial briefing). In an attempt to provide greater clarity, the People provide this introduction.

The Court's first question concerns whether Huber's conduct was on- or off-reservation and whether state court adjudication would infringe under *Williams v. Lee*. In their opening supplemental brief, the People recited undisputed facts that Huber's conduct was not entirely on-reservation, reviewed court decisions under similar facts that concluded that such conduct was not entirely on-reservation and did not infringe, and pointed out that Huber cited no authority or facts to the contrary.

Huber's supplemental brief makes a new argument about subject matter jurisdiction. It is, simply stated and to the extent the People understand it, that if a state lacks regulatory jurisdiction then a state court's exercise of jurisdiction in an enforcement action necessarily infringes under *Williams*. Quite apart from the fact that Huber points to no authority in support of this approach, her argument fails because she has not satisfied her burden to demonstrate that the state lacks regulatory jurisdiction. For this reason, even though question one concerns subject matter jurisdiction, in the discussion below, the People address the issue of regulatory jurisdiction under *White Mountain Apache Tribe v. Bracker*, as well as the Court's question regarding subject matter jurisdiction.

The People show that although Huber previously cited *Bracker*, she did not do so to argue that *Bracker* applied, and did not even attempt do a *Bracker* balancing analysis. The People then point out that every court to consider the issue has concluded that the special restrictions on state regulatory jurisdiction (set forth in *Bracker*) do not apply to conduct that extends beyond a defendant's reservation, and that conduct such as Huber's does so extend for the purpose of deciding whether *Bracker* applies. In an abundance of caution, the People also establish that, even if *Bracker's* dual barriers to state regulatory jurisdiction – infringement and preemption – did apply here, the state laws at issue here would not run afoul of them. As to infringement, numerous courts have held that enforcing laws that simply prevent the sale of contraband in the State (i.e., preventing Indians from marketing an exemption from state law) does not infringe on tribal rights to self-government. As to preemption, the state laws at issue here prevail under the balancing test required by *Bracker*. The state interests in enforcement are especially strong because they involve health and safety and because the effects of Huber's evasion of state law extend far beyond the boundaries of her reservation. Federal laws favor state regulation of tobacco products. The tribal interest is weak because there is no incompatibility between the tribal tobacco ordinance and the state laws at issue. (Actually, Huber does not even cite the tribal ordinance.) The People then show that Huber's brief and summary judgment papers lack evidence or authority to the contrary.

The Court's second question concerns whether the state laws are criminal/prohibitory or civil/regulatory for the purposes of application of PL 280. The People maintain that these statutes are criminal/prohibitory in this context, and that the Court has subject matter jurisdiction on this basis (including over the unfair competition law claim), as explained in their opening supplemental brief. However, even without looking to PL 280, the

fundamental basis for state court jurisdiction is that Huber's conduct was off-reservation and that enforcement of the state laws neither is foreclosed by an act of Congress nor would not infringe on Indian rights to self-government, per *Williams v. Lee*. In supplemental briefing Huber contends that due process requires a remand so that she can gather evidence to enable her to re-do her argument that the laws are civil/regulatory. The People give numerous reasons why Huber's argument fails. For instance, Huber did in fact raise the regulatory versus prohibitory issue below, but did not follow through and argue it (which was her burden). The People also show there is no violation of due process and that even if the matter was remanded Huber could not succeed.

The Court's third question concerns whether the issue of the state's seizure power need be resolved. The People argued – and maintain – that it should not and cannot. That is because (a) every issue that is properly before the Court (Huber's affirmative defenses of subject matter and regulatory jurisdiction) can be decided without considering the seizure issue, (b) the issue is not ripe, and (c) a ruling would be based on speculation rather than facts. Huber responds that the Court may address this issue because there are certain exceptions for issues that have become moot. That argument is misplaced, because this is not a case where a ripe issue became moot during proceedings. The seizure issue never ripe in the first place, just as it was not ripe in *Colville* (the only court to consider this issue).

With this roadmap in hand we turn to examine, once again, the first question.

I. IS IT CORRECT, AS RESPONDENT SUGGESTS, THAT NONE OF THE CLAIMS IN THIS CASE "ARISE IN" INDIAN COUNTRY WITHIN THE MEANING OF 28 U.S.C. SECTION 1360; THAT, AS A RESULT, THE EXERCISE OF ADJUDICATIVE JURISDICTION IN THIS CASE DOES NOT INFRINGE INDIAN SOVEREIGNTY UNDER *WILLIAMS V. LEE* (1959) 358 U.S. 217; AND THAT, IN THE ABSENCE OF SUCH AN INFRINGEMENT, STATE COURTS ARE FREE TO EXERCISE THEIR GENERAL JURISDICTION OVER CIVIL CASES IN WHICH INDIANS ARE PARTIES?

In response to the Court's question, Huber appears to makes two basic contentions: (1) that the causes of action in this case arose on her reservation because the effects of enforcing the laws at issue would be felt there, and (2) that this Court's exercise of jurisdiction would infringe on tribal self-government because it would be enforcing laws the application of which is preempted by federal law and would infringe on tribal rights (i.e., that because the state lacks regulatory jurisdiction, the Court necessarily lacks subject matter jurisdiction.)

The first contention is asserted in a single sentence without citation to authority: that a cause of action arises where enforcement effects might be felt. (Appellant's Opening Supp. Brf. (Huber Brf.), p. 10.) We know of no court that has so held. (Cf. *Hillard v. TABC, Inc.* (C.D. Cal., Dec. 18, 2017, No. CV 17-4434 FMO (SSX)) 2017 WL 6940540, at *3 [in California, tort cause of action arises where injury occurs].)

In any event, the relevance of the first question posed by the Court – whether the causes of action arose on the reservation for the purposes of 28 U.S.C. § 1360 (PL 280) – has diminished. The parties now agree that regardless of whether PL 280 authorizes jurisdiction, it does not prohibit jurisdiction where that exercise does not run afoul of the test in *Williams v. Lee.* (See, e.g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.* (1984) 467 U.S. 138, 150 [PL 280 intended only to

expand state jurisdiction].) So the crux of the court's first question really is *Williams.*

Huber's new argument is that *Williams* infringement follows automatically if a state lacks regulatory jurisdiction. However, this too has no support in the law or the record. We are aware of no court that has held that state courts lack adjudicatory jurisdiction whenever the state lacks regulatory jurisdiction under *Bracker*. Certainly Huber cites none. However, even if Huber were correct, the outcome of this appeal would be the same. As detailed below, whether evaluated in terms of infringement, preemption, or sovereignty, every court to have considered schemes to market contraband from a base on an Indian reservation has concluded both that state courts have subject matter jurisdiction over the action and that states have jurisdiction to regulate such conduct.

Further, Huber did not meet her burden below or on appeal. Her characterization of the state laws at issue as a "vast and invasive regulatory regime" (Huber Brf., p. 55) and use of adjectives to describe the alleged effects of the state laws on Indians ("intrusive" "egregious" "procrustean" "devastating") do not satisfy her burden to support her case with reasoned argument and citations to relevant law and the record. Huber has this burden as a party moving for summary judgment, a party asserting affirmative defenses, and, as appellant. Finally, even if these fatal defects are put aside, Huber's contentions fail on the merits. It is to a consideration of the merits that we turn.

A. Regulatory Jurisdiction

It makes sense to begin with subject matter jurisdiction, both because that is the focus of the Court's question and because that jurisdiction determines the Court's authority to decide any other issue, including regulatory jurisdiction. Huber, however, changed her position and argues that the Court lacks subject matter jurisdiction because it lacks regulatory

jurisdiction. Although the People disagree with that premise, and although Huber cites no court that has adopted her approach, the People do not argue the point as it makes no difference to the outcome of this appeal. For that reason we begin with regulatory jurisdiction.

The general rule regarding when state law may be applied to on-reservation conduct was articulated in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142: There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [Citations.] Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' [Citation.]."[1] Huber contends that one or both of these barriers applies here, therefore the State lacks regulatory jurisdiction, and consequently the Court lacks subject matter jurisdiction. (Huber Brf., pp. 9-21.)

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[1] More recently, the Supreme Court has indicated that infringement is not an independent barrier and that the court's entire analysis should be confined to preemption. "Our cases reveal a "'trend ... away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.' " [Citations.] Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to "pre-empt" state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read. . . . Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*Three Affiliated Tribes, supra,* 476 U.S. at p. 884.) Because the state has regulatory jurisdiction even under the two-part test, because infringement remains a part of the *Williams* standard for subject matter jurisdiction, and because no California court has expressly held that *Three Affiliated Tribes* now controls, the People argue both here.

Huber, however, has not, does not, and cannot show that either of *Bracker's* barriers applies to this action.

1. *Bracker* does not apply

To establish that State regulatory jurisdiction is barred by one of *Bracker's* barriers, Huber first must show that one or both of those barriers actually applies. Huber, however, does not make such a showing, either below or on appeal. This failure is sufficient for the Court to reject Huber's contention. "'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' [Citation.]." (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 683; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969 ["a defendant that advances an affirmative defense to the plaintiff's claims bears the burden of proof on the defense"]; *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564–565 [plaintiff does not have initial burden to disprove affirmative defenses].)

Huber would have had considerable difficulty in trying to show that *Bracker's* restrictions on regulatory jurisdiction apply here. That is because every court to consider similar factual situations has concluded that conduct like Huber's is not on-reservation conduct to which *Bracker's* restrictions apply, notwithstanding that her business was headquartered within an Indian reservation.

For example, Oklahoma sued Native Wholesale Supply Company, a business operating on an Indian reservation in New York, for selling and shipping off-directory cigarettes to a tribe in Oklahoma (the Muscogee Creek Nation), in violation of Oklahoma's directory statute. Native Wholesale argued, as Huber does here, that it was an Indian operating on a reservation, and that state regulatory jurisdiction was barred by *Bracker.* In evaluating application of *Bracker,* the Oklahoma Supreme Court concluded that "[e]ven accepting for the sake of argument that Native Wholesale

Supply's transactions with Muscogee Creek take place on the [reservation] because the business is located and accepts orders there, the Company's argument that enforcement of the [Directory Statute] against it [is preempted] is clearly wrong." (*State ex rel. Edmondson v. NWS* (Okla. 2010) 237 P.3d 199, 216 ¶ 44.)

The court stated that "Native Wholesale Supply's transactions with Muscogee Creek extend beyond the boundaries of any single 'reservation,'" explaining that Native Wholesale imported the cigarettes from sources not on its reservation; received orders on its reservation from buyers on other reservations; and shipped the contraband cigarettes to places not on its reservation. (*Id.*, ¶ 45.) The court concluded: "The entire process comprising these sales thus takes place in multiple locations both on and off different tribal lands. This is not on-reservation conduct for purposes of Indian Commerce Clause jurisprudence, but rather off-reservation conduct . . . . Therefore, Oklahoma's enforcement of the [Directory Statute] against Native Wholesale Supply passes muster without even evaluating it under the *Bracker* interest balancing test." (*Ibid.*, citing *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-49 ["Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State".].)

Huber's business operations in California entailed the same sort of off-reservation conduct that the Oklahoma court held rendered *Bracker* inapplicable. She purchased and imported to her reservation-based business contraband cigarettes from sources outside her reservation; she accepted orders from and sold these cigarettes to off-reservation buyers; and she herself transported the cigarettes to those off-reservation buyers. (CT 3-4 [UF 10-15; 93]; CT 10, 14 [UF 47, 65-69].) She went further than the defendant in Oklahoma by advertising to entice buyers to her

reservation. (CT 9-10 [UF 39-43]. For about half the time, she ran her business from Hawaii, not from the reservation. (CT 899:13-21.) This is not on-reservation conduct subject to *Bracker's* restrictions, but off-reservation conduct to which all non-discriminatory state laws apply.

The Idaho Supreme Court, in an action involving the same sort of scheme came to an identical conclusion, holding that "[defendant's] activities in this case are not limited to a single reservation, or even several reservations. Thus, we hold that [defendant's] importation of non-compliant cigarettes into Idaho is an off-reservation activity and is therefore not subject to a *Bracker* analysis." (*State ex rel. Wasden v. Native Wholesale Supply Co.* (Idaho 2013) 312 P.3d 1257, 1267, cert. den. sub nom. *Native Wholesale Supply Co. v. Idaho* (2014) 134 S.Ct. 2839.)

The Maine Supreme Court, Idaho Supreme Court, and Oregon Court of Appeals reached the same conclusion on facts that are not materially different from those that obtain here. (See *Dept. of Health & Human Services v. Maybee* (Me. 2009) 965 A.2d 55, 57; *State ex rel. Wasden v. Maybee* (Idaho 2010) 224 P.3d 1109, 1123-1124; *State v. Maybee* (Or. Ct. App. 2010) 232 P.3d 970, 977.)

Huber's supplemental brief does not acknowledge any of these cases. Instead, she argues only that the effects of any enforcement action against her will be felt on the reservation, and therefore that the causes of action at issue here arose on the reservation. (Huber Brf., p. 10.) This argument fails for multiple reasons. She cites no facts in the record to support her claims about enforcement effects, fails to acknowledge the undisputed and contrary facts about her business operations, and fails to cite any authority for her conclusion that where a cause of action arises (or where *Bracker* is

applicable) depends on where the effects of enforcement will be felt.[2] Such failures are fatal. (See *Ramos, supra,* 242 Cal.App.4th at p. 683; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [if "party fails to support an argument with the necessary citations to the record . . . the argument [will be] deemed to have been waived."].)

Huber then criticizes the trial court for concluding that it did not need to do a *Bracker* analysis, claiming that the trial court applied some sort of "procrustean litmus test." (Huber Brf., p. 57.) But the trial court's conclusion was not a mistake. Rather, it was consistent with the cases and reasoning described above. The People argued that *Bracker* is inapplicable, based on the same argument and authority cited above (see, e.g., CT 48-49 [People's summary judgment brief, citing Oklahoma *Edmondson* case].) The trial court agreed. Huber had every opportunity to argue the point in the trial court and did not do so.

Huber tries to confuse the issue by claiming that the trial court misapplied the rule that, when applying *Bracker* and evaluating state regulation under its preemption prong, off-reservation effects constitute a factor that weighs in favor of state jurisdiction. (Huber Brf., pp. 57-58.) That is not so. The trial court held that it did not have to reach the balancing test because *Bracker* did not apply in the first place. In any event, this Court reviews the trial court's judgment, not its reasoning, and can affirm on any ground supported by the record. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.) It should do so.

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[2] Cf. *Tokuzo Shida v. Japan Food Corp*. (1960) 185 Cal.App.2d 443, 448 (1960) [holding that tort actions generally arise where the injury occurs].) Here, to the extent that a statutory violation can be analogized to a tort, the injury is to the People of the State of California, throughout the State. (See Health & Saf. Code, § 104555 [purpose of state tobacco laws]; 2005 Cal. Legis. Serv. Ch. 633 (A.B. 178), § 1 [legislative findings re Fire Safety Act].)

It bears emphasizing that Huber not only had the opportunity to argue that the trial court should have done the two-part analysis set forth in *Bracker*, she had the burden to produce evidence and argument to show that those barriers apply, or lose the defense. (*Seltzer, supra,* 182 Cal.App.4th at p. 969 ["a defendant that advances an affirmative defense to the plaintiff's claims bears the burden of proof on the defense"].) Indeed, even if the People had not themselves argued below that *Bracker* is inapplicable, Huber's failure to demonstrate that *Bracker* does apply is fatal to her defense. (See *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564–565 [plaintiff does not have initial burden to disprove affirmative defenses].)

In sum, Huber's conduct was not on-reservation conduct to which *Bracker* must be applied. Instead, it was off-reservation conduct that is per se neither infringing nor preempted, and to which "non-discriminatory state law otherwise applicable to all citizens of the State" applies. (*Mescalero Apache, supra,* 411 U.S. at pp. 148-149.) The trial court correctly concluded that the defense Huber did raise regarding regulatory jurisdiction failed.[3] Huber gives this Court no reason to come to a different conclusion.

2. Even if *Bracker* did apply, state law would be applicable to Huber's conduct

Even if Huber's conduct were deemed to be on-reservation conduct subject to the preemption/infringement *Bracker* barriers, the conclusion would not change. Application of the laws at issue here is neither preempted by federal law nor does it infringe on tribal rights. Every court that has evaluated a state's regulatory authority over contraband cigarette sales in contexts similar to this action has concluded that such regulation is not barred by either *Bracker* prong: see *People ex rel. Becerra v. Rose*

[3] As understood by the People, Huber argued that PL 280 preempted everything, therefore *Bracker* did not apply.

(2017) 16 Cal.App.5th 317, 325–329, review denied (Jan. 17, 2018); *People ex rel. Brown v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571; *Edmondson, supra,* 237 P.3d at p. 216 ¶ 46; *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134; *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.* (1994) 512 U.S. 61, 72-78.)

The bases for these decisions follow:

a. Preemption barrier

State law applied to conduct on Indian reservations may be preempted under "familiar principles of preemption." (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334.) These familiar principles have as their touchstone whether in enacting a specific federal law Congress intended to preempt state law, either expressly or impliedly. (See *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Ops., Inc.* (2007) 41 Cal.4th 929, 936.) Huber makes no claim that this type of preemption applies.

Bracker, however, held that with respect to application of state law to on-reservation conduct "federal preemption analysis [also] involves balancing 'state, federal, and tribal interests at stake.'" (*Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 248, quoting *Bracker, supra,* 448 U.S. at p. 145; see also *Rose, supra,* 16 Cal.App.5th at pp. 325-329 [same].)

Although Huber now argues that *Bracker* applies, she did not carry her burden below. She offered no evidence or argument concerning the balance of interests that *Bracker* requires and she does little more in this Court.

The State's interests are set forth in the statutes themselves. The Legislature determined that the Fire Safety Act is important to protect the health and safety of California citizens, finding that, "Cigarettes are the

leading cause of fire deaths in the United States each year, claiming 1,000 lives and causing nearly 2,000 injuries and nearly four hundred million dollars ($400,000,000) in direct property damage," and that the Act is intended to reduce these harms. (Stats. 2005, c. 633 (A.B.178), § 1(a).) Similarly, the Directory Statute helps reduce the harms caused by smoking because, among other things, it bars the sale of cigarettes made by manufacturers that do not comply with Health and Safety Code section 104555 et seq. That section imposes certain financial obligations on cigarette manufacturers, which make cigarettes more expensive in California. (See Rev. & Tax. Code, § 30175.1, subd. (b); Health & Saf. Code, § 104555 [findings regarding health effects of smoking and benefit of increasing costs].) The harms caused by cigarettes, exacerbated by the availability of low-cost cigarettes, have been confirmed by the Surgeon General and the Centers for Disease Control. (See, e.g., U.S. Dept. of Health and Human Services (2014) *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* ("2014 SG Report"), Executive Summary, available at http://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf [last visited Aug. 6, 2016] ["among the greatest public health catastrophes of the century"]; U.S. CDC, *Morbidity and Mortality Weekly Report,* March 30, 2012 / 61(12); 201-204, p. 1.)[4]

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[4] The Court may take judicial notice of these facts, and the People so request. These facts are noticeable because they are "generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute" (Evid. Code, § 451, subd. (f)), "of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" (Evid. Code, § 452, subd. (g), and/or are "not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code, § 452, subd. (h). (See, e.g., *Barker v. Brown &*

These are indisputably important state interests.[5] More than that, because the sales off the reservation and to non-members are off-reservation effects they add especial weight to the State's interests in the *Bracker* balance. (See *Nevada v. Hicks* (2001) 533 U.S. 353, 362 [state interests strongest in *Bracker* balance when effects are off-reservation]; *Rose, supra,* 16 Cal.App.5th at p. 328 [finding state interest in enforcing these laws to protect health and safety outweigh all federal and tribal interests]; *People ex rel. Brown v. Black Hawk Tobacco, Inc*. (2011) 197 Cal.App.4th 1561, 1571 [same]; *Edmondson*, *supra*, 237 P.3d at p. 216 [same].) The People summarized those off-reservation effects in their opening supplemental brief. (See People's Supplemental Brief [dated Nov. 15, 2018] ("CA. Supp. Brf."), p. 15 & n. 3 [comparing reservation

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Williamson Tobacco Corp. (2001) 88 Cal.App.4th 42, 51 ["it has been a matter of common knowledge since at least 1965 that cigarette smoking is not healthy"]; *Rivera v. Philip Morris, Inc.* (9th Cir. 2005) 395 F.3d 1142, 1152 [adverse health effects of smoking were common knowledge as early as 1969; *Hollar v. Philip Morris Inc.* (N.D. Ohio 1998) 43 F.Supp.2d 794, 807 [taking judicial notice that smoking is harmful, and that this is not a fact question for a jury]; *Ayala v. Philip Morris, Inc*. (D.P.R. 2003) 263 F.Supp.2d 311, 317-18 ["Courts throughout the United States have declared that the hazards of smoking are 'common knowledge,'" citing cases]; *Samuels v. Terrell* (W.D. La., July 6, 2015, No. 2:13-CV-1978) 2015 WL 4092868, at *5, fn. 6 [taking judicial notice of truth of Surgeon General report that there is no safe level of exposure to cigarette smoke under Federal Rule of Evidence 201]; *Reynolds v. Bucks* (E.D. Pa. 1993) 833 F.Supp. 518, 520, fn. 5 [taking judicial notice of truth of Surgeon General report statements regarding health effects of smoking]; *Gent v. CUNA Mut. Ins. Society* (1st Cir. 2010) 611 F.3d 79, 84, fn. 5 [holding that facts concerning Lyme disease in CDC reports and on CDC web site were judicially noticeable under Federal Rule of Evidence 201(b) because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"]; *Holifield v. UNUM Life Ins. Co. of America* (C.D. Cal. 2009) 640 F.Supp.2d 1224, 1234 [taking judicial notice of truth of facts in CDC reports].)

[5] Huber cites no evidence or authority that these are not important and cognizable state interests.

population to number of retail sales and citing undisputed evidence that over a three-year period Huber sold over 14 million packs to off-reservation wholesale customers].)

As to tribal interests, Huber makes generalized claims about tribal rights to self-government and the importance of economic development.

As to the self-government argument, it is the infringement test with a different label. It fails for the same reasons as Huber's infringement argument, discussed below.

As to the economic development argument, Huber cites no evidence that her business benefits the tribe. Once again, she failed to carry her burden of proof regarding an affirmative defense, as well as her burden on appeal. "A brief must contain meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error and contain adequate record citations, or else we will deem all points to be forfeited as unsupported by adequate factual or legal analysis." (*Bunzl Distribution USA, Inc. v. Franchise Tax Board* (2018) 27 Cal.App.5th 986, __ [238 Cal.Rptr.3d 645, 654] [internal citations and quotations omitted]; see also Cal. Rules of Ct., rule 8.204(a)(1)(B)-(C).).

However, even assuming that the tribe did benefit economically from Huber's business, the Supreme Court has ruled that tribes have no cognizable interest in businesses like Huber's that sell an exemption from state law. Although tribes have a legitimate interest in economic development (*Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1191-1192), that interest does not extend to profiting from trafficking in goods that non-tribal businesses are prohibited from selling. In a similar case, where a tribe challenged a state's regulation of on-reservation contraband cigarette sales, the Supreme Court held: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus

to market an exemption from state taxation to persons who would normally do their business elsewhere"; "Washington does not infringe on the right of reservation Indians to make their own laws and be ruled by them, merely because the result of imposing its taxes will be to deprive the Tribes of revenues they currently are receiving." (*Colville, supra,* 447 U.S. at pp. 155, 156-157.) Numerous other courts have held the same. (See, e.g., *California v. Cabazon Band of Mission* Indians (1987) 480 U.S. 202, 219 [something more than "merely importing a product onto the reservation for immediate resale" is needed to implicate important tribal interests]; *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services* (2d Cir. 2014) 769 F.3d 105, 114 ["a tribe has no legitimate interest in selling an opportunity to evade state law"]; *Chemeheuvi Indian Tribe v. State Bd. of Equalization* (9th Cir. 1986) 800 F.2d 1446, 1449 [state regulation does not interfere with tribal self- government when all tribe is doing is "importing a finished product and reselling it to residents and visitors"].)

Huber sold cigarettes that did not have the costs associated with compliance with state law and advertised her cigarettes as "cheaper." (CT 10 [UF 43].) Indeed, she admitted through counsel that her business depended on selling such cheap contraband. (Appellant's Opening Brf. [dated Oct. 29, 2015], p. 15.) In other words, Huber's business model was to do exactly that which all the courts cited above have held cannot be done lawfully: run a business marketing an exemption from state law and then claim immunity from that law because the business is headquartered on an Indian reservation.

Huber alleges that the state laws at issue constitute a "vast and invasive regulatory regime" that in an unspecified way adversely affects tribal interests. She does not support this allegation with facts. Far from being "vast and pervasive" (Huber Brf., p. 55) or "comprehensive" (*id.*, pp.

13, 56), however, the provisions of the Directory Statute at issue here only require a cigarette seller to visit a public web site that contains a sortable list of the hundreds of brands and styles of cigarettes that are legal for sale in the state, and make sure that the ones it wants to sell are on the list. (See Rev. & Tax. Code, § 30165.1, subd. (e)(2) & (3); https://oag.ca.gov/tobacco/directory; CT 329-340 [static directory listing as of June 2014, sorted by brand].) Similarly, the Fire Safety Act requires only that a cigarette seller sell cigarettes that are marked on the package as fire safe or contact the manufacturer or State Fire Marshal to verify that the cigarettes are certified as fire safe. (See Health & Saf. Code, §§ 104951, 14955, subd. (g).) These legal requirements are much more benign than state laws that required reservation retailers (including Indians) to collect, track, and remit taxes on every cigarette sale to non-members, which the Supreme Court approved as minimal burdens in *Moe v. Salish & Kootenai Tribes* (1976) 425 U.S. 463, and *Colville, supra,* 447 U.S. at pp. 150–151. Far from being "vast and pervasive" or "intrusive," the laws here are limited. Unlike the laws approved in, for example, *Colville*, they do not require Huber to do anything affirmative when running her business from day to day. They merely deprive her of the legal ability to sell certain brands where the manufacturer has decided to skip the steps necessary to make them legal for sale in California.

Finally, the federal interests at issue favor state regulation. In performing *Bracker* balancing, courts have identified specific federal interests in state, not federal, regulation of cigarettes:

> [T]he federal government has been generally supportive of *state* regulation of cigarette sales. For example, the Jenkins Act provides, *inter alia*, that any person who sells cigarettes in interstate commerce and ships those cigarettes into a state that taxes the sale or use of cigarettes must file a monthly report with the state tax administrator specifying the name and address of the person to whom the shipment

> was made, the brand of the cigarettes, and the quantity purchased. 15 U.S.C. § 375, et. seq. In addition, . . . states may not receive certain federal aid unless they enact a law banning the sale of tobacco products to minors, effectively enforce such a law, and conduct random, unannounced compliance checks to ensure that retailers are not selling tobacco to minors. 42 U.S.C. § 300x-26.
> (*Ward v. New York* (W.D.N.Y. 2003) 291 F.Supp.2d 188, 204.)

In other words, the federal interest favors state regulation. Further, although Huber points to general federal interests to foster tribal autonomy and economic development – interests that the People do not dispute – no court holds that those generalized interests are dispositive for the *Bracker* analysis. Instead, courts look to see if there are federal interests in regulating the same activity that the state seeks to regulate that are sufficiently strong to tip the *Bracker* balance against state regulation. In *Bracker* itself, which involved a state's attempt to regulate timber harvesting on a reservation, the Supreme Court looked for specific federal laws relating to timber harvesting on tribal land, not general federal laws concerning tribal economic development. (See *Bracker, supra,* 448 U.S. at pp. 145-148.) Similarly, in *Cabazon,* where the issue was state regulation of bingo on Indian reservations, in applying *Bracker* the Court looked for specific federal statutes relating to tribal gaming. (480 U.S. at pp. 217-218.) And in the specific context of state regulation of cigarette sales the Supreme Court stated that "concern with fostering tribal self-government and economic development [does] not go so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." (*Colville, supra*, 447 U.S. at p. 155.)

In addition, Huber's failure to cite any federal law disfavoring state tobacco regulation is fatal. (See *Edmondson, supra*, 237 P.3d at p. 216, ¶ 46 [rejecting defendant's *Bracker* defense, and noting: "[defendant] *has failed to cite any federal enactment* that expressly prevents [states] from

regulating tobacco product distribution and sales]" [emphasis in original]; see also, *id.*, ¶ 47.) [6]

b. Infringement prong

Although Huber characterizes the effects of applying the state laws at issue here as "devastating" to tribal self-government (Huber Brf., p. 56), her argument consists mainly of adjectives, devoid of citation to the record or relevant authority. "In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287, as modified on denial of reh'g (Dec. 21, 2012).) As noted above, the laws at issue here are significantly less burdensome than the ones found reasonable in *Colville*. (448 U.S. at p. 161.)

The only specific putative infringement that Huber identifies is her allegation that applying state law would "nullify" or be "inconsistent" with a Wiyot tribal tobacco licensing ordinance. (See, e.g., Huber Brf., pp. 13, 14, 56, 57, 59.) Huber, however, fails, as she failed in her summary judgment papers, either to cite the tribal ordinance or explain how the provisions of the Directory Statute and Fire Safety Act "nullify" or are "inconsistent" with that ordinance. These failures are fatal to her position. (See *Ramos, supra,* 242 Cal.App.4th at p. 683 [appellant forfeits contentions not supported by reasoned argument and citations to record].)

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[6] If promoting economic growth was an interest sufficient to overcome state law, that would lead to the absurd result that states would lack jurisdiction over *any* action involving the enforcement of *any* law that regulates the sale, transportation, importation, distribution, or possession of *any* product that anyone on a reservation decided to trade in. In short, "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." (*Rice v. Rehner* (1983) 463 U.S. 713, 734.)

Perhaps the reason for Huber's failure to quote the ordinance is that doing so would have belied her assertions about "nullification" and the like. Nothing in the state laws at issue here "nullifies" or is "inconsistent" with the ordinance. The only relevant provision is section 3(a), which prohibits the sale, manufacture, or distribution of tobacco products on the reservation without a tribal license to do so. (CT 1016.) Nothing in the ordinance prevents Huber from complying with both the tribal ordinance and the state Directory Statute and Fire Safety Act. Similarly, nothing in those state laws prevents the tribe from fully enforcing the tribal ordinance. There is no inconsistency, much less a nullification of tribal law. (See *Colville, supra,* 447 U.S. at pp. 158-159 [finding no conflict between state law and tribal cigarette regulations]; cf. *Hartford Fire Ins. Co. v. California* (1993) 509 U.S. 764, 798–799 [no conflict between U.S. antitrust laws barring certain conduct and U.K. law permitting and encouraging such conduct: "Since the [defendants] do not argue that British law requires them to act in some fashion prohibited by the law of the United States . . . or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law"].)

B. Subject Matter Jurisdiction

For the Court's convenience, the People briefly summarize the points made at greater length in their opening supplemental brief:

First, Huber's conduct was not entirely on-reservation conduct. Just as all the courts cited above have concluded that conduct like Huber's should not be deemed to be on-reservation conduct for the purpose of evaluating regulatory jurisdiction, every court to have considered the issue has concluded that it is not on-reservation conduct for the purpose of evaluating subject matter jurisdiction. (See *State v. Maybee, supra,* 232 P.3d at p. 973 [court had subject matter jurisdiction over Directory Statute claims against Indian operating on reservation in New York who sold off-

directory cigarettes to Oregon residents]; see also *Dept. of Health and Human Services v. Maybee, supra,* 965 A.2d at ¶ 6 [same, but re: Maine residents, concluding that state court had authority to adjudicate case involving the defendant's cigarette sales over the Internet because the defendant "engages in activity that reaches beyond the reservation when he accepts orders from and sends cigarettes to consumers who are off the reservation"]; *Edmondson, supra,* 237 P.3d at p. 217 [same, re: Oklahoma residents].)

Second, no federal statute applies here and there is no infringement. Even if the special restrictions on state court jurisdiction announced in *Williams v. Lee* applied, they would not bar jurisdiction here. No act of Congress prohibits this Court's exercise of jurisdiction, and Huber suggests none that might.[7] As to infringing, tribes' rights to make their own laws and be ruled by them are limited to laws affecting tribal land and internal relations among members. (See People's Opening Supp. Brf., pp. 16-17; *Strate v. A-1 Contractors* (1997) 520 U.S. 438, 459.) Exercising jurisdiction to adjudicate whether Huber violated two of California's tobacco laws is not of the same ilk as adjudicating issues of tribal membership, domestic relations between tribal members, or issues of inheritance – issues that are within tribes' rights to self-government.

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[7] In her opening brief Huber contended that the Indian Commerce Clause does so: "The Trial Court's order imposing a permanent injunction restricting Huber's on- reservation commercial conduct raises immediate concerns because it directly violates the Indian commerce clause, which excludes states from regulating commerce with Indians. (U.S. Const., art. I, § 8, cl. 3.)." (Appellant's Opening Brf. [dated May 22, 2015], p. 38.) However, she cited no authority to support that claim, which is directly contrary to controlling authority. (See *Colville, supra,* 447 U.S. at p. 157 ["[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state [regulation]"]; *Ramah Navajo Sch. Bd. v. Bureau of Rev.* (1982) 458 U.S. 832, 845-846 [same].) Further, it is not evident that Huber's current counsel would make this contention.

Nothing in Huber's supplemental briefing undermines or pertains to those arguments. Instead, Huber switched her focus to argue that the Court lacks subject matter jurisdiction because it lacks regulatory jurisdiction, and that it lacks regulatory jurisdiction because exercising that jurisdiction would "nullify" the tribal ordinance. That contention fails for all the reasons discussed above.

II. DOES THE SUPERIOR COURT HAVE SUBJECT MATTER JURISDICTION TO ENTERTAIN ANY OF RESPONDENT'S THREE CLAIMS UNDER 18 U.S.C. SECTION 1162?

Huber now argues that the Court should remand this action to allow her to get evidence to support an argument that the laws at issue are civil/regulatory and not criminal/prohibitory. She alleges that the Attorney General selectively targets only individually-owned Indian cigarette businesses and that this suggests that California's law and public policy is not intended, under the *Bryan/Cabazon* test, to generally prohibit certain conduct like her business. (Huber Brf., pp. 44-45.) Huber contends that "due process" requires a remand because it is a new issue raised on appeal. (*Id.* at p. 45.)

Huber is wrong on every point.

First, the application of PL 280 is not a new issue. It is an issue that Huber herself raised below.[8] For example, in her opening summary judgment papers, Huber acknowledged that if a law is criminal, versus civil/regulatory, the court would have jurisdiction: "Because California is a P.L. 280 state, *Mann* instructed that state courts must go through a

[8] Indeed, as noted in Section I, above, because Huber moved for summary judgment and filed this appeal on the affirmative defenses of both subject matter and regulatory jurisdiction, and based her arguments on whether PL 280 authorized jurisdiction, she had the burden both as a defendant relying on an affirmative defense and as an appellant, to show that PL 280 does not authorize jurisdiction.

particularized analysis to determine whether they can properly adjudicate a matter involving an Indian in Indian country. [Citation.] Specifically, *Mann* instructed that state courts must consider whether a case is: (1) a criminal matter; (2) ordinary private litigation; or (3) a regulatory action. [Citation.] If a matter falls into either of the first two categories state courts have unlimited adjudicatory authority. [Citation.] However, if the action falls into the third category . . . the matter falls outside the adjudicatory authority Congress extended to California under P.L. 280." (CT 762 [Huber MSJ MPAs].)

Second, after stating this standard, however, Huber simply failed to follow through and argue that the laws at issue are regulatory. (See CT 762-763 [Huber MSJ MPAs].) Huber repeated the assertion virtually verbatim in her opposition to the People's motion for summary judgment, still not making an effort to demonstrate that the laws at issue are regulatory. She baldly asserted, without argument or citation to facts or authority, "This case is undeniably a purely regulatory action. . . . There is no legitimate claim that the laws the Attorney General seeks to impose are anything other than 'regulatory.'" (CT 1155 [Huber Opp. to People's MSJ].)

Third, while Huber may now be unhappy that her arguments below were not more thorough, she cites no authority that due process requires this Court to remand the action to give her a do-over. Indeed, even if Huber had not made the argument below, and even if she did not have the burden to have done so, a remand would still not be required. (See *People v. Chavez* (2018) 4 Cal.5th 771, 779 [no barrier to court deciding on basis not raised by parties below; court may base decision on any ground supported by record].)

Fourth, although Huber claims that due process requires that she be giving an opportunity to be heard on the issue, not only did she have that

opportunity below, but in granting rehearing this Court gave her additional opportunities in the form of the two supplemental briefs it ordered. Huber cites no authority that even remotely suggests that this is insufficient process.

Fifth, and finally, a remand would be futile because Huber's premise for a remand is wrong as a matter of law. She contends that "Respondent's selective targeting of only individually Indian-owned cigarette businesses, while leaving tribally-owned cigarette businesses unmolested by civil enforcement actions, clearly suggests that the law and public policy of California is not intended, under the *Cabazon* test, to 'generally prohibit certain conduct,' such as Appellant's cigarette sales activity." (Huber Brf., p. 44.) Huber says she wants to show that the Attorney General's office has left the "vast bulk of Indian tobacco sales unregulated" because the seller has sovereign immunity. (Huber Brf. pp. 43-44.) The *Bryan/Cabazon* question, however, even as Huber frames it, is "whether the 'subset of outlawed conduct is small relative to the entire class of activity'." (Huber Brf., p. 43 [putting this phrase in quotes as though a court said it, but providing no citation, and the People know of none].) That is, even by Huber's account, the relevant question is about the scope of the law on its face, not the effect of sovereign immunity on the exercise of prosecutorial discretion. When one looks to the laws at issue, as the Court did in its now-withdrawn opinion, they are not "undeniably" regulatory and not criminal (CT 1155 [Huber MSJ Mtn.]), and they expressly apply not to any subset of Indians, but to all people, Indians and non-Indians alike.[9]

[9] In any event, Huber had every opportunity, and indeed the burden, to support her defense by doing the investigation she now wants to do before summary judgment.

In short, whether considered on the merits, as a matter of law, as an issue of due process, or in the arguments raised below, Huber's argument is without merit.

III. IF THIS COURT CONCLUDES THAT THE SUPERIOR COURT HAD SUBJECT MATTER JURISDICTION TO PROCEED WITH ANY OF THE CLAIMS IN THIS CASE, MUST WE ADDRESS THE QUESTION, SUGGESTED BUT NOT RESOLVED IN *WASHINGTON V. CONFEDERATED TRIBES OF COLVILLE INDIAN RESERVATION* (1980) 447 U.S. 134, WHETHER RESPONDENT'S POWER "TO ENTER ONTO THE RESERVATION [AND] SEIZE STOCKS OF CIGARETTES WHICH ARE INTENDED FOR SALE TO NONMEMBERS" PRESENTS A RISK OF INFRINGEMENT TO INDIAN SOVEREIGNTY?

At most, Huber's brief suggests that the Court can, under certain circumstances, decide an issue that has become moot since a case commenced. But the question of the state's seizure power is not an issue that has become moot. Rather, it is an issue that is not, and never has been, ripe. "Before a controversy is ripe for adjudication it 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' [Citation.]" (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.)

As demonstrated in the People's opening supplemental papers, deciding whether the state may permissibly seize contraband cigarettes on Huber's reservation is not ripe (there is no factual basis on which to decide) and never has been presented. Similarly, every issue properly before this Court – Huber's liability and the validity of her affirmative defenses of subject matter and regulatory jurisdiction – can be decided without addressing the seizure question. (See People's Opening Supp. Brf., pp. 24-27.)

Huber's reliance on a limited exception for issues that have become moot is misplaced. She cites no authority that the same standard applies when a case is not ripe (and the People's research has found none). Even if it is assumed that the issue was at some point ripe and is now moot, she does not cite evidence or authority that the seizure issue is of great public importance. As far as we know (and Huber offers nothing), the specific question about a state's power to seize contraband cigarettes on a reservation has only arisen once – 38 years ago in *Colville*, where the state initially asked for a declaration on the question, but the Court (and later even the state) decided it was both unripe and unnecessary to decide. (See *Colville, supra,* 447 U.S. at p. 162.)

Certainly questions of whether, when, and how a state court judgment may be enforced in Indian country can and do arise, but they are highly fact specific and have no clear general answer. (See generally, e.g., Robert Laurence, *Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments* (2004) 34 N.M. L. Rev. 239; Cohen, *Handbook of American Indian Law* (2017 ed.) § 7.07[2][c]; Robert Laurence, *Service of Process and Execution of Judgment on Indian Reservations* (1983) 10 Amer. Indian L.R. 257.) As noted in the People's opening supplemental brief, the question of when, where, and how the People might seek enforce the judgment in this action (or even if they will have to enforce it) is not properly before the Court, and the facts necessary to answer it do not yet, and may never, exist. (See *People v. Slayton* (2001) 26 Cal.4th 1076, 1084 ["As a general rule, we do not issue advisory opinions indicating 'what the law would be upon a hypothetical state of facts'"].)

That said, if one considers the Court's question in the abstract and asks whether the State's power (physical ability) to enter the reservation and seize cigarettes presents a "risk" to tribal sovereignty, the answer

would be yes. If the state were to exert that power and sent authorities onto a reservation to seize anything for any reason, that action would potentially infringe on (i.e., "present a risk of infringement to") tribal sovereignty. (See, e.g., *Window Rock Unified School District v. Reeves* (9th Cir. 2017) 861 F.3d 894, 899, cert. denied (2018) 138 S.Ct. 648 ["The Supreme Court has long recognized that Indian tribes have sovereign powers, including the power to exclude non-tribal members from tribal land."].) But that answer is not relevant to this appeal, for at least two reasons, both discussed in the People's opening supplemental brief.

First, every question properly before the Court (Huber's liability and the validity of Huber's defenses) can be answered without considering the seizure question. Second, whether such entry in a particular case impermissibly infringes on tribal sovereignty will depend on the particular facts of the case. (See, e.g., *Nevada v. Hicks, supra,* 533 U.S. at pp. 362–365 [state officials could have entered reservation and execute state court warrant without first applying to tribal tribunal for tribal warrant].) Nothing in Huber's brief calls these conclusions into question.

SUMMARY AND CONCLUSION

Huber's appeal does not call into question the trial court's findings that there is no disputed issue of material fact and that the People established every element of every cause of action asserted against Huber. The appeal challenges only the court's subject matter jurisdiction and the state's regulatory jurisdiction. (See Appellant's Opening Brf. [dated May 22, 2015], p. 7 ["Issues Presented."].)

As to subject matter jurisdiction, regardless of the interpretation of PL 280 and its potential application to this action, it appears that neither party now contends that any federal law expressly preempts or prohibits California courts' jurisdiction over this action. Accordingly, and regardless of the applicability of PL 280, California courts have jurisdiction unless the

exercise of jurisdiction would infringe on reservation Indians' right to make their own laws and be ruled by them, as articulated in *Williams v. Lee. Williams,* however, does not bar jurisdiction in this case – for two reasons. First, Huber's conduct was not entirely on-reservation, and *Williams* applies when the conduct at issue is entirely on reservation. Second, even if *Williams* did apply, it would not bar jurisdiction. No act of Congress prohibits the exercise of jurisdiction, and Huber's claim that the exercise of jurisdiction would infringe on tribal rights by "nullifying" tribal law is belied by an examination of the tribal ordinance, which Huber fails even to cite.

Huber's new argument about subject matter jurisdiction is that, if the State lacks regulatory jurisdiction, then a state court's exercise of jurisdiction in an enforcement action necessarily infringes under *Williams*. Even if it is assumed that there is that connection between regulatory and adjudicatory jurisdiction, Huber's argument fails because she has not satisfied her burden to show that the state lacks regulatory jurisdiction.

More specifically, the special restrictions on state regulatory jurisdiction announced in *Bracker* do not apply to conduct that extends beyond a defendant's reservation, and conduct such as Huber's does so extend for the purpose of deciding whether *Bracker* applies. Second, even if *Bracker's* restrictions did apply, the laws at issue here would not run afoul of them. Enforcing laws that simply prevent the sale of contraband throughout the State (i.e., preventing Indians from marketing an exemption from state law) does not infringe on tribal rights to self-government. Further, the state laws at issue here pass muster under the *Bracker* balancing test. Federal laws favor state regulation of tobacco products; the state interests are especially strong because they involve health and safety and because the effects of Huber's evasion scheme extend far beyond

reservation boundaries. Huber's brief and summary judgment papers lack evidence or authority to the contrary.

For these reasons, as well as those set forth in the People's opening supplemental brief and original brief, the People respectfully submit that the Court should affirm the superior court's grant of summary adjudication in favor of the People and its denial of summary adjudication as sought by Huber, permanently enjoin Huber, and remand the case for determination of the amount of civil penalties.

Dated: December 6, 2018

Respectfully submitted,

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Attorneys for Plaintiff and Respondent, People of the State of California

CERTIFICATE OF COMPLIANCE

I certify that the attached **PEOPLE'S SUPPLEMENTAL REPLY BRIEF** uses a 13 point Times New Roman font and contains **8,972** words.

Dated: December 6, 2018

XAVIER BECERRA
Attorney General of California
KAREN LEAF
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/s/ Nicholas M. Wellington
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DECLARATION OF SERVICE

Case Name: **People v Huber dba Huber Enterprises**

Case No.: **A144214 (Appeal) and DR1110232**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550. On December 6, 2018, I served the following document(s):

PEOPLE'S SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 6, 2018, at Oakland, California.

Kelinda Crenshaw	/s/Kelinda Crenshaw
Declarant	Signature

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Lower Court Case Number: **DR110232**

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