IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

No. A144214

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ARDITH HUBER, individually, dba HUBER ENTERPRISES, et al.,
Defendants and Appellants.

Superior Court of California
Humboldt County
No. DR110232
Hon. Dale A. Reinholtsen

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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I. SUPPLEMENTAL QUESTION 1

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?

A. Since there can be no doubt that all the claims in this case "arise in" in Indian Country, any attempt to characterize them as arising outside of Indian Country as a pretext for avoiding the otherwise required evaluation of their adverse impact on the right of tribal self-government under *Williams v. Lee* is mistaken.

The record in this case reveals that all of the claims in this case "arise in" Indian Country, as that term is defined in 18 U.S.C. § 1151, because Respondent's burdensome regulatory intervention directly and adversely affects (i) business activity and conduct that incontestably occurred on the Wiyot Reservation, (ii) individual Wiyot Indians living and working on that reservation as well as (iii) the Wiyot Tribe's right of tribal self-government, which is a federally protected interest inextricably grounded in the federal reservation trust land that constitutes "Indian Country" in this case.

Appellant Ardith Huber is a member of the Wiyot Tribe of California and was, at all times relevant to Respondent's claims in this case, a resident on the Wiyot Tribe's Table Bluff Rancheria. (Clerk's Transcript on Appeal ("CT"), p. 4:001133, ¶ 2; also herein referred to as the "Wiyot Reservation").) Appellant lives on land owned by the Tribe and assigned to

her under the Wiyot Tribal Allotment Ordinance. (CT, p. 4:001133, ¶ 2.) From approximately 2001 until enjoined by the lower court, Appellant operated a retail and wholesale business from her home on the Wiyot Reservation. (CT, p. 4:001133, ¶ 3.) Appellant sold cigarettes from a small retail storefront added on to her home. (CT, p. 4:001133, ¶ ¶ 3, 4, 7.) In addition, Appellant operated a wholesale business selling cigarettes to over two dozen Indian smoke shops owned either by (i) Indian tribes or (ii) individual tribal members who operated their tobacco enterprises within a recognized Indian reservation. (*See, e.g.,* CT, pp. 1:000076-000256 (listing all the tribal and individual Indian smoke shops that were customers of Appellant).) All the retail and wholesale sales transactions of Appellant's tobacco business, even those involving cigarettes subsequently shipped to locations outside the Wiyot Reservation, occurred within the boundaries of the Wiyot Reservation which was, at all times relevant to the claims made by Respondent, the seller's location. (CT, pp. 4:001133-001135, ¶¶ 7-10, 19.)

Appellant's business, Huber Enterprises, was a sole-proprietorship formed on the Wiyot Reservation and operated under the laws of the Wiyot Tribe. (CT, p. 4:001133, ¶ 5.) The Wiyot Tribe specifically authorized Appellant's business under both its Business License Code and Tribal Tobacco Ordinance. (CT, pp. 4:001133, lines 15-17, 4:001138). The Wiyot Tribe's Business License Code expressly requires, subject to certain exceptions, that all persons engaged within the exterior boundaries of the

Wiyot Reservation possess a valid business license issued by the Wiyot Tribe. (CT, p. 4:001013, at § 2(h).) The Wiyot Tribal Tobacco Ordinance, adopted in June 2010, is expressly based on the Wiyot Tribe's federally protected right to self-government and federally recognized tribal sovereignty. (CT, p. 4:001012-001013, at § 2.)[1] The Wiyot Tribal Tobacco Ordinance establishes a comprehensive tribal regulatory structure that fully authorized and formally permitted Appellant's tobacco business and even established a "Wiyot Tribe Tobacco Fund" to be financed by a "tax of 0.5% . . . of total gross sales of tobacco products" with the proceeds to be appropriated only for tobacco-related school and community health education programs, smoking and tobacco-use prevention measures, and assistance to tribal and community members for cessation of smoking and tobacco use. (CT, p. 4:001017, at § 5.) As a licensee under the Wiyot Tobacco Ordinance, Appellant's busainess was expressly deemed so crucial to the economic development and sovereign self-governance of the Wiyot

1. Section 2(a) of the Wiyot Tobacco Ordinance memorializes the finding of the Wiyot Tribal Council that the "United States recognizes Indian Tribes as domestic nations with sovereignty over their members and territories." (CT, p. 4:001012, § 2(a). Section 2(e) records the Wiyot Tribal Council finding that a "principal goal of United States Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. (See Indian Self-Determination and Education Assistance Act (25 U.S C. § 450a), Indian Reorganization Act (25 U.S.C. § 461 *et seq.*), Indian Finance Act (25 U.S.C. § 1451), Indian Gaming Regulatory Act (25 U.S.C. § 2701), Native American Economic Development, Trade Promotion, and Tourism Act (25 U.S.C. § 4301), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-219 (1987).)"

Tribe that Section 8 provided that the Wiyot Tribe's "issuance of a license [thereunder] shall confer upon the licensee the full protections of the Tribe's sovereign immunity." (CT, p. 4:001017, at § 8(a).)

The unavoidable legal and practical effect of the lower court's coercive imposition of California's comprehensive regulatory regime on Appellant's on-reservation, tribally authorized business is *the overt nullification of tribal law by operation of state law.* In other words, the licenses granted by the Wiyot Tribe in exercise of its sovereign right of self-government were rendered completely nugatory and void by California state law as misinterpreted by Respondent and the Trial Court. A "license" is, of course, a form of official governmental "permission . . . to commit some act that would otherwise be unlawful." (See Black's Law Dict. (9th ed. 2009) p. 1002, col. 2.) California has not merely added a state tax to a co-existing tribal tax, it has sought to regulate the type of cigarettes sold, their packaging and product content contrary to Wiyot tribal law and impose coercive civil penalties for the slightest infraction. Thus, Respondent's argument that the State's imposition of a comprehensive tobacco regulatory regime on the Appellant's cigarette enterprise is justified because certain components of its purchase and sales cycle occur off-reservation is deeply mistaken. The extra-reservation dimensions of Appellant's business do not erase the stubborn fact that it is located and headquartered on the Wiyot Reservation, a territorial domain that incontestably falls within Indian Country. That Appellant

maintained an on-reservation business with some off-reservation operations did not magically remove her enterprise from Indian Country nor diminish the adverse effects of the State's regulatory regime on the Wiyot Tribe's right to self-government. There would be no claims in this case whatsoever if Appellant had not opened and operated her tobacco business in Indian Country on the Wiyot Reservation. (Respondent's Opening Supplemental Brief, pp. 7-15 ("ROSB").)

Respondent's Opening Supplemental Brief searches in vain, as did this Court in its September 25, 2018 withdrawn opinion and the trial court below in its January 6, 2015 order, for the very kind of procrustean test of the legality of the State's exercise of jurisdiction that the United States Supreme Court has repeatedly rejected in any case plainly involving both on-reservation conduct of Indians and their host tribal government with off-reservation effects. (ROSB, pp. 7-18 (arguing incorrectly that since the State's claims did somehow not "arise in" Indian Country, the tribal right to self-government is not infringed); Slip op., p. 37 (incorrectly holding that "[t]o the extent that enforcement occurs off-reservation, the Wiyot right to tribal self-governance is not implicated."); Order Granting the People's Motion for Summary Adjudication, Denying Defendant's Motion for Summary Judgment, and Entering Permanent Injunction, CT, p. 5:001371, ¶ 25 (holding that when "an Indian's cigarette business extends beyond the boundaries of her reservation, the state may enforce its cigarette laws ***without***

weighing the federal, state, and tribal interests at stake.") (emphasis added).) There is such no bright-line "litmus test," such as physical enforcement operations limited to off-reservation locations or the mere existence of off-reservation effects, that *ipso facto* determines the validity of state civil regulation that adversely effects the on-reservation conduct and the self-governance of Indians *on their own reservation acting pursuant to their own tribal laws*. (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 141 ("*Bracker*").)

As the *Bracker* majority emphasized, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." (*Ibid.*) Nor is there any application of "mechanical or absolute conceptions of state or tribal sovereignty" that may substitute for the required "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*Ibid* at 142, 145; *Dept. of Tax. and Finance v. Milhelm Attea & Bros., Inc.* (1994) 512 U.S. 61, 73 ("*Milhelm*"); *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 176.)

Instead, in every case in which a state seeks to assert civil regulatory jurisdiction over the conduct and operations of Indians and their host tribal government on their own reservation, even though there be off-reservation effects, the legality of the state regulation depends on the satisfaction of two

independent tests as articulated by the United States Supreme Court in *Bracker,* quoting *Williams v. Lee*: 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 preempted by federal law. . . . ***Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"*** (*Williams, supra,* 358 U.S. at 220 (emphasis added).) *Bracker* emphasized that the "two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." (*Bracker, supra,* 448 U.S. at 142-143.)

The second independent test announced so emphatically in *Bracker* has yet to be applied by the State of California in this case. It was not applied by Respondent, nor by this appellate tribunal and certainly not by the lower court, which expressly eschewed even the need to consider how the State's invasive tobacco regulatory regime would affect the Wiyot Tribe's right to self-government and economic development. (*Ibid;* Slip op., p. 37; CT, p. 5:001371, ¶ 25; ROSB, pp. 7-18.) Instead of directly addressing the complex *factual and legal* questions required in any serious examination of whether the State's invasive tobacco regulatory regime has "unlawfully" infringed "on the right of reservation Indians to make their own laws and be ruled by them," both Respondent and the reviewing courts in this case have turned to

rigid, mechanical, absolute standards that would conveniently allow the State to impose its civil regulations on reservation Indians and a supportive tribal government even in the absence of delegated authority from the federal government. **(***Bracker, supra,* 448 U.S. at 142-143; *Williams, supra,* 358 U.S. at 220.)

As the State explained in its Respondent's Brief of July 21, 2015, "[a]t no time have the People claimed to base this action on Public Law 280" or any other federal law. (Respondent's Brief, p. 13.) Instead, Respondent based its assertion of regulatory jurisdiction on the inherent authority of the state, quoting *Cabazon,* "in the absence express congressional permission." (*California v. Cabazon Band of Indians* (1987) 480 U.S. 202, 215 ("*Cabazon*").) State authority is at its weakest when exercised in the absence of supporting delegated power from Congress. Even with off-reservations effects arising from the operation of Appellant's former tobacco business, the State was free to impose only a **"minimal burden"** on tribal self-government and Indian business operations, such as the mere collection of a state cigarette tax from non-Indian purchasers as permitted in *Moe* or the bookkeeping requirements imposed on Indian wholesalers in *Milhelm*. (*Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* (1976) 425 U.S. 463, 483 (holding that collection of "a tax validly imposed on non-Indians is a minimal burden" that did not frustrate tribal self-government) (emphasis added) ("*Moe*"); *Milhelm, supra,* 512 U.S. at 73-75; *Nevada v.*

Hicks (2001) 533 U.S. 353, 362 (only "'minimal' burdens" permissible) ("*Hicks*"); *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 151 ("minimal burdens" permissible "to aid enforcing and collecting a tax") ("*Colville*").)

This is not a tax case. As Respondent has made clear, "The People do not assert any claims to collect unpaid taxes." (CT, 000052, lines 17-18; Appellant's Opening Brief ("AOB"), p. 42.) In this case, the State seeks to impose civil regulatory burdens on Appellant and the Wiyot Tribe far in excess of the "minimal burdens" associated with the mere collection of "a tax validly imposed on non-Indians" for the state as in *Moe* or the simple bookkeeping requirements as in *Milhelm.* (*Moe, supra,* 425 U.S. at 483; *Milhelm, supra,* 512 U.S. at 73-75.) Rather than evaluate the adverse effects of the civil regulatory burdens on tribal self-governance of California's invasive tobacco regime and undertake the required balancing of the state, federal, and tribal interests at stake, Respondent and this Court have apparently turned to the notion that the claims in this case somehow did not "arise in" Indian Country within the meaning of 28 U.S.C. § 1360, the codified version of section 4 of Public Law 280[2] that has been construed to

2. Public Law 280 (Pub. L. 83–280, August 15, 1953) is codified as 18 U.S.C. § 1162 (state criminal jurisdiction), 28 U.S.C. § 1360 (private civil litigation), and 25 U.S.C. §§ 1321–1326 (criminal jurisdiction and retrocession).

apply only to "private civil litigation involving reservation Indians in state court" and not to state civil regulatory enforcement proceedings in state court. (*Cabazon*, *supra,* 480 U.S. at 208; *Bryan v. Itasca County* (1976) 426 U.S. 373, 384-385 ("*Bryan*").)

As previously explained in Appellant's Opening Supplemental Brief ("AOSB"), the resort to this precise characterization of the basis for adjudicatory jurisdiction is mistaken because it conflates the undeniable fact that the claims in this case clearly arose in Indian Country with the issue of adjudicatory jurisdiction under 28 U.S.C. § 1360, a codified provision of Public Law 280 fundamentally irrelevant to these proceedings since the state has not based any of its claims on that section of Public Law 280. (AOSB, pp. 9-12.)

What Respondent and this tribunal have misunderstood is that there is an irreconcilable conflict between Wiyot tribal law and California's invasive tobacco regulatory regime. What Wiyot Tribal law permits by license, California law prohibits. Two governmental regulatory regimes have collided, and the State claims its law prevails over tribal law unaided by federal delegated authority. Respondent makes much of its misleading claim that "[t]here is no evidence in the record to support the view that Huber could not comply with both state and tribal law," but this should not be surprising because the trial court mistakenly believed that merely because there were off-reservation effects resulting from on-reservation business operations,

there was no need whatsoever to evaluate how state and tribal law interacted or what adverse effects California's regulatory regime might have on the Wiyot Tribe's right to self-government. (CT, p. 5:001371, ¶ 25 (holding that when "an Indian's cigarette business extends beyond the boundaries of her reservation, the state may enforce its cigarette laws without weighing the federal, state, and tribal interests at stake.") (emphasis added).) This tribunal has also mistakenly concluded that the mere fact of off-reservation enforcement eliminates any impact on the Wiyot right to self-government. (Slip op., p. 37 (incorrectly holding that "[t]o the extent that enforcement occurs off-reservation, the Wiyot right to tribal self-governance is not implicated.")) The very fact that the Trial Court refused to even consider the impact of the state law on tribal law was **reversible error** as surely as was the procrustean off-reservation enforcement standard invoked by this Court. In an effort to bring this crucial error into sharper focus, Appellant will next explore an analogy between (1) California's invasive tobacco regulation of Appellant's tribal tobacco business and (2) state regulation of federal licensees under the so-called Dormant Commerce Clause standard establishing freedom of interstate commerce in the face of competing state regulation.

B. Dormant commerce clause decisions suggest a persuasive analogy between failed state attempts to regulate federal licensees operating in interstate commerce and California's attempt here to regulate the Appellant tribal licensee in Indian Country that clarifies why the California tobacco regime infringes the right to tribal self-government whereas state tax collection imposing only minimal burdens does not.

The Commerce Clause expressly grants Congress the power "[t]o regulate Commerce . . . among the several states, and with the Indian Tribes." (U.S. Const. art. I, § 8, cl. 3.) Since the seminal 1824 decision in *Gibbons v. Ogden,* the implied federal power found in the Commerce Clause alone, without implementing congressional legislation, has been construed to constitute a sufficient constitutional basis on which to strike down state regulations that unduly burden interstate commerce. (*Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat.) 1 ("*Gibbons*").) This implied power is derived from the so-called Dormant Commerce Clause. (Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework* (1998) 21 Harv. J.L. & Pub. Pol'y 395, 403.)

When evaluating a state regulation under the Dormant Commerce Clause, the reviewing court must first determine whether the statute facially discriminates against interstate commerce. (*Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality* (1994) 511 U.S. 93, 99.) If the court finds the state regulation facially discriminates, it is typically held "virtually per se invalid." (*Ibid.*) If there is no facial discrimination, the court would apply a balancing test to determine whether the local benefits outweigh the burdens on

interstate commerce. (*Pike v. Bruce Church* (1970) 397 U.S. 137, 142 ("*Pike*").) As the *Pike* court explained, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*Ibid.*) As part of the *Pike* balancing test, the reviewing court must also determine whether the local interest could have been vindicated by other regulations that have a less burdensome effect on interstate commerce. (*Ibid.*)

By analogy, when a state attempts to regulate on-reservation conduct with off-reservation effects by means of a nondiscriminatory law of general application, the reviewing court under *Bracker* and *Williams* must balance the state, federal, and tribal interests at stake and determine whether the regulation unduly burdens the federally protected right of self-government. (*Bracker, supra,* 448 U.S. at 142-143; *Williams, supra,* 358 U.S. at 220.)

The U.S. Supreme Court has repeatedly held that the mere imposition of a state tax on a federal licensee does not unduly burden interstate commerce and is permitted as a valid exercise of state police powers. *Federal Compress Co. v. McLean* (1934) 291 U.S. 17, 21-23 (upholding a tax on a cotton processing business operated under federal license); *McCulloch v. Maryl Broad River Power Co. v. Query* (1933) 288 U.S. 178, 181 (upholding a South Carolina excise tax on the generation of hydroelectric

power although the plaintiff taxpayer was acting under a license of the Federal Power Commission); *Susquehanna Power Co. v. State Tax Comm.* (1931) 283 U.S. 291, 287 (upholding the power of a state to tax property used in connection with a federal license); *but see American Trucking Associations, Inc. v. Scheiner* (1987) 483 U.S. 266, 284 (striking down a Pennsylvania flat tax upon all trucks using state highways, regardless of whether they engaged in interstate or intrastate commerce, as a deterrent to interstate commerce).)

Similarly, in cases such as *Moe* and *Milhelm,* state laws that require tribal businesses to collect taxes from non-Indian purchasers have been deemed not to impose unreasonable burdens on tribal self-governance. (*Moe, supra,* 425 U.S. at 483 (holding that collection of "a tax validly imposed on non-Indians is a minimal burden" that did not frustrate tribal self-government); *Milhelm, supra,* 512 U.S. at 73-75.)

As soon as states sought to impose more than a simple tax on the federal licensee in the Dormant Commerce Clause cases and tried to subject the federal licensee to a competing regulatory structure inconsistent with federal standards, the courts have generally found the state law void as unduly burdening interstate commerce. In *Gibbons*, for example, a New York law that had granted Ogden a 30-year monopoly to ply the waters between New York and New Jersey collided with the federal regulatory regime that licensed Gibbons ship to engage in the "coasting trade."

(*Gibbons, supra,* 22 U.S. at 186-190, 211-215.) The *Gibbons* court famously struck down the New York regulatory regime as preempted by federal law. Although the holding in *Gibbons* was based on the Supremacy Clause, Justice John Marshall, writing for the majority, expressly considered whether New York's inspection laws were *per se* unconstitutional because they had an adverse effect on interstate commerce. (*Gibbons, supra,* 22 U.S. at 61–62.) In his landmark construction of the nature of federal power to regulate interstate commerce, Justice Marshall made clear that competing state regulation could constitute an acceptable exercise of state police power, provided it did not effectively amount to an impermissible, unduly burdensome exercise of the national power over interstate commerce. (*Ibid.*) While Justice Marshall had made clear that competing, overlapping state regulation of commerce was, in theory, permissible, even though it inevitably affected interstate commerce, the line between permissible and impermissible state regulation of commerce remained unclear under the implied power under the Dormant Commerce Clause. (*Ibid.*) Justice Marshall would later opine in *Willson* that a state law could be "repugnant to the power to regulate commerce in its dormant state." (*Willson v. Black-Bird Creek Marsh Co.* (1829) 27 U.S. 245, 252 (discussing the contours of the commerce power after *Gibbons*).) In 1849 *Passenger Cases,* the majority held for the first time that "a state's action violative of the Commerce Clause"

despite "the absence of a relevant federal statute." (*Passenger Cases* (1849) 48 U.S. 283, 409.)

By analogy, in the present case, two governmental regulatory regimes occupy the same field just as in the Dormant Commerce Clause cases. If the two regimes are fundamentally compatible, they may lawfully coexist, but by what criteria are the two competing regulatory regimes to be determined to be fundamentally compatible? A competing regulatory regime may impose taxes if they result in only "minimal burdens," but more comprehensive regulatory structures, such as a complex of mutually exclusive rules, pose more than minimal burdens and are generally viewed in both contexts as violating protected federal interests, such as the federal power to regulate interstate commerce and the federally protected right to tribal self-government. The case at bar, however, is not a tax case. By analogy, the Dormant Commerce Clause cases instruct this tribunal that when two governmental regulatory regimes occupy the same field, as do California's tobacco regulations and Wiyot tribal tobacco laws, and the state rules prohibit what the tribal rules expressly permit under license, there is a fundamental conflict between the two that must be carefully evaluated under *Bracker* and *Williams* to determine whether the state laws "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" (*Bracker, supra,* 448 U.S. at 142-143; *Williams, supra,* 358 U.S. at 220.)

Two regulatory regimes have collided in the present case. The Trial Court conspicuously eschewed any need whatsoever to evaluate that collision and conflated its jurisdictional analysis with the *Williams* tribal self-government test. The Trial Court erroneously held that the existence of off-reservation effects mechanically and automatically eliminated any need to examine how the imposition of the state regulatory regime affected the Wiyot right to tribal self-government. (CT, p. 5:001371, ¶ 25.) That was **reversible error.** That error was compounded by this Curt's inexplicable finding that the "trial court correctly concluded that the balance of federal, tribal, and state interests weighs in favor of California," when the Trial Court had undertaken no such balancing whatsoever. (Slip op., p. 35.)

So, how should the Trial Court have evaluated the impact of state tobacco laws on the right to tribal self-government as reflected in Wiyot tribal law and policy as well as tribal governmental operations and services? It is clear from relevant case law that the inquiry has both deep factual components as well as purely legal aspects. The Trial Court should have evaluated the extent to which California's tobacco regulatory regime (1) impaired Wiyot Tribal economic development, (2) reduced Wiyot tribal tax revenues that support the Wiyot tribal government and essential governmental operations and services, (3) affected Wiyot tribal employment opportunities, (4) burdened Appellant's tribal business, (5) affected intertribal economic development and commercial relations, (6) constituted

the least intrusive means to achieve the results desired by California regulators, (7) subverted or impaired internal tribal political processes by supplanting a complex tribal regulatory structure with an inconsistent state regime, (8) was inconsistent with Wiyot tribal law and policy, (9) adversely affected the health, safety, and welfare of the individual members of the Wiyot Tribe, and (10) destructive of the traditions and culture of the Wiyot Tribe.

Such an in-depth *factual and legal* exploration of the impact of the state tobacco regulatory regime on the Wiyot Tribe's right to self-government is required as an essential part of the "particularized inquiry into the nature of the state, federal, and tribal interests at stake" under the *Bracker* and *Williams* test to determine if the state laws "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" (*Bracker, supra,* 448 U.S. at 142-143, 145; *Williams, supra,* 358 U.S. at 220.) Such an inquiry was never undertaken by the Trial Court. Such a fatal omission by the Trial Court was **reversible error** that would require, at the very least, the vacation of the permanent injunction and remand to the Trial Court to give Appellant an opportunity to present evidence concerning the devastating impact that California's tobacco regulatory regime has had on the federally protected right of the Wiyot Tribe to self-government.

C. The recent decisions of the California Court of Appeal in *Black Hawk* and *Rose* throw into stark relief the central importance of the federally protected right of tribal self-government infringed by California's invasive tobacco regulatory regime.

The landmark decision in *Williams v. Lee* cannot be reduced to a narrow holding about the territorial jurisdiction of Navajo tribal courts. In *Williams,* it was not merely that Arizona courts had asserted *adjudicatory* jurisdiction over a contract dispute involving Navajo debtors which infringed the tribal right of self-government, it was that in asserting such jurisdiction Arizona courts displaced and impaired the jurisdiction of Navajo tribal courts and, to that extent, impermissibly violated "the right of reservation Indians to make their own laws and be ruled by them." (*Williams, supra,* 358 U.S. at 220.) Similarly, here, it is not the mere fact that adjudicatory state court jurisdiction exists or was asserted that runs afoul of *Williams,* but that the resulting state judicial proceedings constituted an integral part of an impermissibly invasive regulatory regime the state has sought to enforce against Appellant that *nullified Wiyot tribal law and policy.* (*Ibid.*)

In stark contrast to the present case, the application of California's tobacco regulatory regime to the rogue smoke shop operations in *Black Hawk* and *Rose* did not in any way conflict with tribal law or policy nor should they even be considered Indian tobacco cases. (*People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1565 ("*Black Hawk*"); *People ex re. Becerra v. Rose* (2017) 16 Cal.App.5th 317, 324-325 ("*Rose*").)

The state courts in *Black* and *Rose* were free to exercise adjudicatory jurisdiction because neither the assertion of regulatory nor adjudicatory jurisdiction ran afoul of relevant tribal law and policy; indeed, in those two cases, the assertion of regulatory and adjudicatory jurisdiction actually helped protect the right of tribal self-government to the extent it aided the affected tribal governments in protecting themselves from foreign interlopers who were using their reservations as illicit asylums for rogue smoke shop operations that violated tribal law and policy. Consequently, these two cases form, in effect, a reverse roadmap to the remand or outright dismissal of the instant case.

So different is *Black Hawk* from the present case that the lower court's dispositive reliance on that inapposite decision clearly constitutes yet another instance of **reversible error.** The Trial Court mistakenly held that "[u]nder the *Black Hawk* decision . . . , the Supreme Court's tobacco cases do authorize the State's enforcement of the laws at issue here." (CT, p. 5:001370, ¶ 24:23-24.) In *Black Hawk,* one Frederick Allen McAllister, a member of the Sac and Fox Nation, a federally recognized Indian tribe in Oklahoma, formed a California corporation called Black Hawk Tobacco, Inc., and began a rogue cigarette sales business on the reservation of the Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe, that had adopted a tribal law in 1985 basically requiring the sale of cigarettes on its reservation to comply with all California laws regulating the sale of

cigarettes. (*Black Hawk, supra,* 197 Cal.App.4th at 1564-1568.) McAllister was not a member of the Agua Caliente Band, nor was he resident there, nor did he possess a tribal license to conduct a tobacco business. McAllister, in fact, was operating his business in violation of tribal law. (*Ibid.*)

As the *Black Hawk* opinion elaborates, in 2010, the Agua Caliente Tribal Council confirmed that its tribal tobacco ordinance remained "in full force and effect" and adopted a resolution expressly stating that "'. . . the Tribe interprets its law to mean that all tobacco sellers on the Reservation must abide by all laws related to cigarette sales, regardless of where in the California Codes they may be located, including the Directory statute and the Cigarette Fire-Safety Law.' The tribal council expressed its view that 'Black Hawk's continued illegal sale of cigarettes on the Reservation is contrary to Tribal law.'" (*Black Hawk, supra,* 197 Cal.App.4th at 1566.)

Since McAllister was not an Agua Caliente tribal member, nor was his corporation formed under or licensed by tribal law, nor was his business even legal under tribal law, the *Black Hawk* court could not and did not find that the imposition of State tobacco laws violated the Agua Caliente Band's federally protected right to self-government. No such finding was possible because that Tribe had expressly adopted the state law standards as its own under tribal law. (*Ibid.*)

Furthermore, under the reasoning of the U.S. Supreme Court's *Colville* decision, *Black Hawk* is not, formally speaking, even an Indian

tobacco case. (*Colville, supra,* 447 U.S. at 161.) *Colville* held that "[f]or most practical purposes [nonmember resident] Indians stand on the same footing as non-Indians resident on the reservation." (*Ibid.*) The *Colville* court explained that the State of Washington's imposition of a tax on nonmember resident Indian purchasers did "not contravene the principle of tribal self-government . . . for the simple reason that nonmembers are not constituents of the governing Tribe" and have no "say in tribal affairs" nor "significantly share in tribal disbursements." (*Ibid.*) Thus, the imposition of state regulation on a nonmember Indian, such as McAllister, operating a rogue smoke shop on a foreign reservation governed by a tribe of which he was not a member did not in any way implicate the principle of tribal self-government. (*Ibid.*) Under that logic, *Black Hawk* is not even an Indian tobacco case since defendant McAllister was a nonmember Indian intruder from another tribe who stood "on the same footing as non-Indians resident on the reservation." (*Ibid.*) Thus, in so sense was the Trial Court correct in holding that "[u]nder the *Black Hawk* decision . . . , the Supreme Court's tobacco cases do authorize the State's enforcement of the laws at issue here." (CT, p. 5:001370, ¶ 24:23-24.) In blindly relying on *Black Hawk,* a case in which no cognizable issue of tribal self-government even arose, the Trial Court erroneously and conspicuously failed to take into consideration the effect of California's tobacco regulatory regime on the Wiyot Tribe's federally protected right of tribal self-government.

Similarly, any reliance on the *Rose* decision to justify the invasive imposition of California tobacco regulatory regime would be just as fatally unavailing as was the Trial Court's mistaken reliance on the inapposite *Black Hawk* decision. Darrel Paul Rose was, at all times relevant to the decision in his case, a member of the Alturas Indian Rancheria, located in Modoc, County, but he maintained two rogue smoke shops on two separate Karuk tribal allotments held in trust by the federal government. Allotments are remnants of reservations and constitute "Indian Country" under federal law. (18 U.S.C. § 1151.) The Alturas Indian Rancheria held no interest in either allotment, which were both located over 150 miles from the Alturas Indian Rancheria in Siskiyou and Shasta Counties. (*Rose*, *supra,* 16 Cal.App.5th at 321-323.)

Like *Black Hawk* before it, *Rose* is not even, formally speaking, an Indian tobacco case because appellant Darrell Rose was a nonresident nonmember Indian operating two rogue smokes shops on allotments associated with a foreign Indian reservation. Thus, according to *Colville* and the *Rose* decision itself, Rose stood in the same legal position as a non-Indian for purposes of evaluating the impact of California's tobacco regulatory regime on the federally protected right to tribal self-government. (*Colville, supra,* 447 U.S. at 160-161; *Rose*, *supra,* 16 Cal.App.5th at 329, citing *State v. R.H.M.* (Minn. 2000) 617 N.W.2d 55, 64-65 (distinguishing between the

Minnesota's authority over Indians who are enrolled members on their own reservation and nonmember Indians on a foreign reservation.)

Relying heavily on *Bracker, Williams* and *Colville*, the *Rose* court unsurprisingly held, after carefully balancing state, federal and tribal interests and considering the impact of the State regulatory regime on "'the right of reservation Indians to make their own laws and be ruled by them,'" the rogue business operations of a nonmember Indian on an allotment associated with a foreign reservation implicated no cognizable interest in tribal self-government. The *Rose* court held simply "there is no tribal sovereignty issue involved in this case." (*Rose*, *supra,* 16 Cal.App.5th at 329; *Bracker, supra,* 448 U.S. at 142-143, 145; *Williams, supra,* 358 U.S. at 220; *Colville, supra,* 447 U.S. at 160-161.) Rather than in any way lending support to Respondent's position here or the Trial Court's decision below, *Rose* exposes the egregious error committed by the Trial Court when it declared it was not required to balance competing state, federal and tribal interests nor even take into consideration the effect of the State's assertion of regulatory authority on the federally protected right of tribal self-government. (CT, p. 5:001371, ¶ 25.)

Since the Indian tobacco proprietors in both *Black Hawk* and *Rose* were not enrolled members of the tribe on whose trust land they were operating rogue smoke shops in violation of tribal law, the application of California's tobacco regulatory regime to those Indian proprietors doing

business on foreign trust land implicated absolutely no issue of tribal self-government and, thus, do not offer any support whatsoever to California's attempt to apply the same tobacco regulatory regime here.

In stunning contrast to the facts of *Black Hawk* and *Rose,* Appellant Ardith Huber is a duly enrolled member of the Wiyot Tribe and lifelong resident of the Wiyot Reservation. (CT, p. 4:001133.) The Wiyot Tribe adopted a Tribal Business License Code, a Tribal Tobacco Ordinance and a Tribal Trucking License Ordinance, pursuant to which Appellant was issued multiple tribal licenses that authorized her to conduct her tobacco business from her home on the Wiyot Reservation. (CT, p. 4:001133-001136.) Appellant's business was expressly approved by vote of the Wiyot Tribal Council; she maintained her tribal business license and paid tribal business taxes in full compliance with tribal law. (*Ibid.*) The Wiyot Tribe was so supportive of Appellant's tobacco business it conferred upon her business "the full protection of the Tribe's sovereign immunity" under Section 8(a) of the Wiyot Tribal Tobacco Ordinance. (CT, p. 4:001018.) A portion of the taxes collected by the Wiyot Tribe on reservation tobacco sales were paid into the Wiyot Tobacco Fund with the balance helping to finance tribal operations and essential tribal services. (CT, pp. 4:001012-001018.) These laws represent the collective policy judgment of Wiyot tribal self-government in action, yet represent a fundamentally different policy judgment than that reached by the State of California. That collective tribal

policy judgment deserves the respect of "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" under the *Bracker* and *Williams* test to determine if the state laws "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" (*Bracker, supra,* 448 U.S. at 142-143, 145; *Williams, supra,* 358 U.S. at 220.) The Trial Court's *a priori* refusal to even take the issue of Wiyot Tribe's right to self-government into consideration and balance state, federal and tribal interests constitutes **reversable error**. Thus, this Court must vacate the permanent injunction and remand this case to the Trial Court for further proceedings to determine the impact of California's tobacco regulatory regime on the federally protected right of the Wiyot tribe to self-government.

II. SUPPLEMENTAL QUESTION 2

Does the Superior Court have subject matter jurisdiction to entertain any of Respondent's three claims under 18 U.S.C. § 1162?

A. As Respondent concedes, if this Court were to find that all the claims in this case did not "arise in" Indian Country, this Court would have no criminal subject matter jurisdiction under 18 U.S.C. § 1162 because such jurisdiction can only be exercised over violations of criminal/prohibitory laws that occurred in Indian Country.

Respondent has impaled itself on the horns of dilemma. In arguing in response to Supplemental Question 1 that all their claims against Appellant did ***not*** "arise in" Indian Country in a vain effort to evade the conclusion that California's tobacco regulatory regime violates the tribal right of self-

government under *Williams,* they have completely eviscerated the argument that this Court has criminal jurisdiction under 18 U.S.C. § 1162 since such jurisdiction may only be exercised with respect to criminal law violations that occur in Indian Country. Only by arguing in the alternative can Respondent try to escape the consequences of its earlier conclusion that none of its claims arise in Indian Country. (ROSB, pp. 19-23.) 18 U.S. Code § 1162(a) expressly requires that the "offenses committed by or against Indians" over which California courts have criminal subject matter jurisdiction are limited to those committed within Indian Country inside of California. (18 U.S. Code § 1162(a).)

Outside the hypothetical universe of frivolous alternative argument, there is no doubt, as previously explained, that all Respondent's claims clearly "arise in" Indian Country. (See Appellant's Opening Supplemental Brief ("AOSB"), pp, 31-53; Appellant's Supplemental Reply Brief ("ASRB"), *supra,* pp. 9-34).) Respondent's claims were only brought because they arose within Indian Country after Appellant began her tobacco retail and wholesale business on the Wiyot Reservation. To pretend otherwise, to even suggest that because some part of the purchase and sale cycle of Appellant's business occurred off-reservation that there is no inextricable connection to on-reservation operations and tribal governmental interests simply ignores the record in this case. (CT, p. 5: 001363-001366.)

B. Since Respondent's Unfair Competition Law claim is civil/regulatory in nature, as this Court correctly recognized in its withdrawn opinion, this Court has no criminal subject matter jurisdiction under 18 U.S.C. § 1162 to hear such claim.

Just as spurious as the suggestion that none of Respondent's claims "arise in" Indian Country is the untenable argument that any of the claims against Appellant in this case are actually criminal/prohibitory in nature instead of the civil/regulatory measures all the parties assumed them to be since the original complaint was filed against Appellant. (AOSB, pp, 31-53.) Even though Respondent has never previously suggested that its Unfair Competition Law ("UCL") claim was criminal/prohibitory in nature and, therefore, within the grant of subject matter jurisdiction of 18 U.S.C. § 1162, Respondent now argues that the UCL claim has changed its stripes mid-appeal and suddenly assumed a criminal/prohibitory quintessence previously undetected. (ROSB, pp. 20-23; Bus. & Prof. Code, §§ 17200-17209 ("UCL").)

First, Respondent mistakenly attaches special interpretative significance to the fact that it has brought its UCL claim under the "unlawful prong" of the UCL and argues "that a UCL unlawful prong claim is separate from a predicate violation and is more than a mere remedy for a predicate violation." (ROSB, p. 21.) All that may be true, but it is utterly beside the point because it does not make a "UCL unlawful prong claim" inherently criminal/prohibitory in nature. Civil as well as criminal claims may be

brought under the "unlawful prong" of the statute. As the *Shroyer* decision made clear, under the "unlawful prong" of the UCL, a business practice must merely be "forbidden by law, be it ***civil or criminal***, federal, state, or municipal, statutory, regulatory, or court-made." (*Shroyer v. New Cingular Wireless Services* (9th Cir. 2010) 622 F.3d 1035, 1044 (emphasis added; internal quotation marks omitted), *quoting Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-39; *see also Kane v. Chobani, Inc*. (N.D. Cal. 2014) 973 F.Supp. 2d 1120, 1134, 1129 (discussing the required elements for civil claims premised on misrepresentation and deception brought under the unlawful prong of the UCL).)

Second, Respondent also mistakenly makes much of its argument that the character of the predicate laws on which a UCL "unlawful prong" claim is based determines the character of the UCL claim itself. (ROSB, p. 20.) Since all the predicate statutes on which the UCL claims are based must be deemed civil/regulatory in nature, as Appellant has exhaustively established in her Opening Supplemental Brief, Respondent's argument is ultimately self-defeating. (AOSB, pp. 31-53.) Under Respondent's logic, the UCL claim itself would assume the civil/regulatory character of the underlying civil/regulatory predicate statutes. This is, however, not the full story. UCL unlawful prong claims do not necessarily and automatically assume the character of their predicate statutes in invariant chameleon-like transformations. UCL claims may remain civil in nature though they enforce

a criminal statute. (*Rose v. Bank of America, NA*. (2013) 57 Ca1.4th 390, 396; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560, 566.)

III. SUPPLEMENTAL QUESTION 3

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?

A. The correct justiciability doctrine applicable to Supplemental Question 3 is mootness, not ripeness.

Respondent has mistakenly characterized Supplemental Question 3 as raising an issue of ripeness and has argued incorrectly that it is not ripe for review. (ROSB, pp. 24-27.) "Ripeness" is a justiciability doctrine that considers whether a party has brought an action too early for adjudication. A controversy becomes "ripe" once it reaches, "but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22 (footnote omitted.) It is not that it is now too early in this litigation to consider the *Colville* stock seizure issue, but rather whether circumstances have changed since the inception of this action to divest that issue of justiciability. Given the nature of that issue, it arises under the justiciability doctrine of mootness. (Kates, Jr. & Barker,

Mootness in Judicial Proceedings: Toward a Coherent Theory (1974) 62 Cal. L. Rev. 1385, 1401-1435.)

B. This Court should decide Supplemental Question 3 on the basis of the "great public interest" exception to the mootness doctrine.

Given that the essential issue raised by the Court concerns the ***power*** a state "to enter onto the reservation [and] seize stocks of cigarettes which are intended for sale to nonmembers" and that characterization cuts to the heart of this case, Appellant has urged this Court to treat the justiciability question it has raised as one of mootness and embrace the line of California cases following the rule that the justiciability bar against deciding moot issues may be overcome if the issue presented that will eventually recur is of "great public interest." (*Stroh v. Midway Restaurant Systems, Inc.* (1986) 180 Cal.App.3d 1040, 1048; *Ballard v. Anderson* (1971) 4 Cal. 3d 873, 876-877; *see also, In re Stevens* (2004) 119 Cal.App.4th 1228, 1232 (interior quotation marks omitted) *quoting Beilenson v. Superior* Court (1996) 44 Cal.App.4th 944, 949; *In re William M.* (1970) 3 Cal.3d 16, 23-25.) The same "power" that would provide a pretext for the illegal seizure of on-reservation cigarette stocks in violation of the right to tribal self-government also serves as the spurious basis for the state's nullification of Wiyot tribal law and subversion of federally protected tribal political process. Thus, Appellant has urged this court to decide Supplemental Question 3 on the basis of the "great public interest" exception to the mootness doctrine.

CONCLUSION

Neither the trial court nor this tribunal has undertaken any serious, sustained examination of the adverse effects of the imposition of state legislative and adjudicative jurisdiction over Appellant on the Wiyot Tribe's federally protected right of self-government. Nor has either court realistically confronted the nullification of Wiyot tribal law and policy that took place when the state and the trial court decided California law, independent of Public Law 280 and unaided by any enabling federal delegation of authority, preempted all tribal business and tobacco regulations. Although off-reservation effects concededly exist, so too does sweeping on-reservation nullification of Wiyot tribal laws and policies, thereby subverting the authority of tribal self-government to an extent far in excess of the "minimal burdens" permitted by U.S. Supreme Court precedent. (*Hicks, supra,* 533 U.S. at 362 *quoting Colville, supra,* 447 U.S. at 151.)

The U.S. Supreme Court has never held that the moment there are off-reservation effects, the need to balance federal, state and tribal interests automatically ceases. When the State seeks to regulate Indian commerce that adversely affects tribal members on their own reservation, the reviewing court may not evade the legal necessity of balancing state, federal and tribal interests merely because of the presence of some off-reservation "contacts," as the Trial Court put it, especially where, as here, the right to tribal self-

government is directly infringed by invasive state regulation. (CT, p. 5:001371, ¶ 25.)

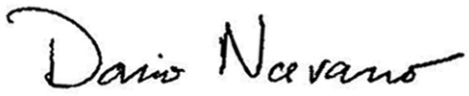
This court has also erroneously conflated two independent tests required by U.S. Supreme Court precedent to evaluate the legality of every assertion of state regulatory authority over Indian reservation and tribal members. The *Bracker* court identified "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee,* 358 U.S. 217, 220 (1959) [*Williams*] . . . . The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." (*Bracker*, *supra,* 448 U.S. at pp. 142-143.) This court, however, failed to treat these two tests as independent, but instead expressly treated the right of tribal self-government as a subsidiary, dependent component of the federal "Indian preemption" test. (Slip op., p. 36.)

Among the obvious legal and practical effects of the coercive imposition of the Directory Act and the Fire Safety Act on Appellant's on-reservation, tribally authorized business is ***the overt nullification of tribal law by operation of state law***. This case must be remanded for further proceedings before the Trial Court that would make possible a serious

evaluation of all the effects of California's tobacco regulatory regime on the Wiyot Tribe's federally protected right of self-government by means of the fatally omitted "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." (*Bracker, supra,* 448 U.S. at 145.) Alternatively, this Court should vacate the challenged permanent injunction and dismiss this case with prejudice on the grounds that California's tobacco regulatory regime unduly burdens the Wiyot Tribe's right to self-government.

Dated: December 6, 2018

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that pursuant to CRC 8.204(c) the text of this Appellant's Supplemental Reply Brief, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certification, consists of **8,100** words in 13-point Times New Roman font as counted by the word-processing program used to generate the text.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at South Lake Tahoe, California on December 6, 2018.

By: _____

Dario Navarro
Attorney for Appellant

PROOF OF SERVICE

Case Name: **People of the State of California, *ex rel.* Xavier Becerra, Attorney General of the State of California v. Ardith Huber, *et al.***

Case Number: **A144214**

1. At the time of service, I was at least 18 years of age and **not a party to this action**. I am a resident of or employed in the county where the mailing took place. My residence or business address is 3170 U.S. Highway 50, Suite 2, South Lake Tahoe, CA 96150.

2. I served a copy of *Appellants' Supplemental Reply Brief* by enclosing it in a sealed addressed envelope to the persons at the addresses listed in item 4 and

   ☑ **BY FIRST-CLASS MAIL:** I deposited the sealed envelope with the United States Postal Service with first-class postage fully prepaid at a United States Post Office in South Lake Tahoe, California; and

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3. *Appellants' Supplemental Reply Brief* was placed in the mail:

   a. on *(date)*: **December 6, 2018**
   b. at *(City and State)*: South Lake Tahoe, California.

4. The envelopes were addressed and mailed as follows (e-mail address omitted):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed at South Lake Tahoe, California on **December 6, 2018.**

Dario Navarro

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