No. 19-16777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BIG SANDY RANCHERIA ENTERPRISES,
a federally recognized Indian tribe incorporated under the Indian Reorganization Act,

Plaintiff-Appellant,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and NICOLAS MADUROS, in his official capacity as Director of the California Department of Tax and Fee Administration,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of California
No. 1:18-cv-00958-DAD-EPG, Judge Dale A. Drozd

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The lower court erred when it determined, in effect, that Big Sandy Rancheria Enterprises ("BSRE") could "establish no circumstances under which relief would be warranted" on its federal preemption claims. *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992). On the facts alleged in the First Amended Complaint ("FAC"), which describes BSRE's sales of tribally-manufactured cigarettes exclusively to Indian tribes and tribal members on their reservations, federal law preempts certain California laws regulating such conduct – specifically, the Complementary Statute, State licensing and reporting requirements, and any obligation upon BSRE to pay, collect or remit cigarette taxes. At a minimum, BSRE's allegations "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Because BSRE is an incorporated Indian tribe organized under section 17 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 5124, the federal court has jurisdiction over BSRE's action to enjoin federally-preempted state tax collections, just as it would have jurisdiction over such a suit by any federally recognized Indian tribe organized under other statutory authority. The lower court erred in concluding otherwise.

California's cigarette laws, as the Attorney General interprets them, and the district court's decision to uphold them, abjectly fail to seek an "accommodation"

between the important federal and tribal interests in tribal self-government and self-sufficiency, and the State's valid interests, such as taxing off-reservation value. *See Washington v. Confederated Tribes of Colville Indian Reservation* ("*Colville*"), 447 U.S. 134, 156 (1980); *Dep't of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.* ("*Milhelm*"), 512 U.S. 61, 73-75 (1994). Instead, they empower California with unbounded control over the sale of tribal products among tribal parties in Indian country, dooming BSRE's efforts, undertaken "under the authority of federal law," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983), to harness tribal resources and "'rehabilitate the … economic life'" of Indian country, still fighting to recover from "'centur[ies] of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)). The decision condoning this unjustified interference with federal laws and policies and infringement of tribal sovereignty must be reversed.

ARGUMENT

I. BSRE's preemption claims withstand the State's motions to dismiss.

A. BSRE incurs no cigarette tax liability.

Although the district court did not determine the extent of California's authority to tax BSRE's sales, or whether the transactions in which BSRE engages give rise to an obligation to collect and remit California cigarette taxes, those

issues are critical to determining the other regulatory issues presented in this appeal. This is because, as California has acknowledged, California's regulatory authority does not extend to transactions which are exempt from taxation under federal law.

For instance, California's Escrow Statute provides that the escrow requirement does not apply to "cigarettes … sold by a Native American tribe to a member of that tribe on that tribe's land, *or that are otherwise exempt from state excise tax pursuant to federal law*." Cal. Health & Safety Code § 104556(j) (emphasis added); ER83. The Complementary Statute, Cal. Rev. & Tax. Code § 30165.1, is intended to assist the State with enforcement of the Escrow Statute. ER80. Accordingly, the Complementary Statute serves no purpose as to, and does not apply to, transactions that are statutorily exempt from California's escrow requirements, i.e., transactions involving sales to federally exempt Indian tribes and Indian entities. State's Br. at 34 (escrow fees "do not attach to cigarettes beyond the reach of state taxation"); ER83:13-18 (tax exempt transactions are "beyond the statutes' intended reach").

Similarly, California's Cigarette and Tobacco Products Licensing Act provides: "No person is subject to the requirements of this division if that person is exempt from regulation under the United States Constitution, the laws of the United States, or the California Constitution. Cal. Bus. & Prof. Code § 22971.4.

Together with federal preemption principles, this statute excludes BSRE, which engages in only tax-exempt transactions, from the requirements of the Licensing Act.

The United States Supreme Court has rejected the notion that a state has absolute regulatory authority over cigarette distributions in Indian country located within that state. Instead, a state's regulatory authority over such transactions is directly tied to the state's authority to tax and is limited to enforcement of regulations that are "reasonably tailored" to the purpose of collecting legitimate state taxes. *Milhelm*, 512 U.S. at 73. And critically, a state's taxing and regulatory authority and its ability to impose a "collect and remit" requirement on a given distributor is dependent upon the provisions of the state's laws and regulations.

Accordingly, while states may devise taxing and regulatory schemes that open the door to some regulation of transactions involving Indian tribes, they can also devise taxing and regulatory schemes that close the door on the state's regulatory authority. As discussed below, the taxing and regulatory scheme California has chosen closes the door on California's efforts to regulate BSRE's on-reservation sales to federally recognized Indian tribes and tribal entities.

Step-by-step examination of federal case law and California's Cigarette Tax Law supports BSRE's conclusions that it is not subject to state cigarette tax, that its customers are not subject to cigarette tax, and that California law does not require

BSRE to collect and remit cigarette tax. *See* Opening Br. at 22-37. Both state law and the "categorical" immunity of Indians from state taxes imposed on them on their reservations establish that BSRE is not validly taxed when it purchases cigarettes on its own reservation from the manufacturer. *See* Cal. Rev. & Tax. Code § 30103;[1] *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995). Categorical immunity also means the Indian entities that purchase cigarettes from BSRE on the purchasers' respective reservations are not validly taxed. *See Chickasaw* at 458-59. The Indian trader statutes preempt any "tax directly imposed upon Indian traders for trading with Indians," so BSRE is not validly taxed when it makes sales to its customers, all of whom are Indians on their reservations. *Milhelm* at 74; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164-66 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 691 (1965). California law does not impose a tax on BSRE's movement of cigarettes from its reservation to another reservation for the purpose of sale and delivery. Cal. Rev. & Tax. Code §§ 30008, 30009.[2]

[1] As California highlights (State's Br. at 49), § 30103 provides that cigarette taxes "shall not apply to the sale of cigarettes … by the manufacturer to a licensed distributor." BSRE is considered a "licensed distributor" because the State license requirement is preempted as to BSRE, and with it California's authority to disadvantage BSRE on account of its not having a license.

[2] Again, if California lacks authority to require that BSRE be licensed, then sections 30008 and 30009 (which exclude from taxation "the keeping or retention"

California's taxing jurisdiction does not extend to retail sales of cigarettes at an Indian tribe's gaming facility, including retail sales to non-Indians. *See, e.g.*, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir. 1994); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 932-37 (8th Cir. 2019). *See also* ER109-110 (California tribal gaming compacts state "nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco"). Further, California law does not require BSRE to collect and remit cigarette taxes, since the Indian retailers to which BSRE sells its products categorically do not owe such taxes. Cal. Rev. & Tax. Code § 30108(a); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11-12 (1985). California agrees with BSRE on this point, stating that California law "require[s] collection only upon sale to a non-Indian on trust land, on reservation." State's Br. at 45 (internal quotation marks omitted). BSRE makes no such sales, so it incurs no collect-and-remit obligation.[3]

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of cigarettes "by a licensed distributor for the purpose of sale") apply to BSRE as if it possessed a license.

[3] California also acknowledges that it cannot tax cigarettes "ultimately sold" by a tribal seller to a tribal purchaser on their own reservation, although it suggests, without explanation or reason, that this categorical bar would apply only "if BSRE and its customers were otherwise complying with the scheme[.]" State's Br. at 43-44.

Aside from its partial agreement with BSRE, California side-steps these issues, and "do[es] not take a position in this case on whether BSRE owes any tax or is responsible for any fee." State's Br. at 2. It insists that the "state scheme" encompasses an "evaluative assessment of whether a tax or fee is owed on any transaction or group of transactions," *id.* at 43, although any such assessment occurs at an unspecified stage and without the necessary facts, as California rules out requiring BSRE or other sellers "to pre-pay the tax and seek reimbursement for any tax-exempt sales," and it does not obtain any "information on individual Indian consumers." ER82:18-21.

The familiar line of cases the State discusses establish that a state may impose minimal burdens on an Indian tribe, tribal member, or Indian trader that are reasonably necessary to assist in the State's collection of taxes validly imposed upon nonmembers in Indian country. *Milhelm* at 75; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991); *Chemehuevi* at 12; *Colville* at 159-60; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482-83 (1976). None of these cases contradict BSRE's conclusion that neither BSRE nor its customers are taxable. Moreover, none of them ratifies California's burdens upon BSRE in the context of BSRE's reservation sales to untaxable tribal purchasers. *Milhelm* articulates the legal standard, and BSRE

presents a plausible case that, under the circumstances, the State's burdens are not justified.

The collection of a valid state tax was a critical factor in each of these cases. *Moe* held that the State of Montana's "requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe* at 483. That is, "the State may require the Indian proprietor simply to add the tax to the sales price," but *only* "to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold," and if such a requirement will "aid the State's collection and enforcement" of the validly imposed tax. *Id.*

Colville applied the same standard: "if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." *Colville* at 159. The Court upheld the State of Washington's recordkeeping requirements for tax-exempt sales as well as taxable ones because it concluded the requirements were "reasonably necessary as a means of preventing fraudulent transactions." *Id.* at 160. If there had been no concern of tax evasion in *Colville* because *none* of the tribal retailers' transactions were taxable, then the state's sole justification would have been absent. Moreover, in *Colville*, the tribes

failed to supply *any* evidence to show that the state's recordkeeping requirements were not "reasonably necessary to ensure payment of taxes which [the state] had power to impose." *Id.* at 159-60. Thus, even with valid taxes in the picture, and as confirmed in *Milhelm*, state regulations must be reasonably tailored to the collection of valid taxes. Here, California does not require "verification of sales that are not taxable to members." State's Br. at 45. This too narrowly defines the applicable exemptions, while raising serious doubts that the recordkeeping burden imposed on BSRE would assist in determining if state taxes are owed, and if so, help California collect them.

In *Chemehuevi*, the Court held that California could require a tribal retail smoke shop to collect the state cigarette tax validly imposed on non-Indian consumers. *Chemehuevi* at 12. Not only does *Chemehuevi* fail to ratify a collect-and-remit requirement imposed on a wholesale seller who only makes tax-exempt sales to tribal purchasers, but it also confirms that California law does not attempt to impose a collect-and-remit requirement on such a wholesaler. *Id.* at 11-12.

Potawatomi does not foreclose BSRE's action either. *Potawatomi* involved a retail seller, not a wholesaler, as the State asserts in its brief. *Potawatomi* at 507 (tribe "owns and operates a convenience store" on tribal trust land); *see* State's Br. at 47. *Potawatomi* held that although tribal sovereign immunity "bars the State from pursuing the most efficient remedy," namely a suit to enforce a tax

assessment, alternative remedies remain available. *Potawatomi* at 514. Among these alternatives is collecting the tax from wholesalers, either through off-reservation seizures of cigarettes that should bear tax stamps, but do not, or by "assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Id.*[4]

These theoretical potential remedies invite, rather than exclude, further analysis. While states might "assess[] wholesalers" (while allowing for legitimate tax free sales), California law, for the reasons previously outlined, undisputedly does not impose any valid assessment upon BSRE. Further, while the State repeatedly defends its right to seize cigarettes found outside Indian country (even though seizures have never been a focus of BSRE's complaint), clearly someone must be avoiding some valid tax or regulation before such a seizure is justified. *See Colville* at 161-62 (finding that "Washington's interest in enforcing its valid taxes is sufficient to justify" off-reservation seizures "when the Tribes … have

[4] As an example of a state "assessing wholesalers," *Potawatomi* cited *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). *See Potawatomi* at 514. *City Vending* merely affirmed that the district court lacked jurisdiction to review state tax assessments of a cigarette wholesaler; no federal or state court ever reviewed the wholesaler's claim of preemption. *City Vending* at 125. The *Potawatomi* court did not intend, by this reference, to foreclose such claims in future cases.

refused to fulfill collection and remittance obligations which the state has validly imposed").

Milhelm held that Indian traders, like tribal retailers in Indian country who make taxable sales to nonmembers, "are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm* at 75. The Court reiterated that no "'rigid rules'" or "'mechanical or absolute conceptions of state or tribal sovereignty'" control the question, which depends instead on "'a particularized inquiry'" into the three sovereigns' interests "'designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" *Milhelm* at 73 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). *Milhelm* approved the New York regulations because the particularized inquiry persuaded the Court that the state's requirements were "reasonably necessary" to serve the state's interest in collecting "valid taxes without unnecessarily intruding on core tribal interests." *Milhelm* at 75 (quoting *Colville* at 160, 162). Validly imposed taxes and, concomitantly, tax-free cigarettes sufficient to satisfy tribes' legitimate demands, are the legal requirements of valid state regulation. This is where California's system falls short.

BSRE previously explained why the New York-style preapproval and precollection regime can be characterized as reasonably necessary and not unduly

intrusive, while California's system cannot. *See* Opening Br. at 34-37, 40-41, 45-46. *Milhelm* analyzed the New York tax scheme in detail to determine whether it was "unduly burdensome." *Id.* at 76. The Court specifically approved the New York regulations which "recognize[d] the right of 'exempt Indian nations or tribes, qualified Indian consumers and registered dealers' to 'purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to [New York tax law].'" *Id.* at 65 (quoting 20 N.Y.C.R.R. § 336.6(a) (1992)). In applying its test, *Milhelm* emphasized that federal law would not permit the state "to 'dictate the kind and quantity of goods and the prices at which such goods shall be sold to the Indians'" by compelling "tax-immune Indians" to pay state cigarette taxes, or by requiring wholesalers or retailers "to precollect taxes on cigarettes destined for their consumption," or "any tax to which [the State] is not entitled." *Id.* at 75-76.

The careful analysis undertaken in *Milhem* would have been unnecessary if no specialized taxing mechanism were required to account for state-tax-free sales to tribal members and entities. *See Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 254 (N.Y. 2010). In fact, New York later replaced its *Milhelm*-approved system with one that (like California's) sought to regulate reservation sellers but failed to "respect[] the federally protected right to sell untaxed cigarettes" to immune Indians. *Id.* at 253. Relying on *Milhelm*, New York's high

court held that federal law preempted prosecutions under the new system. *Id.* at 255.

Here, California fails the *Milhelm* test, as California law does not allow for the provision of tax-free cigarettes to BSRE in a quantity sufficient to provide for legitimate tax-free sales. Rather, while it is undisputed that some consumers may purchase cigarettes free from state tax and free from escrow fees, California nevertheless would require prepaid tax stamps on all cigarettes sold in the state, and would bar all cigarettes whose manufacturer has not paid MSA or escrow fees. *See* CDTFA Publication 146, Sales to Native Americans and Sales in Indian Country (May 2020) at 24 (available at https://www.cdtfa.ca.gov/formspubs/pub146.pdf) (last visited Sept. 1, 2020).[5] This

[5] The publication states:

> There are no special exemptions from the state's cigarette and tobacco products taxes for sales of cigarettes and tobacco products to Native Americans. A non-Native American cigarette distributor who sells cigarettes to a Native American must pay cigarette and tobacco products taxes and apply California cigarette tax stamps to the cigarette packages.

Notably, the publication fails to address Native American cigarette distributors, which implies that a different rule applies. The section on retail cigarette sales asserts that non-Native American consumers owe the tax, but fails to address Native American purchasers, again implying the existence of a special exemption. *Id.*

system cuts off the supply of tax- and fee-exempt cigarettes. The State regulatory burden imposed on BSRE is not reasonably tailored to the collection of valid taxes, *Milhelm* at 73, and California has not met its obligation to make available to tax exempt purchasers a tax-free quantity sufficient to "satisfy the legitimate demands" of those purchasers, *id.* at 69.

As this case demonstrates, without a coherent scheme developed by California to account for qualified tax-free sales, BSRE is subject to ad hoc enforcement by state officials who would decide, after the fact, what actions it could or should have taken to comply with state tax law. *See Cayuga* at 255. Here, California has asserted in correspondence that BSRE is obliged to collect and remit taxes, and that its failure to do so renders its operation unlawful. *See* ER165, ER168. But no State-designed system exists in California to provide BSRE (or anyone else) any way to know how much to collect or from whom, how many cigarettes are deemed "units sold" for purposes of the Escrow and Complementary Statutes, or any method of ensuring that tax-exempt cigarettes may be lawfully delivered and sold to Indians on their own reservation. Such a system of risk and uncertainty fails to meet *Milhelm*'s standard. *Cayuga* at 253-55.

B. BSRE is an Indian trader whose sales are governed by the Indian trader statutes.

The Court should reject California's invitation to erase the Indian trader statutes from federal law. *Warren* and *Central Machinery* held that through these

acts and the regulations promulgated under their authority, the federal government comprehensively regulates trade with Indians. *Central Machinery* at 163; *Warren* at 688-89. To avoid the "anomal[y]" of recognizing stronger protections for traders than for Indians after *Moe* and *Colville* eroded certain tribal immunities from state regulation, *Milhelm* walked back *Warren*'s suggestion "that no state regulation of Indian traders can be valid." *Milhelm* at 71. But *Milhelm* distinguished *Warren* and *Central Machinery*, which preserved their holdings, and did not overrule them. *Id.* at 74-75. It is still the rule, after *Milhelm*, that the Indian trader statutes preempt "a tax directly 'imposed upon Indian traders for trading with Indians.'" *Id.* at 74 (quoting *Warren* at 691).

It also remains "irrelevant" to the preemption analysis if one who makes sales to Indians in Indian country is not federally licensed. *Central Machinery* at 164. "It is the existence of the Indian trader statutes, … not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id.* at 165. This is so notwithstanding the dissenting opinions in *Central Machinery*, which argued against this holding, 448 U.S. at 169-70 (Stewart, J., dissenting); 448 U.S. 171-72 (Powell, J., dissenting), and despite *Milhelm*'s quotation of one word from Justice Powell's *Central Machinery* dissent, *Milhelm* at 71 ("'undermine[d]'"); *cf.* State's Br. at 55-56.

BSRE invokes the Indian trader statutes not because of imaginative "self-defin[ition]," State's Br. at 10, but simply based on the fact that its activity, selling goods to Indians in Indian country, is precisely the activity Congress set aside for regulation by the federal government in the Indian trader statutes. *See* 25 U.S.C. §§ 261-264; 25 C.F.R. §§ 140.1-140.26; *Central Machinery* at 164-65.

Further, the Department of the Interior continues to recognize the vital role played by the Indian trader statutes and regulations in advancing federal policies by ensuring that traders and the Indians to whom they make sales avoid crippling "dual taxation." which "can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments, and "impede a Tribe's ability to attract investment to Indian lands where such investment and participation are critical to the vitality of Tribal economies." Traders With Indians, 81 Fed. Reg. 89015, 89016 (Dec. 9, 2016). The Department's focus is updating the regulations "in a manner more consistent with Tribal self-governance and self-determination," to reflect the prevailing federal policy of relying on tribal jurisdiction in Indian country, "often without federal involvement," an allusion to the Department's longstanding practice of not issuing federal trader licenses. *Id.* at 89015, 89016.[6]

[6] Because of this practice, BSRE is not "flouting the Indian Trader Statutes" by selling to Indians in Indian country without an unobtainable federal license.

The State's reliance on the PACT Act is misguided. *See* State's Br. at 57-60 (discussing the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. 111-154, 124 Stat. 26). With the PACT Act, Congress took steps to combat illegal tobacco smuggling by regulating mail order and other non-face-to-face sales to consumers. PACT Act § 1(c), 15 U.S.C.A. § 375 Note. Congress acted, however, while expressly preserving all existing laws and policies that preempt state authority in Indian country. The PACT Act states that it shall not "amend, modify, or otherwise affect … any limitations under Federal or State law, including Federal common law and treaties, on State, local and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes … by or to Indian tribes, tribal members, tribal enterprises, or in Indian country." PACT Act § 5(a), 15 U.S.C.A. § 375 Note. Whether the PACT Act imposes federal reporting and recordkeeping requirements upon BSRE is not the subject of this lawsuit, but the Act clearly grants California no powers over Indian commerce it did not possess before the Act.[7]

State's Br. at 57; *see United States ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401, 403 (8th Cir. 1980). Its sales are permitted by the Indian tribes with jurisdiction over the respective reservations. *See id.*

[7] Not only does the PACT Act *not* expand state tax and regulatory jurisdiction in Indian country, in the final amendments to the bill that would become the PACT Act, the Senate cut MSA enforcement provisions in their entirety. *Compare* 155 Cong. Rec. S5822-01 at S5859, 2009 WL 1423723 (2009) (including section 4,

The State and the district court are also mistaken in their view that BSRE's relevant conduct occurs off-reservation, and that federal Indian law preemption principles therefore do not apply. *See* State's Br. at 60-64; ER20. The federal rules governing Indian traders cover "[a]ny person desiring to trade with the Indians on any Indian reservation," so they squarely apply to BSRE's sales, all of which are made to Indians on the buyer's reservation. 25 U.S.C. § 262; *Central Machinery* at 164-65. Furthermore, the Indian trader statutes limit state authority to regulate any trader's sales to reservation Indians, even when the state regulation finds the trader off the reservation. *Milhelm* at 74-75 (scrutinizing wholesaler's state-imposed recordkeeping and precollection requirements for undue interference with Indian trading); *Central Machinery* at 165 ("The Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader.").

Reliance on *Colville* to support the State's authority to seize cigarettes "in anticipation of continued violations" by tribal retailers is also misplaced. State's Br. at 62, citing *Colville* at 161-62. The legitimacy of any such seizures, *if* they result from any third party's violations of validly-imposed regulations, is not a

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which would have prohibited any tobacco product "that is not in full compliance with the terms of the [state's MSA Escrow Statute]") *with* 156 Cong. Rec. S1480-01 at S1480, 2010 WL 840588 (2010) (removing these provisions entirely).

question presented by BSRE's claims, which target BSRE's substantive obligations under the Complementary Statute, state licensure responsibility, and state cigarette tax liability. That the State may have authority to seize cigarettes *if* a violation occurs fails to answer the question of what BSRE must do, if anything, to avoid violating valid state laws.

C. The Complementary Statute does not apply to BSRE's untaxed cigarettes.

Although California argues that it is immaterial whether BSRE owes any tax or fee, California agrees with BSRE that MSA escrow fees "do not attach to cigarettes beyond the reach of state taxation[.]" State's Br. at 34. California concedes that, similarly, the Complementary Statute does not extend to tax-exempt cigarettes. ER83:13-15. As outlined previously, this means any off-directory cigarettes handled by BSRE are not contraband unless and until tax is validly imposed. Opening Br. at 40. California does not dispute this point on appeal. State's Br. at 51. Since the cigarettes are not validly taxed (if ever) until sold at retail, the Complementary Statute does not require BSRE to handle only cigarettes on the State directory.

Yet even though tax-exempt cigarettes are also exempt from escrow fees, California tars any non-payment of escrow fees as "evading" an obligation to pay, creating an "illicit" advantage for "scofflaw manufacturers." State's Br. at 34. California views legitimate immunities from state regulation, established under

federal law to secure the right of Indian tribes to be ruled by their own laws and to promote effective tribal governments, solely as the tools of criminals.

Rather than addressing the state-law exclusion for untaxable cigarettes, which is dispositive of BSRE's Complementary Statute claim, California describes two arguments attacking federal preemption, neither of which justifies dismissing the FAC. First, BSRE presents a viable claim that the balance of interests does not justify the Complementary Statute's regulating the kind, quantity and price of goods BSRE sells to Indians. *See* State's Br. at 51-52, citing *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 216 (Okla. 2010). The Indian trader statutes expressly reserve such regulatory power to the federal government and withhold it from states. 25 U.S.C. § 261 (granting federal Indian Affairs official "the sole power and authority … to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians"); *see id.* § 263. The Indian trader regulations prohibit cigarette sales to persons under 18, and do not require compliance with general state laws. 25 C.F.R. § 140.7. This is in addition to Indian tribes' history of sovereignty in the area of tobacco trade before and since European settlers' arrival. ER92 ¶ 30. The tribal interest in conducting transactions free from state-imposed burdens is further strengthened by the active, concerted and sustained role that Indian tribes play in generating the value of the

products at issue, which generate funds for essential tribal services and provide employment for tribal members. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 341; *Colville* at 156-57. The cigarettes are manufactured on reservation, distributed exclusively through a network of businesses owned and operated by tribes and tribal members on their reservations, and BSRE's revenues fund Tribal social welfare programs. ER105-109.

Meanwhile, the State's interest in using the Complementary Statute to enforce MSA compliance is not compelling. The Complaint makes clear that this interest is much more complicated than simply collecting revenues; among other things, escrow fees and the Complementary Statute protect the market share of the same big tobacco manufacturers who intentionally lied to addict Americans to cigarettes, made them more deadly, and aimed them at children, at the expense of manufactures who have never committed any such acts. ER89-100. It is erroneous at this stage of litigation to disregard these facts or construe them in a light unfavorable to the plaintiff. *Gila River*, 967 F.2d at 1412. Further, the State cannot rely on an interest in stopping "scofflaw manufacturers" if no escrow obligation attaches to the cigarettes. Even to the extent some cigarettes may be taxable at retail, and therefore subject to the escrow fee, obliging BSRE to deal

only in directory-listed cigarettes exceeds the State's authority to impose minimal burdens tailored to help with the collection of valid taxes.

Second, preemption principles cannot be bypassed altogether in the name of the State's off-reservation enforcement power. *See* State's Br. at 63-64, citing *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012). The State's assertion that "BSRE pled only off-reservation business activity" is false. State's Br. at 62. BSRE is based on the Big Sandy Rancheria, where it purchases and receives products, after which it sells and delivers them on the reservations of its tribal customers. ER105-109. It carries cigarettes through non-reservation territory in the course of making its federally regulated sales. Even there, express federal law denies the State authority to dictate "the kind and quantity of goods and prices at which such goods shall be sold to the Indians," 25 U.S.C. § 261, and to intercede, based on the State's view of the "public interest," to prohibit the introduction of any article into reservation commerce, 25 U.S.C. § 263. *See Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49 (non-discriminatory state law generally applies to Indians going beyond reservation boundaries "[a]bsent express federal law to the contrary"). The substantive burden imposed by the Complementary Statute – namely, restricting BSRE to deal solely in directory-listed cigarettes, barring its sale of the off-directory Native-manufactured cigarettes

its Indian customers want to purchase – interferes with these restrictions on State authority.

D. State licensing, recordkeeping and reporting requirements are preempted because they do not aid the State in collecting validly imposed taxes.

The State's requirements for licensing, recordkeeping and reporting are displaced by the federal regulation of Indian traders. The State requirements place burdens on trade with Indians in addition to those prescribed by the federal government and the tribes, and "could thereby disturb and disarrange" the congressional plan set up for the protection of Indians, *Warren* at 691, "leav[ing] tribal rights in the hands of the very neighbors who might be least inclined to respect them," *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462 (2020). The intrusion into the federal and tribal domain is not justified by serving the State's interest in collecting valid cigarette taxes.

BSRE has explained why this case does not fit the *Milhelm* template, which is largely because, unlike New York and other states (including Oklahoma and Washington) that have adopted similar models, California has no system to determine at the wholesale level the taxability of cigarettes sold in Indian country. *See* Opening Br. at 34-37. The State therefore relies on an interest in collecting information "to see if *someone* owes the tax[.]" State's Br. at 51, quoting ER24. Licensure supplies no such information to the State, and has therefore been held to

be preempted. *Moe* at 480; *see* Opening Br. at 45. State law is written to accommodate cigarette distribution by unlicensed persons when state regulation is preempted. Cal. Bus. & Prof. Code § 22971.4. Recognizing that such preemption applies to BSRE will not impair California's collection of validly imposed taxes.

The information provided in reports and retained in records does not supply the facts surrounding the circumstances of the retail sale, which are necessary to determining whether non-Indian consumers owe tax that a retailer should collect for the State. *See* Opening Br. at 17, 45-46. As California acknowledges, it is the "downstream entities" who would "provide information regarding whether an end user of their cigarettes is exempt." State's Br. at 32. Like the other regulations, the reporting and recordkeeping burdens imposed upon BSRE's federally and tribally governed trade are not reasonably tailored to help California collect valid taxes.

II. BSRE is an Indian tribe whose action under 28 U.S.C. § 1362 is exempt from the Tax Injunction Act.

The Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, does not bar civil actions arising under federal law "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" under 28 U.S.C. § 1362.

Moe, 425 U.S. at 474. The TIA does not bar this action because BSRE is the kind of plaintiff described in § 1362.[8]

California's argument to the contrary requires the Court to ignore that section 17 of the IRA expressly identifies the corporation chartered by the Secretary of the Interior under section 17 as "the incorporated tribe." 25 U.S.C. § 5124. The State's argument also requires the Court to ignore that every "incorporated tribe" under section 17 necessarily satisfies the § 1362 criteria that the "tribe or band" bringing the action must be one "with a governing body duly recognized by the Secretary of the Interior."

Big Sandy Rancheria petitioned the Secretary for a charter under section 17, the Secretary issued the charter, and the governing body of Big Sandy Rancheria ratified the charter, establishing BSRE as the "incorporated tribe." BSRE therefore satisfies the requirements to bring a federal civil action under § 1362: As an "incorporated tribe," BSRE is a member of the class "any Indian tribe or band."

[8] The State seeks to draw negative inferences from the characterizations of BSRE's corporate status in its initial complaint, but the sufficiency of the court's jurisdiction is based upon the amended complaint, and "[i]f its averments show that [the] court has jurisdiction, the jurisdiction will be maintained without regard to the original petition," which does not bind the plaintiff. *Washer v. Bullitt County*, 110 U.S. 558, 562 (1884); *Rockwell Intern. Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction").

Because the tribe that incorporated as BSRE is federally recognized and has a governing body that the Secretary of the Interior recognizes as qualified to ratify the federal charter, BSRE is an incorporated Indian tribe "with a governing body duly recognized by the Secretary of the Interior."

Nothing more is required than this straightforward application of the clear text of the two statutes. Relevant legislative history and contemporaneous interpretations only confirm the meaning of the statutory terms. The correct understanding of these statutes fulfills the IRA's promise "'to give the Indians the control of their own affairs and their own property'" though any form that organizes the tribe, including "'a corporation to be organized by the Indians,'" *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151 (quoting 78 Cong. Rec. 11125), and the promise of § 1362, "to give Indian tribes access to federal court on federal issues" rather than "relegating Indians to state courts," *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983), particularly for actions seeking to stop state taxation that interferes with the federal policies favoring tribal self-governance and self-sufficiency, *Moe* at 473-75.

Contrary to California's assertion, BSRE is not asking the Court to overrule *Navajo Tribal Utility Authority v. Arizona Dept. of Revenue*, 608 F.2d 1228 (9th Cir. 1979). BSRE's position is consistent with *Navajo*'s holding that § 1362

contemplates litigation directed by "the leadership of a tribe." *Id.* at 1232.[9] Here, the Secretary's charter incorporated the Tribe as BSRE. BSRE's leadership is the leadership of the Tribe – the BSRE Board of Directors leads the Tribe for the purposes described in the charter, just as the Big Sandy Rancheria Tribal Council leads the Tribe for the purposes described in the Tribe's constitution.

Therefore, it is erroneous to extend *Navajo*'s holding to BSRE or to any section 17 corporation. A section 17 corporation is fundamentally different from the "subordinate, semi-autonomous" tribal entity at issue in *Navajo*. BSRE's status as the Tribe's corporate body for business and enterprise is coequal, not subordinate, to the status of the Tribe's corporate body for political governance. Although the business entity and the governmental entity are distinct from one another, both entities organize the group of people that comprises the Tribe.

Because the entities are legally distinct, sometimes it makes a difference which entity is being dealt with. *See Linneen v. Gila River Indian Community*, 276 F.3d 489, 493 (9th Cir. 2002) (section 17 corporation's waiver of sovereign immunity does not waive tribal government's immunity); *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n.1 (9th Cir. 2002) (stating in

[9] *Navajo* did not hold that "§ 1362 requires the tribal government" to step forward, as the State incorrectly asserts. State's Br. at 21. *Navajo* spoke more generally of the tribe's "leadership," not solely its government. *Navajo* at 1232, 1233, 1234.

dicta that a section 17 incorporated tribe, unlike an unincorporated tribe, is a citizen of the state in which it resides for purposes of diversity jurisdiction).

Simultaneously, however, a tribe's governmental entity and its federally chartered commercial entity are identical in several material ways. Significantly, both entities possess the same federally-protected immunity from state taxation. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 157 n.13 ("the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business"); *Wheeler-Howard Act Interpretation*, Opn. M-27810 (Dec. 13, 1934) *reprinted in* 1 *Dept. of the Interior*, *Opinions of the Solicitor Relating to Indian Affairs 1917-1974*, at 491. In addition, both entities are recognized as Indian tribes not subject to federal income tax. *Blue Lake Rancheria Econ. Dev't Corp. v. Comm'r*, 152 T.C. 90, 104 (2019); *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 261-64 (2013); Rev. Rul. 81-295, 1981-2 C.B. 15. Both entities also possess sovereign immunity from suit. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 920-21 (6th Cir. 2009). Section 17 corporations' immunities under federal law demonstrate their sovereign nature in addition to, and despite, their corporate character. These examples illustrate that incorporation is one of the organizational tools the IRA provides Indian tribes to formalize and exercise their rights as a sovereign people. Ultimately, the fact that the entities are

legally distinct, while possessing many of the same attributes of tribal sovereignty and protections under federal law designed to ensure tribal self-government and to protect the integrity of tribal assets, confirms that § 1362 embraces civil actions by federally chartered tribes in their corporate identity.

California challenges the notion that what it calls BSRE's "commercial interest" is the same as "the substantive interest which Congress has sought to protect[,] tribal self-government," suggesting that an injury to tribal self-government may be addressed in an action brought by "the Tribe, *qua* Tribe," but not in an action brought by BSRE. *See* State's Br. at 19; *Moe* at 468 n.7. California's narrow conception of tribal self-government fails to understand that self-government requires adequate funding, and for Indian tribes especially, this requires the tribe to engage in commercial activity, and this was the very reason Congress provided for section 17 corporations. "Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S at 335 (quoting *Bracker* at 143). "In part as a necessary implication of this broad federal commitment, … tribes have the power to manage the use of [their] territory and resources by both members and nonmembers, … [and] to undertake and regulate economic activity within the

reservation[.]" *Id.* at 335-36. Operating a commercial enterprise to raise revenues and create employment is a critical element of tribal self-government. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (explaining that "tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues,' … due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenues through more traditional means"). "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219. Congress empowered the Secretary of the Interior to issue corporate charters to tribes under section 17 of the IRA "to revitalize their self-government," intending that "a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151. The Tribe exercised tribal self-government in its decision to petition for and ratify its IRA charter. The Tribe exercises tribal self-government when it conducts tribal business through the incorporated tribe, in accordance with tribal law, investing tribal resources to improve the reservation economy, grow the Tribe's revenues, and achieve economic self-sufficiency. ER105.

The State fails to meaningfully distinguish *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991). *See* State's Br. at 22. There, the Tenth Circuit held that § 1362 "serve[d] as an adequate jurisdictional grant" for an action brought by United Keetoowah Band ("UKB"), a federally chartered corporation under the Oklahoma Indian Welfare Act ("OIWA"). *United Keetoowah Band* at 1174. The State claims that § 1362 gives UKB, but not BSRE, access to federal court because UKB "did not have separate governmental and commercial entities; its government was chartered as a corporation." That is factually incorrect. As recited in another decision involving UKB, "[i]n 1950, the Secretary of the Interior approved the constitution and bylaws of the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) and issued a corporate charter to the UKB Corporation. The corporate charter authorized the UKB Corporation to hold, manage, operate, and dispose of real property." *Cherokee Nation v. Bernhardt*, No. 12-cv-493-GKF-JFJ, 2020 WL 1429946, *1 (N.D. Okla. Mar. 24, 2020). The court there upheld the conclusion of the Assistant Secretary of the Interior, in a decision taking land into trust for UKB, recognizing that, although "the tribal government and the tribal corporation are separate entities, … 'the UKB Corporation is merely the tribe organized as a corporation.'" *Id.* at *6. Contrary to the State's assertion, therefore, UKB's circumstances are materially indistinguishable from BSRE's. The conclusion the

Tenth Circuit reached in 1991, and that the Assistant Secretary echoed more recently, also applies to BSRE: Although it is a separate entity from the tribal government, BSRE "is merely the tribe organized as a corporation," and as such it may bring suit under § 1362.[10]

Judge Fletcher's analysis of the issue in her dissenting opinion in *White Mountain Apache Tribe v. Williams* is in no way "weaken[ed]" by the subsequent amendment to the IRA, as the State argues. State's Br. at 24-25. Judge Fletcher saw the "duly recognized" language of § 1362 as a reference to a tribe's organization under section 16 of the IRA and recognized this as a prerequisite to the tribe's incorporation under section 17. 810 F.2d 844, 868 n.20 (9th Cir. 1985) (Fletcher, J. dissenting). Now that Congress has confirmed Indian tribes' "inherent sovereign power to adopt governing documents under procedures other than those specified in [section 16]," 25 U.S.C. § 5123(h), Judge Fletcher's fundamental analysis still carries forward. An incorporated tribe's governing body is "duly recognized" within the meaning of § 1362 because such tribe will necessarily have a government organized under section 16 or under other procedures.

[10] To be sure, the OIWA treats Oklahoma Indian tribes differently for some purposes. *See, e.g.*, *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1154-55 (10th Cir. 2019), *cert. denied*, 2020 WL 3405856 (U.S. June 22, 2020). Section 1362, however, which applies to actions "brought by any Indian tribe or band," does not differentiate between tribes organized under the OIWA or the IRA.

California urges the Court to adopt a construction of § 1362 which is contrary to its text: in the State's view, "the entity suing" must be "the governing body itself." State's Br. at 25. However, the statute imposes no such requirement. It provides jurisdiction over "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" arising under federal law. 28 U.S.C. § 1362. California interprets the statute as if it reads "…brought by any Indian tribe or band's governing body…," or "brought by any Indian tribe or band *through* a governing body…." The difference is significant and there is no basis to adopt California's misreading.

California's general observation that section 17 corporations are "creature[s] of conferred powers" does not help its argument. *See* State's Br. at 23. Section 17, which is "not intended to serve as a comprehensive list of powers DOI may properly grant through an IRA sec. 17 charter," broadly authorizes charters that convey "'such further powers as may be incidental to the conduct of corporate business, not inconsistent with law.'" *Blue Lake Rancheria*, 152 T.C. at 111 (quoting 25 U.S.C. § 5124). Such incidental powers include ones that "exist only to aid the corporation, even if only casually, in carrying out the purpose for which it was created," *id.* at 114, including powers "not available to State corporations," *id.* at 112. Suing to stop the enforcement of federally preempted state taxes aids BSRE in carrying out its purpose, which, in turn, aids the Tribe in fulfilling federal

policies promoting tribal self-determination and self-sufficiency. It is sufficient that BSRE possesses this power; it is unnecessary that it be "endowed with the power to act as the tribal government" (State's Br. at 24) to bring suit under § 1362.[11]

California also misconstrues BSRE's argument. BSRE has never argued that "§ 1362 should allow suit by any Indian entity of the tribe." State's Br. at 25. BSRE is a proper plaintiff under § 1362 not because it is an "Indian entity of the tribe," but because it is the Tribe.

Further, California claims incorrectly that BSRE seeks to redefine the term "recognized" in § 1362. State's Br. at 25. There is no need to redefine what it means for an Indian tribe or its governing body to be recognized. The Tribe and its governing body are both federally recognized. BSRE's point, which the State never addresses head-on, is that a federally recognized tribe with a recognized governing body, which incorporates under an IRA charter, remains, in its incorporated form just as much as in its unincorporated form, a federally recognized tribe with a recognized governing body. Congress allowed such tribes

[11] Accordingly, the State's rejection of *Uniband* is unfounded. *See* State's Br. at 23-24. *Uniband* demonstrates that "the tribe exists, at least in part, through its section 17 corporation, notwithstanding the fact that the corporation is a distinct legal entity" from the tribal government. *Uniband*, 140 T.C. at 262.

to bring suits under § 1362 regardless of the form or forms in which they organized.

Finally, as California notes, construing § 1362 to permit suits by incorporated tribes such as BSRE will have limited ramifications on future litigation. Even under California's theory, California concedes BSRE would be able to litigate its tax claim in an action "brought by or with" the tribal government. State's Br. at 27. The only practical effect – and it is a significant effect in terms of the Tribe's rights as a sovereign and under the IRA – is that the Tribe will be able to exercise the choice guaranteed to it by Congress. Just as any tribe may choose to accept or reject the provisions of the IRA, and may choose to organize under an IRA constitution, an IRA charter, both, or neither, Congress allowed "any Indian tribe," so long as the tribe is recognized by the Secretary, to bring an action based on federal law under § 1362, no matter the form the tribe chooses to conduct the tribe's business.

CONCLUSION

BSRE respectfully requests that the Court reverse the judgment below.

Dated: September 4, 2020

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