NO. 84265-0

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

State of Washington,

Respondent/Cross-Appellant,

v.

American Tobacco, et al.,

Appellants/Cross-Respondents.

AMICUS CURIAE BRIEF OF INDIAN TRIBAL GOVERNMENTS WHO ARE PARTIES TO CIGARETTE TAX COMPACTS WITH THE STATE OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PUBLICATIONS

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Indian tribal governments have the inherent sovereign power to tax. The United States Supreme Court has repeatedly recognized this right. In the arbitration award at issue in this case, the arbitration panel ignored this authority when it concluded that certain ***tribal*** taxes were somehow "authorized" by the State of Washington and are actually ***State*** taxes. This conclusion is wrong as a matter of federal law and evidences an egregious disregard for, and misunderstanding of, fundamental principles of federal Indian law. This Court should, accordingly, affirm the Superior Court's declaratory judgment to the contrary. *Amici curiae* submit this brief to more fully explain the inherent nature of the tribal power to tax and why the taxes are unquestionably ***tribal*** taxes, not State taxes.

II. IDENTITY AND INTEREST OF *AMICI*

The Kalispel Tribe of Indians, the Quileute Tribe, the Quinault Indian Nation, the Skokomish Indian Tribe, the Squaxin Island Tribe, the Suquamish Tribe, and the Swinomish Indian Tribal Community submit this brief in support of

Respondent/Cross-Appellant the State of Washington. The *amici curiae* are all federally recognized Indian tribes who are parties to Cigarette Tax Compacts with the State of Washington ("Compacts"). The tribes all exercise their inherent sovereign authority to tax by, *inter alia*, imposing tribal cigarette taxes and selling cigarettes with tribal tax stamps on their reservations and/or off-reservation trust land, to raise essential governmental revenues.

The *amici* possess a thorough understanding of the history and nature of tribes' inherent power to tax, the Compacts, and tribal cigarette taxes. The tribes have substantial interests in the Compacts, including their ability to derive important governmental revenues from tribal cigarette taxes without being hindered by State dual taxation. The arbitration panel's decision wrongly ignores tribal sovereignty and threatens to upset the carefully crafted resolution of longstanding conflicts achieved through the Compacts. *See* CP 43.

III. STATEMENT OF THE CASE

As explained more fully in the State of Washington's Response Brief, the State receives an annual payment (to compensate it for health care costs it incurs due to smoking-related illnesses) from participating tobacco manufacturers ("PMs") under a landmark 1998 Master Settlement Agreement ("MSA") between the PMs and 46 states, Washington D.C., and five territories. CP 26. Pursuant to the MSA, in order to better cover future liability for smoking-related illnesses and level the playing field between the PMs and non-participating tobacco manufacturers ("NPMs"), the State of Washington enacted a "qualifying statute" (using model language prescribed by the MSA) that required NPMs to make annual deposits into escrow accounts based on their number of "units sold." CP 27. "Units sold" means, in relevant part, "the number of individual cigarettes sold in the State by the applicable [NPM]…during the year in question, ***as measured by excise taxes collected by the State on packs bearing the excise tax stamp of the State***…" RCW 70.157.010(j) (emphasis added). The State's

annual payment under the MSA may be subject to adjustment (the "NPM Adjustment") if the State fails to diligently enforce its qualifying statute (*i.e.*, to require the NPMs to make the escrow deposits for their units sold). CP 30. Disputes on the issue of diligent enforcement and whether any NPM adjustment should apply for a given year may be subject to arbitration. *See* CP 30-32.

Such arbitration proceedings, involving several states, were commenced for the year 2004. *Id*. One of the issues (and a particularly significant issue for Washington)[1] was whether cigarettes sold on Indian reservations, which are not taxed or stamped by a state, constitute units sold. CP 78. On September 1, 2021, the arbitration panel issued Common Case Findings and State Specific Findings and Interim Award for the State of Washington (the "arbitration award"). CP 55-93. In the Common Case Findings, the panel rejected the PMs' arguments that units sold include "all tribal sales or sales on tribal lands,"

[1] *See* CP 96.

and instead concluded that only cigarettes that are "both stamped and taxed" qualify as units sold, and that requiring the term to include cigarettes "not bearing the excise tax stamp of the State" would "turn the meaning of 'Units sold' on its head." CP 78-80.

However, in the State-Specific Findings, the panel considered the fact that most tribes in Washington have Cigarette Tax Compacts with the State of Washington and that these tribes "stamp packs of cigarettes with a tribal stamp and collect a tribal tax" equivalent to the State's tax. CP 94-95, 100-103. The State's position was that these "Compact" cigarettes, which are subject to tribal tax and stamped with a tribal tax stamp, are not within the definition of units sold (because the taxes are not "collected by the State" and the packs do not "bear the excise tax stamp of the State"), and are accordingly not subject to the escrow requirements for NPMs. CP 121. But the arbitration panel decided that these Compact cigarettes ***do*** meet the statutory definition of units sold—not because they are actually within the plain meaning of the

definition, but, nonsensically, because the tribal tax is actually a State tax. CP 121-22. Incredibly, the panel rationalized:

> Washington did not simply repeal its cigarette tax. Through a statutorily created and regulated system, Washington ***authorized*** compact Tribes to collect the same tax that the state imposes. There is no evidence that absent the authorizing statutes, the state would have ***permitted*** the Tribes to impose and collect cigarette taxes. Hence, we conclude that ***the tribal tax is a tax of the state and that the tribal stamp is a stamp of the state***.

CP 122 (emphasis added). Based on that and other factors, the panel concluded that Washington had not diligently enforced its qualifying statute in 2004 and would therefore be subject to the NPM Adjustment for that year. CP 175-77

In the King County Superior Court, the State sought to vacate the arbitration award on the grounds that the panel's conclusion was facial error and contrary to public policy. CP 44. The State also sought a declaratory judgment to definitively resolve the issue of whether tribally taxed and stamped cigarettes constitute "units sold." CP 45.

The Superior Court granted the State's motion for declaratory judgment, finding that tribal compact cigarettes do

not meet the definition of "units sold." CP 1203. However, the Superior Court declined to vacate the arbitration award. CP 1205.

The PMs appealed to this Court the Superior Court's granting of the State's motion for declaratory judgment. CP 1209, 1224, 1238, 1250. The State sought Washington Supreme Court review of the Superior Court's denial of its motion for remand to the arbitration panel. The Supreme Court transferred the case to this Court.

The undersigned Indian tribal governments now seek leave to file an *amicus curiae* brief in support of the State of Washington focused on the issue of whether a ***tribal*** cigarette tax is a tax of the ***State*** and whether a ***tribal*** tax stamp is a tax stamp of the ***State***.

IV. ARGUMENT

Cigarettes that are taxed by Indian tribes and sold with tribal tax stamps are not "units sold" under RCW 70.157.010(j). That statute defines "units sold" as "the number of individual cigarettes sold in the State by the applicable tobacco product

manufacturer…during the year in question, ***as measured by excise taxes collected by the State on packs bearing the excise tax stamp of the State***…" (emphasis added).

This plain language means what it says: "units sold" are based on taxes collected, and tax stamps applied, "by the State." The arbitration panel ignored this obvious result and ruled that ***tribally*** taxed and stamped cigarettes are "units sold" based on the nonsensical and legally incorrect idea that ***tribal*** cigarette taxes are actually ***State*** taxes:

> Washington did not simply repeal its cigarette tax. Through a statutorily created and regulated system, Washington ***authorized*** compact Tribes to collect the same tax that the state imposes. There is no evidence that absent the authorizing statutes, the state would have ***permitted*** the Tribes to impose and collect cigarette taxes. Hence, we conclude that ***the tribal tax is a tax of the state*** and that ***the tribal stamp is a stamp of the state***.

CP 122 (emphasis added). This flawed conclusion demonstrates an egregious ignorance of fundamental principles of federal Indian law and patently disregards tribal sovereignty and the terms of the compacting legislation. It also threatens to upset the careful bargain struck in the compacting legislation

and Compacts.[2] Tribal cigarette taxes are unquestionably ***tribal***, not State, taxes; and tribal tax stamps are ***tribal***, not State, stamps.

A. The inherent power to tax is an essential attribute of tribal sovereignty.

As sovereigns older than the United States, tribes retain all attributes of sovereignty not expressly divested by Congress or by necessary implication of their dependent status. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982). This includes the power to tax transactions that occur on tribal lands. *Id*.; *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 152, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

The power to tax is an inherent attribute of tribal sovereignty. *Merrion*, 455 U.S. at 141. It derives from a tribe's

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[2] For example, State attempts to collect escrow deposits from cigarette manufacturers selling to tribes could interfere with tribes' ability to purchase cigarettes from out-of-state wholesalers and tribal manufacturers, RCW 43.06.455(5)(b)-(d), a right specifically bargained for by the tribes.

original sovereignty. *Id*. at 137; *Buster v. Wright*, 135 F. 947, 950, 68 C.C.A. 505 (8th Cir. 1905).

Moreover, it is an essential attribute of tribal sovereignty. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985); *Merrion*, 455 U.S. at 137. Tribes today are full-service governments and, like other governments, need to raise revenues to fund their governmental operations. *See Kerr-McGee*, 471 U.S. at 201 ("[T]he Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs."); *Merrion*, 455 U.S. at 137 ("This power enables a tribal government to raise revenues for its essential services"). *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues…").

B. Tribes have long exercised the inherent power to tax and the federal government has long recognized their authority to do so.

Tribes have exercised their inherent authority to tax, including the authority to tax non-members, since long before the State of Washington even existed. For example, in 1819, the Cherokee Nation imposed a tax on both Cherokee merchants and non-citizen "pedlars." David E. Wilkins, Documents of Native American Political Development: 1500s to 1933 42-43 (2009). In 1850, the Ottawa imposed taxes on land, livestock, and a "poor tax" for "[e]very man living on the Ottawa land." *Id*. at 100. In 1882, the Osage Nation imposed a tax on non-members grazing or feeding livestock within its Nation. *Id.* at 186. And in 1884, the Sisseton and Wahpeton Nation imposed taxes on "any person" selling wood or hay, "[e]very holder of a [land] Patent," "[p]ersons" with land under cultivation, and "[e]very voter without a farm," in its Nation. *Id*. at 209.

All three branches of the federal government contemporaneously recognized the validity of such tribal taxes,

including those imposed on non-members. In 1879, the Senate Judiciary Committee acknowledged the validity of a tax imposed by the Chickasaw Nation on all non-citizen merchants, traders, and physicians doing business in the Chickasaw Nation, recognizing that the Chickasaw "undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue [for governmental services]—a right not in any sense derived from the Government of the United States." S. Rep. No. 698, at 1-2 (1879). In 1900, the U.S. Attorney General concluded that non-members doing business within the jurisdiction of the Five Civilized Tribes were "intruders, and should be removed, unless they…pay the required tax...." 23 Op. Att'y Gen. 214, 217-219 (1900). The next year, considering a Cherokee Nation tax on the exportation of hay, the U.S. Attorney General explained that the Cherokee Nation was organized under its own constitution, government, and laws; and stated that this "autonomy carries with it the unquestionable right of taxation," and that "there can be no question of the right or power of that nation to impose such a tax." 23 Op. Att'y Gen. 528 (1901).

The federal courts agreed. In *Morris v. Hitchcock*, the U.S. Supreme Court upheld an annual permit tax imposed by the Chickasaw Nation on non-citizens who held livestock within its Nation. 194 U.S. 384, 393, 24 S. Ct. 712, 48 L. Ed. 1030 (1904). In *Buster v. Wright*, the Eighth Circuit upheld an annual permit tax imposed by the Creek Nation on non-citizens doing business therein. 135 F. at 958. And in *Maxey v. Wright,* the U.S. Court of Appeals of Indian Territory held that non-Creek attorneys who resided and practiced in the Creek Nation were required to pay a tribal occupation tax. 54 S.W. 807, 812, 3 Ind. T. 243 (1900), *aff'd*, 105 Fed. 1003, 44 C.C.A. 683 (8th Cir. 1900).

In 1934, Congress passed the Indian Reorganization Act ("IRA") to strengthen and advance tribal self-government. *Kerr-McGee*, 471 U.S. at 199, *citing Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). The IRA recognized the right of any tribe "to organize for its common welfare" and "adopt an appropriate constitution and bylaws." Pub. L. No. 383, Ch. 576, § 16, 48 Stat. 987 (1934) (codified as

amended at 25 U.S.C. § 5123). The IRA enumerated several rights and powers that such a constitution should vest in the tribe or its tribal council, "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law." *Id*.

These "powers vested…by existing law" included the power to tax both Indians and non-Indians. According to a 1934 Solicitor's Opinion, the "powers vested in any Indian tribe or tribal council by existing law," are those powers of self-government "which have never been terminated by law or waived by treaty." Powers of Indian Tribes, 55 I.D. 14, 46-48, 65-67 (1934). "Chief among those powers" is the power to "levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation…." *Id*. Similarly, federal guidance from 1934 on drafting tribal constitutions pursuant to the IRA included a tax provision among a list of "statements suitable for adoption in a tribal constitution affirming [the] powers" listed in the IRA. Felix S. Cohen, On the Drafting of Tribal Constitutions 3, 56, 64 (David Wilkins, ed.) (2006). The

suggested provision referenced the power to "levy dues, fees, assessments, or taxes upon the members of the tribe and upon nonmembers trading or residing within the jurisdiction of the tribe." *Id*. The guidance further described a "tax on non-Indian residents within the reservation" as "[p]erhaps the most popular of all Indian taxes." *Id*. at 166. *See also Merrion*, 447 U.S. at 153 (stating that the power to tax "was very probably one of the tribal powers under 'existing law' confirmed by § 16 of the [IRA]."); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 99 (8th Cir. 1956) (holding that a tribe's inherent power to tax had not been taken from it by any federal statute, but rather, was "in accordance with" § 16 of the IRA). Thus, although tribes' power to tax is inherent and does not derive from the IRA, the IRA confirmed tribes' continuing authority to tax both tribal members and non-members.

Unsurprisingly, courts have since repeatedly recognized tribes' authority to tax both members and non-members (whether a tribe is organized under the IRA or not). *E.g.*, *Kerr-McGee*, 471 U.S. at 197 (upholding tribal possessory interest

and business activity taxes imposed on both Navajo and non-Indian businesses); *Merrion*, 455 U.S. at 135-36 (upholding a severance tax on oil and natural gas production by non-Indian lessees on tribal land); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557, 1 Fed. R. Serv. 2d 912 (8th 1958) (upholding a tribal tax on non-members leasing reservation trust lands for grazing or farming).

C. Tribes exercise inherent authority to tax cigarettes; they have never needed the State's authorization to do so.

Long before the Cigarette Tax Compacts existed, tribes within the State of Washington imposed cigarette taxes. *Colville*, 447 U.S. at 144 (describing the cigarette tax schemes of the Colville, Lummi, Makah, and Yakama tribes); Ralph W. Johnson, Indian Tribal Codes: A Microfiche Collection of Indian Tribal Law Codes (1981) (including, without limitation, additional cigarette tax laws from this time period for the Kalispel and Port Gamble Tribes). These taxes were an exercise of tribes' inherent sovereign authority to tax for which they did not need the State's authorization or permission.

Colville upheld Washington's cigarette excise taxes on reservation sales to non-tribal members, 447 U.S. at 159, 161, but it did ***not*** eliminate or limit tribes' inherent authority to tax cigarettes. 447 U.S. at 152-154, 158 (rejecting the State's argument that tribes "have no power to impose their cigarette taxes on nontribal purchasers" and stating that "each government is free to impose its taxes"). *See also Merrion*, 455 U.S. at 151 ("[T]he mere existence of state authority to tax does not deprive the Indian tribe of its power to tax."). Instead, *Colville* and its companion cases created a problem of dual taxation by potentially allowing states to tax certain transactions with non-Indians in Indian country. *Colville*, 447 U.S. at 154 ("Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive *disadvantage* as compared to businesses elsewhere.") (emphasis in original). Dual taxation may interfere with tribes' ability to collect cigarette taxes as a

practical matter, but that does not eliminate or limit tribes' inherent sovereign taxing authority.

Nor did *Colville* (or any other case) make tribal cigarette taxes subject to the authorization or permission of the State. Tribes are separate sovereigns the states cannot tax or regulate. U.S. CONST. Art. I §§ 2 ("…excluding Indians not taxed…"), 8 (granting Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). It is a fundamental principle of federal Indian law that states cannot limit or modify tribal sovereignty. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U.S. at 154. "Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Merrion*, 455 U.S. at 147. Tribes do not even need *federal* government approval to impose taxes on members or non-members. *Kerr-McGee*, 471 U.S. at 201. The arbitration panel's ruling that Washington "authorized" tribes to exercise their inherent sovereign power to tax is completely contrary to federal law.

This is further demonstrated by tribes within Washington imposing a variety of other taxes without State authorization. These include retail sales taxes, lodging taxes, business and occupation taxes, and more. *E.g.*, Kalispel Law and Order Code[3] §§ 29-2.01 to 29-2.06; Squaxin Island Tribal Code[4] § 6.17.050; Suquamish Tribal Code[5] §§ 12.2.5 and 12.3.6; and Swinomish Tribal Code[6] §§ 17-02.060, 17-03.050, and 17-08.060. Tribes impose these taxes pursuant to their inherent sovereign powers. *E.g.*, Kalispel Tax Code § 29-1.02 ("This Tax Code is adopted pursuant to the authority vested in the Kalispel Tribal Governing Body by the Kalispel Constitution, and inherent authority of the Kalispel Tribe of Indians.").

In some cases, these tribal taxes mirror State tax rates. *E.g.*, Suquamish Tribal Code §§ 12.2.5 and 12.3.6; Swinomish Tribal Code § 17-03.050. Tribes sometimes choose to match

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[3] https://kalispeltribalcourt.org/law-order-code/.
[4]https://library.municode.com/tribes_and_tribal_nations/squaxin_island_tribe/codes/code_of_ordinances.
[5] https://suquamish.nsn.us/home/government/suquamish-tribal-code/.
[6] https://swinomish.org/government/tribal-code.aspx.

State taxes for practical purposes—*e.g.*, by matching a State tax, a tribe can maximize its tax revenues without putting itself at a competitive disadvantage. But that certainly does not transform the tribal taxes into State taxes.

Thus, tribes within Washington impose, and long have imposed, a variety of tribal taxes (including cigarette taxes) pursuant to their inherent taxing authority. They do not need, and have never needed, the State's permission to do so.

D. The compacting legislation and Compacts did not transform tribal taxes into State taxes.

Neither the compacting legislation nor the Compacts convert tribal taxes into State taxes. Rather, the tribes impose ***tribal*** taxes and sell cigarettes with ***tribal*** tax stamps.

1. Cigarette Wars

Decades of conflict—known as the cigarette wars—between tribes and the State over cigarette taxes persisted, or even worsened, following the *Colville* decision. CP 547. Some (perhaps all) tribes within Washington still refused to collect and pay State cigarette taxes. CP 551. The State's enforcement options were, and remain, limited. *See Colville*, 447 U.S. at

161-162 (holding that the State could seize cigarettes in transit off reservation, but declining to decide whether the State could enter the reservation to seize cigarettes, which it characterized as a "considerably different" question). Tribes commonly excluded state officials and employees from tribal land. CP 548. So, the State could only attempt to seize unstamped cigarettes from individual customers as they left tribal land, or perhaps seize the occasional shipment of cigarettes on its way to the reservation. *Id*. But those things were difficult to do and did not happen often. CP 548-49; H.B. Rep. on S.B. 5372 (2001) (noting the "considerable difficulty" and "mixed results" involved). Meanwhile, non-tribal retailers complained vociferously about the lack of tax parity and competitive disadvantages. CP 549.

2. Compacting Legislation

Finally, a breakthrough was achieved. *Id*. In 2001, Washington passed compacting legislation authorizing the governor to enter into contracts with tribes concerning the sale

of cigarettes. Laws of 2001, ch. 235 §§ 1-3 (codified as amended at RCW 43.06.450-43.06.460.

This legislation does not purport to authorize or permit tribes to impose cigarette taxes (which would have been wholly inconsistent with the legislature's stated intent to "further the government-to-government relationship" between the sovereigns, RCW 43.06.450, and both unnecessary and ineffective under federal law). To the contrary, the compacting legislation expressly states that it does "***not*** constitute a grant of taxing authority to any Indian tribe." RCW 43.06.450 (emphasis added).

Nor does the compacting legislation purport to make a tribal tax into a State tax. Instead, the legislation repeatedly refers to "the ***tribal*** cigarette tax" and "***Tribal*** stamps," and indicates that the tribes will retain the tribal tax revenues "to provide needed revenues for tribal governments" for their "essential government services." RCW 43.06.450, 43.06.455, 43.06.460 (emphasis added). The legislation clarifies that State taxes do ***not apply*** with respect to the cigarettes sold by an

Indian retailer during the effective period of such a contract. Laws of 2001, ch. 235 §§ 4-6 (codified as amended at RCW 82.08.0316 (State sales tax does not apply); 82.12.0316 (State use tax does not apply); and 82.24.295 (State cigarette tax does not apply)). *See also* H.B. Rep. on S.B. 5372 (2001) ("Cigarettes sold by Indian retailers in Indian Country during the contract's term are subject to a tribal cigarette tax and are exempt from [State] cigarette, and sales and use taxes."). Indeed, the tax being a ***tribal*** tax was understood to be a key feature of the legislation. CP 550 ("That was a nonnegotiable from the tribal perspective. The tribes were absolutely clear that they were not going to be the state's tax collector, that it was going to be a 100 percent tribal tax or we weren't going to do it.").

The legislation merely recognizes Washington's ability to agree to forego State taxes on cigarettes that are taxed and stamped by tribes. *See* RCW 43.06.455(3) (requiring the contracts to provide for "a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of

cigarettes…"). "In lieu of" means "[i]nstead of or in place of; in exchange or return for." Black's Law Dictionary (11th ed. 2019). Simply put, the tribal tax will apply instead of the State tax. That language does not even hint at converting the tribal tax to a State tax.

Finally, the fact that the legislation requires most (but not all) contracts to provide for a tribal cigarette tax rate that is 100 percent of State and local taxes, RCW 43.06.460, does not make the tribal tax a state tax. This is simply something the State bargained for, in part to satisfy non-tribal retailers' concerns about tax parity and competitive advantages. CP 554. The different tax rates the legislature authorized for certain tribal contracts, RCW 43.06.465 and 43.06.468, further demonstrate that the tribal taxes are not State taxes.

3. Cigarette Tax Compacts

In 2001, *amicus curiae* Squaxin Island Tribe was the first tribe to enter into a Compact with the State of Washington under the new compacting legislation. CP 558; Squaxin Tribal Code § 6.14.050. Most other tribes within the State followed.

CP 559. Because each tribe is a separate sovereign, each tribe negotiated and executed its own Compact, and the terms of each Compact could vary somewhat. *Id*.

The Compacts are government-to-government agreements, which each party enters into as an exercise of its respective sovereignty. The Tribes are not, and could not be, bound by the compacting legislation, because State law does not apply to tribes in Indian country absent a grant of Congressional authority. *Williams*, 358 U.S. at 223; *Worcester v. Georgia*, 31 U.S. 515, 520, 6 Pet. 515, 8 L. Ed. 483 (1832). Thus, the Compacts merely reflect the terms the ***State*** must secure from each sovereign tribe before the ***State*** may enter into a Compact. The operative provisions are the provisions of each tribe's respective tribal laws.

4. Tribal Cigarette Tax Laws

The tribes who are parties to the Compacts impose their own ***tribal*** cigarette taxes pursuant to ***tribal*** laws. *E.g.*, Suquamish Tribal Code § 11.1.9 ("[T]he Tribe shall impose on all persons…a tribal cigarette tax on the retail sale of

cigarettes…"). The tribes impose these taxes as an exercise of their inherent sovereignty. *E.g.*, Squaxin Island Tribal Code § 6.14.010 (citing its Constitution and "the inherent sovereignty of the Squaxin Island Tribe to regulate its own territory and activities therein" as the authority for its Cigarette Sales and Tax Code); Swinomish Tribal Code § 17-04.030 (enacting its Tobacco Tax Code pursuant to authority provided in its Constitution and By-Laws). Accordingly, the taxes are tribal taxes, not State taxes.

The tribal taxes are "equal to" 100 percent of the state and local taxes in most (but not all) cases. *E.g.*, Squaxin Island Tribal Code 6.14.060(B); Suquamish Tribal Code § 11.1.9. As discussed above, even in the absence of a compact, a tribe may elect to match a State tax for its own reasons. The fact that two jurisdictions each exercise their sovereign authority to impose an equivalent tax does not make one the tax of the other.

The cigarettes are required to bear a tribal tax stamp. *E.g.*, Swinomish Tribal Code § 17-04.100(A) ("All cigarettes

sold by Tribal retailers shall bear a Tribal tax stamp."). A tribal tax stamp is not a state tax stamp.

Finally, the tribal cigarette taxes that the tribes collect must be used for "essential government services" of each tribe. *E.g.*, Kalispel Law and Order Code 10-5.06; Squaxin Tribal Code 6.14.090; Suquamish Tribal Code 11.1.12; Swinomish Tribal Code 17-04.060(D). The application of these tax revenues to tribal government services further emphasizes the tribal nature of the cigarette taxes and plainly demonstrates that the taxes are not imposed or authorized by the State.

E. Tribal cigarette tax revenues are vital to tribes.

Tribal cigarette tax revenues are vital to tribes. Although tribes have the inherent power to tax as an essential attribute of their sovereignty, tribes' ability to collect tax revenues is presently much more limited than that of other governments. For example, raising revenues through property taxes, as many governments do, is generally not practical for tribes for reasons that may include, without limitation: a limited land base; significant portions of reservations being nontaxable because

they are held in trust by the federal government; and questions concerning tribal, state, and local taxation of non-Indian-owned fee lands within the reservation. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810-11, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (Sotomayor, J., concurring). Similarly, the problem of dual taxation (discussed above) may limit tribes as a practical matter in their ability to collect sales taxes and other taxes on non-members. *Id*. at 810-11. Additionally, placing any significant tax burden on their own tribal members remains impractical for many tribes because rates of poverty and unemployment in Indian country remain significantly greater than the national average. *Id*. at 812-13.

These and other barriers make the sources of tax revenues that tribes ***do*** have—such as tribal cigarette tax revenues—all the more essential to their sovereignty. The importance of these cigarette tax revenues is reflected in the cigarette wars that the tribes so tenaciously fought for decades, in their nonnegotiable position that the compacting legislation and the Compacts must provide for a ***tribal*** tax (not a State tax),

and in their filing of this brief to ensure that the Superior Court's correct declaratory judgment that tribal compact cigarettes are not "units sold" stands.

V. CONCLUSION

Amici curiae respectfully request that this Court ***affirm*** the Superior Court's declaratory judgment and hold that tribal cigarette taxes are ***not*** State taxes, tribal tax stamps are ***not*** State tax stamps, and the cigarettes in question are ***not*** "units sold" for purposes of RCW 70.157.010(j).

I certify that this document contains 4,931 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, in compliance with RAP 18.17.

Respectfully submitted this 16th day of December 2022.

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

Dated this 16th day of December, 2022, at Renton, Washington.

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