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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, ex rel. ROB BONTA, in his official capacity as Attorney General of the State of California, Plaintiff, **v.** **AZUMA CORPORATION, et al.,** Defendants.	2:23-cv-00743-KJM-DB **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

INTRODUCTION 9

BACKGROUND 10

LEGAL STANDARD FOR A PRELIMINARY INJUNCTION 11

DISCUSSION 12

I. The State Has Not, and Cannot, Prove it is Likely to Succeed on the Merits of its PACT Act Claims. 12

A. The State cannot prove that Azuma and the Tribal Retailers are operating unlawfully under the PACT Act. 12

1. The State has not shown that Tribal Retailers are in violation of any applicable State law. 13

a. The PACT Act does not "federalize state cigarette laws" as the State contends. 13

b. Federal law prohibits the State from requiring Tribal Retailers to obtain State retail licenses. 16

c. Federal law prohibits the State law requirements that Tribal Retailers purchase only Directory-listed cigarettes from State-licensed distributors. 18

d. State regulations impose more than a "minimal burden" which is not tailored to collection and remittance of any valid tax. 21

e. The tax-exempt cigarettes sold by Azuma and the Tribal Retailers do not trigger escrow payments and are not required to be listed on the State's directory. 24

2. The State has not established the Court's subject matter jurisdiction to determine whether the Tribal Retailers are operating unlawfully, because they cannot be joined under Rule 19 due to sovereign immunity. 25

a. The Tribal Retailers are necessary parties. 26

b. The State's claims would interfere with or abrogate the contractual rights and obligations of the Tribal Retailers, which makes joinder necessary for the Tribal Retailers to protect their rights and interests. 27

c. It is not feasible to join the Tribal Retailers because they enjoy sovereign immunity. 28

d. The Tribal Retailers are indispensable parties that cannot be joined. 28

B. The State's claims are barred by tribal sovereign immunity because the Act precludes the application of *Ex parte Young* to the Del Rosas and Rose. 30

II. The State Cannot Satisfy the Remaining Preliminary Injunction Requirements. 33

A. A preliminary injunction would disturb the status quo, and the State has not shown irreparable injury. 33

B. Defendants and the Tribal Retailers will sustain irreparable injury from the requested injunction 35

C. The public interest favors denying the requested injunction. 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Aggarao v. MOL Ship Mgt Co., Ltd.,
675 F.3d 355 (4th Cir. 2012) 34

Alto v. Black,
738 F.3d 1111 (9th Cir. 2013) 25

Ass'n for Accessible Medicines v. Bonta,
562 F. Supp. 3d 973 (E.D. Cal. 2021) 37

Big Sandy Rancheria Enterprises v. Bonta,
1 F.4th 710 (9th Cir. 2021) 14, 16, 26

Bryan v. Itasca County, Minn.,
426 U.S. 373 (1976) 14

Burlington N. & Santa Fe Ry. Co. v. Vaughn,
509 F.3d 1085 (9th Cir. 2007) 31

Cal. Pharmacists Ass'n v. Maxwell-Jolly,
563 F.3d 847 (9th Cir. 2009) 37

Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe,
474 U.S. 9 (1985) 20

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 15, 19, 20

California v. Southern Pacific Co.,
157 U.S. 229 (1895) 29

Cayuga Indian Nation v. Gould,
930 N.E. 2d 233 (N.Y. 2010) 22, 24

Chayoon v. Chao,
355 F.3d 141 (2d Cir. 2004) 30

Chicken Ranch Rancheria of Me-Wuk Indians v. California,
42 F.4th 1024 (9th Cir. 2022) 33

Cook v. AVI Casino Enterprises, Inc.,
548 F.3d 718 (9th Cir. 2008) 30

Cotter v. Desert Palace, Inc.,
880 F.2d 1142 (9th Cir. 1989) 35

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,

502 U.S. 251 (1992) 14

Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.,
512 U.S. 61 (1994) ..... passim

Deschutes River Alliance v. Portland General Electric Co.,
1 F.4th 1153 (9th Cir. 2021) 26, 29

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs,
932 F.3d 843 (9th Cir. 2019) 28

Disbar Corp. v. Newsom,
508 F.Supp.3d 747 (E.D. Cal. 2020) 11

Disney Enterprises, Inc. v. VidAngel, Inc.,
869 F.3d 848 (9th Cir. 2017) 12

Ex parte Young,
209 U.S. 123 (1908) 30

Gila River Indian Community v. Waddell,
967 F.2d 1404 (9th Cir. 1992) 15, 19

HCI Distribution Inc. v Hilgers,
No. 8:18-cv-173, 2023 WL 3122201 (D. Neb. Apr. 27, 2023) 20, 24, 35, 37

Keegan v. Humble Oil and Refining Co.,
155 F.2d 971 (5th Cir. 1946) 29

Kescoli v. Babbitt,
101 F.3d 1304 (9th Cir. 1996) 25

Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1998) 30

Lewis v. Clarke,
581 U.S. 155 (2017) 30

Lomayaktewa v. Hathaway,
520 F.2d 1324 (9th Cir. 1975) 27, 28

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,
634 F.2d 1197 (9th Cir. 1980) 35

Lydo Enters. v. City of Las Vegas,
745 F.2d 1211 (9th Cir. 1984) 34

McClanahan v. State Tax Comm'n of Ariz.,
411 U.S. 164 (1973) 14

McCormack v. Hiedeman,
694 F.3d 1004 (9th Cir. 2012) 34

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) 32

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 30

Miranda B. v. Kitzhaber,
328 F.3d 1181 (9th Cir. 2003) 31

Moe v. Confederated Salish and Kootenai Tribes,
425 U.S. 463 (1976) 14, 15, 16, 18

Montana v. Blackfeet Tribe of Indians,
471 U.S. 759 (1985) 14

Muscogee (Creek) Nation v. Pruitt,
669 F.3d 1159 (10th Cir. 2012) 22

Nat'l Shooting Sports Found., Inc. v. State,
5 Cal. 5th 428 (2018) 23

Oakland Trib., Inc. v. Chron. Pub. Co.,
762 F.2d 1374 (9th Cir. 1985) 34

Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.,
498 U.S. 505 (1991) 30

Oklahoma Tax Comm'n v Bruner,
815 P.2d 667 (Okla. 1991) 16

Paiute-Shoshone Indians of Bishop Community v. City of Los Angeles,
637 F.3d 993 (9th Cir. 2011) 26, 27

Pashby v. Delia,
709 F.3d 307 (4th Cir. 2013) 33

Prairie Band Potawatomi Nation v. Richards,
379 F.3d 979 (10th Cir. 2004) 19, 20

Recycle for Change v. City of Oakland,
856 F.3d 666 (9th Cir. 2017) 12

Republic of Philippines v. Pimentel,
553 U.S. 851 (2008) 25

Rice v. Rehner,
463 U.S. 713 (1983) 17

Rose D. ex rel John D. v. Swift,
310 F.3d 230 (1st Cir. 2002) 31

Salt River Pima-Maricopa Indian Cmty. v. Arizona,
50 F.3d 734 (9th Cir. 1995) 19

Securities & Exchange Com'n v. Liu,
851 F.Appx. 665 (9th Cir. 2021) 12

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 31

Shermoen v. United States,
982 F.2d 1312 (9th Cir. 1992) 25, 28

Shields v. Barrow,
58 U.S. 130 (1854) 29

Skokomish Indian Tribe v. Forsman,
738 Fed. Appx. 406 (9th Cir. 2018) 29

Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,
240 F.3d 832 (9th Cir. 2001) 36

Tanner Motor Livery, Ltd. v. Avis, Inc.,
316 F.2d 804 (9th Cir. 1963) 33

Turo Inc. v. City of Los Angeles,
847 Fed. Appx. 442 (9th Cir. 2021) 34

United States v. Baker,
675 F.2d 1478 (9th Cir. 1995) 22

United States v. Kagama,
118 U.S. 375 (1886) 32

United States v. Nutri-Cology, Inc.,
No. C-91-1332-DLJ, 1991 WL 1092506 (N.D. Cal. July 19, 1991) 35

United States v. Odessa Union Warehouse Co-op,
833 F.2d 172 (9th Cir. 1987) 35

Wagnon v. Prairie Band Potawatomi Nation,
546 U.S. 95 (2005) 14, 15

Washington v. Confederated Tribes of Colville Indian Reservation,
447 U.S. 134 (1980) 15, 19

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 14, 15, 20

White v. Univ. of California,
765 F.3d 1010 (9th Cir. 2014) 26, 28, 30

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008) 11, 12, 34

Wyandotte Nation v. Sebelius,
443 F.3d 1247 (10th Cir. 2006) 35

Statutes

15 U.S.C § 375 note 9

15 U.S.C. § 375 31

15 U.S.C. § 376a 12, 13

15 U.S.C. § 378 ..... 29, 31, 32

18 U.S.C. § 1161 17

18 U.S.C. § 2341 37

25 U.S.C. § 2701, *et seq.* 11

Cal. Bus. & Prof. Code § 22973 18

Cal. Bus. & Prof. Code § 22973.3 17

Cal. Bus. & Prof. Code §§ 22974.3–22974.8 18

Cal. Civ. Code § 3531 23

Cal. Health & Safety Code § 104556(j) 24

Cal. Health & Safety Code §104555(f) 24

Pub. L. 111-154, § 5; 124 Stat. 1087, 1109-10 (2010) 9, 13, 16, 17

Rules

Fed. R. Civ. P. 19 ..... 25, 26, 28

Other Authorities

CDTFA Publication 146, *Sales to Native Americans and Sales in Indian Country* (April 2022) 17, 21

Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112 (Jan 12, 2023) 10

INTRODUCTION

The Plaintiff State of California cannot show it is entitled to the extraordinary relief of an injunction that would alter the status quo. This is so for at least three main reasons. First, the State's Motion for Preliminary Injunction ("PI Motion") ignores Section 5 of the PACT Act ("Act"). That Section expressly preserves tribal immunities from State regulation in Indian country and controls the resolution of ambiguities in the Act.[1] Second, the State cannot prove Azuma Corporation and the individual defendants ("Defendants") are violating the Act because the Act permits Azuma to distribute cigarettes to lawfully operating Tribal Retailers. 15 U.S.C. § 376a(e)(2)(A)(ii). The State cannot prove the Tribal Retailers are not lawfully operating, particularly in light of the limitations on the State's power to regulate Indian Country commerce expressly incorporated into the Act. Furthermore, the Tribal Retailers are necessary and indispensable parties who cannot be joined as required under Rule 19 because they enjoy sovereign immunity. Third, the Act expressly reaffirms tribal sovereign immunity and forecloses the *Ex parte Young* exception on which the State relies to circumvent that immunity. The State's sole remedy against a tribally owned business is to provide information of alleged violations to the U.S.

[1] Section 5 reads in relevant part:

> (a) IN GENERAL.--Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect--
>
> (1) any … compacts … between any State … and any government of an Indian tribe … relating to the collection of taxes on cigarettes … sold in Indian country; …
>
> (3) 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 and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
>
> (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes[.]
>
> …
>
> (e) AMBIGUITY. -- Any ambiguity between the language of this section or its application any other provision of this Act shall be resolved in favor of this section.

Pub. L. 111-154, §§ 5(a)(1), (a)(3), (a)(4), (e); 124 Stat. 1087, 1109-10 (2010); 15 U.S.C § 375 note ("Section 5"). For the convenience of the Court, a complete copy of the PACT Act, including the uncodified Section 5, is appended to this brief.

Department of Justice ("DOJ") who, the Act provides, "shall take appropriate actions to enforce [the Act]." 15 U.S.C. § 378(c)(2).

These issues, which are at the confluence of federal, state and tribal law, are complex and intertwined. They require the careful application of the Act, case law regarding federal preemption of state laws in Indian country, and the State's convoluted scheme for taxation and regulation of cigarettes. The State asks this Court to shutter Azuma's business before Azuma or the Tribal Retailers have an opportunity to fully litigate these complex issues, including the State's assumption that the Tribal Retailers are required to be licensed by the State and should be remitting some unspecified amount of tax from an unidentifiable subset of their on-reservation transactions. In addition, the balance of harms weighs strongly against a preliminary injunction, as Azuma and the Tribal Retailers face significant harm to their respective interests in self-governance, while the asserted harm to the State is purely monetary, and its urgency and magnitude is significantly tempered by the State's long delay in seeking the injunction. The State's motion for a preliminary injunction—and, notably, one that would alter the status quo—should be denied.

BACKGROUND

Azuma is chartered pursuant to the laws of, and is wholly owned and operated by, the Alturas Indian Rancheria (the "Tribe"), a federally recognized Indian Tribe, *see* 88 Fed. Reg. 2112 (Jan 12, 2023), which is governed by its Business Committee.[2] Defendants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa are the members of the three-person Business Committee. The State's PI Motion is brought only against the Del Rosas and Rose in their official capacities as officers of the Tribe.

Azuma's cigarette factory is on the Alturas Rancheria in Alturas, California. Alturas Rancheria is Indian Country, the title to which is held by the United States in trust for the benefit of the Tribe. Azuma holds a Permit to Manufacture Tobacco Products ("Permit") from the United States Department of Treasury, Alcohol, Tobacco Tax and Trade Bureau and complies with all

[2] As an arm of the Tribe, Azuma is immune from civil suit, including the present suit. *See, e.g., White v Univ. of California*, 765 F.3d 1010 (9th Cir. 2014). Azuma intends to file a Motion to Dismiss the State's claims in this matter pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds of tribal sovereign immunity.

applicable federal tobacco product laws, the applicable tribal laws of the Alturas Indian Rancheria, and laws of the tribal jurisdictions into which it sells. *See generally* Declaration of Darren Rose ("Rose Decl."). Pursuant to its Permit, Azuma manufactures cigarettes sold under various trade names. Once manufactured, Azuma sells its cigarettes to retailers that are wholly owned by other federally recognized Indian tribes ("Tribal Retailers") operating within Indian Country inside the State of California. The Tribal Retailers are licensed and regulated by the laws of their respective tribes.

Azuma's cigarettes travel directly from the Alturas Rancheria to the Indian Country of the Tribal Retailers, and do not travel in interstate commerce at any time. The Tribal Retailers sell the cigarettes to consumers within Indian Country at tribal commercial developments including casinos owned and operated by their tribes. Declaration of Wendy Ferris ("Ferris Decl.") at ¶¶11-19; Declaration of Philip Del Rosa ("Del Rosa Decl.") at ¶13. These commercial developments were developed and are operated by each tribe and play a significant and active role in generating value on their respective reservations. The enterprises are not developed simply to allow the sale of items such as cigarettes to take place on the reservations. Ferris Decl. at ¶¶11-19; Del Rosa Decl. at ¶10. The tribal casinos are regulated by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. ("IGRA"), and gaming compacts between the State and the tribes. Ferris Decl. at ¶¶ 11-19; Del Rosa Decl. at ¶ 12. The compacts approved by the U.S. Secretary of the Interior provide, "Nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco." *Id.*

LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 25 (2008) . "In cases where the movant seeks to alter the status quo, a preliminary injunction is disfavored and a higher level of scrutiny must apply." *Disbar Corp. v. Newsom*, 508 F.Supp.3d 747, 751 (E.D. Cal. 2020). The movant must "establish the normal preliminary injunction elements: 1) irreparable injury, 2) probable success on the merits, 3) a balance of hardships that tips in the movant's favor, and 4) that a preliminary

injunction is in the public interest." *Securities & Exchange Com'n v. Liu*, 851 F.Appx. 665, 668 (9th Cir. 2021); *Winter*, 555 U.S. at 20. The burden of showing a likelihood of success on the merits falls upon the moving party. *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). Probable success on the merits "is the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors [citation] in the absence of serious questions going to the merits." *Id*. The court applies a sliding scale where the more sharply the balance of the hardships tips toward the movant, the less certain the movant's probability of success must be; provided it meets the serious questions test. *Id*. The converse is also true. The less hardship for the movant, the more certain its success on the merits must be. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017).

DISCUSSION

I. The State Has Not, and Cannot, Prove it is Likely to Succeed on the Merits of its PACT Act Claims.

A. The State cannot prove that Azuma and the Tribal Retailers are operating unlawfully under the PACT Act.

For the State to show that Azuma is violating § 376a(a)(3), the State must demonstrate that Azuma's customers, the Tribal Retailers, are not "lawfully operating." Similarly, for the State to show that Azuma or its agents are in violation of the Act under § 376a(e)(2)(A) for making prohibited deliveries while Azuma is on the Noncompliant List, the State must demonstrate that the delivery recipients, the Tribal Retailers, are not "lawfully engaged" in the business of distributing cigarettes.[3] In short, before granting relief on the State's PACT Act claim, including granting the preliminary injunction, the Court must first decide the threshold issue that each of the Tribal Retailers is breaking the law. *See* PI Motion at 9-10.

[3] Azuma has filed an action against the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in the United States District Court for the District of Columbia challenging ATF's placement of Azuma on the Noncompliant List at the State's request. *Azuma Corp. v Garland, et al.*, Case No. 1:23-cv-01761-CKK (D.D.C. June 16, 2023). A determination that Azuma's listing was improper would preclude the State's claims here.

The State incorrectly claims that the Tribal Retailers are not "lawfully engaged in the business of selling cigarettes" based on its assertions that: 1) the Tribal Retailers do not hold State retailers' licenses; 2) the Tribal Retailers purchase cigarettes from a distributor not licensed by the State; 3) the Tribal Retailers do not collect, pay or remit state cigarette taxes when owed; and 4) Azuma's cigarettes are not on the State Directory.

1. The State has not shown that Tribal Retailers are in violation of any applicable State law.

Properly applying federal limits on the application of state cigarette laws, and contrary to the State's assertions, the Tribal Retailers are lawfully operating. The State bases its PI Motion on its claim that, because Azuma is on ATF's Noncompliant List, it is "prohibited from distribution of Azuma's cigarettes." Doc. 16 at 2. That statement is demonstrably incorrect, as the Act expressly permits persons on the Noncompliant List to distribute cigarettes to lawfully operating cigarette retailers. 15 U.S.C. §§ 376a(a)(3); 376a(e)(2)(A). The State also incorrectly claims that, under State law, the Tribal Retailers that purchase Azuma's cigarettes are not lawfully engaged in the business of selling cigarettes. Doc. 13-1 at 12, 15-16.

a. The PACT Act does not "federalize state cigarette laws" as the State contends.

The State seeks to bypass federal precedent by incorrectly claiming that the Act "federalizes state cigarette laws" in Indian Country (Doc 13-1 at 8). Contrary to the State's assertion, Section 5 of the Act provides that the Act shall *not* be "construed to 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 and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country." Pub. L. 111-154, § 5(a)(3) (emphasis added). The Act cannot "federalize" all state cigarette laws in Indian Country while simultaneously maintaining the legal status quo regarding the applicability of state cigarette laws to tribes and tribally owned entities. Accordingly, the Court must reject the State's claim that the Act "federalizes" state cigarette laws in Indian Country, and

instead apply existing "limitations under Federal [and] State law, including Federal common law," as commanded by Section 5 of the Act.

More specifically, the Supreme Court has recognized that federal law significantly limits state authority over transactions involving Indian tribes in Indian Country. "[S]tate action may not burden 'the right of reservation Indians to make their own laws and be ruled by them.'" *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 724-25 (9th Cir. 2021) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). "Whether state regulation infringes on tribal sovereignty depends on *who* is being regulated—Indians or non-Indians—and *where* the activity to be regulated takes place—on or off a Tribe's reservation. *Id.* at 725. The State may not require tribally owned retailers to be licensed by the State before selling cigarettes to tribal members *or non-members* in Indian Country. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481 (1976).

"States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or on tribal members for sales made inside Indian country' without congressional authorization." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005). The "categorical approach" prohibiting state taxation of reservation Indians stems from "Chief Justice Marshall's observation that 'the power to tax involves the power to destroy,"' *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992), and "gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes... and to regulate and protect the Indians and [their] property against interference even by a state," *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 376 n.2 (1976) (internal quotation marks omitted). When a state seeks to tax an Indian tribe or individual Indians on their reservation, there is no weighing of the state's interest or examination of whether tribal self-government has been infringed. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 179-80 (1973). Instead, state taxation is prohibited unless Congress has expressed an "unmistakably clear" intent otherwise. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985).

Aside from direct taxation, there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). Rather, "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id*. at 215. The only relevant "exceptional circumstance" the Court has identified relates to nonmember consumers at retail tribal smokeshops "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). In this exceptional circumstance, the state can impose *only* a "minimal burden" on the tribal retailers "to aid in collecting and enforcing that tax" on non-members. *Id*. at 159; *see also Moe*, 425 U.S. at 482-83 (1976); *Cabazon* at 215-16 (citing *Colville* and *Moe*); *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc*., 512 U.S. 61, 73 (1994).

Also, where the legal incidence of a state tax falls on a non-member transacting with tribes or tribal members on the reservation, federal law preempts the tax if it fails to satisfy the balancing test articulated in *Bracker* (the "*Bracker* balancing test"). *Wagnon* at 102, 110. *Bracker* calls for a "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." *Bracker* at 145. Courts must make this assessment "on a case-by-case basis." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992).

Whether the State can apply its laws to license Tribal Retailers is a separate issue from whether the State may collect taxes from non-Indians. The *Bracker* balancing test applies to whether the State may tax sales to non-Indians. Federal law preempts the State's authority to license Tribal Retailers. Only if the tax is valid under the *Bracker* balancing test, may the State impose a minimal burden on the Tribal Retailers to collect any taxes owed by non-members. The *Bracker* balancing test does not support State licensing of the Tribal Retailers. The State's licensing regime, described more fully in the following sections, exceeds its authority.

b. Federal law prohibits the State from requiring Tribal Retailers to obtain State retail licenses.

As noted above, the Act does not alter existing federal law, including common law, "with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country." Pub. L. 111-154, § 5(a)(3). States are prohibited from imposing a licensing requirement on cigarette retailers "conducting a cigarette business for the Tribe on reservation land." *Moe*, 425 U.S. at 481; *accord*, *Oklahoma Tax Comm'n v Bruner*, 815 P.2d 667, 669-70 (Okla. 1991). All of Azuma's sales are to tribally owned retailers that sell cigarettes in their own tribe's Indian Country. *Moe* forecloses the State's claim that, because Tribal Retailers do not hold a state retailer's license, they are not "lawfully engaged in the business of... selling cigarettes." Doc. 13-1 at 9-10.[4]

The State relies primarily on *Big Sandy*, but *Big Sandy* undermines the State's claim. Contrary to the State's assertion, *Big Sandy* did not "h[o]ld that cigarette retailers on Indian land are properly subject to state regulation, including licensing and recordkeeping requirements." Doc. 13-1 at 15. *Big Sandy* dealt with a wholesale distributor, not a retailer. 1 F.4th at 718. Moreover, the State makes the misleading assertion that *Big Sandy* approved the application of California's cigarette licensing and recordkeeping regime "to on-reservation cigarette businesses." Doc. 13-1 at 17. In fact, the Court decided *Big Sandy* based on the premise that the entity was engaged in "off-reservation conduct," which, because of its off-reservation location, was "subject to non-discriminatory state laws of general application." *Big Sandy* at 728-29. Here, the Tribal Retailers are all engaged in activity solely within the reservation of their respective tribes and are therefore subject to an entirely different "analytical framework," as *Big Sandy* explained. *Id.* at 725-26.

[4] In fact, the California Cigarette and Tobacco Products Licensing Act of 2003 itself provides that, "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. *See also* 18 Cal. Code of Regs § 1616(d)(3)(A) (tribes must "register" and collect only use taxes), and Business Taxes Law Guide – Revision 2023, CDTFA, annotation 305.0300 (tribes must "register" and collect only use taxes).

The State's reliance on *Rice v. Rehner*, 463 U.S. 713 (1983), is also misplaced. *Rice* held that a liquor store operating in Indian Country was required to obtain a state license pursuant to a federal statute that expressly applies state liquor laws in Indian Country.[5] 18 U.S.C. § 1161. The Act has no similar provision. To the contrary, Section 5 of the Act expressly maintains existing federal law and expressly does not affect tribal-state compacts regarding the regulation (and taxation) of cigarette sales in Indian Country. Pub. L. 111-154, § 5. Thus, the Act cannot be construed to negate or modify the Supreme Court's holding in *Moe* that a State cannot impose licensing requirements on a tribally owned cigarette retailer located in that Tribe's Indian Country, and the licensing requirements under State law do not apply.[6]

The State also misrepresents the holding in *Milhelm Attea*, claiming the Court "approv[ed] state licensing and recordkeeping requirements for cigarette retailers located on Indian land." Doc. 13-1 at 16. To the contrary, in *Milhelm Attea*, New York's cigarette tax laws merely required tribal retailers to obtain a "tax exemption certificate" in order to purchase a predetermined number of tax-free cigarettes for resale to tribal members. *Id*. at 67. The tax exemption certificates did not do "anything more than establish a method of identifying those retailers who are already engaged in the business of selling cigarettes," and "certification [was] 'virtually automatic' upon submission of an application." *Id.* at 77.

By contrast, the State's comprehensive licensing regime requires cigarette retailers to pay a $265 fee annually per location, Cal. Bus. & Prof. Code § 22973.3(d), subject themselves to investigation by the Board of Equalization, *id*. § 22973.3(b), provide a sworn statement that the applicant has not been convicted of a felony, swear to be subject to the full panoply of State law "pertaining to the manufacture, sale, or distribution of cigarettes or tobacco products," *id*. §

[5] The Court also rested its holding on the fact that there was such historically pervasive federal regulation involving alcohol in Indian country that Congress had "divested the Indians of any inherent power to regulate in this area," giving the states such authority. *Rice*, 463 U.S. at 724, 733. No such historically pervasive federal regulation of cigarette sales exists.

[6] The California Department of Tax and Fee Administration (CDTFA) agrees that California is "subject to, and limited by" the Court's holding in *Moe*. CDTFA Publication 146, *Sales to Native Americans and Sales in Indian Country* (April 2022) at Preface (Req. J. Ntc., Ex. 1). Notably, the CDTFA does not list *Rice* as one of the authorities that California is "subject to and limited by."

22973(a)(3), and subject themselves to substantial civil and criminal penalties for any violation of such laws. *Id*. §§ 22974.3 – 22974.8. Those burdens are clearly not "minimal," violate the letter of *Moe*, and were certainly not approved in *Milhelm Attea*.

Furthermore, California previously advised an on-reservation tribally owned distributor that licensure was "technically not required." Rose Decl. at ¶ 16. None of the Tribal Retailers identified in this case have been cited for not possessing a license. Ferris Decl. at ¶ 21; Del Rosa Decl. at ¶ 14.

Accordingly, the State's assertion that Tribal Retailers are "not lawfully engaged in the business of selling cigarettes" for lack of a State cigarette retailer's license must be rejected. The Tribal Retailers are lawfully engaged in the business of selling cigarettes, and Azuma may sell cigarettes to the Tribal Retailers under the terms of the Act.

c. Federal law prohibits the State law requirements that Tribal Retailers purchase only Directory-listed cigarettes from State-licensed distributors.

Federal law prohibits states from imposing the entirety of their licensing regime upon tribal entities operating on their reservations. A limited exception under federal law permits "state regulation that is reasonably necessary to the assessment or collection of lawful state taxes," so long as it does not "unnecessarily intrud[e] on core tribal interests." *Milhelm Attea*, 512 U.S. at 75; *see Moe* at 483. Only if a state tax is valid under the circumstances may the state "impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm Attea* at 73.

The first question under this rubric is whether there are any "valid taxes" on non-Indian purchasers that might justify the regulatory burden on the on-reservation Tribal Retailers. The State alleges that the Tribal Retailers "do not collect, pay, or remit state cigarette taxes when owed." Doc. No. 13-1 at 12. However, the State fails to provide any proof, or conduct any analysis, demonstrating that any taxes are owed. This question calls for the *Bracker* balancing test.

In this case, the interests of the Tribal Retailers are at their "strongest" under the *Bracker* balancing test because "the revenues are derived from value generated on the reservation by

activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville*, 447 U.S. at 156–57. The Supreme Court has recognized that a tribe generates value on its reservation where it has "built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribe provides." *Cabazon*, 480 U.S. at 219; *see Gila River*, 967 F.2d at 1410-11; *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (balance of interests allowed for state taxation because, "[m]ost importantly, the goods and services sold are non-Indian").

The Tribal Retailers sell Azuma's cigarettes at tribally owned and operated commercial developments, including casinos. Ferris Decl. at ¶¶ 8-19; Del Rosa Decl. at ¶ 9. Prior to the tribal governments' development of these commercial operations, non-tribal members rarely frequented the Indian country of the Tribal Retailers, and there was no viable market for cigarette sales. Del Rosa Decl. at ¶ 9. Cigarette purchasers frequently spend extended periods of time at the casino engaging in gaming, dining, or spending time at the tribally owned hotel. Ferris Decl. at ¶¶ 20, 10(e).

In *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004), rev'd on other grounds by *Wagnon*, 546 U.S. 95, the court found that a state tax on on-reservation fuel sales by a tribal retailer to non-tribal members was preempted by federal law where the tribe, "created a new fuel market by financing and building its gaming facilities" near where the fuel was sold. *Id.* at 984. The same reasoning applies here, where the retailer-tribes created a new market for cigarette sales by financing and building commercial enterprises, including gaming facilities, that provide recreational opportunities and ancillary services to non-members. The non-members do not "simply drive onto the reservations, make purchases and depart, but spend extended periods of time enjoying the services" provided by the tribes. *Cabazon*, 480 U.S. at 219; Ferris Decl. at ¶ 10(e); Del Rosa Decl. at ¶ 10. But for this value generated by the retailer-tribes in their Indian Country, there would be no market for the sale of Azuma's cigarettes. Ferris Decl. at ¶ 20; Del Rosa Decl. at ¶ 9. Moreover, here, as in *Prairie Band*, the federal policy of promoting tribal self-sufficiency

and economic development weighs strongly in favor of finding that California's cigarette taxes and regulations are preempted by federal law. *Id*. at 985 (citing *Bracker*, 448 U.S. at 143–44).

By contrast, the State's interest in enforcing its tax scheme primarily consists of raising revenues. Doc. 13-1 at 19 of 21. While the State asserts an interest in promoting public health, *id*. at 20, such interests are not substantial where, as here, the State "allows products with the same health effects to be purchased elsewhere in the state, and residents may also travel to other states to purchase them." *HCI Distrib. Inc. v Hilgers*, No. 8:18-cv-173, 2023 WL 3122201, at *15 (D. Neb. Apr. 27, 2023).

Accordingly, with the facts specific to this case, *Bracker* balancing preempts the State's cigarette tax imposed upon nonmembers who buy from the on-reservation Tribal Retailers. Because the balance of interest tips in favor of the Retailer tribes and the federal government, the State may not even impose minimal burdens on the Tribal Retailers. *See Milhelm Attea* at 73. Perhaps more to the point, the State has failed to present any evidence that there are valid state taxes for the Tribal Retailers to collect. The *Bracker* analysis requires a case-by-case, fact-intensive analysis for each Tribal Retailer to determine whether they are lawfully operating. *Bracker* balancing does not permit the State or the Court to assume that taxation of non-members is valid simply because it was valid under the different circumstances of another case.[7]

From any angle, the State has not proven the essential prerequisite for imposing even minimal burdens on the Tribal Retailers to assist the State in collecting taxes, much less that it can impose its full-scale licensing regime on the Tribal Retailers. The State's requirements are preempted by federal law and violate Section 5 of the Act. They cannot form the basis for finding that Tribal Retailers are operating unlawfully.

[7] The State's reliance on *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), is misplaced, as *Chemehuevi* pre-dated the Supreme Court's decision in *Cabazon*, wherein the Court held that the State's interests under the *Bracker* test were outweighed by Tribal and Federal interests where Tribe had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribe provide." *Cabazon*, 480 U.S. at 219.

d. State regulations impose more than a "minimal burden" which is not tailored to collection and remittance of any valid tax.

Even assuming some of the Tribal Retailers' cigarette sales could be validly taxed by the State, the State has not created a mechanism that enables either Azuma or the Tribal Retailers to calculate which of their sales are subject to the State's cigarette tax, and which sales are tax exempt. In the absence of any such mechanism, Azuma and each of the Tribal Retailers could be required to apply *Bracker* balancing to each individual transaction to determine its taxability consistent with federal law. Because one size does not fit all in the *Bracker* interest-balancing analysis, the answer will depend upon all of the circumstances. The State's regime, which was plainly not designed with reservation commerce in mind, fails to accommodate transactions that are not subject to state regulation under *Bracker*, while it also fails to aid the State, Azuma or the Tribal Retailers in any reasonable way to collect a hypothetically valid state tax.

Compounding the difficulty faced by Azuma and the Tribal Retailers, the State has adopted inconsistent and contradictory guidance about who is and is not taxable. In its filings in this case, the State claims that *only* cigarette sales by tribal retailers to *members of the retailers' tribe* in said tribe's Indian Country are tax exempt. See Doc 1, at 4, ¶ 16. However, in an official publication released in April 2022 titled, "Sales to Native Americans and Sales in Indian Country" ("CDTFA Publication 146"), CDTFA explained that sales by "Native American retailers" in their own Indian Country are exempt from cigarette excise taxes whenever the buyer is any "individual of Native American descent and eligible to receive services as a Native American from the United States Department of Interior," their spouse (Native American or not) or their company. CDTFA Publication 146 at 1, 24 (Ex. 1 to the Request for Judicial Notice submitted herewith).

The Publication also confirms that a Native American retailer may "buy[] untaxed cigarettes without a California tax stamp" from a Native American distributor, *id.* at 24, which are exactly the tax-exempt transactions Azuma conducts. Nowhere does the Publication specify that a Native American cigarette distributor or retailer must hold a state license. Instead, it provides only that the non-Native American *purchaser*, if she buys untaxed cigarettes, "must register with CDTFA and pay applicable California excise tax." *Id.* (emphasis added).

The State cannot enforce its tax scheme on a tribal entity amid such uncertainty without adequately and accurately informing the entity what must be done to comply. In *Cayuga Indian Nation v. Gould*, 930 N.E. 2d 233 (N.Y. 2010), the New York Legislature enacted statutes that assessed cigarette taxes on on-reservation sales by tribal retailers to non-tribal-members, but the State did not promulgate a mechanism to enable tribal retailers to distinguish between or report taxable and tax-exempt purchases. *Id*. at 239-240. When the State seized untaxed cigarettes from a tribal retailer, the Court of Appeals of New York held that such seizure was unlawful:

> Even outside the context of Indian relations, *taxpayers are not ordinarily required to guess what they need to do to comply with the Tax Law. It is generally up to the Legislature and the Department [of Taxation] to articulate—before a transaction occurs—in what circumstances a tax is owed, who is obligated to collect it, how it should be calculated and when and how it must be paid*.

Id. at 255 (emphasis added). The court found "doubt[ful]" that the State's failure to create such a mechanism "would comply with the United States Supreme Court's requirement that a sales tax collection scheme involving Indian retailers be not 'unduly burdensome.'" *Id*. The same principles apply here. Unlike other states,[8] California has not promulgated any mechanism to enable or require Tribal Retailers to distinguish validly taxable and non-taxable sales or report such sales upstream to distributors like Azuma. Further, given the internal discrepancy between State agencies, the State has fatally failed to adequately articulate "in what circumstances the tax is owed," *Gould* at 255, and as such, the State's excise tax scheme is not enforceable in Indian Country. If the State cannot internally agree on which taxes are owed, it is both unreasonable and unlawful for the State to require Azuma and the Tribal Retailers to guess. *Id*.[9]

[8] New York (post-*Gould*) now issues tax exempt coupons based upon "probable demand" for cigarettes by tribal members. *See Milhelm Attea*, 512 U.S. at 64-68. Other states have adopted systems similar to New York's, including Oklahoma, *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1163 (10th Cir. 2012), and Washington, *see United States v. Baker*, 675 F.2d 1478, 1489-90 (9th Cir. 1995). Nebraska requires tribal retailers to collect information from cigarette purchasers who are exempt from the State's cigarette excise taxes. Neb. Dept Revenue, Form 68, Nebraska Credit Computation for Cigarettes Sold to Native American Indian Tribal Members in Indian Country (Ex. 4 to the Request for Judicial Notice submitted herewith). In stark contrast, California has no suitable mechanism to confidently conduct and report sales exempt from cigarette excise tax.

[9] The State's assertion that the CDTFA's monthly distributor tax reports, "include a space to identify exempt distributions" begs the question, because without a mechanism for Tribal Retailers to report tax-exempt sales (continued…)

The CDTFA has previously shown itself capable of tailoring state law to avoid infringing on tribal rights. In the context of sales and use taxes on food and beverages sold in Indian country, the CDTFA performed a reasoned *Bracker* analysis, then revised its regulations accordingly, to bring its tax scheme into compliance with federal law. *See* Mem. from Trista Gonzalez, Chief of Tax Policy Bureau, to Nicolas Maduros, Director of CDTFA, at 4-8 (Oct. 25, 2019).[10] Under the prior regulations, CDTFA could not determine which transactions were taxable or how much tax the State would collect. *Id.* at Attachment 1, p. 2. The CDTFA's *Bracker* analysis and regulatory amendments, promulgated after extensive tribal input, responded to this uncertainty by adding certain presumptions to the regulations favoring tax exemptions. *Id.* at 4-8 & Attachment 2; *see* 18 Cal. Code Regs. § 1616(d). This process is exactly what Azuma has asked the Attorney General's office to do for cigarette excise taxes, and the Attorney General's office has refused. Rose Decl. at ¶ 18.

In addition to being unenforceable under federal law, the State's excise tax scheme violates Cal. Civ. Code § 3531, which provides, "the law never requires impossibilities." Because the State has not created a mechanism (much less a minimally burdensome one) for distinguishing which sales are validly subject to the excise tax from those that are not, it is impossible for Tribal Retailers to determine and verify who is taxable and who is not, and how to record or report the same upstream to distributors, who are responsible for remitting the excise tax to the State through the affixation of tax stamps. Thus, Azuma and the Tribal Retailers are excused from complying with the scheme as a matter of State law. *See Nat'l Shooting Sports Found., Inc. v. State*, 5 Cal. 5th 428, 434 (2018) (holding "the law recognizes exceptions to statutory requirements for impossibility of performance.").

The State's requirements also exceed the "minimal burdens" standard by requiring tribally owned retailers to purchase cigarettes only from State-licensed distributors. With this requirement,

upstream to distributors, Azuma receives no information to complete the forms, and instead is left to guess how many of the sales are excise-tax exempt.

[10] Exhibit 2 to the Request for Judicial Notice submitted herewith. *See also* Board of Equalization, Initial Discussion Paper on Regulation 1616 (Dec. 18, 2015), Exhibit 3 to the Request for Judicial Notice.

given the universe of obligations that comes with maintaining a license, including the prepayment of state excise taxes on all sales, including exempt sales, and the restriction to deal only with directory-listed cigarettes, the State is regulating the price, kind and type of cigarettes that may be offered for sale, and restricting the Tribal Retailers' ability to offer traditional Native American products that are produced by Native American-owned businesses, which is important to the tribes' governmental policies and practices. Ferris Decl. at ¶ 10(f).

In addition, requiring the Tribal Retailers to purchase only directory-listed cigarettes fails the tailoring element of the "minimal burdens" standard. The Directory Statute is not designed to aid in the collection of valid taxes from non-Indians, but to enforce small cigarette manufacturers' payment into escrow of what are essentially security deposits, mandated by the MSA to prop up large manufacturers' market share. *HCI Distrib.* at *14-15.

Ultimately, the State's decision to not design a mechanism for tribal entities to determine taxability and to track, report, and remit valid taxes, if any exist, is fatal to its claim that either the Tribal Retailers or Azuma are operating unlawfully by not remitting taxes and not adhering to the licensing regime. It is the State's responsibility to explain how its tax scheme works, not the tribal entities' responsibility to guess. *See Gould*, 930 N.E. 2d at 255.

e. The tax-exempt cigarettes sold by Azuma and the Tribal Retailers do not trigger escrow payments and are not required to be listed on the State's directory.

The State directed the ATF to place Azuma on ATF's Noncompliant List because Azuma had allegedly not complied with the State's Escrow Statute. *See* Doc. 1 at Ex. J & M. The Escrow Statute requires cigarette manufacturers that are not parties to the MSA to pay fees into an escrow account established by the State to "ensur[e] that the state will have an eventual source of recovery from them if they are proved to have acted culpably." Cal. Health & Safety Code §104555(f). The State further admits in its Complaint that the escrow fees "do not attach to cigarettes beyond the reach of state taxation," Doc. 1 at 5, ¶ 20, including "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). As discussed above, Azuma only

makes tax-exempt sales to Tribal Retailers, and the State has failed to prove that any of the Tribal Retailers' subsequent sales are taxable after balancing the relevant interests, as mandated by *Bracker*. In the absence of the required particularized *Bracker* balancing for each Tribal Retailer, or any mechanism provided by the State to reliably identify taxable sales consistent with federal law, Azuma's products are entirely "beyond the reach of state taxation." As a result, the sale of Azuma's cigarettes do not trigger any obligation for Azuma to make escrow payments, and Azuma's cigarettes should not be listed on the State's cigarette directory.

2. The State has not established the Court's subject matter jurisdiction to determine whether the Tribal Retailers are operating unlawfully, because they cannot be joined under Rule 19 due to sovereign immunity.

Rule 19 preserves the right of absent persons to be joined as "parties to make known their interests and legal theories." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). Rule 19 calls for a three-part inquiry into (1) whether absent persons are necessary, (2) if necessary, whether it is "feasible" to join them, and (3) if not feasible, whether the litigation cannot proceed in their absence. Fed. R. Civ. P. 19. "Absent parties are necessary if they claim an interest relating to the subject of the action and are so situated that the disposition of the action in the parties' absence may as a practical matter impair or impede the parties' ability to protect that interest." *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (brackets omitted). Absent parties are also necessary where "the court cannot accord complete relief" that is meaningful "as between the parties." Fed. R. Civ. P. 19(a)(1)(A); *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013). The Court cannot involuntarily join a party that has not waived its sovereign immunity. *Id*. at 1310. To determine whether absent parties are indispensable, thereby preventing the Court from proceeding in their absence, the Court balances four factors: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen the prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli*, 101 F.3d at 1310-1311.

A case "may not proceed when a required-entity sovereign is not amenable to suit." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008). "Although Rule 19(b) contemplates

balancing the factors [listed in the Rule], when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (internal quotation marks omitted); *Deschutes River Alliance v. Portland General Electric Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) ("The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.").

The threshold issue of whether the Tribal Retailers are operating unlawfully implicates their rights, obligations and interests, and thus they are necessary parties under Rule 19(a). The Tribal Retailers cannot be joined because they are arms of their respective Indian tribes and immune from suit, and the case must be dismissed under Rule 19(b) because it cannot proceed in their absence "in equity and good conscience." Therefore, the Court lacks subject matter jurisdiction to reach the merits of the State's case and must deny its request for a preliminary injunction.

a. The Tribal Retailers are necessary parties.

The Tribal Retailers are necessary parties under Rule 19(a) for two main reasons. First, proceeding with the suit in the absence of the Tribal Retailers will impair or impede the Tribal Retailers' ability to protect a claimed legal interest in the subject matter of the action. Fed. R. Civ. P. 19(a)(1)(B); *see Paiute-Shoshone Indians of Bishop Community v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011). Second, the Court cannot award complete relief to the existing parties without joining the Tribal Retailers. Fed. R. Civ. P. 19(a)(1)(A). The Complaint acknowledges that Azuma conducts "tribe-to-tribe sales," Compl. ¶ 54, quoting *Big Sandy* at 729, and the PI Motion identifies Tribal Retailers, all of which are Indian tribes and arms of Indian tribes possessing tribal sovereign immunity. *See* Decl. of James Dahlen (Doc. 13-4) at 2-3. *See also* Ferris Decl. at ¶ 8.

Because the State accuses the Tribal Retailers of violating the law, the Tribal Retailers are the proper parties to defend themselves against the State's accusations. *Paiute-Shoshone*, 637 F.3d at 1001. This predicate ruling cannot be made in the absence of the Tribal Retailers without prejudicing their (and their parent Indian tribes') sovereign rights relating to imposing state regulations in their respective Indian Country. If the Court were to hold that the Tribal Retailers

are operating unlawfully, it "may as a practical matter impair or impede" their ability to protect their interests, whether because of potential estoppel or precedential effect. *Id.* The Tribal Retailers must be afforded the opportunity to present evidence and legal argument to defend their sovereign rights and interests against the State's attempted - unprecedented - wholesale imposition of State cigarette laws in their respective Indian Country.

Moreover, as discussed above, even if the balance of interests tips in favor of the State (which is does not), the State has extremely limited civil regulatory authority over the operations of Indian tribes in Indian Country. Because both Azuma and the Tribal Retailers are arms of their respective Indian tribes, and the transactions occur exclusively in Indian Country, state regulation is preempted except in the unique circumstance where the balancing of state and federal interests favors the state *and* the state imposes minimal burdens narrowly tailored to aid in the collection of a valid state tax imposed upon non-Indians. This inquiry requires *Bracker* balancing.

Here, the effect of a decision in the State's favor would impair the sovereignty of numerous Indian tribes who are absent from the case. A decision approving the State's claim that the entire State cigarette regulatory regime applies in Indian Country, and that the Tribal Retailers operate unlawfully for failure to comply with that regime, will have the practical, if not direct, effect of enjoining each of them from selling any cigarettes from *any* manufacturer. Because the State allows cigarettes to be sold by other retailers, such a decision would only discriminate against Indian tribes and strongly implicates issues of federal law. Such wholesale application of State law to the Tribal Retailers is also an imposition on their inherent right to self-government. Therefore, the Tribal Retailers are necessary parties to any adjudication of whether they are operating unlawfully.

b. The State's claims would interfere with or abrogate the contractual rights and obligations of the Tribal Retailers, which makes joinder necessary for the Tribal Retailers to protect their rights and interests.

The Tribal Retailers are also necessary because their rights and obligations under contracts with Azuma will be affected if the Court rules in the State's favor. In effect, the State's claims would abrogate Azuma's contracts with the Tribal Retailers. The Ninth Circuit held in *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), that "no procedural principle is more

deeply imbedded in the common law that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Id*. at 1325. The Ninth Circuit explained that the common law principle is "codified in Rule 19." *Id*. Similar to the State's case here, in *Lomayaktewa*, one governmental party, the Hopi Tribe, sought to invalidate the contract of another governmental party, the Navajo Nation. Because the State's claims would interfere with the contractual rights of the Tribal Retailers, they are necessary parties.[11]

c. It is not feasible to join the Tribal Retailers because they enjoy sovereign immunity.

The Tribal Retailers each "have an interest in preserving their own sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent." *Shermoen* at 1317 (internal quotation marks omitted). The State does not dispute the Tribal Retailers are all Indian tribes and tribally owned entities operating in Indian Country. As tribally owned entities, the Tribal Retailers are arms of their respective Indian tribes and enjoy sovereign immunity. They cannot be compelled to join this lawsuit. *See Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 856 (9th Cir. 2019).

d. The Tribal Retailers are indispensable parties that cannot be joined.

Because the Tribal Retailers are immune from suit, that fact alone is the compelling factor and the suit must be dismissed. *White*, 765 F.3d at 1028. Regardless, the factors require dismissal in this case. Again, the four factors are (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen the prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there exists an alternative forum.

> Parties are indispensable when their interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interests would be directly affected by the decree… The fact that the decree would not be technically binding on the absent parties is not the controlling factor.

[11] In addition, adjudication of this claim in the Tribal Retailers' absence could lead to inconsistent judgments if the Tribal Retailers or Azuma bring claims arising from the abrogation of those contracts, because a decision here would not be binding on the Tribal Retailers in their absence. Fed. R. Civ. P. 19(a)(1)(B)(ii).

Keegan v. Humble Oil and Refining Co., 155 F.2d 971, 973 (5th Cir. 1946) (citing *Shields v. Barrow*, 58 U.S. 130 (1854) and *California v. Southern Pacific Co.*, 157 U.S. 229 (1895)).

Proceeding with the action would be highly prejudicial to both Azuma and the Tribal Retailers, because of the threshold determination of whether the Tribal Retailers are operating unlawfully, and because the Tribal Retailers' ability to continue selling cigarettes could be impaired. The Court cannot shape relief to lessen the prejudice in the Tribal Retailers' absence, because the predicate issue of whether the Tribal Retailers are operating unlawfully cannot be avoided, and if the State cannot prove this element of its claim no relief can be granted. For the same reasons, the State can be awarded no adequate remedy.

An alternative remedy is available for the State's claims, and is provided for in the PACT Act. The State must submit its complaint to the United States Attorney General for his enforcement. 15 U.S.C. § 378(c)(2). Tribal sovereign immunity does not bar suits by the United States against Indian tribes, and therefore would not prevent the Attorney General from enforcing the PACT Act against Azuma and the Tribal Retailers, if warranted. Even if that alternative remedy did not exist, this factor is less significant when the sovereign interests of Indian tribes are involved. *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 409 (9th Cir. 2018) ["we acknowledge that a Rule 19 dismissal will likely leave Skokomish without an alternative judicial forum. However, this result is not dispositive of the indispensable-party analysis."]. "There is a wall of circuit authority in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity… regardless of whether an alternative remedy is available…." *Deschutes River Alliance*, 1 F.4th at 1163.

Ultimately, the weight of all four factors, in addition to the fact that the absent parties enjoy tribal sovereign immunity, requires the case to be dismissed because the Tribal Retailers are indispensable parties that cannot be joined.

B. The State's claims are barred by tribal sovereign immunity because the Act precludes the application of *Ex parte Young* to the Del Rosas and Rose.

The State seeks a preliminary injunction only against the Del Rosas and Rose in their official capacities as officers of the Tribe, relying on the doctrine of *Ex Parte Young*. *See Ex parte Young*, 209 U.S. 123 (1908). The State cannot succeed on this theory, however, because tribal sovereign immunity shields the tribal officers and the Act forecloses the *Ex Parte Young* exception to immunity. Accordingly, this Court lacks jurisdiction over them pursuant to the doctrine of tribal sovereign immunity.

Indian tribes enjoy "'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2030 (2014). "Suits against Indian tribes are therefore barred absent congressional abrogation or a clear waiver from the tribe itself." *White*, 765 F.3d at 1023 (citing *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Tribal sovereign immunity applies to the Tribe's commercial activities "on or off the Tribe's reservation lands." *Bay Mills*, 134 S.Ct. at 203; *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 725 (9th Cir. 2008) (citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc*., 523 U.S. 751, 754 (1998)). "Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe." *White* at 1025 (examining five factors in assessing whether entity is an arm of the tribe) "[T]hat tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals." *Bay Mills*, 572 U.S. at 789.

Sovereign immunity is an absolute bar to a lawsuit against tribal employees that is in substance a lawsuit against the government itself. *See, e.g*., *Lewis v. Clarke*, 581 U.S. 155, 162-163 (2017). For tribal employees acting in their official capacity, "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id*. A plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004).

As a general matter, "[i]n determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether [the plaintiff] has alleged an ongoing violation of federal law and seeks prospective relief." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007)). "For nearly a century, the doctrine of *Ex parte Young* flourished and suits against state officials seeking prospective injunctive relief were commonplace." *Rose D. ex rel John D. v. Swift*, 310 F.3d 230, 234 (1st Cir. 2002) ("*Swift*") (citations omitted). "Lately, however, the Supreme Court has fashioned an exception to the exception, applicable to certain cases in which 'Congress has created a remedial scheme for the enforcement of a particular federal right.'" *Id.* (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996). As the Supreme Court explained in *Seminole*: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole*, 517 U.S. at 74.

Swift recognized that the exception to the *Ex parte Young* doctrine turns on whether Congress intended to foreclose *Ex parte Young* jurisdiction. *Swift* at 238; *see also Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188 (9th Cir. 2003) (noting *Seminole*'s holding "that the 'intricate scheme' that Congress set forth would be 'superfluous . . . when more complete and more immediate relief would be available under *Ex parte Young*'."). Ultimately, the doctrine of *Ex parte Young* does not apply to tribal officials when Congress created a remedial scheme that is sufficiently comprehensive to make the doctrine unnecessary.

Congress intended to foreclose jurisdiction under *Ex parte Young* vis-à-vis violations of the Act, particularly as it applies to federally recognized Indian tribes and their subordinate entities. Under the Act, "A State, through its attorney general, . . . may bring an action in a United States district court to prevent and restrain violations of this chapter by any person or to obtain any other appropriate relief from any person for violations of this chapter[.]" 15 U.S.C § 378(c)(1)(A). Although the Act defines "person" to include state, local and Indian tribal governments, *Id.* at § 375(11), the more specific enforcement provisions of the Act demonstrate that Congress intended

Indian tribes and their officials to be treated differently from states and non-Indian individuals. Specifically, the Act provides, in relevant part:

> Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government or Indian tribe against ***any unconsented lawsuit under this chapter*** or *otherwise* to restrict, expand, or modify any sovereign immunity of a State or local government or Indian tribe.

15 U.S.C. § 378(c)(1)(B) (emphasis added). In the following provision of the Act, Congress provided a procedure for how states may pursue tribal violations of the Act:

> A State, through its attorney general . . . may provide evidence of a violation of this chapter by any person not subject to State, local, or tribal government enforcement actions for violations of this chapter to the Attorney General of the United States or a United States attorney, who shall take appropriate actions to enforce this chapter.

15 U.S.C. § 378(c)(2).

Thus, the Act does not "abrogate or constitute a waiver of any sovereign immunity… against ***any*** unconsented lawsuit[.]" 15 U.S.C. § 378(c)(1)(B) (emphasis added). To the contrary, it provides that, with respect to sovereign entities and any other person not subject to state civil actions, including tribal officials, the Act requires the State to provide evidence of violations to the Attorney General of the United States, or a United States attorney for enforcement. *Id.* § 378(c)(2). Taken together, these provisions show Congress did not grant the State authority to bring enforcement actions against Indian tribes, and precluded the State from using the *Ex parte Young* doctrine to circumvent tribal sovereign immunity. Instead, Congress intended that only the federal government should enforce the Act's provisions against Indian tribes, tribal entities, and tribal officials.

The reasons Congress might have prevented state enforcement against tribes is well established in Supreme Court and Ninth Circuit jurisprudence:

> For centuries, states have been the "deadliest enemies" of tribes, *United States v. Kagama*, 118 U.S. 375, 384 (1886), and the entities "least inclined to respect" tribal sovereignty, *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452, 2462 (2020). Accordingly, delegations of jurisdiction over tribal affairs to states have been perceived as an abandonment of the federal government's duty to safeguard tribal sovereignty.

Chicken Ranch Rancheria of Me-Wuk Indians v. California, 42 F.4th 1024, 1050 (9th Cir. 2022) (Wardlaw, J., concurring) (footnote omitted). It is also evident in this case, where the State attempts to impose its entire licensing and taxing scheme to sovereign Indian tribes in an unprecedented manner that is contrary to the federal policy of tribal self-determination and economic self-sufficiency.

Congress did not intend for states to have standing to bring unconsented PACT Act enforcement actions against Indian tribes, including against tribal officials under the doctrine of *Ex Parte Young*. The State's remedies under the Act only lie in (1) bringing an enforcement action against a person that is within its ordinary jurisdiction, or (2) by providing evidence to the U.S. Attorney General for enforcement. Because Indian tribal governments and their officials and arms are not within the State's ordinary jurisdiction, its only recourse under the Act is to provide evidence of a violation to the U.S. Attorney General. The State's enforcement action is improper, and the preliminary injunction must be denied.

II. The State Cannot Satisfy the Remaining Preliminary Injunction Requirements.

A. A preliminary injunction would disturb the status quo, and the State has not shown irreparable injury.

The State must provide an extraordinary reason, like certain success on the merits, that Azuma is violating federal law before the Court may issue a preliminary injunction that would disturb the status quo. "The status quo is the last uncontested status which preceded the present controversy." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963). Here, the status quo is that Azuma is, and has been for approximately five years, selling Azuma-manufactured cigarettes to distributors and retailers wholly owned by other federally recognized Indian tribes operating within Indian Country inside the State of California, with the State's full knowledge. The State seeks to change that status.[12] Further, the status quo is Azuma's and the Tribal Retailers'

[12] In determining the status quo, the court should not consider intervening changes in state or federal policy. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (abrogated on other grounds). Azuma's placement on ATF's noncompliant list at the State's urging is therefore not relevant to determining the status quo, because it occurred after, and as a part of, the dispute between the parties. Indeed, "it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions…." *Aggarao v. MOL Ship* (continued…)

sovereign autonomy to establish and regulate their own business enterprises within their sovereign territory. The State seeks to abrogate tribal sovereignty and impose its entire cigarette regulatory regime upon Azuma and, significantly, the Tribal Retailers. A preliminary injunction cannot be used to enforce a statute against a non-party. *See McCormack v. Hiedeman*, 694 F.3d 1004, 1019-20 (9th Cir. 2012).[13] For the reasons discussed above, the State has failed to show that it is certain to succeed on the merits.

The State has also not demonstrated irreparable injury that would warrant an injunction. The movant must show a true likelihood of irreparable injury—the mere possibility, however strong, is not sufficient. *Winter*, 555 U.S. at 22. When, as here, the movant has been aware that the conduct at issue has taken place for years, it casts doubt on a movant's purported irreparable injury. *Id*. at 23. And the movant "must provide more than conclusory or speculative allegations" to establish irreparable injury. *Turo Inc. v. City of Los Angeles*, 847 Fed. Appx. 442, 444 (9th Cir. 2021).

Fatally, the State admits that it has known of Azuma's sales to tribal entities while it has been (unlawfully) placed on the PACT Act Noncompliant List *for over four years prior to seeking injunctive relief.* Doc. 13-1 at 13. Such delay precludes a finding of irreparable harm. *See Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.") (citing *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984)).

In addition, the State's sole alleged injury is potential lost tax revenues and escrow payments. Doc. 13-1 at 19 – 20. These are purely monetary injuries for which the State seeks legal damages. It is well established that "injunctive relief is not available where a monetary award would suffice because compensable injuries are not irreparable." *Cotter v. Desert Palace, Inc.*, 880

Mgt Co., Ltd., 675 F.3d 355, 378 (4th Cir. 2012).

[13] The preliminary injunction here is also disfavored because it would "afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Clark v. Weber*, 557 F.Supp.3d 1010, 1014 (C.D. Cal. 2021). Other than its requested civil penalties, the requested preliminary injunction would afford the State the relief it requested in its complaint—stopping Azuma's cigarette sales.

F.2d 1142, 1145 (9th Cir. 1989) (citations omitted); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). The State's claim that the tax and escrow payments are used to fund "public health goals" makes no difference. If the State prevails, monetary damages would be available to fund such goals. Further, the State's public health claims ring hollow because the State permits cigarettes to be sold, purchased and used by its citizens, and an injunction will not prevent its citizens from purchasing other brands of cigarettes. *See HCI Distrib.* at *15 (State's interests in preventing tribal cigarette sales are not substantial where the State, "allows products with the same health effects to be purchased elsewhere in the state, and residents may also travel to other states to purchase them.").

Finally, the State's reliance on *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172 (9th Cir. 1987), for the proposition that it need not show irreparable injury where injunctive relief is authorized by statute, is misplaced. In *Odessa Union*, the defendant conceded that the conduct at issue – the sale of contaminated wheat – was an enjoinable violation of the relevant statute. *Id.* at 175 n.3. Where, as here, the statutory violation is "substantially disputed, any presumption of harm from such [statutory] violation is to be considered by the Court, but does not compel a conclusion of irreparable harm." *United States v. Nutri-Cology, Inc.*, No. C-91-1332-DLJ, 1991 WL 1092506, at *2 (N.D. Cal. July 19, 1991). Moreover, as explained above, the State cannot demonstrate that a violation of the Act has occurred.

In sum, the State has not demonstrated any non-monetary injury that warrants the extraordinary and status-quo altering relief that it seeks.

B. Defendants and the Tribal Retailers will sustain irreparable injury from the requested injunction

In contrast to the absence of a State injury, the injunction will inflict serious and irreparable harm to Defendants and the absent Tribal Retailers. The proposed injunction would impose an unprecedented wholesale State regulatory regime in all Indian Country located in California. Allowing the State to enforce State law on tribal land through an unprecedented expansion of State civil jurisdiction constitutes irreparable injury as a matter of law. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255-1257 (10th Cir. 2006).

On a more practical level, if Defendant is enjoined, its entire business is lost, and along with it the necessary governmental services that depend on revenues from Azuma. Given the remote location of the Alturas Rancheria, the Tribe's gaming revenue is limited. The Tribe cannot assess real property taxes to provide basic services on land held in trust by the United States; revenues available to virtually every other government. Azuma provides a primary source of governmental revenue. Rose Decl. at ¶ 17; Del Rosa Decl. at ¶ 8. Shutting it down would have devastating effects on the Tribe. The Tribe uses revenues earned by Azuma to fund and support numerous community organizations and activities, including the Alturas Fire Department and the Alturas Chamber of Commerce. Del Rosa Decl. at ¶ 16; *see also* Rose Decl. at ¶ 17.

Also, as detailed in the declaration of Darren Rose, the Tribe and Azuma have invested over nine million dollars ($9,000,000) in the manufacturing facility located on the Alturas Rancheria. Rose Decl. at ¶ 9. The requested injunction would force the Tribe and Azuma to shut down all manufacturing operations, will render Azuma insolvent, and will force Azuma to terminate the employment of its employees, four of which are tribal members. *Id*. at ¶¶ 15, 17. These employees, and likely many, if not all, employees of the Tribe's cigarette retail businesses, will lose essential benefits that Azuma provides, including health insurance, housing and transportation assistance. *Id*. at ¶ 17. In addition, revenues earned by the manufacturing facility are utilized by the Tribe to support other tribal businesses, which support tribal members and other employees, including the Desert Rose casino, a trucking company, a fuel transportation company, and several retail stores. Del Rosa Decl. at ¶ 8. These businesses, in turn, provide essential benefits to their employees, including health and dental insurance, housing and transportation assistance. *Id*. The injunction would cause a significant loss of employment and associated benefits. *Id*.

The requested injunction will force Azuma to shut down its business, and it will likely lose a large portion of its customer base and the goodwill that Azuma has earned from its business. Rose Decl. at ¶¶ 13, 17. "Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co*., 240 F.3d 832, 841 (9th Cir. 2001).

In contrast to the purely monetary damages that the State claims it will sustain without an injunction, and which can be recovered in the unlikely event that the State succeeds on the merits of its claims, the substantial injuries to Azuma and the Tribe's reliance on it cannot be compensated later. *Ass'n for Accessible Medicines v. Bonta*, 562 F. Supp. 3d 973, 987–88 (E.D. Cal. 2021), modified, No. 2:20-CV-01708-TLN-DB, 2022 WL 463313 (E.D. Cal. Feb. 15, 2022) ("[M]onetary injury can be irreparable when Eleventh Amendment sovereign immunity prevents a plaintiff from recovering damages in federal court.") (citing *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), vacated on other grounds by *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012).

There is no question that the balance of injuries tips sharply against entering the injunction that the State seeks. Thus, the State's burden is to show near certainty on the merits of its claims, and, as set forth above, the State had not met that burden.

C. The public interest favors denying the requested injunction.

The State's claimed public interest rests primarily on its assertions that 1) Azuma's cigarettes are "contraband cigarettes" under the CCTA, and 2) the Act applies the entire State's cigarette regulatory regime in Indian Country. Doc. 13-1 at 14 -15. The latter assertion fails as a matter of law as discussed above. So too does the CCTA assertion, as the statute expressly provides that a person such as Azuma, which holds a federal tobacco manufacturer's permit, and its agents, by definition cannot be in possession of "contraband cigarettes" under the CCTA. 18 U.S.C. § 2341(2)(A). There is no foundation for the State's claim that the public interest favors the extraordinary relief that it seeks. Moreover, the State's purported public interests are not cognizable under the standards for a preliminary injunction. *See HCI Distrib.* at *15.

By contrast, the public interest favors denying the injunctive relief that the State seeks. As demonstrated by the State's filings, Azuma's cigarettes are sold at retail locations owned and operated by numerous other sovereign tribal governments in California. Those tribal governments license and regulate the sale of Azuma's cigarettes, and they, along with Alturas, rely on revenues from the sale of Azuma's cigarettes to support their governmental and economic development

activities. Ferris Decl. at ¶ 10(b); Del Rosa Decl. at ¶ 8. Issuing the injunction would have disastrous effects on workers for both Azuma, each of the Tribal Retailers, and the governmental agencies and business supported by Azuma and such Retailers, thereby threatening the livelihood of hundreds of State and tribal citizens. Further, issuing the injunction would be contrary to the Act and is therefore inconsistent with public policy.

CONCLUSION

The State is not likely to succeed on the merits of its case, has not shown irreparable injury, and has not shown exceptional circumstances warranting an injunction. Further, the Court lacks subject matter jurisdiction and the balance of the injuries tips sharply in favor of the Defendant. The Court should deny the PI Motion.

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Respectfully submitted,

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