State of California v. Azuma Corporation, et al

23-16200

US Court of Appeals for the Ninth Circuit

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Text

No. 23-16200

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

C ASES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

C OURT R ULES

O THER A UTHORITIES

INTRODUCTION

Azuma Corporation ("Azuma") is currently listed on the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF")'s so-called PACT Act non- compliant list due to its repeated refusals to comply with applicable federal and state law. Its presence on that list prohibits distribution of Azuma's cigarettes. See *15 U.S.C. § 376a(e)(2)(A)*. Despite Azuma's listing, its distributions continued.

Based on meet-and-confer efforts, and borne out in proceedings below, the State anticipated Defendants would raise a range of jurisdictional and tactical defenses regarding the application of state law to Azuma's cigarette business. To staunch the flow of Azuma's illicit sales in the meantime, the State moved for a preliminary injunction.

The district court granted the motion in a thorough and well-reasoned opinion. The district court properly disregarded Azuma's continually proffered insistence that, unlike every other cigarette manufacturer--Native American aligned or not--California's tobacco laws do not apply to it. Weighing the harms to the State in the absence of an injunction--loss of excise taxes and of the public policy and public health goals of both state and federal law--and the harms an injunction would impose on Defendants--net revenue loss from paying taxes owed and otherwise complying with state and federal law--the district court enjoined Darren Rose in his official capacities as Vice-Chairman of the Tribe andPresident/Secretary of Azuma. Nevertheless, the deliveries not only continued, but continued in greater numbers.

In the face of Rose's blatant disregard of the district court's order, the State moved to find Rose in contempt. So finding,[1] the district court noted "Rose d[id] not argue he has substantially complied with the court's order." SER-14. "Rather," the district court continued, "he challenge[d] the underlying merits of the preliminary injunction order and attempt[ed] to relitigate issues the court already has addressed in prior orders." Id. Once more, Azuma insisted that the law uniquely did not apply to it. Only when the district court found Rose in contempt-- last week, after five years on the non-compliant list and almost six months under the district courts' injunction--did he "direct[] Azuma staff to cease all deliveries of cigarettes." SER-4.

Rose takes the same tack here as he did in response to the State's original motion for preliminary injunction and subsequent motion to hold Rose in contempt. He does not dispute that Azuma is listed on the non-compliant list. He does not deny that he delivers or causes packages to be delivered on behalf of Azuma, despite such listing. And he does not deny that neither Azuma nor itscustomers comply with applicable state law. He instead makes unconvincing technical arguments in attempt after attempt to escape the clear weight of the law.

Those arguments are unavailing, and the district court should be affirmed.

JURISDICTIONAL STATEMENT

Appellee agrees with Appellants that the district court properly exercised jurisdiction over this action pursuant to *28 U.S.C. § 1331* for arising under federal law, that the district court's order is an appealable interlocutory order under *28 U.S.C. § 1292(a)(1)*, and that this appeal is timely under *Federal Rule of Appellate Procedure 4(a)(1)(A)*. See Opening Br. 10. However, because Appellants do not here challenge the district court's application of the Ex parte

[1] In granting the State's motion to hold Rose in contempt, the district court ordered the State to move for appropriate sanctions, attorneys' fees, and costs. That motion is due on March 29, 2024.

Young doctrine or otherwise argue that the district court lacked jurisdiction to issue the challenged injunction due to sovereign immunity or otherwise, *28 U.S.C. § 1291* does not serve as a basis for this Court's jurisdiction. Contra Opening Br. 10.

ISSUE PRESENTED

Whether the district court abused its discretion by finding the State likely to succeed on the merits of its claim that Darren Rose, in his official capacities, violated *15 U.S.C. § 376a(e)(2)(A)* by completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf Azuma Corporation, an entity listed on the so-called PACT Act non-compliant list pursuant to *15 U.S.C. § 376a(e)(1)*.

STATEMENT OF THE CASE

Azuma Corporation ("Azuma") is a tribally chartered corporation wholly owned by the Alturas Indian Rancheria (the "Tribe"), a federally recognized tribe of Achumawi Indians located near Alturas, California, in Modoc County. 3-ER-423. Azuma holds a federal manufacturer's permit issued by the U.S. Tobacco Tax and Trade Bureau ("TTB"), 3-ER-423, and manufactures cigarettes under the brands Tracker and Tucson, 3-ER-430. It also previously imported cigarettes under the Heron and Sands brands into California from Seneca Manufacturing Company

("SMC"). 3-ER-429.

Azuma distributes these cigarettes from its facility in Modoc County, California to retailers throughout the State, from Crescent City to El Cajon. See SER-39, 42-45 (report of Azuma shipments). However, Azuma and its customers do not abide by the numerous state laws relating to the distribution of cigarettes in California. They do not hold cigarette licenses,[2] SER-39-40, they do not collect, pay, or remit state cigarette taxes when owed, SER-40; and the cigarettes they distribute--Tracker, Tucson, Heron, and Sands--are not on the California TobaccoDirectory, rendering them contraband subject to seizure, *Cal. Rev. & Tax. Code § 30436(e)*; see also California Tobacco Directory, C AL . D EP ' T J UST ., O FF . A TT ' Y G EN ., https://oag.ca.gov/tobacco/directory (last updated Mar. 1, 2024); 3-ER-430.

In 2018, the California Office of the Attorney General ("OAG") learned that Azuma was distributing Heron and Sands cigarettes and sent an inquiry to both Azuma and SMC. 3-ER-429. In response, Azuma claimed by letter dated September 14, 2018, that definitions sections of the Code of Federal Regulations and the U.S. Code rendered their cigarettes "not subject to state regulation or taxation." Id. The California Attorney General's Office rejected Azuma's arguments in a letter dated November 29, 2018, and warned of potential referral to federal authorities. SER-47, 50-52. Azuma responded with another letter dated December 10, 2018, SER-47, writing, "Due to the numerous factual inaccuracies, and questionable legal analysis, while Azuma Corporation will respond, Azuma will not be able to do so until January 31, 2019," SER-53-54. No such response ever came. SER-47.

Due to both Azuma's and Azuma's customers' failure to abide by state cigarette regulations, California nominated Azuma to the so-called PACT Act non- compliant list on December 18, 2018. See 3-ER-431; *15 U.S.C. § 376a(e)(1)*. As aresult--aside from a brief two-month interruption toward the end of 2019[3] --ATF has included Azuma on that list since April 10, 2019. See 3-ER-356-57.

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[2] Only one of the customers listed on the PACT Act reports submitted as evidence in support of the preliminary injunction currently holds an active retail license under the Licensing Act. SER-40. Regardless, as explained below, all of Azuma's shipments violate the PACT Act because neither Azuma nor Azuma's customers hold a distributor's license under the Cigarette Tax Law, and because Azuma does not itself hold any tobacco license.

[3] On September 30, 2019, Azuma claimed that it did not receive any notice from ATF of its nomination for the list, 3-ER-356-57, despite Federal Express confirming delivery to Azuma's physical address, complete with signature of a tribal employee. Though the PACT Act only requires that ATF "make a reasonable attempt to send notice to the [nominated] seller by letter, electronic mail, or other means," *15 U.S.C. § 376a(e)(1)(E)(ii)*; see also id. § 376a(e)(8), ATF nonetheless removed Azuma from the non-compliant list due to the purported defect on October 11, 2019. 3-ER-356-57. ATF provided Azuma with opportunity to respond to the nomination by November 1, 2019. Id. Azuma filed an objection on that date, making various legal arguments against its listing. 3-ER-357. ATF rejected those arguments and placed Azuma on the list once again effective December 18, 2019. Id.

Nevertheless, Azuma continued its operations unabated. 3-ER-433.

Accordingly, California sent a warning letter to Azuma dated October 26, 2022, alerting Azuma of its violations of law and demanding that it cease its unlawful cigarette distributions and sales, 3-ER-433, then held a subsequent face- to-face meeting with Azuma's counsel, see 2-ER-215. As after every prior attempt at bringing Azuma's distributions into compliance with state law, Azuma continued its unlawful operations. See 3-ER-433. This suit followed on April 19,

2023. 3-ER-421, 447.

On May 12--just days after the filing of this suit--ATF once again determined that Azuma was correctly placed on the PACT Act non-compliant list in response to an April 10, 2023, Azuma letter requesting removal. 3-ER-357. ATFexplained that "Azuma continues to violate the Contraband Cigarette Trafficking Act (CCTA) and PACT Act by illegally shipping unstamped, untaxed cigarettes . . . to unlicensed entities which cannot lawfully possess untaxed, unstamped cigarettes." 3-ER-410 "These actions," ATF continued, "potentially defraud the State of California out of millions of dollars of cigarette tax revenue and . . . could form the basis for violations of the Federal wire fraud and money laundering statutes." Id. In conclusion, ATF characterized Azuma's request for delisting as a request "to be treated differently than every other cigarette manufacturer in the State of California." 3-ER-419.

With ATF confirming that Azuma was properly on the PACT Act non- compliant list, the State moved for a preliminary injunction on June 16, 2023. 3- ER-329. Proceeding under the Ex parte Young doctrine against the tribal officers in charge of Azuma, that motion sought to enjoin Azuma from delivering cigarettes, or causing cigarettes to be delivered, in violation of the PACT Act. 3-ER-330.

Specifically, the motion sought to enjoin unlawful deliveries made for Azuma to retailers located on tribal land throughout California. Id. After extensive briefing, including supplemental briefing that was requested by Defendants, and a hearing, the district court issued an injunction as to Defendant Darren Rose in his official capacities. 1-ER-8, 25.

Carefully considering the parties' arguments, the district court found the State showed a likelihood of success on the merits. 1-ER-23. And relying on evidence of Rose's direct involvement in Azuma's distributions, 1-ER-20, including his confirmation that he served as an officer for Azuma as its President/Secretary, 1- ER-19, the district court's injunction issued against him in his official capacities:

> Defendant Darren Rose, in his official capacity as vice- chairman of the Alturas Indian Rancheria and as president/secretary of Azuma Corporation, and his employees and agents are hereby enjoined from completing or causing to be completed any delivery, or any portion of a delivery, of packages containing cigarettes on behalf of Azuma Corporation to anyone in California in violation of section 376a(e)(2)(A) of the PACT Act.

1-ER-25. That injunction became effective on September 15, 2023, upon California's filing of a $1,000 bond. See 1-ER-25-26. That same day, Defendants filed this appeal. 3-ER-442. Defendants did not move for reconsideration, nor did they ask for a stay in this Court or in the district court. See 3-ER-450-51.

The State later learned that, despite the district court's injunction, Azuma's deliveries not only continued, but continued in greater numbers. Cf. 3-ER-430 (alleging 10 million cigarettes is "sufficient to meet Azuma's current reported distribution volume for about six months," i.e., a distribution rate of about 1.67 million cigarettes per month). In the two months after the injunction became effective, Azuma distributed over 5 million cigarettes, see SER-22-27, in transactions identical to the ones the district court had previously found todemonstrate "a substantial case for" the State's PACT Act claims, 1-ER-18; see also SER-14. Once the State discovered these transactions, it moved for an order to show cause why Rose should not be held in contempt. SER-18. Defendants responded to the motion primarily by attacking the preliminary injunction's validity. See SER-14. After a hearing on January 26, 2024, the district court found Rose in contempt on February 28, 2024, SER-15, and ordered the State to file a motion "for sanctions and attorneys' fees and costs" by March 29, 2024, SER-16.

The district court also ordered Rose to "submit an affidavit detailing the steps he has taken to ensure compliance with this court's order." Id.

Two days after the court issued its contempt order--but over five months since the injunction became effective--Defendants moved the district court to stay the preliminary injunction, asking that the district court rule on its belated motion in two weeks' time. SER-5.[4] And on March 6, 2024, Rose submitted the court- ordered affidavit of compliance, stating that he had finally "directed Azuma staff to cease all deliveries of cigarettes" and that "no deliveries . . . will . . . occur in the future, unless and until the Contempt Order is dissolved, set aside or otherwise made ineffective." SER-4.

SUMMARY OF THE ARGUMENT

Appellants do not deny that Defendant Darren Rose exercises control over Azuma as its President/Secretary and as the Tribe's Vice-Chairman, or that Azuma's illicit deliveries continue. Nor do they argue that the district court improperly balanced the parties' or the public interests in issuing its preliminary injunction. Challenging only the district court's holding "that the State made as substantial case against for relief under [15 U.S.C.] § 376a(e)(2)(A)," Opening Br.

22, the only issue on appeal is the whether district court abused its discretion in finding that the State "is likely to succeed on the merits." Winter v. Nat. Res. Def.

Council, Inc., 555 U.S. 7, 20 (2008).[5]

Appellants' challenge should fail. The deliveries at issue are textbook PACT Act violations. Azuma is listed on the PACT Act non-compliant list, prohibiting persons from delivering cigarettes on its behalf to "consumers," as defined by that Act. The PACT Act specially defines "consumer" to include non-individual customers, and Azuma's customers are precisely such "consumers" because they are not "lawfully operating" due to their non-compliance with applicable state cigarette law. Moreover, the district court's injunction properly runs againstDefendant Darren Rose under Ex parte Young. He is a named defendant and has self-identified as President/Secretary of Azuma, placing him well within the district court's injunctive authority under Rule 65. Finally, the district court properly disregarded Appellants' Rule 19 claims--Appellants' failure to demonstrate preemption of California law has no impact on any third party's rights.

STANDARD OF REVIEW

A district court's decision regarding preliminary injunctive relief is subject to limited review. See *Puente Ariz. v. Arpaio, 821 F.3d 1098, 1103 (9th Cir. 2016)*.

The court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. See *Fed. Trade Comm'n v. Consumer Def., LLC, 926 F.3d 1208, 1211-12 (9th Cir. 2019)*.

ARGUMENT

I. T HE D ISTRICT C OURT C ORRECTLY F OUND T HAT THE S TATE I S

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Appellants agree that Azuma is listed on the non-compliant list. Opening Br.

19. Appellants agree that Azuma makes cigarette deliveries throughout the State, despite its listing. Opening Br. 22-23. And Appellants agree that neither Azuma nor its customers comply with California cigarette laws. Opening Br. 23-24.

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[4] Defendants' motion to stay the preliminary injunction remains pending as of filing.

[5] Any challenges to the other three requirements for a preliminary injunction outlined in Winter have been accordingly forfeited. See *Orr v. Plumb, 884 F.3d 923, 932 (9th Cir. 2018)* ("The usual rule is that arguments . . . omitted from the opening brief are deemed forfeited.").

Delivering cigarettes to cigarette retailers that are not lawfully operating, Azumaclearly violates the PACT Act, and the district court did not abuse its discretion by preliminarily enjoining those illicit distributions pursuant to Ex parte Young.

A. Because Azuma is on the non-compliant list, it is unlawful to deliver cigarettes on Azuma's behalf

Among other things, the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), *Pub. L. 111-154*, *124 Stat. 1087* (codified at *15 U.S.C. §§ 375*-378, *18 U.S.C. §§ 1716E*, *2343*), federalizes state cigarette laws, see *15 U.S.C. § 376a(a)*; Opening Br. 12. The Act's enforcement regime includes a requirement that the U.S. Attorney General maintain a list of sellers who do not comply with the Act. *15 U.S.C. § 376a(e)(1)*. Listed entities are provided an opportunity to challenge their listing, and remain listed only after the U.S. Attorney General investigates and confirms that the entity is properly listed. See id. § 376a(e)(1)(E) (setting out U.S. Attorney General investigation requirements).

Once listed, the PACT Act imposes "a broad prohibition against delivery of cigarettes for persons on the PACT Act non-compliant list." 1-ER-17 (citing *15 U.S.C. § 376a(e)(2)(A)*); see also id. § 376a(e)(2)(A)(i), (iii) (excepting packages that the deliverer has reason to believe do not contain cigarettes from the PACT Act's prohibition on "any delivery" for listed persons). This prohibition applies not only anyone "who receives the list," but also anyone who "delivers cigarettes . . . to consumers." *15 U.S.C. § 376a(e)(2)(A)*. Consumers are, in turn, broadly defined to include "any person that purchases cigarettes," unless suchperson is "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes." Id. § 375(4); see also id. § 376a(e)(2)(A)(ii) (excepting cigarette deliveries "made to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes" from the PACT Act's delivery prohibitions); 2- ER-411 ("[T]he phrase `lawfully operating' includes compliance with State and Federal law as well as Tribal law.").

ATF determined that Azuma is operating in violation of the PACT Act. SER- 56. Among other violations, ATF specifically found that Azuma violated the PACT Act because it "shipped cigarettes into the State of California that are untaxed, [and] unstamped . . . to unlicensed entities." SER-68. ATF accordingly placed Azuma on the PACT Act non-compliant list. 3-ER-356-57. Azuma, however, acting through its officers, has opted to continue shipping untaxed cigarettes to unlicensed entities throughout California while listed on the non- compliant list, and has done so for over two years. These shipments are plainly unlawful, and the district court correctly found that California will likely succeed on the merits of its PACT Act claim.

The district court first correctly found that "both Azuma and Mr. Rose deliver cigarettes to `consumers'" as it is defined under the PACT Act, and thereforesubject to the PACT Act's delivery prohibitions.[6] 1-ER-19. This is because, as both ATF recognized in placing Azuma on the non-compliant list and the district court recognized in its order, "Azuma and Mr. Rose make deliveries to Azuma's customers, who do not have licenses as required by the Licensing Act or the Tax Law." 1-ER-19-20; see also 3-ER-410 ("It is ATF's position that Azuma continues to violate the . . . PACT Act by illegally shipping unstamped, untaxed cigarettes . . . to unlicensed entities which cannot lawfully possess untaxed, unstamped cigarettes . . . .").[7] Azuma has repeatedly admitted that both it and its customers do not comply with state cigarette laws, claiming instead that federal Indian law precludes state authority. But, as the district court recognized, see 1- ER-21-23, and as explained below, see infra pp. 15-17, a long line of cases have held that cigarette retailers on Indian land are properly subject to state regulation, including licensing and recordkeeping requirements as well as remittance of taxes owed for sales to non-members. And applying that long line of cases to the instant case, the district court properly found that Azuma's customers are not "lawfullyoperating" and therefore that Azuma's deliveries are properly enjoined under the PACT Act.

B. Azuma's customers are "consumers" because they are not "lawfully operating" under the PACT Act

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[6] ATF has also notified both Azuma and Rose and Azuma is on the non-compliant list, 3-ER-356-57, and are therefore subject to the PACT Act's delivery prohibitions as persons "who receive[d] the list," *15 U.S.C. § 376a(e)(2)(A)*.

[7] The district court also found that Azuma made deliveries to consumers due to its listing on the non-compliant list. As the district court explained, that list is composed of "non-compliant delivery sellers" and "delivery sellers are defined [under the PACT Act] as persons who sell to consumers." 1-ER-20 (citing *15 U.S.C. § 375(6)*).

Both here and in the court below, Appellants have posited already rejected theories of preemption in order to claim that their customers are not subject to the state laws that they ignore. Not only are those theories wrong, but the district court did not abuse its discretion by rejecting them, and instead applying the clear precedent of this Court and the Supreme Court to find Azuma's customers not to be "lawfully operating." Thus falling under the PACT Act's definition of "consumers," the district court properly enjoined Azuma's sales to those customers.

1. The relevant law is well-settled and establishes that Azuma's customers must comply with state cigarette laws

"[A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." *Oklahoma v. Castro-Huerta, 597 U.S. 629, 636* (2022). Contra Opening Br. 12 (claiming without support that "state civil regulatory laws presumptively do not apply" to "inter- and intra-tribal commerce occurring within Indian Country"). At the same time, state authority in Indian country can be preempted by federal law and "the right of reservation Indians to make their own laws and be ruled by them." White Mountain Apache Tribe v.

Bracker, 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee, 358 U.S. 217, 220 (1959))*. And when a party challenges the application of state law, it is the challenging party, "not California, who has the burden of showing the challenged regulations are invalid." 1-ER-22 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160 (1980))*.

Where, as in the case of Azuma's customers, "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," relevant state, federal, and tribal interests are balanced. *Bracker, 448 U.S. at 144-45*; see also Opening Br. 43. Because "nonmembers are not constituents of the governing Tribe," nonmember Indians "stand on the same footing as non-Indians" in this analysis. *Colville, 447 U.S. at 161*; see also *Big Sandy Rancheria Enters. v. Bonta, 1 F.4th 710, 726 (9th Cir. 2021)* (quoting *Colville, 447 U.S. at 161*).

Conducting this balancing, the Supreme Court made clear over 50 years ago that state cigarette taxes imposed on non-Indians are valid in Indian country, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976)*, and nine years later, specifically found that California's cigarette taxes are validly imposed on non-Indian purchasers in Indian country, *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11-12 (1985)* (per curiam). The balancing exercise Azuma raised as a barrier to injunction below has already been done. The Supreme Court conducted such balancing in Moe to holdthat States can impose "minimal burden[s]" on tribal businesses "to avoid the likelihood that in [their] absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *425 U.S. at 483*; see also 1-ER-21-22.

In the decades since, the Supreme Court has had further occasion to revisit the interests articulated in Bracker with respect to cigarettes, delineating the contours of permissible "minimal burdens" States may impose to ensure collection of valid state cigarette taxes like California's.

Relying on these decades of Supreme Court precedent, this Court, too, had occasion to address whether the California tax and licensing scheme is properly applied as a "minimal burden" to Indian businesses less than three years ago in *Big Sandy Rancheria Enterprises. v. Bonta, 1 F.4th 710 (9th Cir. 2021)*. Concluding that it is, the Court explained that "tax enforcement schemes `with even more demanding requirements than those of California have been repeatedly upheld by the Supreme Court as imposing only a "minimal burden."'" *Id. at 731*. (quoting *Big Sandy Rancheria Enters. v Becerra, 395 F. Supp. 3d 1314, 1332-33* (E.D. Cal.

2019)) (citing *Dep't of Tax'n & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 64-67, 76 (1994)*; *Colville, 447 U.S. at 159-60*).

2. "Minimal burdens" are properly imposed on Azuma's customers, even if none of their sales are taxable

Appellants here posit theories the Court already rejected in Big Sandy to argue that California law does not apply to Azuma's or Azuma's customers' sales.

The district court did not abuse its discretion in following binding precedent and rejecting them as well.

Appellants primarily claim that the State must first demonstrate that any of their customers' sales are in fact taxable in order to impose these "minimal burdens." See Opening Br. 42-43; *id. at 46-47* (claiming the "initial salient question" is whether any of Azuma's customers make taxable sales). To the contrary, the initial question is whether the tax itself is valid--that is, whether a tribal business's sales could be taxable. *Big Sandy, 1 F.4th at 731* (citing *Chemehuevi, 474 U.S. at 11-12*). That is sufficient for attendant "minimal burdens" to attach. Indeed, the Big Sandy Court specifically found that California's "minimal burdens may be imposed on Indian businesses that . . . purport to engage only in tax-exempt transactions." Id. (citing *Milhelm, 512 U.S. at 76*; *Colville, 447 U.S. at 159-60*). Accordingly, while Appellants' theories for why some of their customers' sales might be exempt, see Opening Br. 44-48, are incorrect, crediting them would not exempt either Azuma or its customers from complying with California law.

Appellants claim that Big Sandy does not apply here, because it "considered the question of the Tax Law's application to a distribution operating outside Indian Country." Opening Br. 46 (emphasis removed). But the transactions at issue in Big Sandy are identical in all relevant respects to the transactions here. Like Azuma,the tribal seller in Big Sandy sold cigarettes exclusively to tribal retailers on other tribes' land. *1 F.4th at 718*. Nevertheless, the Court found that "California's licensing, recordkeeping, and reporting requirements" were properly applied to the distributor's "sales to nonmember Indian retailers." *Id. at 731*. That is, California's "minimal burdens" were properly applied to precisely the same kinds of transactions at issue here, even if the party challenging them in that case was the distributor arriving on-reservation to sell to the tribal retailers rather than the tribal retailers themselves. Indeed, the decades of Supreme Court "minimal burdens" precedent the Court relied on in Big Sandy was first applied to on-reservation retailers and then to their suppliers. See *Moe, 425 U.S. at 483* (upholding state collection and remittance requirement for Indian retailers); *Colville, 447 U.S. at 159-60* (upholding state recordkeeping requirements for Indian retailers);

Chemehuevi, 474 U.S. at 12 (upholding California collection and remittance requirement for Indian retailers); *Milhelm, 512 U.S. at 74-75* (applying the "minimal burden" analysis to wholesalers selling to Indian retailers).

3. Both the Licensing Act and Cigarette Tax Law constitute permitted "minimal burdens"

The district court issued its injunction based on Rose's failure to demonstrate Azuma's customers' are exempt from the Cigarette and Tobacco Products Tax Law (the "Cigarette Tax Law" or "Tax Law"), *Cal. Rev. & Tax. Code §§ 30001*- 30483. 1-ER-22. However, they are also subject to the Cigarette and TobaccoProducts Licensing Act of 2003 (the "Licensing Act"), *Cal. Bus. & Prof. Code §§ 22970*-22991, and are thus not "lawfully operating" for their noncompliance with both or either.

a. Cigarette Tax Law

As explained above and as recognized by the district court, the Supreme Court has already considered application of the Cigarette Tax Law to tribal retailers, and specifically found that the Tax Law properly "require[s] [tribal smokeshops] to collect the tax on [the State's] behalf" when they sell cigarettes to non-members. *Chemehuevi, 474 U.S. at 12*; see also 1-ER-22-23 ("[T]he Supreme Court has held tribal shops can be required to collect taxes on California's behalf." (citation omitted)). None of Azuma's customers hold a license or remit taxes under the Cigarette Tax Law, SER-39-40, and are therefore not "lawfully operating," 1-

ER-23.

b. Licensing Act

California requires licensing and recordkeeping up and down the distribution chain--manufacturers, importers, distributors, wholesalers, and retailers--after the Legislature found that "[t]he licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products." *Cal. Bus. & Prof. Code § 22970.1(d)*.

And once licensed, each link in the distribution chain is required to transact onlywith other licensed entities. See *Cal. Bus. & Prof. Code § 22980.1(a)* ("A manufacturer or importer shall not sell cigarettes or tobacco products to a distributor, wholesaler, retailer, or any other person who is not licensed pursuant to [the Licensing Act] . . . ."); id. §

22980.1(b)(1) ("[A] distributor or wholesaler shall not sell cigarettes or tobacco products to a retailer, wholesaler, distributor, or any other person who is not licensed pursuant to [the Licensing Act] . . . ."); id.

§ 22980.1(c) ("A retailer, distributor, or wholesaler shall not purchase packages of cigarettes . . . from a manufacturer or importer who is not licensed pursuant to [the Licensing Act] . . . ."); id. § 22980.1(d)(1) ("A retailer or wholesaler shall not purchase cigarettes . . . from any person who is not licensed pursuant to [the Licensing Act] . . . ."). Azuma holds no license under the Licensing Act.

Accordingly, whether or not any particular customer of Azuma's is licensed or unlicensed, Azuma's lack of its own license means that none of Azuma's customers are "lawfully engaged" as a cigarette business.

In response, Azuma relies on an exception to the Licensing Act for those "that the state, pursuant to the United States Constitution, the laws of the United States, or the California Constitution, is prohibited from regulating." Id. § 22980.1(b)(2);

Opening Br. 38. However, that exception only applies to sales made by "a distributor or wholesaler," *Cal. Bus. & Prof. Code § 22980.1(b)(2)*, not manufacturers such as Azuma. Instead, the subsection addressing manufacturers(and importers) confirms that, regardless of any exception for distributors or wholesalers, they can only sell cigarettes to licensed persons. Id. § 22980.1(a) ("A manufacturer or importer shall not sell cigarettes or tobacco products to a distributor, wholesaler, retailer, or any other person who is not licensed pursuant to this division or whose license has been suspended or revoked."). This accords with the centrality of distributors in the California taxation scheme--only after a cigarette has passed through the tax-collection level of the sales chain can it be sold to a tax-exempt consumer. See *Cal. Rev. & Tax. Code §§ 30107*-30108 (establishing that although the cigarette tax is "paid by the user or the consumer," it is collected by a distributor); *In re A.N., 9 Cal. 5th 343, 351 (2023)* ("We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." (quoting *In re R.T., 3 Cal. 5th 622, 627 (2017))*.

Finally, Appellants point to a legislative bill analysis to claim that "on- reservation retailers . . . are exempt from state licensing." Opening Br. 38. But a bill analysis does not change the plain meaning of the statute itself. See *In re A.N., 9 Cal. 5th at 522* ("We start with the statute's words, which are the most reliable indicator of legislative intent." (quoting *In re R.T., 3 Cal. 5th at 627*)). Indeed, California courts only turn to such "extrinsic aids" when "the statutory language[is] ambiguous or subject to more than one interpretation." *Id. at 523* (quoting *John v. Superior Court, 63 Cal. 4th 91, 96 (2016))*. Here, the statutory language is clear and exempts only sales from licensed distributors or wholesalers to those "that the state, pursuant to the United States Constitution, the laws of the United States, or the California Constitution, is prohibited from regulating," *Cal. Bus. & Prof. Code § 22980.1(b)(2)*, not to on-reservation persons generally. And as explained above, *supra pp. 15-17*, licensing is a permissible "minimal burden" properly imposed on on-reservation retailers to ensure the collection of lawfully imposed taxes for sales to non-members.

* * * The district court considered Appellants' preemption arguments and, after considering the relevant Supreme Court and Ninth Circuit precedents, concluded that Appellants failed to demonstrate Azuma's customers either are wholly exempt from California's cigarette laws or comply with those laws. 1-ER-21-23. Thus not subject to the "lawfully operating" exception to the PACT Act's delivery prohibitions for persons on the non-compliant list, the district court properly concluded that each of Azuma's deliveries violates that Act. And so concluding, the district court did not abuse its discretion in enjoining those deliveries during the pendency of this suit.

C. The PACT Act's delivery prohibitions apply to listed entities themselves

As explained above, once ATF places an entity on the non-compliant list, the PACT Act prohibits knowingly delivering packages on behalf of the listed entity.

And as the district court explained, the Act's prohibition applies to "two groups of persons . . .--persons who received the noncompliant list and persons who deliver cigarettes to `consumers.'" 1-ER-18. "Person" is in turn defined broadly to include "an individual, corporation, company, association, firm, partnership, society, State

government, local government, Indian tribal government, governmental organization of such a government, or joint stock company." *15 U.S.C. § 375(11)*.

All Appellants squarely fit within that definition--either as an "individual," a "corporation," an "Indian tribal government," a "governmental organization of such a government," or otherwise.

Appellants' arguments to the contrary, Opening Br. 26-29, contradict the plain language of the statute and should be disregarded. It is not only third parties that can deliver "for" a listed entity; deliveries made by a listed entity are undoubtedly made "for" that entity. Cf. Opening Br. 35 (discussing "a delivery by Azuma for itself" (emphasis added)). Indeed, the prohibition runs broadly against "person[s]," *15 U.S.C. § 376a(e)(2)(A)*, and the term "delivery seller" is itself a subset of such "person[s]," id. § 375(6) ("The term `delivery seller' means a person who makes a delivery sale." (emphasis added)). The delivery prohibitionapplies to any "person" thus applies to any "delivery seller" as well.[8] See SER-13- 14.

Nor does this straightforward interpretation of the statute's language "render § 376a(d) superfluous." Opening Br. 28. Section 376a(d) applies to all delivery sellers, regardless of whether they are on the non-compliant list or not. See *15 U.S.C. § 376a(d)(1)* (providing "no delivery seller may sell or deliver to any consumer" unless state and local tobacco excise taxes have been paid (emphasis added)).[9] Section 376a(e)(2)(A), on the other hand, places additional restrictions on delivery sellers--and others--if they are placed on the non-compliant list.

Defendants are in clear violation of those additional restrictions, and the district court properly enjoined Rose from continuing to make Azuma's illicit deliveries.

Appellants' reading of the PACT Act would allow an entity actively violating state law to continue to do so, as long as it makes the illicit deliveries itself. This runs contrary to the PACT Act's stated purpose to "make it more difficult for cigarette . . . traffickers to engage in and profit from their illegal activities." PACTAct § 1(c), 124 Stat. at 1088 (codified at *15 U.S.C. § 375* note); see also SER-14.

And asking the Court to disregard the plain language of the statute to so argue, Appellants ask the Court disregard the most elementary of statutory cannons that "statutory interpretations which would produce absurd results are to be avoided." *Ma v. Ashcroft, 361 F.3d 553, 558 (9th Cir. 2004)*. As the district court explained when finding Rose in contempt of its injunction, Azuma's reading "would leave a gaping enforcement gap in the statute," SER-14, and should be rejected, see Ariz.

State Bd. for Charter Sch. v. U.S. Dep't of Educ., 464 F.3d 1003, 1108 (9th Cir.

2006) ("When a natural reading of the statutes leads to a rational, common-sense result, an alteration of meaning is not only unnecessary, but also extrajudicial.").

II. T HE D ISTRICT C OURT P ROPERLY E NJOINED R OSE IN H IS O FFICIAL C APACITIES B OTH A T RIBAL AND C ORPORATE O FFICER

On May 12, 2023, ATF rejected Azuma's request to be removed from the non-compliant list. 3-ER-357. Because Azuma was "illegally shipping unstamped, untaxed cigarettes . . . to unlicensed entities which cannot lawfully possess untaxed, unstamped cigarettes," it specifically warned that Azuma's "actions potentially defraud the State of California out of millions of dollars of cigarette tax revenue." 3-ER-410. California subsequently filed its motion for preliminary injunction to staunch the bleeding of last tax revenues during the pendency of the suit.

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[8] Additionally, Appellants' claim that this plain reading of the statute "introduces a significant loophole," Opening Br. 28, turns the meaning of "loophole" on its head. To the contrary, Appellants' reading would privilege delivery sellers already determined to be operating in violation of the PACT Act, freeing them from a prohibition that applies to every other person.

[9] Additionally, even crediting Appellants' arguments, the relief they seek is hollow. Azuma does not comply with *15 U.S.C. § 376a(d)* either and properly enjoined under it as well.

The district court's preliminary injunction properly bound Rose pursuant to *Federal Rule of Civil Procedure 65(d)(2)* in his capacity as President/Secretary of Azuma. The State's Complaint named both Rose and Azuma as Defendants.[10]

When moving for a preliminary injunction to halt Azuma's illicit distributions, the State brought the motion against all three members of Tribal Business Committee pursuant to Ex parte Young on the understanding that the Committee had full control over Azuma. 3-ER-329-30; see also *Michigan v. Bay Mills Indian Comty., 572 U.S. 782, 796 (2014)* ("[A]nalogizing to Ex parte Young, tribal immunity does not bar . . . suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." (citation omitted)). And though Azuma's particular structure and leadership was unknown when the State filed suit, the Complaint correctly identified Rose as "an officer and/or board member of Azuma." 3-ER-423. Only after Appellants filed declarations in opposition to the State's motion did the State learn that Rose, in addition to being the Tribe's Vice- Chairman, also managed Azuma as its President/Secretary. 2-ER-211-12.

Rose's sworn declaration clarifying his position in Azuma's leadership, combined with other evidence of his personal involvement in the business, allowed the district court reasonably to find that Rose was responsible for Azuma'sunlawful deliveries. 1-ER-19-20. It therefore enjoined Rose--the tribal official with control over Azuma--from continuing to make those deliveries, and denied the motion as to the other two members of the Business Committee without prejudice. 1-ER-25. As Appellants correctly note, whether acting as tribal Vice- Chairman or the President/Secretary of Azuma when making those deliveries, "his specific capacity did not matter." Opening Br. 35; see also 1-ER-20 ("Whether Mr. Rose acted solely in his official capacity as Vice-Chairperson and a member of the Business Committee, or solely in his capacity as President of Azuma, or both, the court finds the State has demonstrated its entitlement to relief with respect to its section 376a(e)(2)(A) claim against Mr. Rose."); SER-12 (same).

On appeal, Appellants do not argue that Rose is improperly enjoined under Ex parte Young. Nor do they claim that Azuma's President/Secretary is an improper officer in an Ex parte Young action aimed at Azuma's unlawful conduct. Instead, they argue that the district court should not have been able to enjoin Rose in his official capacity as Azuma's President/Secretary solely "because the State did not seek to enjoin Rose in that capacity." Opening Br. 25. Appellants claim they "did not oppose the motion as if Azuma . . . was the target of the motion," Opening Br. 33, and that by "short-circuiting the ordinary avenue of serving process upon a person before subjecting him to a binding judicial order," *id. at 33-34*, it deprived them of the "opportunity . . . to brief the issue," *id. at 32*. Appellants' argument iscontrary to both the law and the facts, and the district court did not abuse its discretion by enjoining Rose in both his known official capacities.

First, Appellants understood the requested injunction would cease Azuma's deliveries and briefed the motion below accordingly. In the same declaration Rose revealed he was Azuma's President/Secretary, he claimed that the preliminary relief sought would shut down all of Azuma's manufacturing operations, render Azuma insolvent, and force Azuma to terminate the employment of its employees.

2-ER-214-15. He also claimed that it would result in significant loss of employment and associated benefits for the Tribe's other businesses. Id. Clearly understanding the requested injunction would halt Azuma's deliveries, Appellants briefed the motion as such and cannot now plausibly argue that they lacked notice or an opportunity to present defenses on Azuma's behalf.[11]

And Rose--whether in his official capacity as tribal Vice-Chairman or Azuma officer--fits squarely among those that are properly bound by injunction under Rule 65. An injunction is binding not only on the "the parties," and "the parties' officers, agents, servants, employees, and attorneys," but also all "other persons who are in active concert

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[10] The district court subsequently found that Azuma enjoyed the Tribe's sovereign immunity and dismissed pursuant to Defendants' Rule 12(b)(1) motion.

[11] Indeed, Azuma itself appears here as an appellant, despite being dismissed from the underlying action and the injunction running solely against Rose in his official capacities.

or participation with" them, so long as theyreceive actual notice of the injunction. Fed. R. Civ. P. 65(d)(2). Rose is a party to the suit, received actual notice of the injunction, and is properly bound.

Even crediting Appellants' argument that "Rose the Tribal Vice-chairman" could be pleaded as a separate party than "Rose the President/Secretary of Azuma," see Opening Br. 23, Appellants' argument fairs no better.[12] Rule 65 enables restraining non-parties in order to prevent parties from "nullify[ing] a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14 (1945), see also *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 774 F.3d 935, 955 (9th Cir. 2014)* ("The law is clear that those who control an organization may be held liable if they fail to take appropriate action to ensure compliance with an injunction . . . ."). Indeed, the district court's authority extends well beyond the scope exercised in its preliminary injunction order: the Rule enables enjoining even those "not subject in personam to the jurisdiction of the court" so long as they are "in privity with parties to the litigation." Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1277 (9th Cir. 1992).

There is no serious argument that Rose is not in privity with himself, and he is properly enjoined as an Azuma officer for that reason as well.

III. T HE D ISTRICT C OURT ' S O RDER C AREFULLY C ONSIDERED AND C ORRECTLY R EJECTED A PPELLANTS ' R ULE 19 C LAIMS

The district court, in issuing its preliminary injunction order, considered Defendants' contention that Federal Rule of Civil Procedure 19 required Azuma's customers to be joined in the action, but concluded "defendants have not met their burden of showing the tribal retailers are necessary parties" under that rule. 1-ER- 14. As the district court explained, "[a] party may be necessary under Rule 19(a) in three different ways." 1-ER-11 (quoting Salt River Project Agr. Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012). The district court carefully examined each of these three ways, conducting a "fact-specific and practical" inquiry, 1-ER-11 (quoting Jamul Action Comm. v. Chaudhuri, 200 F. Supp. 3d 1042, 1048 (E.D. Cal. 2016)), that is here reviewed for abuse of discretion, see Walsh v. Centeio, 692 F.2d 1239, 1241 (9th Cir. 1982). On all three, the district court concluded that "defendants have not met their burden of showing the tribal retailers are necessary parties under Rule 19." 1-ER-14. Those conclusions are correct, and properly upheld by this Court.

On appeal, Appellants primarily argue that Azuma's customers "ha[ve] an interest in the action and resolving the action in [their] absence may as a practical matter impair or impede [their] ability to protect that interest." Salt River, 672 F.3dat 1179; see also Opening Br. 49-50. To do so, they misinterpret the district court as holding that Azuma's customers "must obey state law," and that they "cannot purchase cigarettes from anyone, including licensed distributors." Opening Br. 50 (emphasis removed).[13] Instead, the district court applied the PACT Act's burden shifting in finding that Azuma's deliveries violated that Act, ultimately concluding only that "Rose has not shown the tribal retailers are exempt" from state law. 1-

ER-23.

As explained above, a State's law is presumptively applied to "all of its territory, including Indian country." Castro-Huerta, 597 U.S. at 636.

Demonstrating that Azuma's customers complied with neither the Cigarette Tax Law nor Licensing Act, California met its initial burden demonstrating that they were not "lawfully operating" and thus "consumers" under the PACT Act. See 1- ER-19-20.[14] The burden then shifted to Rose, "to show the tribal retailers are in fact operating lawfully,

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[12] It should also be noted that Rose was named in the Complaint as an officer of Azuma in his official capacity. See 3-ER-423 (naming Rose in his official capacities as "vice-chairperson of the Alturas Tribe and an officer and/or board member of Azuma").

[13] Appellants' contention rings particularly hollow, as the injunction did not prevent those retailers from purchasing cigarettes even from Azuma itself. Those sales continued even after the district court issued its injunction. See supra pp. 8-9.

either because they are complying with applicable statelaws, or because the state laws do not apply to them." 1-ER-18. The district court's finding that Rose failed to meet that burden has no impact--practical or otherwise--on any legally protectable interest of their customers. Just as Rose had the opportunity to demonstrate that Azuma's customers were lawfully operating-- either by providing evidence they are complying with applicable state law or showing those laws are preempted--"those tribal retailers could still prove they acted lawfully in a hypothetical future case regardless of their nonparticipation in this one." 1-ER-13. Such hypothetical future case would follow the same path as this one--state law would presumptively apply, and the retailers could show either compliance with or preemption of the applicable law. And it would follow that same path with or without the district court's order.

Next, Appellants claim a risk of exposing Azuma to inconsistent obligations should the "[t]ribal retailers or Azuma bring claims arising from the abrogation" of claimed contracts between Azuma and its customers. Opening Br. 51. But as the district court noted, "California does not request and [the district] court [did] not issue an injunction abrogating Azuma's contracts." 1-ER-14. Nor did Appellants "put forward [any] reasons why Azuma cannot both comply with the law and fulfill its contractual obligations." Id. Indeed, Azuma did not provide any evidence that any unfulfilled contracts between it and its customers exist in the first place, rendering the claimed risk "unsubstantiated or speculative" and properlydisregarded. 7 C HARLES A. W RIGHT , ET AL ., F EDERAL P RACTICE AND P ROCEDURE § 1604 (3d ed. Westlaw Apr. 2023 update). In the absence of any of these supposed contracts, Appellants "only theorize the possibility that [Azuma's customers] would initiate suit against" them, which again does not implicate Rule 19. *Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108* (4th Cir.

1980); see also *Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990)* (explaining that finding a party necessary under Rule 19 requires "more than speculation about a future event").

Finally, the district court correctly found that even if Azuma's customers have a legally protectable interest in the litigation, they are not indispensable under Rule 19 because "the interests of the tribal retailers are adequately represented" by Defendants:

> [T]he interests of defendants and the tribal retailers are co- extensive in that defendants will need to show the tribal retailers are acting lawfully in order for defendants to avoid liability under section 376a(e)(2)(A)(ii) of the PACT Act, and defendants have pointed to no aspect of the case the present parties would neglect.

1-ER-14. Defendants here argue that Azuma's customers alleged immunity as tribal sovereigns preclude them from obtaining "concrete evidence of the Tribal Retailers' specific interests for purposes of the mandatory Bracker balancing test." Opening Br. 52. But as explained above, see *supra pp. 15-17*, that balance has already been struck and no evidence from Azuma's customers would disturb thedistrict court's legal conclusion. California can validly tax tribal cigarette sales to non-members, and its "minimal burdens" aimed at collecting those taxes are properly imposed on tribal business, whether or not any particular transaction is in fact taxable. See *Big Sandy, 1 F.4th at 731*. The only evidence relevant to Defendants' claimed "lawfully operating" exception is that which would show that "the tribal retailers are . . . complying" with State law. 1-ER-21. That evidence-- whether the retailers hold any license under the Licensing Act or Cigarette Tax Law--is held by the State, a party to this litigation.

At bottom, Appellants would make all customers of an illegal sales operation necessary and indispensable parties under Rule 19, necessitating bringing suit not just against the one violating the PACT Act, but simultaneously against all of the violator's customers. Such a reading of Rule 19 and the PACT Act would render that Act's delivery prohibitions virtually meaningless, and the district court did not abuse its discretion by refusing to credit it.

CONCLUSION

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[14] The district court's correct reading of the PACT Act's burdens coincides with the Act's policy goal of compliance with applicable cigarette laws, by imposing additional requirements on the suppliers of such retailers, including compliance with state cigarette law. See *15 U.S.C. § 376a(a)(3)*; PACT Act § 1(c), 124 Stat. at 1088 (codified at *15 U.S.C. § 375* note) ("It is the purpose of this Act to . . . provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling.").

For the reasons set forth above, the district court order enjoining Darren Rose in his official capacities should be affirmed.

Dated: March 11, 2024 Respectfully submitted, Rob Bonta Attorney General of California James V. Heart Supervising Deputy Attorney General David C. Goodwin Byron M. Miller Deputy Attorneys General s/Peter F. Nascenzi Peter F. Nascenzi Deputy Attorney General

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