No. 23-16200

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

AZUMA CORPORATION, et al.,

Defendants-Appellants.

Appeal from Order of the United States District Court
for the Eastern District of California
No. 2:23-cv-00743-KJM-DB
Hon. Kimberly J. Mueller

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Before it was preliminarily enjoined, tribally owned Azuma Corporation ("Azuma") manufactured cigarettes on its reservation, sold them to tribally owned retailers ("Tribal Retailers") for resale on their respective reservations, and delivered them to the Tribal Retailers. The preliminary injunction erroneously relied on a statutory provision that does not apply to sellers such as Azuma making their own deliveries, and it baselessly targeted the offices of the Vice-chairperson of the tribal government and the President of Azuma's board. The preliminary injunction also relied on the unfounded conclusion that the Tribal Retailers were themselves operating unlawfully because they do not hold state licenses. The court erroneously failed to analyze, under federal Indian law principles and the particular factual circumstances of each Tribal Retailer, whether any justification exists for the State to regulate these tribal entities on their reservations, and it ruled against the Tribal Retailers despite their absence from the proceedings. In each of these ways the court abused its discretion, and Azuma therefore respectfully requests that the preliminary injunction be vacated.

ARGUMENT

I. Section 376a(e)(2)(A) does not apply to Darren Rose in his official capacities on this record.

A. Section 376a(e)(2)(A) applies only to third parties delivering for persons listed on the non-compliant list.

California obtained the preliminary injunction under the wrong subsection of the PACT Act, and a subsection that all but eliminated its burden of proof. The preliminary injunction order should be reversed for abuse of discretion because the lower court was persuaded to adopt a construction of the PACT Act that is contrary to the language of the provision, its context and structure, and the Act's application by other courts.

The delivery prohibition at issue prohibits the delivery of packages by two categories of "person"—(1) those who receive the noncompliant list, and (2) those who deliver cigarettes to consumers—"for" a different category of "person": one "whose name and address are on the [noncompliant] list." 15 U.S.C. § 376a(e)(2)(A).[1] Understanding Congress "to have employed words in their natural

[1] Statutory references herein are to Title 15 of the United States Code unless otherwise specified. In full, this provision reads:

> Commencing on the date that is 60 days after the date of the initial distribution or availability of the list described in paragraph 1(A), no person who receives the list under paragraph (1), and no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery

sense," and to have used "the words which most directly and aptly express the ideas they intend to convey," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824), the provision prohibits deliveries by a person for a different person. Deliveries by Azuma for Azuma are not prohibited under this section.[2]

California relies on the use of the broadly defined term "person," describing both the agent ("no person … shall") and the principal ("…for any person"), to argue that because Azuma is a "person," Congress meant to target deliveries by Azuma for Azuma. Answering Br. at 24-25. This was the district court's reasoning in its February 28, 2024, Order finding Rose in contempt after Azuma continued to deliver Azuma cigarettes. SER-13-14. An "ordinary reader," however, would instead observe the "person[s]" described in § 376a(e)(2)(A) are grouped into three

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> of any package for any person whose name and address are on the list, unless—
>
> (i) the person making the delivery knows or believes in good faith that the item does not include cigarettes or smokeless tobacco;
>
> (ii) the delivery is made to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes or smokeless tobacco; or
>
> (iii) the package being delivered weighs more than 100 pounds and the person making the delivery does not know or have reasonable cause to believe that the package contains cigarettes or smokeless tobacco.

[2] This does not mean Azuma is off the hook; if its deliveries are unlawful, they would be prohibited by other PACT Act provisions, as discussed *infra*.

categories (the first two prohibited, the third only a relator), so that although the members of the groups all share personhood, Congress wished to emphasize that personhood is not the salient characteristic. *See Niz-Chavez v. Garland*, 593 U.S. 155, 161 (2021) ("ordinary reader" benchmark). The awkward alternative construction would mean that Congress smuggled additional liability for delivery sellers on the noncompliant list into the PACT Act (which specifically and expressly regulates delivery sellers elsewhere in the Act, including in all the *other* subsections of § 376a, and for the *same conduct* covered by § 376a(e)(2)(A)). Specifically, Congress would have done so by referring to two abstract categories of persons who must not make deliveries, and *omitting* any reference there to noncompliant delivery sellers, even while expressly referring to delivery sellers on the noncompliant list later in the very same sentence.

Even if § 376a(e)(2)(A) might admit to more than one construction within the bounds of grammar, California's and the district court's interpretation falls away when the statutory context is considered. The PACT Act primarily regulates "delivery sellers" with every subsection of § 376a, *except* the subsection on which the preliminary injunction order relied. Those subsections impose legal requirements with which delivery sellers must comply. For example, under subsection (a),

> each delivery seller shall comply with—

> (1) the shipping requirements set forth in subsection (b);
>
> (2) the recordkeeping requirements set forth in subsection (c);
>
> (3) all State, local, tribal and other laws generally applicable to sales of cigarettes; … and
>
> (4) the tax collection requirements set forth in subsection (d).

§ 376a(a). Section 376a(a)(3) further specifies that its requirements "includ[e] laws imposing—(A) excise taxes; (B) licensing and tax-stamping requirements; (C) restrictions on sales to minors; and (D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco[.]" § 376a(a)(3). Subsections (b) through (d) provide the substance of the requirements imposed by § 376a(a)(1), (2), and (4), for shipping, recordkeeping, and tax collection. Subsection (d) expressly addresses deliveries by a delivery seller, providing that "no delivery seller may … deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes … unless" applicable excise tax has been paid and the tax stamp affixed. § 376a(d)(1). These delivery seller obligations are all enforceable under § 378 and subject to penalties under § 377.

Meanwhile, subsection (e), the outlier provision on which California chose to rest its motion for preliminary injunction, does not expressly or directly regulate delivery sellers. Instead, it shifts focus and regulates the conduct of other people who might deliver for delivery sellers that have not complied with subsections (a) through (d). For example, § 376a(e)(1) establishes the noncompliant list ATF is

required to maintain and publish. That list is comprised of persons ATF has deemed to be delivery sellers operating out of compliance with the Act. § 376a(e)(1). The list is distributed and published as a means of giving notice to common carriers and other delivery services. *See* § 376a(e)(1)(A)(i)(II) (list is distributed to "common carriers and other persons that deliver small packages to consumers in interstate commerce"). Section 376a(e)(2) then prohibits deliveries "for any person on whose name and address are on the list." § 376a(e)(2)(A). The subsequent paragraphs of subsection (e) expressly address the rights and obligations of "common carriers" and "other delivery services." § 376a(e)(3), (4), (5).

The final subsection of § 376a describes statutory presumptions to be made about a delivery sale. One such presumption is that the delivery sale is "deemed to have occurred in the State and place where the buyer obtains personal possession of the cigarettes." § 376a(f). Another presumption is that a "delivery pursuant to a delivery sale" is "deemed to have been initiated or ordered by the delivery seller." *Id.* For the purpose of construing § 376a(e)(2)(A), it is significant that § 376a(f) uses the phrase "initiated or ordered by the delivery seller," while § 376a(e)(2)(A) does not. If § 376a(e)(2)(A) were intended to apply to delivery sellers, one would expect it to include a prohibition on initiating or ordering a delivery, rather than merely the generic "cause to be completed."

Reading § 376a(e)(2)(A) in context shows that when Congress intended to regulate and impose liability upon delivery sellers, it did so in no uncertain terms, not as part of a generic category. Moreover, Congress logically organized § 376a into subsections putting like matters together, and should not be understood to have used general terms in a far-flung subparagraph to effectively add a fourth item to the list of obligations in § 376a(a) that "each delivery seller shall comply with." Unlike subsections (a) through (d), nothing in subsection (e)—apart from the provision at issue, according to the district court—places affirmative duties on delivery sellers. It does not limit delivery sellers' conduct as a consequence of being added to the noncompliant list, unless, under the district court's reasoning, it does so through the backdoor in § 376a(e)(2)(A).

Rather, the consequence of a delivery seller being listed is that others cannot make deliveries for the listed person. That is the reason for making and distributing a list. It is significant that ATF officials notifying Azuma that the agency was considering placing Azuma on the noncompliant list in February 2019 warned Azuma of the consequences by informing Azuma, "Placement on this list may affect your business' ability to deliver cigarettes and smokeless tobacco. The PACT Act prohibits common carriers from delivering cigarettes and smokeless tobacco if the sender (delivery seller) is on the non-compliant list." 3-ER-391. ATF did not tell Azuma that placement on the list would prohibit Azuma from delivering its

cigarettes, but only that its listing "may affect [Azuma's] ability to deliver cigarettes," because, ATF explained, the "PACT Act prohibits common carriers from delivering cigarettes" for listed entities. *Id.* Similarly, when ATF notified Azuma of its placement on the list in November 2019, the agency again told Azuma, "ATF regularly distributes the list to common carriers that are then prohibited from delivering products sold by companies on the list." SER-60. ATF correctly takes the view that placement on the noncompliant list does not prohibit deliveries by the listed entity, but makes it more difficult for a listed entity to get its cigarettes delivered, because common carriers and others are prohibited from making such deliveries.

Indeed, subsection (e) is full of provisions geared toward this purpose, including list distribution and publishing (§ 376a(e)(1)(A)); identifying listed sellers by alternate names, addresses, and contact information to "facilitate compliance with this subsection by recipients of the list" (§ 376a(e)(1)(B)); and permitting "a common carrier, the United States Postal Service, or any other person receiving the list" to discuss "with a listed delivery seller … the resulting effect on any services requested by the listed delivery seller" (§ 376a(e)(1)(F)). The delivery prohibition itself contains exceptions regarding what the deliverer "believes in good faith" or "does not have reasonable cause to believe" about the contents of the package. § 376a(e)(2)(A)(i), (iii). These state-of-mind provisions only make sense with respect

to a third party because the delivery seller knows what the packages contain. The delivery prohibition also contains a grace period of 60 days from the distribution or availability of the initial list or 30 days from any updates or corrections before the prohibition on deliveries begins, §§ 376a(e)(2)(A) & (B), which gives delivery services, who have not been deemed bad actors, ample time to come into compliance. In contrast, those grace periods make little sense with respect to a delivery seller, which is already listed for its noncompliance. A variety of exceptions and protections for common carriers and other delivery services are contained in § 376a(e), paragraphs (3), (4), (5), and (9). More exceptions and limitations regarding civil penalties for violations of § 376a(e) by "common carrier[s]," "independent delivery service[s]," and their employees are provided in § 377(b)(3).

In addition, because § 376a(a)-(d) cover the same conduct the Injunction Order would force into § 376a(e)(2)(A), there is no "enforcement gap," as California and the district court contend, when § 376a(e)(2)(A) is properly construed as limited to third persons (including common carriers and other third party delivery services) acting "for" a listed delivery seller. *See* Answering Br. at 26; SER-14. California may seek to enjoin Azuma's (or any other delivery seller's) alleged unlawful deliveries of unstamped, unapproved cigarettes by claiming violations of § 376a(a)(3), which provides that "each delivery seller shall comply with … all … generally applicable" state cigarette laws, and § 376a(d)(1), under which "no

delivery seller may … deliver to a consumer" untaxed, unstamped cigarettes. §§ 376a(a)(3), 376a(d)(1). Indeed, California already asserts a claim for such violations. 3-ER-434-435. Civil penalties, injunctive relief and money damages are available for these violations. §§ 377(b), 378(a), 378(c)(1)(A). No "enforcement gap" compels an interpretation of § 376a(e)(2)(A) that artificially and superfluously prohibits delivery seller conduct already prohibited by the PACT Act's delivery seller provisions.

Therefore, no "loophole" arises from Azuma's statutory construction, as California asserts. On the contrary, reversing the decision below would close the loophole that the district court's interpretation creates, so that ruling for Azuma here would not be "hollow." Answering Br. at 25, n. 8 & 9. On a remand after reversal, if the State wished to try again to stop Azuma's allegedly unlawful cigarette deliveries under § 376a(a) or 376a(d), the elements of the State's case would include proving that Azuma is a "delivery seller," meaning it makes "delivery sales" to "consumers." §§ 376a(a); 376a(d); 375(4)-(6). Thus, the State would need to prove not only that the defendant sells cigarettes through remote orders or deliveries, but also that it sells to a person not "lawfully operating as a … retailer of cigarettes." § 375(4). Permitting an injunction under § 376a(e)(2)(A), on the other hand, allows California to obtain relief by showing only that the defendant received the noncompliant list, a prerequisite that, according to the State, is inherently satisfied

for any delivery seller whose name appears on the list. See Answering Br. at 14 n.6. The lower court's interpretation virtually seals defendants' fates by introducing reliance on ATF's listing, made at the behest of the State, into a proceeding that under the PACT Act ought to involve the State proving its case to a federal court, not merely to its enforcement partners in the ATF.

Properly construing the PACT Act, Azuma's own deliveries, including delivery-related activity by Rose in an official Azuma capacity, do not violate § 376a(e)(2)(A). The contrary decision below should be reversed.

B. No evidence established that the offices occupied by Rose are responsible for Azuma's deliveries.

It bears emphasis that, as the district court stated, "California [did] not argue or show … that Alturas delivers … cigarettes to consumers." 1-ER-19. It cannot follow that Alturas should be enjoined, via suit against its official, from delivering cigarettes to consumers. With no showing that the Tribe (through any tribal official or otherwise) is conducting the alleged unlawful activity, California necessarily failed to show it is likely to succeed on its claim that a tribal official is violating the law.

California sought to enjoin tribal government officials "pursuant to *Ex parte Young* on the understanding" that the government "had full control over Azuma." Answering Br. at 27. However, this understanding was never supported by proof. The record shows the tribal government did not have full control over Azuma. *See*

Opening Br. at 30. Even as the district court held Azuma is an arm of the Tribe, it found the evidence did not clearly show "how much control non-tribal members have over Azuma's operation," and how much control the Tribe has. Dkt. 58 at 5:12-14. In an official capacity action under *Ex parte Young*, the plaintiff cannot "circumvent sovereign immunity by naming some arbitrarily chosen governmental officer or an officer with only general responsibility for governmental policy." *Jamul Action Committee v. Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020); *see also Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-93 (9th Cir. 2007) (named officials must have responsibility over the specific conduct being challenged). Under either party's interpretation of § 376a(e)(2)(A), the factual record does not support an injunction against a tribal official.

Further, to base the preliminary injunction on the conclusion that Rose, as a board member of Azuma, was responsible for Azuma's deliveries requires construing § 376a(e)(2)(A) as prohibiting Azuma's own deliveries of the cigarettes it sold. As explained in the previous section, that statutory construction is incorrect.

California's defense of the conflation of Rose's roles in tribal government and on Azuma's board misses the point. *See* Answering Br. at 28-30. Because of the dual peculiarities of the preliminary injunction motion—brought against tribal government offices with no direct connection to the subject deliveries, and under a provision not aimed at delivery sellers themselves, but at those who make deliveries

"for" them—Defendants had to oppose the injunction by guessing at the State's factual and legal theories based on what it filed. While Defendants had little doubt the State wanted to halt the delivery of Azuma cigarettes, and Defendants therefore identified the harms that would follow from that (*see* Answering Br. at 29), California obtained the preliminary injunction without bothering to answer how § 376a(e)(2)(A) applies or does not apply to Rose, the Tribe, or Azuma. Even after the injunction issued, its basis remained opaque, as the court merged Rose's capacities, 1-ER-19 at lines 17-18, did not expressly decide the meaning of § 376a(e)(2)(A), and appeared to allow that although Azuma had been shown to deliver cigarettes, Azuma would not be enjoined, 1-ER-20, n.10.

California also argues that the injunction, once issued, properly reached Rose in any capacity, but that argument fails to address whether the injunction should have issued in the first place. Further, the relevant privity question in this regard is not whether Rose is "in privity with himself." Answering Br. at 31. Rather, an official capacity defendant is not "himself" but merely represents whoever holds the office. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (holding "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"); *see Lewis v. Clarke*, 581 U.S. 155, 162 (2017) (citing *Will* in tribal official context)). Therefore, the question is whether

the office that was sued is in privity with the office that was enjoined, and that is a question the State has not answered.

II. Azuma does not sell or deliver cigarettes to "consumers," but only to the lawfully operating Tribal Retailers.

A. The lower court failed to correctly apply federal Indian law principles to determine whether State law binds the Tribal Retailers.

A long line of cases establishes that California presumptively (though not inflexibly) has no civil authority to regulate Indian tribes in Indian country unless Congress authorizes it. *See*, *e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.18 (1987) (rejecting "the opposite presumption"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("exceptional circumstances" are required before "a State may assert jurisdiction over the on-reservation activities of tribal members"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable"); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."); *see also Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) ("Absent explicit congressional direction to the

contrary, we presume against a State's having the jurisdiction to tax within Indian country."); *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 725 (9th Cir. 2021) (quoting *Bracker*, "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable"); *Indian Country, U.S.A., Inc. v. Okla.*, 829 F.2d 967, 976 (10th Cir. 1987) ("There is a presumption against state jurisdiction in Indian country").[3]

California argues for the opposite presumption, Answering Br. at 15, 32, but it relies on a case that is limited by its terms to states' authority "to prosecute crimes committed in Indian country" by non-Indians. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 637 (2022). The *Castro-Huerta* presumption for state criminal authority over non-Indians in Indian country is decidedly inapplicable to state civil authority over Indians and Indian tribes in Indian country.

Cabazon declared, in the context of civil regulation in Indian country, that a "presumption … that state laws apply on Indian reservations absent an express congressional statement to the contrary … is simply not the law." *Cabazon*, 480 U.S. at 216 n.18. *Bracker* likewise rejected the "claim that [a state] may assess taxes

[3] The PACT Act expressly preserves these principles. PACT Act § 5(a)(3)-(4), Pub. L. No. 111-154, 124 Stat. 1087, 1109-10, 15 U.S.C. § 375 Note. It does so to ensure Act is not construed as federalizing state cigarette laws, or authorizing their application against Indian tribes and in Indian country, by force of federal statute. *Contra* Answering Br. at 12 (asserting PACT Act "federalizes state cigarette laws").

on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary." *Bracker*, 448 U.S. at 150-51. It is a false premise "in the context of an assertion of state authority over the activities of non-Indians within a reservation," and "[i]t is even less correct when applied to the activities of tribes and tribal members within reservations." *Cabazon* at 216 n.18.[4]

Here, the relevant inquiry is California's civil authority to regulate the Tribal Retailers, all Indian tribally owned entities operating in their home Indian country—*i.e.*, Indians in Indian country. Specifically, the question is whether California has authority to bind the Tribal Retailers to the State licensing schemes. Only if

[4] California is also inaccurate about the burden of showing state law is invalid. *See* Answering Br. at 16, citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160 (1980). *Colville* assigned the tribes this burden on a limited issue only after the Court analyzed, under the circumstances of that case, whether the state had authority to impose a tax on non-Indian customers of tribal retailers. Because the tax attached to off-reservation value and was imposed on recipients of state services, the state's interest in raising revenues was strong enough to justify depriving the tribes of the revenues they were receiving. *Id.* at 155-57. With a valid tax in place, the next question was the validity of state laws requiring tribal retailers to keep records of their transactions. *Id.* at 159. And the rule was that a valid state tax carries with it the authority to "impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." *Id.* On this question the tribes bore the burden, so that in the absence of any evidence, the Court was willing to assume the recordkeeping requirements were "reasonably necessary as a means of preventing fraudulent transactions." *Id.* at 160. *Colville* did not put the burden on the tribes to show the invalidity of the threshold primary regulation or tax, but only the tag-along secondary regulation.

California possesses such authority can the Tribal Retailers be labelled "consumers" (rather than "lawfully operating" retailers) under the PACT Act.

The "exceptional circumstance" the State relies on to justify regulating tribal businesses on their reservations arises from *Moe v. Confederated Salish and Kootenai Tribe of Flathead Reservation*, 425 U.S. 463 (1976). *Moe* established that a "State may *sometimes* impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Colville* at 151 (emphasis added); *see Moe* at 482. Notably, this context-dependent holding is contrary to California's *per se* view of *Moe*. Answering Br. at 16. Then, if it turns out a tax is validly imposed, "the State may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and colleting the tax." *Colville* at 151; *see Moe* at 483.

Short-circuiting the analysis by transforming the first step from a question into an answer is contrary to Supreme Court precedent. The first step requires balancing the relevant interests to determine whether a valid imposition of tax exists that can justify departing from the ordinary presumption that tribes operating on their reservations are not subject to state regulation. *See* Opening Br. at 42-45.

It is insufficient to say the balancing "has already been done." Answering Br. at 16.[5] On the contrary, there is only one on-reservation tax scenario, the taxation

[5] California further asserts that the "balance has already been struck," and therefore "no evidence" of the specific interests at stake can possibly change the results

of Indian tribes and tribal members in Indian country, in which "it is unnecessary to rebalance the[] interests in every case." *Cabazon* at 215 n.17. That situation is set apart as a "per se rule," *Cabazon* at 215 n.17, and a "categorical bar," *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). It is contrasted against every instance in which a state seeks to assert authority over non-Indians on a reservation: "This inquiry is not dependent upon mechanical or absolute conceptions of state or tribal sovereignty, but has called 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. *See also Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 102 (2005) ("even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to the tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test"); *Chickasaw* at 459 ("if the legal incidence of the tax rests on non-Indians, no categorical bar

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reached decades ago. Answering Br. at 34-35. But facts are not irrelevant. The interests may differ and the strength of a given interest may change, based on the facts of the case. *See Colville* at 156-57 (explaining that tribal interests in raising revenue are "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes," while the state interest "is likewise strongest when the tax is directed at off-reservation value"); *Cabazon* at 219-20; *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936-37 (8th Cir. 2019).

prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, … and may place on a tribe or tribal members 'minimal burdens' in collecting the toll"); *Ramah Navajo School Bd., Inc. v. Bureau of Rev. of New Mexico*, 458 U.S. 832, 845 (1982) (deciding to maintain *Bracker*'s "case-by-case" approach to "allow for more flexible consideration of the federal, state, and tribal interests at issue").

Accordingly, this Court has repeatedly called *Bracker* balancing a "fact-specific" test that requires "case-by-case" assessment. *Desert Water Agency v. U.S. Dept. of the Interior*, 849 F.3d 1250, 1252 (9th Cir. 2017) ("courts must undertake a fact-specific balancing test"); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008) ("[t]he test calls for careful attention to the factual setting"); *Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410 (9th Cir. 1994) (ordinary "case-by-case" assessment and application of "fact-specific balancing test" unnecessary where Secretarial approval authorized state law to apply on reservation); *Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992) (recognizing "the need to assess [the issue] on a case-by-case basis").

Therefore, a particularized, context-specific analysis of the weight of the competing interests must be done to determine whether state tax may be imposed upon any non-Indians buying cigarettes from the Tribal Retailers. The value added by the tribes is a significant factor that influences the weight of the tribal interests

and distinguishes this case from cases such as *Moe*, *Colville*, and *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). *See* Opening Br. at 44-45. Only if this initial balancing test favors the state is it possible to reach step two, regulating the Tribal Retailer to help collect the state tax.[6]

California argues that *Big Sandy* allows step one to be skipped altogether. Answering Br. at 18, citing *Big Sandy* at 731.[7] However, *Big Sandy* did not conduct *Bracker* balancing because it was dealing with the application of state authority to "'off reservation' activity subject to non-discriminatory state laws of general application." *Big Sandy* at 729. The Court highlighted the different approach that different circumstances would require, stating that "*Bracker* balancing is appropriate when a tribe or tribal entity challenges a state's regulation of transactions between

[6] Step two involves its own balancing. The state's interest in raising revenues will have been established at this point, unlocking the possibility that the state might regulate another sovereign within that sovereign's territory, which comes with necessary limitations. The state burden must be minimal, it must not "frustrate[] tribal self-government … or run[] afoul of any congressional enactment dealing with the affairs of reservation Indians," *Moe* at 483, and it must be "reasonably tailored to the collection of valid tax from non-Indians," *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994). In *Moe*, where the Court announced the "minimal burden" standard, the Court held the state may require tribal sellers in Indian country to add the state tax to the price of cigarettes but could not require them hold a state license to sell cigarettes. *Moe* at 480, 483.

[7] There may not be a great difference in the parties' positions on this point. As California argues, "the initial question is whether the tax itself is valid—that is, whether a tribal business's sales *could* be taxable." Answering Br. at 18. Answering that question calls for the interest-balancing test.

the tribe and nonmembers *on the tribe's reservation*." *Id.* at 730. This precisely describes the issue at hand in this case: California's regulation of transactions between the Tribal Retailers and nonmembers on the Tribal Retailers' reservations. When California argues the *Big Sandy* transactions are "identical in all relevant respects to the transactions here," Answering Br. at 18-19, it is erroneously focusing on Azuma's sales, when the proper focus is on the Tribal Retailers.

Bracker balancing, conducted with consideration of the particular interests at stake (rather than the very different set of interests in *Chemehuevi*, *Colville*, or *Moe*), would show the Tribal Retailers have a strong interest in selling tribally made cigarettes to non-members and non-Indians without the external, unearned drain of state taxation. As a result, the ostensible justification for applying the state licensing regime to the Tribal Retailers disappears. The Tribal Retailers are therefore lawfully operating retailers, not "consumers," under the PACT Act. § 375(4). This means Azuma's transactions with them are not "delivery sales" regulated by the PACT Act, §§ 375(5) & 376a(a), and deliveries to them are permitted under § 376a(e)(2)(A)(ii).

The district court's decision that Azuma sells and delivers to "consumers" without engaging the requisite balancing of the Tribal Retailers' interests was a misapplication of the law and an abuse of discretion. Thus, the preliminary injunction must be vacated.

B. State law exempts the Tribal Retailers from State licensing requirements.

In addition to the Tribal Retailers' independence from state regulation arising from federal Indian law principles, neither the Licensing Act[8] nor the Tax Act[9] by their own terms require the Tribal Retailers to hold a license to sell cigarettes on their reservations, and neither Act requires the Tribal Retailers to purchase cigarettes only from a licensed distributor.

The Licensing Act includes provisions that acknowledge federal law prohibits California from regulating certain sellers. One such provision says "[n]o person is subject to the requirements of [the Licensing Act] 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. A more specific provision states that although generally a distributor or wholesaler cannot sell cigarettes to unlicensed persons, that rule does not apply to the sale of cigarettes by any person to any person that the State is prohibited from regulating. Cal. Bus. & Prof. Code § 22980.1(b)(2). A California Bill Analysis regarding this section explains that retailers on Indian reservations are not subject to the licensing requirements of the Licensing Act, and that this provision allows distributors to sell

[8] Cal. Bus. & Prof. Code §§ 22970-22991.

[9] Cal. Rev. & Tax. Code §§ 30001-30483.

cigarette and tobacco products to those retailers. Cal. B. An., A.B. 3092 Assem. (Aug. 26, 2004); *see* Opening Br. at 38-40.

Thus, it is the express intention of California lawmakers to exclude on-reservation cigarette retailers, such as the Tribal Retailers, from the licensing requirements of the Licensing Act, meaning they need not possess a license and they need not purchase cigarettes only from those who possess a license. This is consistent with *Moe*, which struck down a state license requirement as applied to tribal sellers. *Moe*, 425 U.S. at 480.

California's argument to the contrary does not hold water. It asserts that as a manufacturer, Azuma is subject to the separate requirement that manufacturers may not sell cigarettes to unlicensed persons. Answering Br. at 21-22; *see* Cal. Bus. & Prof. Code § 22980.1(a). This argument ignores the expansive language of the carveout in § 22980.1(b)(2), which states that it applies to sales "by a distributor, wholesaler, *or any other person*." Cal. Bus. & Prof. Code § 22980.1(b)(2) (emphasis added). Although the provision is a carveout from a subdivision directed at distributors and wholesalers, it expressly extends beyond those categories to authorize sales by "any other person" as well. The State's argument also mistakenly focuses on Azuma, rather than the Tribal Retailers. Even assuming (only for sake of argument) that Azuma would be in violation of § 22980.1(a) for selling to unlicensed buyers, the Tribal Retailers would not be in violation of any provision of

the Licensing Act for doing business with Azuma. Since the Tribal Retailers are exempt from the requirements of the Licensing Act, they are not required to purchase from licensed sellers (distributors, wholesalers, or anyone else).

In support of the State's authority to enforce the Tax Law, California relies entirely on *Chemehuevi*. Answering Br. at 20. *Chemehuevi*'s per curiam summary disposition, decided on the petition for certiorari, focused on construing the Tax Law to determine whether the legal incidence of the cigarette tax fell upon the consumer or the tribal retailer, ultimately concluding "the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable." *Chemehuevi*, 474 U.S. at 11. After locating the legal incidence "on the non-Indian consumers," the Court stated that "petitioner has the right to require respondent to collect the tax on petitioner's behalf." *Id.* at 12. *Chemehuevi* did not address or decide anything about requiring the tribal seller to hold a state license. Therefore, it offers no support regarding licensing, which was the only basis on which the State sought, and the lower court granted, the preliminary injunction at issue here.

Moreover, *Chemehuevi* did not address the reasons the Tax Law is inapplicable. Azuma discussed this extensively, demonstrating that the tax agency does not require licensure for reservation sales, that the Tribal Retailers are retailers and not "distributors" under the Tax Law and therefore are not required to hold a distributor's license, and that even if they were, whether the Tax Law applies

requires *Bracker* balancing. Opening Brief at 40-42. California does not substantively respond to these arguments. Furthermore, a tax imposed upon non-members in Indian country may still be invalid if incompatible with federal law or tribal self-governance. *Bracker* at 142-45; *see Colville* at 151 (such tax is "sometimes" authorized). As Azuma has shown, the determination requires *Bracker*'s "particularized inquiry," not the "mechanical or absolute" approach California urges. *Bracker* at 145.

III. The Tribal Retailers are indispensable parties.

California insists the preliminary injunction has no impact on the Tribal Retailers' interests because they can vindicate themselves in a hypothetical future case. Answering Br. at 33. This argument ignores the impact a ruling can have on nonparties who are not bound by it. *See Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968). "The court must consider" that impact under Rule 19, which does not ask whether a person's interests are technically or formally impaired, but whether "as a practical matter" a ruling may "impair or impede the person's ability to protect the interest." *Id.*; Fed. R. Civ. P. 19(a)(1)(B). As the State's arguments in this appeal demonstrate, the lower court's order would be held out as a definitive ruling on state authority to regulate the Tribal Retailers' reservation businesses, regardless of the distinct arguments or evidence the Tribal Retailers might seek to present. *See, e.g.*, Answering Br. at 34-35. Multiple Indian

tribes who have worked to build their reservation economies with tribally manufactured goods will have to surmount additional obstacles to protect their interests.

Azuma cannot adequately represent the absent tribes and Tribal Retailers, despite their alignment as to the ultimate outcome of the case, because there is significant doubt Azuma is capable of fully presenting the arguments and evidence the absentees would offer if they consented to participate. Opening Br. at 52. Each absent tribe's interest is a sovereign interest in "its very ability to govern itself, sustain itself financially, and make decisions" about its tribal enterprises and reservation commerce, as the contours of such interest may be uniquely shaped by each tribe. *See Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 856 (9th Cir. 2019). No party to the litigation can adequately represent all these interests. California's argument that the absentees' participation is unnecessary is founded on the State's erroneous "rigid rule" view of Indian country preemption and infringement determinations. *See Bracker* at 142 ("there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members"). The die is cast, California says, and the Tribal Retailers' only choice is to comply with state law. Answering Brief at 34-35. The State's approach would eviscerate decades of precedent mandating a context-specific, fact-dependent assessment, and would steamroll tribal

sovereignty in the name of enforcing a federal law that took pains to preserve it. *See* PACT Act § 5, Pub. L. No. 111-154, 124 Stat. 1109-10, 15 U.S.C. § 375 Note.

These tribes' interests are central to this case and, "in equity and good conscience," the action should not proceed without their participation. Fed. R. Civ. P. 19(b). Their joinder is infeasible because of their sovereign immunity. "The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." *Deschutes River Alliance v. Portland General Electric Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021). "[T]he absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have their legal duties judicially determined without consent." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The district court abused its discretion when it did not deny the preliminary injunction and dismiss the case based on the absence of indispensable parties.

CONCLUSION

For all the foregoing reasons, the order of the district court must be reversed.

Dated: April 1, 2024

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CERTIFICATE OF COMPLIANCE

I am the attorney for Appellants.

This brief contains 6,644 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: April 1, 2024 */s/ John M. Peebles*