No. 24-698

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *EX REL* BONTA,
Appellee,

v.

PHILLIP DEL ROSA, *et al.*,
Appellants.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:23-cv-00743-KJM-SCR
The Honorable Kimberly J. Mueller, Senior Judge

Appellee's Answering Brief

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INTRODUCTION

Appellants traffic in contraband cigarettes and have done so for years. The particulars of their business have changed over time, but each iteration has involved the distribution of cigarettes to non-member customers well beyond the borders of their Indian reservation—without licenses or affixing of state excise stamps; without collection and remittance of taxes; without disclosure of their sources or their shipments.

Appellants have done so despite repeated and express warnings that such business operations were illegal. In February 2009, May 2010, and November 2011, the Bureau of Indian Affairs ("BIA") sent cease and desist letters to Defendant–Appellant Darren Rose, 3-ER-285, warning that his sales of tax-evaded cigarettes were illegal and that "the State of California may seize the cigarettes or other products and arrest you and/or any others involved in the operation," 3-ER-301. "Accordingly," BIA continued, "we advise you to cease all operations." *Id.* Business continued. In 2013, after issuing its own set of warning letters, Plaintiff–Appellee the Office of the California Attorney General brought suit in state court, alleging violations of various state cigarette regulatory and tax laws. 3-ER-285. Rose was found liable, assessed civil penalties of nearly $1 million dollars, and enjoined from making any further sales of cigarettes to non-members of his Indian tribe. *Id.* That decision was affirmed in a published decision of the state court of

appeals. *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317, 332 (2017). Business continued.

Appellants began manufacturing cigarettes, 3-ER-287–88, and operating as a supplier for another on-reservation operation, Big Sandy Rancheria, *see* 3-ER-290; *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1329 (E.D. Cal. 2019). That distributor sued the State, arguing (as Appellants do) that it and its tribe-to-tribe distributions fell outside the reach of state regulatory law. This Court, in a published decision, rejected those arguments, concluding that an Indian distributor conducting business off of its reservation was subject to the full panoply of state tobacco laws. *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 729 (9th Cir. 2021). Defendants took on distribution themselves, *see* 3-ER-288, and business continued.

The latest chapter began again with warning letters—first from Appellee, 3-ER-287, and then from the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), 3-ER-289–90, the agency tasked with implementing the Prevent All Cigarettes Trafficking Act of 2009 ("PACT Act") at issue in this appeal. ATF wrote Defendants and explained that "Azuma's operations are in violation of the PACT Act," and placed Azuma, Defendants' tribal business, on the so-called non-compliant list. 3-ER-350. Azuma's listing forbids it and Defendants from delivering or causing to be delivered any cigarettes without, among other

things, complying with state tobacco laws. *See* 15 U.S.C. § 376a(e)(2)(A). Business did not stop; Defendants continued to make and cause to be made deliveries of cigarettes—through the district court's preliminary injunction, this Court's upholding of that injunction, and all the time between and since. At each step, in each iteration, back to those first BIA letters in 2009, Defendants have been specifically warned, explained to, compelled, and enjoined—by the state, by federal agencies, by state and federal courts—that their operations are illegal and that they must comply with applicable state law.

Now, while Rose's contempt is pending in the district court a second time following continued violations of that court's plain-text preliminary injunction, Appellants request this Court find them immune from state prosecution under the PACT Act, asking how they could have possibly known that their sales of unstamped, untaxed, off-directory cigarettes up and down the state of California was illegal?

For the reasons set forth below, Appellants arguments fail.

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 appealable under the collateral order doctrine, *see Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1089–90 (9th Cir.

2007), and that this appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED

1. Whether the law of the case doctrine bars Appellants from asserting sovereign immunity as a defense to a cause of action on appeal after failing to raise such defense in their prior appeal of a preliminary injunction issued pursuant to the same cause of action. And, if not, whether 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), displaces *Ex parte Young* as an enforcement mechanism against tribal officials in their official capacities.

2. Whether tribal officials are entitled to qualified immunity for their violations of the PACT Act for unlawfully distributing cigarettes without a license to unlicensed tribal retailers who fail to collect and remit state cigarette taxes when owed and who fail to comply with the mechanisms for collection and remittance of such taxes.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

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-281. Defendant–Appellants Phillip Del Rosa and Darren Rose are both officers of

the Tribe, *id.*; 2-ER-105; 2-ER-159, and directors of Azuma, 2-ER-172. Rose additionally serves as Azuma's President/Secretary. 2-ER-159–60.

Azuma holds a federal manufacturer's permit issued by the U.S. Tobacco Tax and Trade Bureau ("TTB"), 3-ER-281, and manufactures cigarettes under the brands Tracker and Tucson, 3-ER-288. It previously imported cigarettes under the Heron and Sands brands into California from another manufacturer, 3-ER-287–88, and also previously used a sub-distributor, Big Sandy Rancheria, to distribute its cigarettes throughout California, *see* 3-ER-290.

Defendants currently distribute cigarettes from the Azuma facility in Modoc County, California to tribal retailers throughout the State, from Crescent City to El Cajon. *See* SER-145–46, -148–51 (report of Azuma shipments). But neither they nor their customers abide by the numerous state laws relating to the distribution of cigarettes in California. They do not hold cigarette licenses, SER-145–46; they do not collect, pay, or remit state cigarette taxes when owed, SER-146; and the cigarettes they distribute are not on the California Tobacco Directory, rendering them contraband subject to seizure, Cal. Rev. & Tax. Code § 30436(b), (e); *see also California Tobacco Directory*, CAL. DEP'T JUST., OFF. ATT'Y GEN., https://oag.ca.gov/tobacco/directory (last updated Jan. 17, 2025); 3-ER-288.

Due to the failure of Defendants and their customers to abide by state cigarette regulations, and after several warnings, *see, e.g.*, 3-ER-287, California

nominated Azuma to the PACT Act non-compliant list maintained by ATF on December 18, 2018, 3-ER-289; *see also* 15 U.S.C. § 376a(e)(1). In response, ATF determined that "Azuma's operations are in violation of the PACT Act," and placed Azuma on the list. 3-ER-350. Among other things, placement on the non-compliant list prohibits the delivery of cigarettes by or on behalf of those listed. *See* 15 U.S.C. § 376a(e)(2)(A). Azuma has remained on that list continuously since 2019. *See* 3-ER-289–90; SER-79–80.

II. PROCEDURAL BACKGROUND

California sent a warning letter dated October 26, 2022, alerting Azuma that it had discovered continued violations of law and demanding that it cease its unlawful cigarette distributions and sales. 3-ER-291. Defendants continued operations. *Id.* This suit followed on April 19, 2023, bringing a number of causes of action under state and federal law. 3-ER-279, -292–96, -402. The first cause of action—the subject of this appeal—alleges violations of the PACT Act,[1] and names Appellants Phillip Del Rosa and Darren Rose in their official and personal capacities. 3-ER-292–93.

[1] Appellants make arguments in their opening brief concerning the applicability of qualified immunity to the Contraband Cigarette Trafficking Act ("CCTA"), and the Civil Racketeering Influenced Corrupt Organizations Act ("Civil RICO"). *See, e.g.*, Opening Br. 21–22, 41. However, the district court dismissed the State's CCTA and Civil RICO claims for failure to state a claim, 1-ER-9, -13, and as discussed below, those claims are accordingly not before this Court.

A. Preliminary Injunction and Appellant Rose's Contempt

In anticipation of this action, Azuma wrote to ATF to request that the company be removed from the non-compliant list. SER-80. Less than a month after the filing of this suit, ATF issued its response, reiterating its earlier determination that Azuma was correctly on the non-compliant list. *Id.* Writing to the company, ATF explained 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." SER-133. "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" and declined to do so. SER-142.

With ATF confirming that Azuma was properly on the non-compliant list, the State moved for a preliminary injunction on June 16, 2023. SER-75. Proceeding under the *Ex parte Young* doctrine against Appellant tribal officers in charge of Azuma, that motion sought to enjoin Azuma from delivering or causing to be delivered cigarettes in violation of the PACT Act. SER-75–76. Specifically, the

motion sought to enjoin unlawful deliveries to retailers located on tribal land throughout California. *Id.*

After extensive briefing and a hearing, the district court issued an injunction under *Ex parte Young* as to Defendant Darren Rose in his official capacities as both Tribal Vice-Chairman and Azuma's President/Secretary:

> 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-37. The injunction became effective on September 15, 2023. *See* 1-ER-37–38; 3-ER-407. That same day, Defendants filed a notice of appeal challenging the preliminary injunction. 3-ER-407. Defendants did not, however, move for reconsideration, nor did they seek a stay in this Court or in the district court. *See* 3-ER-407–11.

Then, the State learned—despite the district court's injunction—that Azuma's deliveries of unstamped, contraband cigarettes had continued. The district court held Rose in contempt, SER-73, and then awarded nonmonetary sanctions as "reasonable measures to ensure compliance with the preliminary injunction," SER-62.

Meanwhile, briefing on Defendants' appeal of the preliminary injunction moved forward. In that earlier appeal, Defendants took issue with application of the PACT Act's delivery prohibition to deliveries made by the listed person itself and to deliveries made to tribal retailers. *See* Opening Br. 11, *California v. Azuma Corp.*, No. 23-16200 (9th Cir. Jan. 12, 2024), DktEntry: 16. However, though the district court had considered and rejected Defendants' arguments that the PACT Act could not be enforced against tribal officials under *Ex parte Young*, 1-ER-20–23, Appellants declined to raise that issue in that appeal, *see* Opening Br. 11, *California v. Azuma Corp.*, No. 23-16200 (9th Cir. Jan. 12, 2024), DktEntry: 16. After oral argument on July 19, 2024, this Court affirmed the preliminary injunction in a memorandum opinion dated September 10, 2024, 2-ER-50–61, and Defendants' petitions for rehearing and rehearing *en banc* were denied with no judge requesting a vote, Order 1, *California v. Azuma Corp.*, No. 23-16200 (9th Cir. Oct. 29, 2024), DktEntry: 46.

B. Motion to Dismiss

During the litigation over the preliminary injunction, Defendants also filed a motion to dismiss in the district court, seeking to dismiss all claims against all defendants. 2-ER-102–03. On January 24, 2024, the district court issued an order granting in part and denying in part that motion. 1-ER-13. On the basis of sovereign immunity, it dismissed with prejudice all of the State's claims against

Azuma, 1-ER-7, and dismissed without prejudice the State's claims against the individual Defendants arising under the Contraband Cigarette Trafficking Act ("CCTA") and the Civil Racketeering Influenced Corrupt Organizations Act ("Civil RICO") for failure to state a claim. 1-ER-9, 13. Incorporating unchanged the analysis of *Ex parte Young* from its preliminary injunction analysis, 1-ER-8, the district court, however, denied the motion as to the PACT Act claims against Defendants in their official capacities, 1-ER-8–9. The district court also found that Defendants failed to meet their burden of demonstrating they were entitled to qualified immunity and denied the motion as to the personal capacity PACT Act claims as well. 1-ER-11.

On February 7, 2024, Defendants appealed those denials. 3-ER-399. And in the meantime, the State filed a First Amended Complaint, retaining the PACT Act claims the district court previously held could go forward, realleging the CCTA and Civil Rico claims, and dropping its state law claims. 2-ER-77–81; *see also* Opening Br. 29 n.4. Defendants declined to file an answer or otherwise respond to the personal capacity CCTA and Civil RICO claims in the First Amended Complaint and continued to report on the docket (pursuant to the district court's contempt sanctions order) that the company had made no reportable cigarette sales since February 2024. *See, e.g.*, SER-26–57. Upon discovery that those reports were incorrect—that in fact, Defendants had sold nearly 30 *million* additional cigarettes,

still without licenses, without collection of tax, and without disclosure of its distributions under state law or the PACT Act itself, SER-6—Plaintiff submitted a notice of violation of the district court's preliminary injunction, SER-22.

The district court held a hearing on February 13, 2025, and adjudication of Rose's further contempt remains pending as of the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court already held that the State has demonstrated "likelihood of success on the merits of its PACT Act claim" in its opinion upholding a preliminary injunction based on that claim. 2-ER-58. Nonetheless, Defendants now challenge the district court's denial of their motion to dismiss that claim. In this second appeal, Defendants ask the Court to hold them immune to state enforcement in both their official and personal capacities for their clear violations of the PACT Act. That challenge should fail.

Appellants first claim that they cannot be enjoined under *Ex parte Young* for violations of the PACT Act. Though the district court issued the preliminary injunction pursuant to *Ex parte Young*, and though Appellants argued against its application to the PACT Act in the district court, *see* 1-ER-20–23, Appellants did not raise the issue in their first appeal. Their challenge to *Ex parte Young* is accordingly waived. *See United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998)

("When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter.").

Not only waived, their challenge is also incorrect. The PACT Act confirms the availability of *Ex parte Young* as an enforcement mechanism by creating a broad cause of action, 15 U.S.C. § 378(c)(1)(A), empowering district courts to fashion broad remedies, *id.* § 378(a), (c)(1)(A), and including a specific provision maintaining the existing contours of sovereign immunity, *id.* § 378(c)(1)(B). Those existing contours include the ability to file "suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) (emphasis removed).

Appellants next argue that qualified immunity bars personal liability under the PACT Act. However, qualified immunity is inapplicable to the PACT Act because the Act's clear language provides "fair warning," *United States v. Lanier*, 520 U.S. 259, 270 (1997), of what it prohibits. Nor can these Appellants seriously contend that they did not know their activities were illegal, after receiving repeated warnings from both the federal and California governments—including the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), who administers the Act—that their cigarette operations were illegal. Doing precisely what the PACT Act prohibits, Appellants are not entitled to qualified immunity.

STANDARD OF REVIEW

Ordinarily, issues of tribal sovereign immunity and qualified immunity are reviewed *de novo*. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007) (tribal sovereign immunity); *Robinson v. Prunty*, 249 F.3d 862, 865–66 (9th Cir. 2001) (qualified immunity). However, issues that could have been raised in a prior appeal are waived unless "there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice." *Jenkins v. County of Riverside*, 398 F.3d 1093, 1094 n.2 (9th Cir. 2005).

ARGUMENT

I. *EX PARTE YOUNG* APPLIES TO THE STATE'S PACT ACT CLAIMS AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITIES

"Under the doctrine of *Ex Parte Young*, immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). "This doctrine has been extended to tribal officials sued in their official capacity such that 'tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.'" *Id.* (quoting *Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)); *see also Michigan v. Bay Mills Indian Cmty.*, 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)). Thus, tribal sovereign immunity does not apply to tribal officers so long as the plaintiff has "alleged an ongoing violation of federal law and seeks prospective relief." *Vaughn*, 509 F.3d at 1092 (emphasis removed).

Both of those conditions are easily satisfied here—Azuma has been violating the PACT Act since it first began distributing cigarettes, and those violations have continued for years. (Indeed, they continued even after the district court enjoined them and again after it held Defendant Rose in contempt for violating the court's injunction.) Thus, *Ex parte Young* provides a proper mechanism for enforcement of the PACT Act against Appellants in their official capacities as officers of Azuma and of the Tribe. Additionally, Defendants could have, but did not, raise their *Ex parte Young* arguments on appeal when they challenged the preliminary injunction that rested on that theory. They have accordingly waived the issue, and their belated arguments should be rejected for that reason as well.

A. Defendants have waived their sovereign immunity arguments

"When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter." *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998). Indeed, such issue "is waived." *Jimenez v. Franklin*, 680 F.3d 1096, 1099 (9th Cir. 2012); *see also JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 532 (6th Cir. 2008) ("The law-of-the[-]case

doctrine bars challenges to a decision made at a previous stage of litigation which could have been challenged in a prior appeal, but were not.").

Appellants explain that this Court "did not address the *Ex parte Young* issue" that they now raise in their prior appeal of the district court's preliminary injunction. Opening Br. 28. That is because Appellants did not raise it.[2] *See* Opening Br. 11, *California v. Azuma Corp.*, No. 23-16200 (9th Cir. Jan. 12, 2024), DktEntry: 16. Appellants, however, had the opportunity to do so. *Ex parte Young* undergirded the district court's injunction order. *See* 1-ER-20–23. Indeed, the order they challenge in this appeal adopted that same reasoning without modification. *See* 1-ER-8 ("As the court found in its prior order, the PACT Act does not preclude liability under *Ex parte Young*. The court will not revisit that argument here." (citation omitted)). There is thus no reason why Appellants could not have raised the issue in their appeal of the preliminary injunction order.

Waiver is particularly appropriate here, where the issue Appellants now raise appears to have been held in reserve specifically to enable this second appeal of the official-capacity PACT Act claim. Ordinarily, only final orders are appealable, *see* 28 U.S.C. § 1291, and courts of appeal have jurisdiction only over certain interlocutory orders such as preliminary injunctions, *see id.* § 1292(a)(1).

[2] Though the injunction ran only against Darren Rose in his official capacities, all Appellants in this appeal appeared in the appeal of that injunction and had the opportunity to raise the issue. *See* 2-ER-50.

However, "denial of a claim of tribal sovereign immunity is immediately appealable under the collateral order doctrine." *Vaughn*, 509 F.3d at 1091. And having reserved only that aspect of their challenge to the official-capacity PACT Act claim, it serves as the jurisdictional basis for the current appeal of that claim. *See* Opening Br. 14. Appellants' sandbagging thus appears aimed directly at generating this second appeal.

Aside from wasting the resources of this Court, permitting Appellants' second appeal has concrete effects in the district court as well. This is because the appeal has divested the district court of jurisdiction over the challenged claim. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Thus, this appeal has prevented the normal course of discovery into Rose and his co-defendant's violations, despite Rose's prior and current contempt of the preliminary injunction. Additionally, Defendants have attempted to modify their business to escape the language of the preliminary injunction, *see* SER-17–18, while maintaining this appeal to deprive the district court of jurisdiction. Defendants have notably not argued that their business is lawful under the PACT Act, but that the precise section the State moved for a preliminary injunction under is limited in its reach and circumvented by slight

changes in business activities.[3] *See* SER-18–19. The Court should not "encourage th[is] inefficient and uneconomical approach," *Jimenez*, 680 F.3d at 1100," by considering "the *Ex parte Young* issue" when Appellants could have, but did not, raise it in the first appeal.

Nor can Appellants claim that any of the exceptions to the law of the case doctrine apply here. They identify no "intervening change of controlling authority." *Jenkins v. County of Riverside*, 398 F.3d 1093, 1094 n.2 (9th Cir. 2005). They do not claim that "new evidence has surfaced." *Id.* And finally, they cannot show that failure to address "the *Ex parte Young* issue" now "would work a manifest injustice." *Id.* Tribal sovereign immunity "may be forfeited where the [sovereign] fails to assert it," *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (alteration in original), as Defendants have here, *see also id.* ("A defendant may . . . be found to have waived sovereign immunity if it does not invoke its immunity in a timely fashion and takes actions indicating consent to the litigation."). Instead, permitting Appellants' belated arguments would work injustice on the State, rewarding the delayed adjudication of Appellants' unlawful

[3] Notably, the State agreed to administratively close this appeal to facilitate settlement discussions after resolution of the preliminary injunction appeal, *see* Order 1, DktEntry: 11, only after Appellant Rose averred he "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-65. Nevertheless, Azuma's business records show distributions of over 30 million cigarettes since that declaration. SER-6.

business and imposition of permanent, comprehensive injunctive relief. *Cf. In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002) (finding waiver of sovereign immunity when the State delayed invoking the defense in "a tactical decision" that would have given it "an unfair advantage").

B. The PACT Act preserves *Ex parte Young* as an enforcement mechanism

Appellants' *Ex parte Young* arguments are wrong on the merits as well. As the district court recognized when it issued its preliminary injunction, the PACT Act preserves *Ex parte Young* as an enforcement mechanism. *See* 1-ER-22. First, the PACT Act establishes "a broad cause of action," 1-ER-22, enabling States to "bring an action in a United States district court to prevent and restrain violations of this chapter by any person or to obtain any other appropriate relief from any person for violations of [the Act]," 15 U.S.C. § 378(c)(1)(A).[4] The Act also significantly defines "person" broadly to include not just "an individual, corporation, company, association, firm, partnership, society . . . or joint stock company," but also sovereign entities, including an "Indian tribal government, [or] governmental organization of such a government." *Id.* § 375(11). The Act makes clear that district courts are unconstrained in creating appropriate remedies,

[4] Section 378(d) helps draw a meaningful contrast. Permitted manufacturers may enforce the PACT Act, but are not authorized to seek civil penalties and cannot pursue injunctive relief against any "State, local, or tribal government." 15 U.S.C. § 378(d).

broadly empowering them "to prevent and restrain violations of [the Act] by any person or to obtain any other appropriate relief from any person for violations of [the Act], including civil penalties, money damages, and injunctive or other equitable relief," 15 U.S.C. § 378(c)(1)(A); *see also id.* § 378(a) ("The United States district courts shall have jurisdiction to prevent and restrain violations of [the Act] and to provide other appropriate injunctive or equitable relief, including money damages, for the violations."). Thus, the PACT Act expressly enables precisely the kind of suit the State now brings against Defendants.

Second, to make clear that "pre-existing remedies and defenses are available," including *Ex parte Young*, 1-ER-22, the PACT Act goes further and states that nothing in the Act "shall be deemed . . . to restrict, expand, or modify any sovereign immunity of a State or local government or Indian tribe," 15 U.S.C. § 378(c)(1)(B). Thus, the PACT Act expressly affirms *Ex parte Young*'s relevance—including as to Indian tribes—by preserving the existing contours of sovereign immunity, which includes the availability of suits under *Ex parte Young* to constrain tribal officers' violations of federal law. *See Bay Mills*, 572 U.S. at 796 ("[A]nalogizing to *Ex parte Young*, tribal immunity does not bar . . . suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." (emphasis removed) (citation omitted)).

Starting with their preferred conclusion and working backwards, Appellants claim that the PACT Act imposes "remedial limitations." Opening Br. 40. But as explained above, the text of the statute confirms the opposite—rather than "limit significantly" remedies for violations such that it displaces *Ex parte Young*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996), the PACT Act makes clear that district courts have broad discretion in fashioning appropriate remedies. And as the Supreme Court has explained, an act that "places no restriction on the relief a court can award" cannot be said to "impose . . . a liability that is significantly more limited than would be the liability imposed on the [government] officer under *Ex parte Young*" or otherwise displace *Ex parte Young* as an available remedy. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 647–48 (2002); *see also* 15 U.S.C. § 378(c)(1)(B) ("Nothing in [the PACT Act] shall be deemed to . . . expand . . . any sovereign immunity of a[n] . . . Indian tribe."); 1-ER-22. Congress is more than capable of providing carve-outs when it believes sovereign interests so require, as it did elsewhere in the PACT Act. *See, e.g.*, 15 U.S.C. § 377(a)(2) (exempting "State, local, [and] tribal government[s]" from criminal penalties).

Appellants also argue that allowing *Ex parte Young* claims against tribal officials for violations of the PACT Act would "enlarge state authority over Indian tribes" because the Act "takes the extraordinary step of incorporating state laws

into the federal statute and providing for their application against Indian tribes." Opening Br. 38. But PACT Act violations are nevertheless violations of federal law, and it is no expansion of state authority to retain the extant *Ex parte Young* doctrine to enjoin such violations. Additionally, even without the PACT Act, tribal officials may be subject to suits under *Ex parte Young* for violations of state law. *See Bay Mills*, 572 U.S. at 795–96 (explaining that Michigan could "bring suit against tribal officials or employees . . . seeking an injunction for" violations of state law).[5] Thus, whether operating under the PACT Act or directly under the state laws it incorporates, state authority to enforce its laws against tribal officers remains essentially the same.

Finally, Appellants are left to argue that by providing States with an avenue to encourage federal enforcement, the PACT Act impliedly displaces the remedies the Act expressly preserves. *See* Opening Br. 39 (citing 15 U.S.C. § 378(c)(2)). But

[5] While the district court disagreed that *Bay Mills* held that tribal officials are subject to suit under *Ex parte Young* for violations of state law, 2-ER-44–49, and the Ninth Circuit has not yet spoken on the topic, every other circuit that has addressed the question has held the opposite, *see Hengle v. Treppa*, 19 F.4th 324, 345 (4th Cir. 2021) ("Tribal sovereign immunity does not bar state law claims for prospective injunctive relief against tribal officials for conduct occurring off the reservation."); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019); ("[T]he Supreme Court has already blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law."); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015) ("[T]ribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands.").

that referral provision merely authorizes the provision of information to the U.S. Attorney General to aid in the United States's own independent enforcement authority. *See* 15 U.S.C. § 378(c)(2) (enabling the United States to "take appropriate actions to enforce" the Act). Reading it as an "express and specific remedial scheme" applicable "primarily" to Indian tribes, Opening Br. 39, contradicts the language of the Act. The PACT Act does not separately define which persons are "not subject to State . . . enforcement actions," 15 U.S.C. § 378(c)(2), but instead explicitly refers to existing law, *see id.* § 378(c)(1)(B) ("Nothing in this chapter shall be deemed to abrogate . . . restrict, expand, or modify any sovereign immunity of a[n] . . . Indian tribe."). And as explained above, that existing law includes suits "for prospective relief against tribal officers allegedly acting in violation of federal law." *Vaughn*, 509 F.3d at 1092.[6]

[6] Nor does the use of *Ex parte Young* render the information sharing provision meaningless, as Appellants imply. *See* Opening Br. at 36–37 (claiming that "immune Indian tribes would seem to be the primary type of person referenced in this provision"). As related to tribal sovereign immunity, the provision allows States to provide information to the U.S. government to pursue remedies the State is barred from obtaining under *Ex parte Young*. Under that doctrine, the State can only name tribal officials and is barred from seeking any remedy other than forward-facing injunctive relief aimed at compliance. The U.S. government, on the other hand, can bring suit against tribes and tribal entities themselves, and can obtain not just forward-facing injunctive relief, but also civil penalties, 15 U.S.C. § 377(b), and money damages, *id.* § 378(a).

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants are not entitled to qualified immunity for their clear violations of the PACT Act. Qualified immunity protects government officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). And in evaluating claims for qualified immunity, the analysis must be "'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Rather than engaging in such particularized analysis—either as to the facts or as to the PACT Act—Appellants claim they are entitled to qualified immunity unless the State "show[s] not only that Azuma and [its] Tribal Retailer[customers] were obliged to adhere to California's regulatory and taxation requirements, but also that . . . such obligations were beyond dispute." Opening Br. 55–56. Thus, without a single reference to the PACT Act, *see id.* at 55–69 (section claiming the law is not "clearly established"); *id.* at 10–12 (table of authorities), Appellants claim that any ambiguity as to how any of the state law incorporated by that Act applies to any of their transactions would render all of their conduct immune from monetary penalties under any statute.[7] That is not the law.

[7] While Appellants' scattershot approach takes aim not just at the PACT Act, but also at the CCTA and Civil RICO, no claims under those statutes are before the (continued…)

A. The PACT Act itself provides fair warning of the conduct it prohibits

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). But "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow v.*

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court, *see supra* pp. 9–10, and are not addressed here, *cf. Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 214 (5th Cir. 2009) (reviewing denial of qualified immunity on some claims, but not on the claim the district court dismissed without prejudice). Appellants appear to take issue with the district court granting leave to amend the State's CCTA and Civil RICO claims, *see* Opening Br. 29, but allowing amendment is not an appealable final order and thus also not properly before this Court, *cf. Greenspring Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064, 1068 (9th Cir. 2010) ("An order dismissing a case with leave to amend may not be appealed as a final decision under § 1291.").

Nor did the district court broadly "hold[] that Defendants were not entitled to qualified immunity 'for violating federal and state laws'" as Appellants claim. Opening Br. 17 (quoting 1-ER-11). Instead, the district court merely explained that "Defendants d[id] not cite, nor c[ould] the court find, any authority extending qualified immunity to tribal officers sued in their personal capacities for violating federal and state laws." 1-ER-11.

Appellants thus appear to ask this Court to provide what would amount to an advisory opinion as to whether qualified immunity is hypothetically available under the CCTA and Civil RICO without a live claim or controversy or a specific theory of liability. *See White*, 580 U.S. at 79 (explaining that a qualified immunity analysis "must be 'particularized' to the facts of the case"). Lying beyond the scope of this appeal, the Court should disregard Appellants' arguments relating to those claims.

Fitzgerald, 457 U.S. 800, 819 (1982). That is because qualified immunity does not protect "those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.").

Qualified immunity is thus "the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 520 U.S. 259, 270–71 (1997). In the face of constitutional or statutory rights, the "clearly established" prong of the analysis looks often to caselaw, which has been "elaborate[ed] from case to case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). But where a statute proscribes specific conduct, such elaboration through caselaw is typically unnecessary. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("[I]n an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law."). Instead, the statute itself is most often sufficient to provide sufficient "fair warning." *See Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[C]lear violation of the statute or regulation forfeits immunity . . . with respect to damages caused by that violation.").

The PACT Act, clearly delineating the conduct it proscribes, provides such "fair warning." Among other things, the PACT Act federalizes state cigarette laws by regulating "delivery sales" and "delivery sellers" *See* 15 U.S.C. § 376a(a); Opening Br. 38. A "delivery seller" is defined as "a person who makes a delivery sale," 15 U.S.C. § 375(6), which is itself defined as the sale of cigarettes to a "consumer" where the buyer and seller are not in the physical presence of each other when the order is made or the seller takes possession of the cigarettes, *id.* § 375(5). Consumers are, in turn, broadly defined to include "any person that purchases cigarettes," unless such person is "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes." *Id.* § 375(4); *see also* SER-134 ("[T]he phrase 'lawfully operating' includes compliance with State and Federal law as well as Tribal law."). All such sales must "comply with . . . all State, local, tribal, and other laws generally applicable to sales of cigarettes . . . as if the delivery sales occurred entirely within the specific State and place." *Id.* § 376a(a)(3). Such sales must also comply with specific shipping requirements, *id.* § 376a(a)(1), (b), recordkeeping requirements, *id.* § 376(a)(2), (c), and tax collection requirements, *id.* § 376a(a)(4), (d).

Not only can States enforce such requirements directly, *see id.* § 378(c)(1)(A), but the PACT Act also requires the U.S. Attorney General to maintain a list of sellers who do not comply with the Act, *id.* § 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-29 (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). Mirroring the Act's regulation of "delivery sales," this prohibition applies not only to anyone "who receives the list," but also anyone who "delivers cigarettes . . . to consumers." 15 U.S.C. § 376a(e)(2)(A); *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).

ATF determined that Azuma is operating in violation of the PACT Act and accordingly placed Azuma on the PACT Act non-compliant list. SER-79–80; 3-ER-350; *see also* 3-ER-362 (ATF finding, among other things, that Azuma violated the PACT Act because it "shipped cigarettes into the State of California that are untaxed, [and] unstamped . . . to unlicensed entities"). Azuma's deliveries are therefore subject not only to the PACT Act provisions applicable to all delivery

sales, but also to the Act's delivery prohibition applicable to listed entities. *See* 15 U.S.C. § 376a(e)(2)(A).

The State properly alleges—and Appellants do not dispute—that Azuma, acting through its officers, continued to deliver cigarettes despite its placement on the non-compliant list, and has otherwise failed to comply with any of the requirements for delivery sales. 3-ER-292–93. In the context of the existing preliminary injunction, both the district court and this Court have already found that Azuma is subject to the PACT Act's proscriptions by finding it "deliver[s] cigarettes to 'consumers'" as it is defined under the PACT Act. 1-ER-31; *see also* 2-ER-55. This is because, echoing ATF's findings in placing Azuma on its non-compliant list, Azuma's customers "do not have licenses as required by the Licensing Act or the Tax Law." 1-ER-31–32; *see also* 2-ER-55 ("[T]he Tribal Retailers that operate smoke shops without remitting taxes or holding the requisite state licenses are 'consumers' under the PACT Act."); SER-133 ("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 . . . ."). By directing Azuma to continue to do what the PACT Act prohibits, Appellants have clearly violated the PACT Act and are not entitled to qualified immunity.

B. Potential application of an affirmative defense does not make a statute any less clear

Azuma has repeatedly admitted that both it and its customers do not comply with state cigarette laws, claiming instead that federal Indian law should preclude state authority. Because this claim of preemption has not been adjudicated, Appellants argue, it is not "clearly established" that Azuma's business is unlawful. *See* Opening Br. 55–56. Not only are Appellants incorrect—decades of Supreme Court precedent makes clear that Azuma's customers *are* subject to California's cigarette tax, licensing, and recordkeeping laws, *see infra* pp. 32–38—their claim amounts only to an affirmative defense, which does not obfuscate the PACT Act's clear language or otherwise negate its "fair warning."

As both this Court and the district court explained, the PACT Act applies a burden-shifting framework. "California must first show the statute applies to defendants." 1-ER-30; *accord* 2-ER-56 ("California bears the initial burden to show a likely violation of the PACT Act."). Then "the burden shifts to defendants to show the tribal retailers are in fact operating lawfully, either because they are complying with applicable state laws, or because the state laws do not apply to them." 1-ER-30; *accord* 2-ER-57 ("The burden then shifts to the Defendants to show that the Tribal Retailers are operating lawfully."). Thus, any argument that federal law preempts relevant state law as to Azuma's customers "is best understood as an affirmative defense." 1-ER-29.

The potential application of an affirmative defense does not make the underlying statute vague or otherwise negate the "fair warning" of what the statute proscribes. *See Anderson v. Morrow*, 371 F.3d 1027, 1032 (9th Cir. 2004) (rejecting criminal defendant's contention that invocation of an affirmative defense makes statute no longer "clear on what it prohibits"). Instead, in the case of an affirmative defense, the burden rests on the defendant to prove that it applies. *See United States v. Carey*, 929 F.3d 1092, 1098 (9th Cir. 2019) ("[I]f a statute includes an exception to criminal liability separate from the elements of the offense—in other words, an affirmative defense—then a defendant, not the government, must prove the exception beyond a reasonable doubt." (citation omitted)); 1-ER-29 ("[T]he burden is on defendants to show the exception applies to them."). To hold otherwise would essentially immunize all government officials from civil liability in their personal capacities—a defendant would need only to identify one affirmative defense that might apply in order to render him- or herself immune from suit. Accordingly, though Appellants are incorrect in contending that State cigarette laws might be wholly preempted as to some of its customers, *see infra* pp. 32–38, crediting their argument would not entitle them to qualified immunity either.

C. The law foreclosing Appellants' preemption affirmative defense is clearly established

1. The contours of state cigarette law applied to tribal entities has been clearly established for decades

Appellants also cannot seriously contend that their conduct is lawful—this Court's decision involving Azuma's former sub-distributor in *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (2021), makes clear that it is not. To confuse the question, Appellants focus only on their conduct on the Alturas Indian Rancheria and their customers' land to argue in favor of *Bracker* balancing in an attempt to muddy the relevant law. *See* Opening Br. 55–62 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)). But they ignore the portions of their deliveries that take place entirely off of Indian land, rendering *Bracker* inapplicable. *See id.* at 57 (addressing only "Azuma activities within the Alturas Indian Rancheria" and their customers' "conduct within their respective reservations"). It has been clearly established since before 1973 that Indians traveling outside their Indian country are subject to "nondiscriminatory state law otherwise applicable to all citizens of the State," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973), and clearly established since 1994 that state cigarette laws apply to cigarettes en route to Indian country, *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 67, 78 (1994). The Ninth Circuit recently agreed, using this clearly established law to affirm that California's "Directory

Statute and California's licensing, recordkeeping, and reporting requirements" properly apply to a tribal business traveling off reservation to sell to Indians on other tribes' land. *Big Sandy*, 1 F.4th at 728; *see also id.* at 729 ("In these circumstances, the district court properly declined to balance federal, state, and tribal interest under *Bracker*."); *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1334 (E.D. Cal. 2019) (characterizing the tribal business's arguments to be an "attempt to retread old ground"). Defendants' attempt to resurrect those long-since rejected arguments here does not change the fact that the relevant law is well-established. *Cf. United States v. Laurienti*, 611 F.3d 530, 542 (9th Cir. 2010) (holding that a statutory interpretation that "flows naturally" from Supreme Court precedent does not violate the "fair warning requirement"). Defendants' business is clearly unlawful, and they are not entitled to qualified immunity under the state and federal laws aimed at such conduct.

2. Shifting the focus to Azuma's customers does not make the relevant law any less clear

Unable to claim that their own conduct is lawful, Appellants posit that some of their sales to some of their customers may—when fully considered—fall beyond the reach of the State. Specifically, they argue that "[a] key issue in this case . . . is whether the Tribal Retailers to whom Azuma has sold cigarettes are 'lawfully operating' as retailers," Opening Br. 20, and thus the State must "show not only that . . . the Tribal Retailers were obliged to adhere to California's regulatory and

taxation requirements, but also that . . . such obligations were beyond dispute," *id.* at 55–56. While Appellants misstate the relevant standard, *see supra* pp. 24–30, the answer they reach is also wrong—in fact, decades of precedent *have* put it "beyond dispute" that Azuma's customers are not "lawfully operating."

"[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. 16 (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-34 (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. 59. Because "nonmembers are not constituents of the governing

Tribe," nonmember Indians "stand on the same footing as non-Indians" in this analysis. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980); *see also Big Sandy*, 1 F.4th at 726 (citing *Colville*, 447 U.S. at 161).

The Supreme Court made clear nearly 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 invokes has already been done. The Supreme Court conducted such balancing in *Moe* to hold that States can impose "minimal burden[s]" on tribal businesses "to avoid the likelihood that in [their] absence non-Indians [or non-member Indians] purchasing from the tribal seller will avoid payment of a concededly lawful tax." 425 U.S. at 483; *see also* 1-ER-33–34. 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.

The Ninth Circuit considered whether the California tax and licensing scheme is properly applied as a "minimal burden" to Indian businesses in *Big Sandy*. 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."'" *Big Sandy*, 1 F.4th at 731 (quoting *Big Sandy Rancheria Enters. v Becerra*, 395 F. Supp. 3d at 1332–33) (citing *Milhelm*, 512 U.S. at 64–67, 76; *Colville*, 447 U.S. at 159–60).[8]

Appellants point to this Court's prior decision upholding a preliminary injunction that bars Azuma's deliveries as demonstrating that "the public officials making decisions for Alturas and Azuma were not doing so in an area where the correct answer was clearly established." Opening Br. 62. Appellants, however, misread this Court's opinion. Indeed, nothing in the Court's prior opinion diverges from *Big Sandy* or the decades of Supreme Court precedent it applied. The Court did not state it was "unclear" whether State had authority to impose its licensing, recordkeeping, and reporting regime on tribal sellers. Instead, the Court merely

[8] Appellants imply that some of their customers' gaming compacts under the Indian Gaming Regulatory Act ("IGRA") change the analysis. *See* Opening Br. 18–19. But those compacts simply make clear that they provide no independent basis for state regulatory authority over tobacco, without disturbing existing bases for that authority. *See* 2-ER-108 ("[N]othing herein shall be construed to make applicable to the Tribe any state laws, regulations, or standards governing the use of tobacco.").

stated it was unclear whether "some of the Tribal Retailers" Azuma delivers cigarettes to are "subject to California's requirement that [they] collect and remit taxes for the sale of tobacco products." 2-ER-57. The State has never disputed that some of Azuma's customers might conduct only tax-exempt sales. Rather, as the *Big Sandy* Court explained, the Supreme Court has made clear that "minimal burdens may be imposed on Indian businesses that . . . purport to engage only in tax-exempt transactions." 1 F.4th at 731 (citing *Milhelm*, 512 U.S. at 76; *Colville*, 447 U.S. at 159–60). None of Azuma's customers comply with those minimal burdens and their status as unlawfully operating is therefore beyond dispute. [9]

[9] Nor does the Court's previous statement that it declined to "decide whether the Tribal Retailers . . . are illegally buying cigarettes" due to their lack of license, 2-ER-59, affect the analysis. *Contra* Opening Br. 62. The Court did not take up the question because it instead found the State had demonstrated a likelihood of success on the merits solely by demonstrating that none of Azuma's customers collected or remitted taxes. *See* 2-ER-58–59.

Regardless, it is similarly "beyond dispute" that Azuma's customers are operating unlawfully by purchasing cigarettes from Azuma, an unlicensed manufacturer. Appellants claim that the licensing law's exemption for sales 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), says otherwise, Opening Br. 24. But 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, *see id.* § 22980.1(a) ("A manufacturer . . . shall not sell cigarettes . . . to a distributor, wholesaler, retailer, or any other person who is not licensed pursuant to this division . . . ."). Appellants' also claim that a bill analysis means that "[r]etailers on Indian reservations . . . are not subject to the licensing requirements of the [Licensing Act]." Opening Br. 24 (alterations in original). This is also incorrect. A bill analysis does not change the plain meaning of the statute itself. *See In re A.N.*,

(continued…)

Appellants baldly claim that *Big Sandy* does not apply here, because it "arose under distinguishable circumstances." Opening Br. 65. 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 operating on those other retailing tribes' land. 1 F.4th at 718. And like Azuma, the tribal seller in *Big Sandy* attempted to invoke the sovereignty of its customers to immunize its sales from state regulation. *Id.* at 729. 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. 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

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9 Cal. 5th 343, 352 (2023) ("We start with the statute's words, which are the most reliable indicator of legislative intent."). 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. 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. Appellants were specifically advised that their "inter-tribal" business model would run afoul of state law. *See supra* pp. 5–7. And as explained above, *supra* pp. 35–36, licensing and reporting constitute a permissible "minimal burden" properly imposed on on-reservation retailers to ensure the collection of lawfully imposed taxes for sales to non-members.

(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). Thus, not only does *Big Sandy* demonstrate that the relevant law is clearly established, the Supreme Court precedent the Court relied on itself clearly established the relevant law.

3. Defendants' cigarette business is unlawful, and no tribal official in Defendants' position could reasonably understand otherwise

Rather than "an extraordinary escalation by California in the longstanding jurisdictional clash between Indian tribes and states," Opening Br. 53, this action instead is aimed at individuals whose unlawful cigarette business has already resulted in hundreds of thousands of dollars in penalties, and who, in response, have attempted to escape further liability by cloaking their activities in tribal sovereignty. Thus, Defendants in particular could not reasonably understand their cigarette business was not unlawful. *Cf. Harlow*, 457 U.S. at 821 (Brennan, J., concurring) (explaining that the qualified immunity standard does not allow "the official who *actually knows* that he was violating the law to escape liability for his actions"). Rose has engaged in the unlawful sales of contraband cigarettes since at

least 2009. 3-ER-285. After notification from both the State and the federal government that his tobacco operations were unlawful, the Shasta County Superior Court imposed $765,000 in fines against Rose and enjoined him from selling cigarettes to non-members of the Alturas Tribe. *Id.* As the California Court of Appeal recognized in affirming the judgment against Rose, his sales off of his tribe's land made him "stand[] on the same footing as non-Indians for the purpose of determining whether the state can assert its civil/regulatory authority over him," and thus California's Directory Statute and cigarette tax applied. *People ex rel. Becerra v. Rose*, 16 Cal. App. 5th 317, 329 (2017). It beggars belief that someone already held personally liable for violating these exact laws could reasonably understand Azuma's sales to not also be unlawful. The same can be said of Phillip Del Rosa, who was also fully aware of that prior litigation. *See* 3-ER-326 ("[Rose] and Phillip Del Rosa have elected not to authorize [Rose's salary] payments pending the outcome of this matter.").

Rose and Del Rosa undoubtedly should have been "expected to know that [their] conduct would violate" the law and "should [have been] made to hesitate." *Harlow*, 457 U.S. at 819. Rather than hesitate, Rose and Del Rosa continued their conduct in the face of warnings from State and ATF, listing on the PACT Act non-compliant list, and repeatedly rejected attempts to be removed from that list. *See* 3-

ER-289–91. California accordingly "ha[s] a cause of action" against them. *Harlow*, 457 U.S. at 819.

D. Defendants have not demonstrated that qualified immunity applies to state enforcement actions

Qualified immunity protects government officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 555 U.S. at 231. And while officials are accorded "breathing room to make reasonable but mistaken judgments about open legal questions," *Ziglar v. Abbasi*, 582 U.S. 120, 150–15; *see also* Opening Br. 42, qualified immunity does not protect those who brazenly do what statutes strictly forbid them from doing. As the district court explained, "California is not seeking damages for violation of its rights." 1-ER-10–11. "Rather, it is seeking to enforce Federal . . . laws." 1-ER-11. Because the persons asserting the defense "bear the burden of showing qualified immunity shields them from liability," 1-ER-10 (citing *Forrester v. White*, 484 U.S. 219, 224 (1988)), and Appellants "d[id] not cite . . . any authority extending qualified immunity to tribal officers sued in their personal capacities for violating federal and state laws," the district court correctly found that Appellants failed to demonstrate they were entitled to qualified immunity, 1-ER-11. Accordingly, it held that "[t]he PACT Act claim . . . brought against them in their personal capacities may proceed." 1-ER-11.

On appeal, Appellants (still) have not cited any authority extending qualified immunity to state enforcement of proscriptive federal statutes. Indeed, every case Appellants cite in support of their claim that qualified immunity is available in such instance involves private plaintiffs and fall into the familiar "violation of rights" pattern that the district court found inadequate. *See* Opening Br. 50; *Brown v. Nationsbank Corp.*, 188 F.3d 579, 588 (5th Cir. 1999) (claim based on "the intangible right of honest services"); *Cullinan v. Abramson*, 128 F.3d 301, 309 (6th Cir. 1997) (claim based on right "not to be victimized by patterns of racketeering activity"); *BEG Investments, LLC v. Alberti*, 34 F.Supp.3d 68, 81 (D.D.C. 2014) (business claiming violation of its "statutory rights under RICO").[10] In this Court, Defendants have again failed to meet their burden of demonstrating that qualified immunity applies to state enforcement actions of proscriptive federal statutes, and their appeal fails for that reason as well.

[10] Appellants also cite *Watson v. Florida Judicial Qualifications Commission*, 746 Fed. App'x 821 (11th Cir. 2018), but that case does not address qualified immunity at all. Instead, it affirmed dismissal of a Civil RICO action based on absolute immunity. *See id.* at 826. Defendants did not raise absolute immunity in the district court, nor do they raise it in this Court. Similarly, *Kaul v. Christie*, 372 F.Supp.3d 206, 245 (D.N.J. 2019), found the question of applying qualified immunity to "violations of federal statutes" to be "academic" as plaintiff failed to state a claim, *id.* at n.38.

CONCLUSION

Not only is *Ex parte Young* a proper PACT Act enforcement mechanism against tribal officials in their official capacities, Appellants' failure to raise the question in their prior appeal effected a waiver of any argument sovereign immunity applies. The relevant law is also clearly established, and Appellants are properly held liable for their PACT Act violations in their personal capacities. Accordingly, the Court should affirm the district court's denial of Appellants' motion to dismiss the State's PACT Act claims against them in both their official and personal capacities.

Dated: March 12, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-698

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