No. 24-698

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, ex rel. ROB BONTA, in his official capacity as Attorney General of the State of California,

Plaintiff-Appellee,

v.

PHILIP DEL ROSA, in his personal capacity and official capacity as Chairman of the Alturas Indian Rancheria; DARREN ROSE, in his personal capacity and official capacity as Vice-chairman of the Alturas Indian Rancheria; and WENDY DEL ROSA, in her official capacity as Secretary-Treasurer of the Alturas Indian Rancheria,

Defendants-Appellants.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, Rule 26.1, Appellants certify by and through their counsel of record that no nongovernmental corporation is a party to this appeal.

Dated: January 10, 2025

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By: *s/ Tim Hennessy*

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STATEMENT OF JURISDICTION

Plaintiff-Appellee State of California asserted the district court had federal question jurisdiction and supplemental jurisdiction over the action. 28 U.S.C. §§ 1331, 1367(a).

The order denying in part Defendants-Appellants' motion to dismiss is appealable under the collateral order exception to the final judgment rule, 28 U.S.C. § 1291, because the district court denied Appellants' claim that, notwithstanding the *Ex parte Young* exception, tribal sovereign immunity barred the claims against them in their official capacities, and denied Appellants' claim of qualified immunity as to the claims against them in their personal capacities. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090-91 (9th Cir. 2007) (applying collateral order doctrine to denial of claim of tribal sovereign immunity and application of *Ex parte Young*); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 587 (9th Cir. 2008) (applying collateral order doctrine to order denying qualified immunity).

The appeal is timely pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. The order appealed from was entered on January 24, 2024, and the notice of appeal was filed 14 days later, on February 7, 2024.

ISSUES PRESENTED

Appellants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa are, respectively, the Chairman, Vice-chairman, and Secretary-Treasurer of the Alturas

Indian Rancheria ("Tribe"), a federally recognized Indian tribe with reservation land in Modoc County, California.

The Tribe owns Azuma Corporation ("Azuma"). Azuma manufactures cigarettes on the Tribe's reservation. Before it was enjoined in this action from making deliveries, Azuma sold and delivered those cigarettes to tribally owned retailers located on other Indian reservations in California.

California sued, alleging violations of federal and state laws that regulate cigarette sales. The suit names Rose and the Del Rosas in their official capacities as government officials of the Tribe, seeking injunctive and declaratory relief. The suit also names Rose and Phillip Del Rosa in their personal capacities, seeking money damages and civil penalties against them personally for their conduct as tribal officials. The questions presented are:

1. Whether the Prevent All Cigarette Trafficking Act of 2009, or "PACT Act," Pub. L. 111-154, 124 Stat. 1087, precludes California's official-capacity action against tribal government officials under the *Ex parte Young* exception to sovereign immunity, *see Ex parte Young*, 209 U.S. 123 (1908); and

2. Whether the tribal government officials sued in their personal capacities are entitled to qualified immunity from California's civil statutory enforcement claims.

STATEMENT OF THE CASE

I. Introduction

The Alturas Indian Rancheria, located on a 20-acre reservation in the rural northeastern corner of the state, is one of the smallest, most remote federally recognized Indian tribes in California. To fund its governmental programs and reduce its reliance on federal aid, the Tribe engages in a variety of commercial activities, including the on-reservation cigarette manufacturing conducted by Azuma. The tribe-owned corporation, Azuma, manufactures cigarettes on the Tribe's reservation. Before the district court issued a preliminary injunction in this case, Azuma delivered those cigarettes directly to tribe-owned retailers operating in the Indian Country of their respective Tribes, pursuant to tribal law.

This case involves California's effort to extend its tobacco licensing laws to inter- and intra-tribal commerce occurring within Indian Country, where state civil regulatory laws presumptively do not apply because they infringe the right of Indian tribes to govern their own conduct within their reservations. California sued Azuma and the members of the Tribal government for alleged violations of the PACT Act and the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2342. Both federal laws require compliance with *applicable* state cigarette laws. A primary issue in the case, therefore, is whether state cigarette laws apply under the circumstances. California also alleged civil violations of the Racketeer Influenced

and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c), predicated on the alleged CCTA violations. In addition, it made claims for violations of state laws, specifically the "Directory Statute," Cal. Rev. & Tax. Code § 30165.1(e)(2) & (3), and the "Escrow Statute," Cal. Health & Safety Code § 104557(a).

The district court granted in part and denied in part Defendants' motion to dismiss. The court permitted California to proceed with its PACT Act claim against the Tribe through naming the tribal officials as defendants, holding the PACT Act does not foreclose the use of the *Ex parte Young* doctrine. 1-ER-8-9; *see also* 1-ER-20-23. The court also allowed California to proceed with its personal capacity claims, holding that Defendants were not entitled to qualified immunity "for violating federal and state laws," as distinct from violating "statutory or constitutional rights." 1-ER-10-11.

These aspects of the district court's order should be reversed.

II. Background.

A. Factual Background

Alturas Indian Rancheria is a federally recognized Indian Tribe. Indian Entities Recognized…, 89 Fed. Reg. 99899 (Dec. 11, 2024). The Tribe is governed by a three-member Business Committee comprised of Defendants-Appellants Phillip Del Rosa, Darren Rose, and Wendy Del Rosa. *See* Declaration of Philip Del Rosa ("Del Rosa Decl."), 2-ER-105-106; Complaint, 3-ER-281.

Azuma manufactures cigarettes under a federal permit issued by the United States Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau. Azuma's cigarette factory is located on the Alturas Rancheria in Alturas, California. The land comprising the Alturas Rancheria is held by the United States in trust for the benefit of the Tribe. Azuma complies with all applicable federal tobacco product laws, the applicable tribal laws of the Alturas Indian Rancheria, and laws of the tribal jurisdictions into which it sells. *See generally* Declaration of Darren Rose ("Rose Decl."), 2-ER-159-164; Del Rosa Decl., 2-ER-106.

Azuma sells the cigarettes it makes to retailers that are wholly owned by other federally recognized Indian tribes ("Tribal Retailers"). The Tribal Retailers operate exclusively within their respective Indian Country inside the State of California. The Tribal Retailers are licensed and regulated by the laws of their respective tribes. *See* Declaration of Wendy Ferris ("Ferris Decl."), 2-ER-186-187.

The Tribal Retailers, in turn, sell the cigarettes at retail within their respective Indian Country. These sales occur exclusively at tribal commercial developments, including casinos owned and operated by their tribes. Ferris Decl., 2-ER-187-194; Del Rosa Decl., 2-ER-108. The tribal casinos are regulated by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. ("IGRA"), tribal gaming ordinances, and gaming compacts between California and the tribes. Ferris Decl., 2-ER-187-194; Del Rosa Decl., 2-ER-107-108. The gaming compacts approved by the U.S.

Secretary of the Interior provide, "Nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco." Del Rosa Decl., 2-ER-107-108. These commercial developments were developed and are maintained and operated by each tribe. They were not developed simply to allow the sale of items such as cigarettes to take place on the reservations free of state taxes and regulation. Ferris Decl., 2-ER-187-194; Del Rosa Decl., 2-ER-107. Rather, they play a significant and active role in generating value on their respective reservations.

B. Statutory background.

1. PACT Act

The PACT Act generally requires persons who ship cigarettes or smokeless tobacco products in interstate commerce to report such shipments to the U.S. Attorney General and the tax administrator of the state into which the shipment is made. 15 U.S.C. § 376. The Act also requires "delivery sellers"—generally defined as persons selling to "consumers" through the internet and other remote means—to comply with certain requirements related to shipping, labeling, and recordkeeping, in addition to other tax, licensing, and minimum age requirements of the jurisdiction into which the products are shipped. 15 U.S.C. § 376a(a)-(c). The term "consumers" means any cigarette purchaser except any person "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes." 15 U.S.C. § 375(4).

A key issue in this case, therefore, is whether the Tribal Retailers to whom Azuma has sold cigarettes are "lawfully operating" as retailers. Since they are tribal entities located on their tribes' reservations, this issue turns on whether California's regulatory and tax laws apply to them.

Under the PACT Act, generally a state may bring a civil action in federal court for alleged PACT Act violations. 15 U.S.C. § 378(c)(1)(A). However, for "any person not subject to State … enforcement actions for violations of [the PACT Act]," a state "may provide evidence" of the alleged violation to federal officials, who "shall" then take appropriate enforcement actions. 15 U.S.C. § 378(c)(2). The Act states that "[n]othing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a[n] … Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a[n] … Indian tribe." 15 U.S.C. § 378(c)(1)(B).

Section 5 of the PACT Act also provides that the Act "shall [not] be construed to amend, modify, or otherwise affect" any limitations on tribal or state "tax and regulatory authority with respect to the sale, use or distribution of cigarettes … by or to Indian tribes, tribal members, tribal enterprises, or in Indian country[.]" PACT Act § 5(a)(3), 124 Stat. 1109-10, 15 U.S.C. § 375 Note. Section 5 further provides that "[a]ny ambiguity between the language of th[at] section or its application and

any other provision of th[e] Act shall be resolved in favor of this [S]ection [5]." *Id.* § 5(e).

2. CCTA

The CCTA makes it unlawful to "knowingly ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes[.]" 18 U.S.C. § 2342. The term "contraband cigarettes" is defined in the CCTA to mean more than 10,000 cigarettes "which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found," if a tax stamp or similar indicia of tax payment is required, "and which are in the possession of any person other than" certain categories of person authorized to possess unstamped cigarettes. 18 U.S.C. § 2341(2). These exempt categories include persons holding a federal permit to manufacture tobacco products or an agent of such person. 18 U.S.C. § 2341(2)(A).

Because cigarettes are deemed "contraband" under the CCTA only if they should, but do not, bear a state tax stamp, the CCTA claim presents the issue of whether California cigarette taxes must be paid on the cigarettes manufactured and sold by Azuma to the Tribal Retailers.

The CCTA provides that an action to "prevent and restrain violations" of the CCTA may be brought in federal district court by a State, a local government, or a federal tobacco permit holder. 18 U.S.C. § 2346(b)(1). However, no such action

may be commenced "against an Indian tribe or an Indian in Indian country." *Id.* The CCTA also cautions that its provisions do not "abrogate or constitute a waiver of any sovereign immunity of … an Indian tribe against any unconsented lawsuit under [the CCTA], or otherwise restrict, expand, or modify any sovereign immunity of … an Indian tribe." 18 U.S.C. § 2346(b)(2).

3. RICO

CCTA violations may serve as predicate acts of racketeering under RICO. 18 U.S.C. § 1961(1) (citing "sections 2341-2346 (relating to trafficking in contraband cigarettes)"). Under the RICO provision asserted in the Complaint, it is "unlawful for any person employed by or associated with any enterprise" in or affecting interstate commerce "to conduct or participate … in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c).

4. California Cigarette Laws

California's claims under the foregoing federal laws implicate a range of state civil regulatory and tax laws concerning cigarettes.

California imposes taxes on cigarettes at $2.87 per pack of twenty. *See* Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30131.2(a), 30130.51(a). California generally requires cigarette "distributors" to affix tax stamps and remit excise taxes

on each distribution of cigarettes. *Id.* §§ 30161, 30163.[1] However, "[t]he legal incidence of the tax falls on consuming purchasers if the vendors are untaxable," such as where the seller is an Indian in Indian country. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985); *see* Cal. Rev. & Tax. Code § 30107. In this circumstance, the state imposes on the seller not a tax but a "'pass on and collect' requirement" which is triggered if the purchaser is subject to tax. *Chemehuevi* at 12; *see* Cal. Rev. & Tax. Code § 30108(a). Further, if "the vendor is the type of entity on which the State cannot impose a collection requirement," then "the consumer has a duty to pay any tax directly" to the State. *Chemehuevi* at 12 (citing 18 Cal. Code Regs. § 4091); *see* Cal. Rev. & Tax. Code § 30187.

Additionally, an untaxable distributor is not required to pre-collect taxes in anticipation of a future taxable event, but collection instead occurs "at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his or her distribution of the cigarettes or tobacco products, at the time the purchaser becomes so obligated[.]" Cal. Rev. & Tax. Code § 30108(a). As a result, where neither the wholesale distributor or the retail distributor is taxable, state law does not require the wholesale distributor to collect or remit taxes; collection and remittance falls to the retailer in the event any of its

[1] Every person who sells, uses, consumes, or stocks untaxed cigarettes is a "distributor" under California law. *See* Cal. Rev. & Tax. Code §§ 30008, 30011.

sales are taxable. California's guide to taxation in Indian country confirms this, stating: "A Native American retailer in California who buys untaxed cigarettes without a California tax stamp … and sells them to non-Native Americans in Indian country is required to collect the cigarette … tax from those purchasers and pay the tax to CDTFA." 2-ER-228 (Cal. Dept. of Tax and Fee Admin., Pub. 146, *Sales to American Indians and Sales in Indian Country*, at 24 (Apr. 2022)).

California law also generally requires cigarette manufacturers, distributors and retailers to hold licenses. Cal. Rev. & Tax. Code § 30140 (distributors); Cal. Bus. & Prof. Code §§ 22972 (retailers), 22975 (distributors), 22979 (manufacturers). State law generally prohibits the sale of cigarettes to, or the purchase of cigarettes from, resellers who are not licensed. Cal. Bus. & Prof. Code § 22980.1. However, California law provides an exemption from the license-related requirements to persons "exempt from regulation under the United States Constitution, the laws of the United States, or the California Constitution." *Id.* § 22971.4. By the same token, although generally a distributor cannot sell cigarettes to unlicensed persons, that rule does not apply to the sale of cigarettes by any person to any person the State is prohibited from regulating. *Id.* § 22980.1(b)(2). Under this provision, according to the Legislative Analyst, "[r]etailers on Indian Reservations … are not subject to the licensing requirements of the [Licensing Act]." Cal. B. An., A.B. 3092 Assem. (Aug. 26, 2004).

California also regulates the price of cigarettes through the 1998 Tobacco Master Settlement Agreement ("MSA," available at oag.ca.gov/tobacco/msa), the "Escrow Statute," Cal. Health & Safety Code § 104557, and the "Directory Statute," Cal. Rev. & Tax. Code § 30165.1. California adopted these statutes and enforces them to meet its contractual obligations to Big Tobacco under the MSA, an agreement to which Indian tribes were not parties. The Escrow Statute requires manufacturers whose cigarettes are sold in the state either to join the MSA or to place funds into a 25-year escrow. Cal. Health & Safety Code § 104557(a). The current escrow rate is approximately 89 cents per pack. Under the Directory Statute, the Attorney General maintains a directory of tobacco product manufacturers and brands approved for sale in California. Cal. Rev. & Tax. Code § 30165.1(c). To be listed on the directory, a manufacturer must certify that it has joined the MSA or is in full compliance with the Escrow Statute and all the state's tobacco product, licensing, and manufacturing laws. *Id.* § 30165.1(b). The Directory Statute prohibits any person from selling, offering for sale, possessing for sale, shipping or otherwise distributing into or within California, or importing for personal consumption in California, any taxable cigarettes of a manufacturer or brand family not included on the directory. *Id.* § 30165.1(e)(2). Off-directory cigarettes cannot bear State tax stamps. *Id.* § 30165.1(e)(1). The escrow obligations and the associated restrictions of the Directory Statute do not apply to cigarettes "beyond the

reach of state taxation." 3-ER-283 (Compl. ¶ 20); *see* Cal. Health & Safety Code § 104556(j).

C. Procedural Background.

1. California files the complaint.

California filed this action on April 19, 2023. 3-ER-279 (Complaint). The named defendants in the initial complaint were: (1) Azuma Corporation; (2) Phillip Del Rosa (in his (i) personal capacity and (ii) official capacity as Chairman of the Alturas Indian Rancheria); (3) Darren Rose (in his (i) personal capacity and (ii) official capacity as Vice-chairman of the Alturas Indian Rancheria); and (3) Wendy Del Rosa (solely in her official capacity as Secretary-Treasurer of the Alturas Indian Rancheria). *Id.* at 1 (listing parties).

The complaint alleged five claims for relief: violations of the PACT Act, the CCTA, RICO, the Directory Statute, and the Escrow Statute. 3-ER-292-295. All claims were asserted against all defendants, except the RICO claim, which was solely against Darren Rose and Phillip Del Rosa. The complaint sought declaratory and injunctive relief against Azuma and the individual defendants in their capacities as tribal government officials. 3-ER-296-297. It also sought damages, civil penalties, costs, and fees against Azuma and against Rose and Phillip Del Rosa personally. 3-ER-297-299.

2. Defendants move to dismiss.

In July 2023, Defendants moved to dismiss the complaint. 2-ER-102. Among other things, Defendants argued that tribal sovereign immunity barred the official-capacity PACT Act claim, as the statute did not leave room for courts to apply the *Ex parte Young* exception to sovereign immunity. *See* 2-ER-103. Defendants Rose and Philip Del Rosa also asserted qualified immunity for the personal-capacity claims against them, arguing that as Tribal officials, they are entitled to make reasonable discretionary judgments about open legal questions as they conduct the Tribe's business without facing personal liability or the burdens of litigation. *See id*.

3. California obtains a preliminary injunction.

On September 8, 2023, the district court granted in part California's motion for a preliminary injunction, enjoining Rose, in his official capacity with Alturas and Azuma, from delivering cigarettes or causing their delivery in violation of the delivery provision of the PACT Act. 1-ER-14-38. Defendants had opposed the preliminary injunction based in part on tribal sovereign immunity, arguing (as they also did in their motion to dismiss) that the PACT Act displaced the *Ex parte Young* doctrine's mechanism for circumventing sovereign immunity.[2] The district court

[2] The district court denied defendants' request to combine briefing on the preliminary injunction motion and the motion to dismiss based on the overlapping issues presented by the motions. 2-ER-276.

rejected this argument in its preliminary injunction order. 1-ER-20-23. This Court affirmed the preliminary injunction on September 10, 2024, in a separate appeal. 2-ER-50-61. That appeal did not address the *Ex parte Young* issue.

4. The district court denies in part the motion to dismiss.

The district court heard the motion to dismiss on October 13, 2023, then on January 24, 2024, granted the motion in part and denied it in part. 1-ER-2; *see also* 2-ER-84-101 (transcript of hearing).

The claims against Azuma were dismissed without leave to amend based on the court's conclusion that Azuma is entitled to sovereign immunity as an arm of the Tribe. 1-ER-4-7. The court also dismissed the official-capacity claims for violations of state law, without leave to amend. 1-ER-9.[3] The CCTA claim against all defendants was dismissed based on the CCTA provision that "explicitly prohibits states from bringing a civil action 'against an Indian tribe or an Indian in Indian country,'" but the court granted leave to amend. *Id.* (quoting 18 U.S.C. § 2346(b)(1)). And the court dismissed the RICO claim with leave to amend, finding California had "fail[ed] to state a civil RICO claim because it ha[d] not sufficiently alleged the underlying violations of the CCTA," as cigarettes in the possession of

[3] The district court denied California's motion for reconsideration of this issue. 2-ER-44-49.

Azuma, a federally licensed tobacco product manufacturer, "are not 'contraband' as defined by the statute." 1-ER-13.

The court declined to "revisit" its prior decision that the PACT Act does not preclude an *Ex parte Young* official-capacity suit against the tribal officials. 1-ER-8-9. Thus, it allowed the official-capacity PACT Act claim to proceed. The court also rejected the personal-capacity Defendants' qualified immunity defense. 1-ER-10-11. The court distinguished between alleged violations of "statutory or constitutional rights," from which government officials may be immune, and alleged "violat[ions of] federal and state laws," to which qualified immunity does not extend. *Id.* This ruling allowed the personal-capacity PACT Act claim to proceed and allowed California to assert personal-capacity CCTA and RICO claims in an amended complaint.

Defendants appealed the portions of the order rejecting their sovereign immunity and qualified immunity defenses. 3-ER-399.[4]

[4] California subsequently filed an amended complaint. 2-ER-62-83. The amended complaint again contains official-capacity PACT Act and CCTA claims against Rose and Philip Del Rosa (although not Wendy Del Rosa), and personal-capacity claims against Rose and Philip Del Rosa based on the PACT Act, CCTA, and RICO. 2-ER-77-81. The district court thereafter granted Defendants' motion to dismiss the official-capacity CCTA claim. 2-ER-40-43. The amended complaint does not assert any state law claims.

SUMMARY OF THE ARGUMENT

The PACT Act precludes state enforcement actions premised on *Ex parte Young* against the officials of immune Indian tribes and tribal entities. The statute instead channels enforcement against immune Indian tribal entities to federal authorities. States cannot circumvent the congressionally specified procedure by invoking *Ex parte Young* to reach Indian tribes through their officials. With *Ex parte Young* unavailable, tribal sovereign immunity shields Appellants from the PACT Act claims asserted against them in their official capacities.

Tribal officials may assert qualified immunity as a defense against actions that seek to hold them personally liable for discretionary conduct within the scope of their official duties. The qualified immunity doctrine applies in this case for the same reasons it applies in typical actions alleging violations of constitutional or statutory rights. Chief among these reasons, the public interest requires that officials be able to fulfill the obligations of their positions through impartial decision making uninhibited by the threat of personal liability. Indian tribes require officials willing to implement policies promoting tribal sovereign authority, even when complex legal rules do not provide clear answers. The personal capacity claims asserted against Rose and Philip Del Rosa, founded on alleged infringements of California's contested right to regulate on-reservation tribal activities, gravely threaten to undermine effective tribal governance.

Appellants therefore respectfully request that the Court reverse the district court's rejection of Appellants' sovereign immunity defense and its rejection of Rose and Philip Del Rosa's qualified immunity defense, and direct the court to dismiss the claims against them without leave to amend.

STANDARD OF REVIEW

"Issues of tribal sovereign immunity are reviewed de novo." *Burlington Northern*, 509 F.3d at 1091. The Court also "review[s] de novo the district court's denial of a motion to dismiss on qualified immunity grounds." *Lazy Y Ranch*, 546 F.3d at 588.

ARGUMENT

I. States cannot use the *Ex parte Young* doctrine to sue Indian tribal officials for tribes' alleged violations of the PACT Act.

A. Sovereign immunity and the *Ex parte Young* exception.

One of the "core aspects of sovereignty" possessed by Indian tribes is "'the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Tribal sovereign immunity fully applies to suits brought by states, as well as "suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Id.* at 789, 790.

Tribal sovereign immunity also applies to suits brought against individuals in their official capacity, such as the instant action against the Tribe's Chairman, Vice-

chairman, and Secretary-Treasurer. *Lewis v. Clarke*, 581 U.S. 155, 163 (2017) ("Defendants in an official-capacity action may assert sovereign immunity."). However, "[s]uits seeking prospective injunctive relief ordinarily may proceed against tribal officers sued in their official capacities under the doctrine of *Ex parte Young*." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020); *see Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine permits actions that seek non-monetary injunctive or declaratory relief arising from threatened or ongoing violations of federal law by the (otherwise immune) government entity through the defendant government official. *Id.*

B. Congressional limitations on the use of *Ex parte Young*.

Even if the traditional *Ex parte Young* criteria are otherwise satisfied, however, "a federal court's discretion to permit actions to proceed against [government] officials is not unlimited." *Sofamor Danek Grp., Inc. v. Brown*, 124 F.3d 1179, 1185 (9th Cir. 1997). "Congress may choose to limit the availability of an *Ex parte Young* suit against [government] officers for violations of federal statutory law." *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 423 (9th Cir. 1996). In keeping with the long-recognized rule that "federal common law is subject to the paramount authority of Congress," *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), Congress may implicitly preclude the use of common-law doctrines such as *Ex parte Young*. Even where Congress has not "affirmatively

proscribed the use of federal common law," if the congressional act "does speak directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 315 (internal quotation marks omitted); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015) (Congress' awareness of courts' "long-established practice" does not require legislative statement that affirmatively manifests contrary intent). As always, the court must give effect to the statutory text's "fairest reading." *Armstrong* at 329.

"The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). Thus, where a statute is to be enforced in a specified manner, courts "have no warrant to revise the statutory scheme" by supplying a supplemental avenue for enforcement. *Armstrong* at 329.

In *Seminole Tribe*, the Supreme Court explained that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996). Following the "general principle" that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms …, [the Court] ha[s] not created additional remedies," courts "should hesitate before casting aside" the limitations of a "remedial scheme for the

enforcement against a State of a statutorily created right, … and permitting an action against a state officer based upon *Ex parte Young*." *Id.* (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

The Court described the statutory remedial scheme at issue in *Seminole Tribe* as "carefully crafted," "intricate," and "detailed." *Id.* at 73-74. There, the Indian Gaming Regulatory Act specified that a State found to be in violation of its duty to negotiate in good faith with an Indian tribe for a gaming compact would be ordered to conclude a compact within 60 days and, failing that, to accept a compact selected by a mediator or regulations to be prescribed by the Secretary of the Interior. *Id.* at 74; *see* 25 U.S.C. § 2710(d)(7). This modest set of sanctions would be rendered "superfluous" by the "more complete and more immediate relief" that would be available under *Ex parte Young*. *Seminole Tribe* at 75. "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*." *Id.* at 75-76. The Court found this choice "strongly indicates that Congress had no wish to create" *Ex parte Young* liability for state violations of IGRA. *Id.* at 76.

The Ninth Circuit has found that a statute reflects a "detailed express remedial scheme" akin to *Seminole Tribe* where, because of the Eleventh Amendment immunity of potential State defendants, the statute provides a method for the United States to enforce the statute against States in federal court, while other plaintiffs must

pursue claims against States in state court, if at all. *Townsend v. University of Alaska*, 543 F.3d 478, 487 (9th Cir. 2008). In *Townsend*, an individual sued his former employer, the University of Alaska, alleging violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333, and he sought to amend the complaint to add individual supervisors as defendants. *Id.* at 481. The USERRA provided that "a person" may bring "an action against a State (as an employer) … in a State court of competent jurisdiction in accordance with the laws of the State." *Townsend* at 482 (quoting 38 U.S.C. § 4323(b)(2)). Meanwhile, federal district courts were given jurisdiction over "an action against a State (as employer) … commenced by the United States." *Id.* (quoting 38 U.S.C. § 4323(b)(1)). Because Congress had designed "such a detailed express remedial scheme," the Court held, citing *Seminole Tribe*, "Congress evinced an intent *not* to create an additional individual cause of action against state supervisors." *Id.* at 487. The Act imposed duties on States as employers, but only the United States was allowed to enforce the Act against them in federal court, and other plaintiffs could not circumvent this scheme by naming supervisors instead of the State employer itself.

C. The PACT Act's procedure for enforcement against Indian tribal entities supplants *Ex parte Young*.

Turning to the PACT Act, its remedial scheme similarly recognizes that tribal sovereign immunity would bar enforcement actions brought by states against Indian

tribes. The solution it provides is for the United States to enforce Indian tribes' compliance with the Act. States cannot circumvent the congressional scheme by seeking to enforce tribal compliance through an *Ex parte Young* action brought against tribal officials.

The PACT Act states that it does not "abrogate or constitute a waiver of any sovereign immunity of a State or local government or Indian tribe against any unconsented lawsuit under this chapter[.]" 15 U.S.C. § 378(c)(1)(B). In the paragraph that follows that statement, Congress provided the procedure for pursuing tribal violations of the Act, including states' role in the process:

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

15 U.S.C. § 378(c)(2). The reference in this paragraph to "any person not subject to State … enforcement actions" includes entities that possess sovereign immunity from suit, such as Indian tribes.[5] Indeed, immune Indian tribes would seem to be the primary type of person referenced in this provision. Since tribal sovereign immunity does not shield Indian tribes from suits brought by the United States,

[5] Under the PACT Act, "[t]he term 'person' means an individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company." 15 U.S.C. § 375(11).

E.E.O.C. v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1075 (9th Cir. 2001), it is logical for Congress to channel enforcement actions against tribes to federal prosecutors. And although other reasons might cause a person to be "not subject to State enforcement actions," such as an absence of personal jurisdiction, it is likely rare for a State to possess evidence of a PACT Act violation by a person who lacks minimum contacts with the State.

The PACT Act thus speaks directly to the procedure available to a state that wishes to enforce the Act against an Indian tribe. Congress expressly provided for one method of enforcement—referring the matter to federal officials—which "suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290.

The broader context confirms that Congress had ample reason to craft the PACT Act so that state enforcement actions against Indian tribes were off the table. Supreme Court and Ninth Circuit opinions frequently recognize the tension between states and tribes and describe Congress's role in maintaining détente.

> "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). For centuries, states have been the "deadliest enemies" of tribes, *United States v. Kagama*, 118 U.S. 375, 384 (1886), and the entities "least inclined to respect" tribal sovereignty, *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020). Accordingly, delegations of jurisdiction over tribal affairs to states have been perceived as an abandonment of the federal government's duty to safeguard tribal sovereignty.

Chicken Ranch Rancheria of Me-Wuk Indians v. California, 42 F.4th 1024, 1050 (9th Cir. 2022) (Wardlaw, J., concurring). The PACT Act sharpens these concerns, as it takes the extraordinary step of incorporating state laws into the federal statute and providing for their application against Indian tribes and on Indian reservations without tribal consent. Congress therefore insisted that the statute would not enlarge state authority over Indian tribes. *See* PACT Act § 5(a), 124 Stat. 1087, 1109-10, 15 U.S.C. § 375 Note. Permitting states to bring PACT Act enforcement actions in which an Indian tribal government is the real party in interest would upset the careful balance, compounding the states' involvement, which is otherwise limited to the incorporated regulatory authority.

Because the PACT Act provides for enforcement by states against Indian tribes in a specified manner, courts "have no warrant to revise the statutory scheme," or to "supplement" the Act to bypass statutory limitations. *Armstrong*, 575 U.S. at 329, *City of Milwaukee*, 451 U.S. at 315. Utilization of the *Ex parte Young* fiction would do just that, allowing California to enforce the Act against the Tribe by naming tribal officials as defendants, rather than referring the matter to the United States Department of Justice as Congress prescribed.

In ruling otherwise, the district court emphasized that "the relevant PACT Act provisions place no limits on available remedies or who may be sued." 1-ER-22 (Prelim. Inj. Order, citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S.

635, 647 (2002); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188 (9th Cir. 2003)); *see also* 1-ER-8 (Dismissal Order, citing *Verizon* at 367-48 and citing Preliminary Injunction Order at 7-10 (1-ER-20-23)). Rather, the lower court held, because the PACT Act states that it "does not 'restrict, expand, or modify' the sovereign immunity of tribes," the Act "confirms pre-existing remedies and defenses are available." 1-ER-22 (quoting 15 U.S.C. § 378(c)(1)(B)).

However, the court ignored the provision specifying how a state may deal with PACT Act violations by persons not subject to state enforcement actions, which primarily include immune Indian tribes. It may do so by referring the violation to federal officials. 15 U.S.C. § 378(c)(2). This express and specific remedial scheme necessarily limits the use of other, more expansive, enforcement tools against persons not subject to state enforcement actions. It thereby limits the remedies available against immune Indian tribes and limits who may sue them. Furthermore, precluding *Ex parte Young* does not "expand" or "modify" tribal sovereign immunity, but merely recognizes such immunity while identifying the one method of avoiding the immunity bar that Congress deemed consistent with its duty to Indian tribes.

The district court concluded that to preclude *Ex parte Young* claims, Congress needs to "have said so expressly or enacted a detailed remedial scheme." 1-ER-22. The court was mistaken to view these as the only indicators that Congress removed

Ex parte Young from a plaintiff's arsenal. As the Sixth Circuit has explained, the holding in Seminole Tribe was not so narrow, and "the detailed procedures in *Seminole Tribe* were not important in and of themselves." *Mich. Corrections Org. v. Mich. Dept. of Corrections*, 774 F.3d 895, 907 (6th Cir. 2014). Rather, "'[t]he Court read the remedial limitations imposed by the Gaming Act merely as a clue from which to deduce congressional intent.'" *Id.* (quoting *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 235 (1st Cir. 2002) (brackets omitted)). The PACT Act creates a cause of action and, with it, creates remedial limitations, as described above. It is not the level of detail in the statute, but the existence of the limitations, which demonstrates Congress's preclusion of *Ex parte Young* claims, which would circumvent not only tribal sovereign immunity, but also the terms and intent of the PACT Act. The Court must "look[] to the underlying statute to determine how Congress intended it to be enforced." *Id.* at 905. "By leaving the permissible enforcement mechanisms that Congress has provided in a statute where they are rather than by supplementing them with other enforcement actions, the Court … respect[s] the give-and-take of the legislative process and [leaves] the invariable compromises in such laws where the Court finds them." *Id.* at 907.

The PACT Act establishes a mechanism for enforcing the Act against Tribal entities that are immune from suits brought by states: referral to the United States Department of Justice. The statute neither permits states to sue tribal entities

directly, nor to sue them indirectly through an *Ex parte Young* action against their officers. Accordingly, Appellants respectfully request that the Court vacate the contrary orders of the district court and remand with instructions to dismiss all PACT Act claims against Appellants in their official capacities premised on *Ex parte Young*.

II. Monetary claims against Darren Rose and Philip Del Rosa personally are barred by qualified immunity.

California's complaint also sought damages from Rose and Phillip Del Rosa in their personal capacities based on alleged violations of the PACT Act, CCTA, and RICO, as well as civil penalties for alleged violations of the PACT Act, CCTA, and state laws.[6] The district court rejected Defendants' assertion of qualified immunity against these claims, holding that such immunity applies only to claims that seek damages for a violation of rights, and not to California's civil statutory enforcement claims. 1-ER-10-11. To the contrary, however, the common law qualified immunity doctrine as developed and elucidated by the Supreme Court shields government officials from personal civil liability for discretionary actions taken in their official capacities, and the Supreme Court has never recognized an exception under which qualified immunity would be unavailable based on the nature of the civil claim giving rise to the liability.

[6] As noted *supra*, although the district court denied Defendants' motion to dismiss the state law claims, California chose not to assert state law claims in its amended complaint. This brief will therefore focus on the federal statutory claims.

A. Qualified immunity protects the individual-capacity defendants from monetary liability for their exercise of discretion as officers of the Tribal government.

"Government officials are entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities," to give them "breathing room to make reasonable but mistaken judgments about open legal questions." *Ziglar v. Abbasi*, 582 U.S. 120, 150-51 (2017) (internal quotation marks omitted). "Tribal officials, like federal and state officials, can invoke personal immunity defenses" such as qualified immunity. *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 915 (9th Cir. 2021) (citing *Lewis*, 581 U.S. at 162-63).

"At common law, government actors were afforded certain protections from liability, based on the reasoning that the public good can best be secured by allowing officers charged with the duty of deciding the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (internal quotation marks omitted). "[T]wo mutually dependent rationales" supported the genesis of this official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).[7]

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield government officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). On one side of the scale are "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (internal quotation marks omitted). As the Supreme Court explained,

> By its nature, … the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. … When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

[7] *Scheuer* was overruled in part by *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Harlow* held the "objective reasonableness" of the defendant official's conduct "as measured by reference to clearly established law" is the only relevant consideration for overcoming qualified immunity, rejecting *Scheuer*'s inquiry into the official's subjective state of mind (i.e., "bad faith"). *See Davis v. Scherer*, 468 U.S. 183, 191 (1984).

Forrester v. White, 484 U.S. 219, 223 (1988). The "threat of *personal* monetary liability" is likely to "introduce an unwarranted and unconscionable consideration into the decisionmaking process" of a government official, "thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 655-56 (1980).

The qualified immunity doctrine mitigates the costs that otherwise would be borne by defendant officials and "society as a whole" when official government actions spawn claims for personal liability, including "the expenses of litigation, the diversion of official energy from pressing public issues, … the deterrence of able citizens from acceptance of public office, [and] the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (cleaned up); *see also Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

On the other side of the balance is "the societal interest in compensating the innocent victims of government misconduct," *Owen*, 445 U.S. at 653, and enforcing "the paramount authority of the Federal Constitution," *Scheuer*, 416 U.S. at 249. Immunity is rarely absolute because in many cases "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.

Qualified immunity protects government officials from personal liability where their conduct "did not violate clearly established law," based on "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson*, 555 U.S. at 243-44 (internal quotation marks omitted); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity permits officials to avoid burdens of litigation "in cases where the legal norms the officials are alleged to have violated were not clearly established at the time"); *Davis v. Scherer*, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."). This standard "seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability." *United States v. Lanier*, 520 U.S. 259, 270 (1997); *see also Saucier v. Katz*, 533 U.S. 194, 206 (2001) (qualified immunity operates "to ensure that before they are subject to suit, officers are on notice that their conduct is unlawful").

Qualified immunity thereby "give[s] 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." *Lanier* at 270-71. It provides protection to government officials whose conduct falls within the "hazy border" that emerges from legal tests that do not supply a "clear answer" as to what

will be deemed lawful or unlawful, often because such tests "must accommodate limitless factual circumstances" and "the law must be elaborated from case to case." *Saucier*, 533 U.S. at 205-06 (internal quotation marks omitted); *see, e.g.*, *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 617 (9th Cir. 2018) (officials entitled to qualified immunity for likely violations of "arcane," "complex and murky" area of dormant Commerce Clause doctrine). It protects officials from liability "[w]hen the courts are divided on an issue [that is] central to the cause of action alleged." *Ziglar*, 582 U.S. at 154. Thus, "if a reasonable officer might not have known for certain that the conduct was unlawful[,] then the officer is immune from liability." *Id.* at 152; *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

The Supreme Court has stated, in the context of *absolute* immunity, that "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester*, 484 U.S. at 224; *see Harlow* at 812. This is a "functional" inquiry, evaluating the functions entrusted to the official or class of official and "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions," *Forrester* at 224, which is applied "only to decide which type of immunity—absolute or qualified—a public officer should receive,"

Richardson v. McKnight, 521 U.S. 399, 408 (1997). The Supreme Court has recognized absolute immunity is required for "judicial, prosecutorial, and legislative functions," *Harlow* at 810-11, "sensitive" functions of high-level executive officers, *id.* at 812-13, and the President's official duties, *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

The remainder of "government officials performing discretionary functions generally are shielded from liability" not by absolute immunity, but by qualified immunity. *Harlow* at 818. Thus, a government official asserting a qualified immunity defense carries his initial burden by showing that he acted within the scope of his discretionary authority when undertaking the conduct in question. *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000).[8]

There is no dispute that this burden is satisfied here. The Complaint expressly identifies Rose and the Del Rosas as Tribal government officials and alleges that Rose is also "an officer and/or board member of Azuma." 3-ER-281 (Compl. ¶ 9-

[8] Many decisions, including the Ninth Circuit's, omit a detailed discussion of the defendant's burden altogether, and generally state that initially "[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct." *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991); *Pearson*, 555 U.S. at 236 (discussing the sequence in which to address "the two prongs of the qualified immunity analysis"–whether the facts allege a violation of constitutional right, and whether that right was clearly established); *see also Andrich v. Kostas*, 470 F.Supp.3d 1048, 1061 n.5 (D. Ariz. 2020) ("Ninth Circuit law is not a model of clarity concerning which party has the burden of proof when the defense of qualified immunity has been raised.").

11). It alleges that the individual Defendants' "positions of power within the Alturas Tribe and Azuma" are what allowed them to accomplish the allegedly unlawful circumvention of California taxes and other state tobacco regulations. 3-ER-284 (Compl. ¶ 24). The Complaint sets forth the governmental authority of the Tribal Business Committee, of which the Defendants are officers, and alleges that Rose and Philip Del Rosa, through their control of the Business Committee, "have authority to govern all aspects of the Alturas Tribe and its subdivisions and arms," including Azuma, the Tribally-owned enterprise allegedly engaged in unlawful cigarette manufacturing, sales, and distributions. 3-ER-291-292 (Compl. ¶¶ 64-66).

The Complaint clearly alleges that Rose and Philip Del Rosa undertook the conduct in question in the exercise of their discretionary authority as officials of the Tribal government. As Tribal officials, Rose and Del Rosa are entitled to make reasonable discretionary judgments about open legal questions as they conduct the Tribe's business without facing personal liability or the burdens of litigation.

B. Qualified immunity applies to the civil regulatory enforcement claims in this case.

The district court, in rejecting Defendants' immunity defense, cited the absence of "authority extending qualified immunity to tribal officers sued in their personal capacities for violating federal and state laws." 1-ER-10-11. However, in *Davis v. Scherer*, the Supreme Court held that government officials are entitled to qualified immunity from claims that their conduct violated statutory law. *Davis* held

that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." 468 U.S. at 194. Rather, the Court held, "these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Id.* at 194 n.12. While acknowledging "that officials should conform their conduct to applicable statutes and regulations," the Court nevertheless held it is not "always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages." *Id.* at 194, 196. The "ambiguous," "contradictory," and fluctuating rules to which officials are subject when making decisions in the exercise of their government authority need not compel officials to "err always on the side of caution." *Id.* at 196. Under *Davis v. Scherer*, public officials' qualified immunity encompasses actions that seek to impose liability for alleged violation of statutes and regulations.

Supreme Court authority is also clear that statutes are read in harmony with the general principles of common law immunities. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Statutes which on their face may appear not to admit any immunities do not abolish or alter immunity defenses, but preserve them, unless the statute contains specific provisions to the

contrary. *Rehberg v. Paulk*, 566 U.S. 356, 362 (2012); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Thus, the mere fact that California alleges violations of statutes that do not address personal immunity defenses does not bar Defendants from asserting immunities that are otherwise available. Moreover, nothing in the PACT Act, CCTA, or RICO suggests, much less specifically provides, that Congress intended to depart from the fundamental principles that insulate government officials from personal liability for their reasonable government conduct. Indeed, multiple federal courts have found absolute or qualified immunity is a valid defense to civil RICO claims. *Watson v. Florida Judicial Qualifications Comm'n*, 746 Fed. Appx. 821 (11th Cir. 2018); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 588 (5th Cir. 1999); *Cullinan v. Abramson*, 128 F.3d 301, 312 (6th Cir. 1997); *Kaul v. Christie*, 372 F.Supp.3d 206, 246 n.38 (D.N.J. 2019); *BEG Investments, LLC v. Alberti*, 34 F.Supp.3d 68, 81 (D.D.C. 2014). Provisions in the PACT Act preserving tribal sovereignty and sovereign immunity, 15 U.S.C. § 378(c)(1)(B); PACT Act § 5(a), and in the CCTA creating statutory immunity from actions "against an Indian tribe or an Indian in Indian country," 18 U.S.C. § 2346(b)(1), and preserving tribal sovereign immunity, *id.* § 2346(b)(2), demonstrate Congress intended the statutes to function in tandem with status-based immunities.

Furthermore, the Supreme Court has held that the principles undergirding the firmly recognized immunity from civil damages liability readily translate to official immunity from other liabilities. In *Trump v. United States*, 603 U.S. 593 (2024), the Court discussed Presidential immunity from criminal prosecution. Drawing on precedent regarding Presidential immunity in the civil context, the Court observed that both claims for civil damages and criminal prosecution pose kindred threats of intrusion on the executive's authority and functions. *Id.* at 613. Both potential liabilities impair the public's interest in government officials taking "bold and unhesitating action" because of the distorting effects of potential personal civil or criminal consequences. *Id.*

The same kind of parallel compels the recognition of qualified immunity in this case. Qualified immunity exists because of the deleterious effects of potential monetary liability on the government officer. There is a well-established and overriding public interest in shielding public officials from personal monetary liability when they exercise their discretion in the performance of their duties, with the aim of encouraging the vigorous exercise of official authority. *See, e.g.*, *Ziglar* at 150-51; *Filarsky* at 383; *Pearson* at 231; *Harlow* at 807, 814, *Forrester* at 223. The dangers that threaten this critical public interest are the same whether the money goes to a private plaintiff asserting a violation of civil rights, or to the treasury of a state government asserting a violation of a civil regulatory statute. It is also

irrelevant whether the monetary liability is compensatory or punitive. It is the practical financial effect on the defendant, and not the label applied to the relief, that is determinative on questions of immunity. *See Forrester* at 223; *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (for immunity purposes labeling "monetary relief as a form of 'equitable restitution' … is in practical effect indistinguishable in many aspects from an award of damages against the State").

To be sure, the caselaw often speaks of qualified immunity from suits for civil damages, *e.g.*, *Harlow* at 808, and often explains that overcoming immunity requires the plaintiff to show that the "right" alleged to have been violated was clearly established, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The courts use this terminology because, almost invariably, government officers face personal civil liability for their official conduct in the context of actions under section 1983 and *Bivens*, which allow injured individuals to seek damages from state officers for deprivations of legal "rights, privileges or immunities," 42 U.S.C. § 1983, and from federal officers for invasions of certain constitutional rights, *see Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971). However, the Supreme Court has never held that qualified immunity is limited to these contexts. On the contrary, decisions such as *Trump* demonstrate the Court is willing to view recognized immunities as applicable to previously untested circumstances where similar public interests are at stake.

This case presents the unprecedented circumstance of a state government seeking to impose personal liability on a tribal government officer for his official actions in a murky zone of federal Indian law. It is an extraordinary escalation by California in the longstanding jurisdictional clash between Indian tribes and states. The fact that that states have not previously shown the temerity to aim for the personal pockets of their fellow sovereign governments' public officials, when the sovereigns disagree about the respective limits of their powers, is no reason to find qualified immunity does not shield the tribal defendants from such novel actions. On the contrary, this kind of case—where the alleged violation of statute depends on an adjudication of the relative weight of the sovereign interests at stake—poses the same dangers to tribal governments as the typical case that seeks damages for an alleged violation of individual rights.[9]

The threat of personal liability to pay penalties and damages to a state government is virtually certain to inhibit Tribal officials in the "impartial or

[9] Indeed, the Supreme Court has recently framed the fundamental issue in such cases in terms of the Constitutional rights granted to the states. *See Okla. v. Castro-Huerta*, 597 U.S. 629, 636 (2022). Through this lens, there is little to distinguish these cases from the millrun qualified immunity case involving an alleged violation of constitutional rights. Moreover, the qualified immunity doctrine persists even though it frequently denies individuals "the only realistic avenue for vindication of constitutional guarantees," *Harlow*, 457 U.S. at 814, but here, immunity for the tribal officials would leave multiple avenues available to vindicate California's asserted constitutional rights, such as federal enforcement, including injunctive relief.

imaginative" performance of their duties, and to introduce the "personal interests of the decisionmaker" into decisions of tribal public policy. *Forrester*, 484 U.S. at 223. Tribal officials' reasonable attempts to "unflinching[ly] discharge … their duties" to the tribe, *Harlow* at 814, may mistakenly carry them over the nebulous and changeable line separating the lawful exercise of tribal sovereignty from the unlawful violation of state civil regulatory laws. The threat of personal liability will likely chill officials' vigorous performance of their responsibilities to the tribe and discourage others from taking on the role. Embroiling tribal officials in personal litigation might well prevent them, and future officials like them, from devoting the time and effort required to faithfully discharge their duties. *Ziglar*, 582 U.S. at 150.

On top of all this is the firmly established federal policy favoring tribal self-government, the principle that Indian tribes must be allowed to administer their internal affairs without interference from other sovereigns. This principle limits, for instance, when Indian tribes are subject to federal laws, *see Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004), and state laws, *see McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 179 (1973). Here, tribal self-government is incompatible with subjecting tribal officials to the threat of personal liability at the hands of another sovereign. Such a threat undermines the power of tribal officials to make necessary, bold, and even legally debatable decisions guided by the tribe's

interests, and cedes a significant part of that power to the state, acting for the state's interests.

These considerations are undoubtedly a significant reason why mindful states have not before used the threat of personal liability against tribal government officials in these intergovernmental disputes. Now faced with the issue as a matter of first impression, the traditional bases for personal immunity demonstrate why the Court should not endorse California's use of this dangerous new tool to stifle tribal sovereignty.

C. Defendants did not violate clearly established law.

The alleged federal statutory violations by Rose and Del Rosa depend on noncompliance with applicable state regulatory and tax laws by Azuma and the Tribal Retailers to which it sold and delivered cigarettes. Federal Indian law significantly limits state authority over conduct involving Indian tribes in Indian country. Nearly two centuries of Supreme Court precedent informs the nuanced, fact-dependent analysis for where to locate those limitations. To overcome Rose and Del Rosa's qualified immunity and hold them personally liable for the judgments they made on behalf of Alturas and Azuma, California must show not only that Azuma and the Tribal Retailers were obliged to adhere to California's regulatory and taxation requirements, but also that, under the circumstances facing

Alturas' public officials, such obligations were beyond dispute. This California cannot show.[10]

"'There is no rigid rule' that resolves 'whether a particular state law may be applied to an Indian reservation or to tribal members.'" *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 724 (9th Cir. 2021) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). "Generalizations on this subject" remain "treacherous," as the "conceptual clarity" of the earliest decisions has receded, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), and the reach of state regulatory authority varies according to a tapestry of "basic principles" woven by the Supreme Court over the years, often requiring a "particularized inquiry" of the "specific context." *Bracker*, 448 U.S. at 141, 145.

States may not exercise the authority they typically possess within their borders if doing so would burden 'the right of reservation Indians to make their own

[10] The district court ended its qualified immunity analysis at the threshold, so it did not reach the issue discussed in this section. The issue is nevertheless appropriate for decision in this appeal because it is a purely legal question applied to the plaintiff's allegations and the undisputed facts presented in support of the motion to dismiss; on this issue, no further development of the factual record is required. *See Planned Parenthood v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020); *see also Mitchell*, 472 U.S. at 528 (appellate court reviewing denial of defendants' claim of immunity solely determines question of law). Further, since "qualified immunity is an immunity from suit rather than a mere defense to liability," the issue should be resolved "at the earliest possible stage in litigation," so that "insubstantial claims against government officials" are disposed of "prior to discovery." *Pearson*, 555 U.S. at 231-32 (internal quotation marks omitted).

laws and be ruled by them,'" or if the state's authority is "'preempted by operation of federal law,'" with any ambiguities "'construed generously in order to comport with traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Big Sandy*, 1 F.4th at 724-25 (quoting *Bracker*, 448 U.S. at 142-44). "Whether state regulation infringes on tribal sovereignty depends on *who* is being regulated—Indians or non-Indians—and *where* the activity to be regulated takes place—on or off a Tribe's reservation." *Id.* at 725.

"States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or on tribal members for sales made inside Indian country' without congressional authorization." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005). Based on this categorical bar, Rose and Del Rosa concluded that Azuma would not be required to pay any state tax imposed on Azuma for activities within the Alturas Indian Rancheria. It also means that each of Azuma's customers, the Tribal Retailers, is immune from direct state taxation imposed upon their conduct within their respective reservations. Furthermore, to the extent the MSA-based escrow obligation may be regarded as a tax, federal law categorically bars its imposition upon Azuma.

The Supreme Court has also held on the same basis that a state cannot impose a license requirement upon "a reservation Indian conducting a cigarette business for the Tribe on reservation land." *Moe v. Confederated Salish and Kootenai Tribes of*

Flathead Rsvn., 425 U.S. 463, 480 (1976); *see also id.* at 466 (deeming the judgment under review "correct on the merits"); *Confederated Salish and Kootenai Tribes of the Flathead Rsvn. v. Moe*, 392 F.Supp. 1297, 1307 (D. Mont. 1974) (judgment below, holding state of Montana may not "require a member of the tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license"). Other courts have correctly described *Moe*'s holding that "an Indian vendor cannot be required to obtain a state license." *Stagner v. Wyoming State Tax Com'n*, 682 P.2d 326, 327 (Wyo. 1984); *see id.* at 331 ("By virtue of appellant's status as an Indian, he is exempt from [state] licensing and its attendant burdens."); *State ex rel. Oklahoma Tax Com'n v. Bruner*, 815 P.2d 667, 669-70 (Okla. 1991) (citing *Moe* and holding that state "does not have a lawful right to impose or enforce its license and permit requirements upon tribally licensed Indian cigarette retailers doing business in Indian Country on behalf of the Tribe"). Alturas officials reasonably understood this rule to excuse Azuma and the Tribal Retailers from any obligation to hold State-issued licenses to conduct their on-reservation cigarette business.

There is otherwise no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). Rather, "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id*. at 215. The only relevant "exceptional

circumstance" the Supreme Court has identified relates to nonmember consumers at retail tribal smokeshops making purchases that are found to be subject to state tax because "the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). In this exceptional circumstance, the state can impose *only* a "minimal burden" on the tribal retailers "to aid in collecting and enforcing that tax" on non-members. *Id*. at 159; *see also Moe*, 425 U.S. at 482-83; *Cabazon* at 215-16; *Dept. of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc*., 512 U.S. 61, 73 (1994).

Where the legal incidence of a state tax falls on a non-member transacting with tribes or tribal members on the reservation, federal law preempts the tax if it fails to satisfy the balancing test articulated in *Bracker* (the "*Bracker* balancing test"). *Wagnon* at 102, 110. The *Bracker* balancing test generally applies "when a state 'asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" *Big Sandy* at 725 (quoting *Bracker* at 145). *Bracker* calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker* at 145; *see California v. Azuma Corp.*, No. 23-16200, 2024 WL 4131831, *2 (9th Cir. 2024) (reciting *Bracker* test) (2-ER-55-56). Tribal officials, like courts, must make this assessment

"on a case-by-case basis." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992).

To the extent the State's claims are not foreclosed by the categorical rules set forth above – the on-reservation taxation of an Indian tribe, tribal enterprise, or tribal member and the preclusion of state licensure requirements for on-reservation tribal cigarette enterprises – they require application of *Bracker*'s particularized inquiry, which focuses on the specific context and requires tribal decision makers to identify and weigh the relevant interests of the affected Indian tribes, states, and the federal government on a case-by-case basis. Particularly relevant here, tribal interests are at their "strongest" under the *Bracker* balancing test where "the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville*, 447 U.S. at 156–57. The Supreme Court has recognized that a tribe generates value on its reservation where it has "built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribe provides." *Cabazon*, 480 U.S. at 219; *see Gila River*, 967 F.2d at 1410-11; *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (balance of interests allowed for state taxation because, "[m]ost importantly, the goods and services sold are non-Indian"); *Prairie Band Potawatomi Nation v.*

Richards, 379 F.3d 979, 984-85 (10th Cir. 2004) (rev'd on other grounds by *Wagnon*, 546 U.S. 95).

Azuma and the Tribal Retailers have made substantial investments in commercial facilities on their reservations to manufacture products there using tribal capital, and to offer the tribally-made products for sale to tribal members and to others who come to the reservation to shop and to spend time and money at a tribal casino, hotel, or restaurant. Azuma's products contain tribally-generated value both from their manufacture on-reservation by a tribally-owned and operated enterprise, and from the market conditions created by the tribes who sell the products as an amenity to accompany multi-million-dollar gaming, dining, lodging and other entertainment offerings to consumers who otherwise would not have visited the Indian Country of the retailer-tribes.

In addition, the State's relevant regulatory and taxing interests vary according to the specific context. Its interest in raising revenue is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville* at 156-57. To justify an on-reservation tax, the Supreme Court has required that the state provide "governmental functions … to those who must bear the burden of paying" the tax, and that such services be provided on the reservation. *Ramah Navajo School Bd., Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 843-44 (1982). The state services must be "connected with the … activities

directly affected by the tax." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989).

Alluding to these kinds of considerations, this Court recognized that, under the *Bracker* analysis,

> It is conceivable that some of the Tribal Retailers generate so much economic value for the Tribe through casinos, resorts, and other business ventures that their on-site cigarette sales, even to non-Indian purchasers, may not be subject to California's requirement that the Tribal Retailers collect and remit taxes for the sale of tobacco products.

2-ER-57 (citing *Big Sandy*, 1 F.4th at 726; *Gila River*, 967 F.2d at 1410); *see also* 2-ER-56 ("This balancing may favor the Tribal Retailers such that they are not unlawfully operating under the PACT Act, are not 'consumers' under the PACT Act, and thus Azuma is not violating the Prohibited Delivery Provision by delivering cigarettes to them."). The Court cautioned that it was "not clear" whether such tribal interests would ultimately weigh in favor of the defendants. The Circuit Court's acknowledgment of the uncertainty, however, demonstrates that the public officials making decisions for Alturas and Azuma were not doing so in an area where the correct answer was clearly established.

Qualified immunity is likewise not foreclosed by this Court's holding that California showed a likelihood of success on the merits of its PACT Act claim. *See* 2-ER-58. A plaintiff's likelihood of success is easily compatible with defendants' qualified immunity. For instance, in *Daniels Sharpsmart*, *supra*, the Ninth Circuit

found the plaintiff would likely succeed on its claim that certain state enforcement actions constituted a per se violation of the Commerce Clause and affirmed an injunction against the state officials. 889 F.3d at 616. At the same time, however, the Court held that qualified immunity protected the officials from personal liability for any such violation. *Id.* at 617. Although the Commerce Clause's "extraterritoriality doctrine," stating that "[o]ne state cannot be permitted to dictate what other states must do within their borders," had "been clearly established for decades" *id.* at 615, 17, there was no decision applying the doctrine to the specific California statute at issue, "and that statute at least injected some ambiguity into the equation," leaving the area "complex and murky enough" that an official "who is not knowledgeable about the arcane considerations lurking within dormant Commerce Clause doctrine could reasonably, if erroneously, believe that the Department could control what was done with California waste in another state," *id.* at 617.

Thus, the immediate point of this discussion is not to prove that under prevailing federal Indian law doctrines the State's claims must fail. Qualified immunity does not protect only government officials who are fully vindicated in their view of the law. Rather, to overcome qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The question of the reach of state law in this case is not "beyond

debate." Supreme Court and Ninth Circuit precedents supply basic principles to guide public officials' decisions, but no controlling decisions apply these doctrines to the specific circumstances here, nor is there "a robust 'consensus of cases of persuasive authority.'" *Id.* at 742 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)); *see Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (overcoming qualified immunity requires showing "the violative nature of the particular conduct [was] clearly established … in light of the specific context of the case, not as a broad general proposition," internal quotation marks omitted).

Indeed, the *Bracker* analysis is highly dependent on the particular circumstances of a given case such that it is inherently unsuited to clearly establishing the contours of a state's authority to regulate and tax reservation activities. The *Bracker* balancing test has been called "rudderless, affording insufficient guidance to decisionmakers," with the acknowledgment that no preferable alternative appears. *Wagnon*, 546 U.S. at 124 (Ginsburg, J., dissenting). "No 'bright-line' test is capable" of adequately accommodating "the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Id.* (quoting *Colville* at 156). *Bracker*'s "'flexible' test has provided little guidance other than that courts should balance federal, tribal, and state interests." *Rogers Cty. Bd. of Tax Roll Corrections v. Video Gaming Techs., Inc.*, 141 S.Ct. 24, 25 (2020) (Thomas, J., dissenting from denial of certiorari). *Bracker* supplies a

"vague test" that defies certainty of outcome. *Id*. The broad, general standards of the *Bracker* test, under which "the result depends very much on the facts of each case," do not provide the kind of "obvious" clear answers that can justify imposing personal liability on tribal officials. *Brosseau v. Haugen*, 543 U.S. 194, 198-201 (2004).

The principal case on which California has relied, *Big Sandy*, arose under distinguishable circumstances, so it does not "clearly establish" Azuma's alleged violations, either directly or through its sales to allegedly unlawfully operating retailers. *Big Sandy* plainly does not establish that the Tribal Retailers are in violation of any state law, as the case dealt with a wholesale distributor, not a retailer. 1 F.4th at 718. Nor does *Big Sandy* place the alleged state-law violations by Azuma "beyond debate." *Big Sandy* "express[ed] no opinion" about the imposition of cigarette excise taxes on the tribal entity's intertribal transactions. *Id.* at 724 n.8. This left open not only the tax question itself, but also the related question of determining which cigarettes, if any, would be subject to the MSA-derived escrow requirement and the Directory Statute which enforces it, given that manufacturers need not make escrow payments on cigarettes "sold by a Native American tribe to a member of that tribe on that tribe's land, or that are otherwise exempt from state excise tax pursuant to federal law." Cal. Health & Safety Code §§ 104556(j), 104557(a)(2). Moreover, the application of the escrow obligation to an on-

reservation tribal cigarette manufacturer was not at issue in *Big Sandy*, where no manufacturer was a party to the case.

As to the State's regulation of sales by a tribal entity to an Indian tribe on the purchasing tribe's reservation, *Big Sandy* "declined to balance federal, state, and tribal interests under *Bracker*," *Big Sandy* at 729, because in that case the tribal corporation alleged that state regulation of its sales activities off its reservation "infring[ed] *the Tribe's* self-governance," *id.* at 730 (emphasis added). In virtually the same breath, the Court emphasized that "*Bracker* balancing is appropriate when a tribe or tribal entity challenges a state's regulation of transactions between the tribe and nonmembers *on the tribe's reservation*." *Id.* at 729. The Court's discussion shows that *the purchasing tribe's self-governance interests* are appropriately considered when analyzing state regulation of nonmember conduct – here, Azuma's conduct – on the purchasing tribe's reservation. It is those interests, the interests of the tribes that operate the Tribal Retailers, that informed the Tribal Officials' judgments as to how to conform Azuma's conduct to applicable law.

Further, although California has tailored state law to avoid infringing on tribal rights in other contexts, the State has refused to craft its cigarette laws to clearly establish the extent to which they impose obligations on reservation Indians consistent with federal law and without infringing upon tribal sovereignty. For instance, in the context of sales and use taxes on food and beverages sold in Indian

country, the California Department of Tax and Fee Administration (CDTFA) performed a reasoned *Bracker* analysis, then revised its regulations accordingly, to bring its tax scheme into compliance with federal law. *See* 2-ER-244-248 (Mem. from Trista Gonzalez, Chief of Tax Policy Bureau, to Nicolas Maduros, Dir. of CDTFA, 4-8 (Oct. 25, 2019)); *see also* 2-ER-262-266 (Bd. of Equalization, Initial Discussion Paper on Reg. 1616 (Dec. 18, 2015)). Under the prior regulations, CDTFA could not determine which transactions were taxable or how much tax the state would collect. 2-ER-251 (Gonzalez Mem. attachment 1, p. 2). The agency's *Bracker* analysis and regulatory amendments, promulgated after extensive tribal input, responded to this uncertainty by adding certain presumptions to the regulations favoring tax exemptions. 2-ER-244-248, 252-255; *see* 18 Cal. Code Regs. § 1616(d). Azuma has urged the Attorney General's office to undertake the same process for cigarette excise taxes, and the Attorney General's office has refused. 2-ER-163 (Rose Decl. ¶ 18).

Instead, tribal cigarette sellers in California face confounding guidance as to regulation and taxability. The Licensing Act provides an amorphous exemption backstopped by "the United States Constitution, the laws of the United States, [and] the California Constitution." Cal. Bus. & Prof. Code § 22971.4. Regulations specify that tribes must "register," rather than obtain a license, and collect only use taxes. 18 Cal. Code Regs. § 1616(d)(3)(A). An official state tax guidance publication

explains that sales by "Native American retailers" in their own Indian Country are exempt from cigarette excise taxes when the buyer is any "individual of Native American descent and eligible to receive services as a Native American from the United States Department of the Interior," or their spouse (Native American or not), or their company. 2-ER-205, 228 (CDTFA Pub. 146, Sales to Native Americans and Sales in Indian Country, at 1, 24 (Apr. 2022)). This guidance contrasts with California's claim in this case that only cigarette sales by tribal retailers to members of the retailers' tribe in that tribe's Indian country are tax exempt. 3-ER-282 (Compl. ¶ 16). The same publication also confirms that a Native American retailer may "buy[] untaxed cigarettes without a California tax stamp" from a Native American distributor, 2-ER-228, Pub. 146 at 24, which are exactly the tax-exempt transactions Azuma conducts. Nowhere does the publication specify that a Native American cigarette distributor or retailer must hold a state license. Instead, it provides only that a non-Native American *purchaser*, if she buys untaxed cigarettes, "must register with CDTFA and pay applicable California excise tax." *Id.* (emphasis added).

Other states such as New York, Washington, Oklahoma and Nebraska have implemented systems that promote certainty for the state government and for tribal governments and Indian country businesses, which have received court approval as consistent with federal law and tribal self-government. *See Milhelm Attea*, 512 U.S. at 64-68; *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1163 (10th Cir. 2012)

(discussing Oklahoma system); *United States v. Baker*, 675 F.2d 1478, 1489-90 (9th Cir. 1995) (Washington system); 2-ER-273 (Neb. Dep't of Rev., Form 68, Nebraska Credit Computation for Cigarettes Sold to Native Am. Indian Tribal Members in Indian Country). California's unwillingness to provide clear direction through state law exacerbates the difficulty tribal officials face in their decision making.

Qualified immunity permits government officials to fulfill their duties, even when doing so requires them to navigate legal gray areas, without fear of incurring personal liability if an adversary or court later disagrees with their judgment. Without it, "[t]he decision maker rather than the decision would become the target" whenever a tribal official implements a contentious policy favoring tribal sovereignty instead of ceding ground to the state. *Buckles v. Kings Cty.*, 191 F.3d 1127, 1136 (9th Cir. 1999). Because the personal-capacity claims in this case would impair the public interest in allowing government officials to vigorously exercise their official authority, the lower court erred in declining to dismiss these claims on the basis of qualified immunity.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the Court reverse the portions of the district court's order permitting California to assert its official-capacity PACT Act claim and permitting it to assert personal-capacity claims for alleged violations of civil regulatory statutes.

Dated: January 10, 2025

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

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Dated: January 10, 2025 *s/ Tim Hennessy*