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

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

I. The PACT Act forecloses the use of *Ex parte Young* to circumvent tribal sovereign immunity 8

A. Appellants have not waived their right to assert sovereign immunity against the PACT Act claim. 8

B. The PACT Act limits State enforcement against immune Indian tribes, preventing the use of equitable workarounds to sidestep the statute. 13

II. Qualified immunity bars the claims that seek to impose personal monetary liability upon tribal government officials. 19

A. Appellants' immunity from the PACT Act, CCTA, and RICO claims is properly before the Court. 19

B. The PACT Act alone does not overcome Appellants' qualified immunity. 23

C. Federal Indian law principles are critical to determining whether Appellants' conduct violated clearly established law, even when raised as an affirmative defense. 26

D. Appellants did not violate clearly established law. 29

E. Qualified immunity applies to state enforcement actions against tribal government officials. 35

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 38

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001) 14

Amerind Risk Mgmt. Corp. v. Malaterre,
633 F.3d 680 (8th Cir. 2011) 13

Anderson v. Creighton,
483 U.S. 635 (1987) 26, 27

Anderson v. Morrow,
371 F.3d 1027 (9th Cir. 2004) 27, 28

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 28, 34

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 20

Big Sandy Rancheria Enters. v. Bonta,
1 F.4th 710 (9th Cir. 2021) 30, 33

Bodi v. Shingle Springs Band of Miwok Indians,
832 F.3d 1011 (9th Cir. 2016) 9

Brosseau v. Haugen,
543 U.S. 194 (2004) 23

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 31, 32

Cascadia Wildlands v. Scott Timber Co.,
105 F.4th 1144 (9th Cir. 2024) 12

Center for Biological Diversity v. Salazar,
706 F.3d 1085 (9th Cir. 2013) 11

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 14

Club Retro, LLC v. Hilton,
568 F.3d 181 (5th Cir. 2009) 22

Davis v. Scherer,
468 U.S. 183 (1984) 25

Dep't of Taxation & Fin. v. Milhelm Attea & Bros.,
512 U.S. 61 (1994) 30, 34

Florida Dept. of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982) 12

Ganwich v. Knapp,
319 F.3d 1115 (9th Cir. 2003).....22

Gila River Indian Community v. Waddell,
967 F.2d 1404 (9th Cir. 1992).....32

Gomez v. Toledo,
446 U.S. 635 (1980) 26

Greensprings Baptist Christian Fellowship Trust v. Cilley,
629 F.3d 1064 (9th Cir. 2010)..... 21, 22

Grondal v. United States,
37 F.4th 610 (9th Cir. 2022).....8, 9

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 21, 22

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 26, 27

JGR, Inc. v. Thomasville Furniture Indus., Inc.,
550 F.3d 529 (6th Cir. 2008).....8

Jimenez v. Franklin,
680 F.3d 1096 (9th Cir. 2012).....8, 11

Kentucky v. Graham,
473 U.S. 159 (1985) 16

Lazy Y Ranch Ltd. v. Behrens,
546 F.3d 580 (9th Cir. 2008).....20

Maverick Gaming LLC v. United States,
123 F.4th 960 (9th Cir. 2024).....8, 9

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003) 21

Mitchell v. Forsyth,
472 U.S. 511 (1985) 20, 22

Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,
425 U.S. 463 (1976) 32, 33, 34

Moore v. Garnand,
83 F.4th 743 (9th Cir. 2023) 22

Mullenix v. Luna,
577 U.S. 7 (2015) 28

Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.,
498 U.S. 505 (1991) 18

Okla. Tax Com'n v. Sac and Fox Nation,
508 U.S. 114 (1993) 31

People ex rel. Becerra v. Rose,
16 Cal.App.5th 317 (2017) 34, 35

Pistor v. Garcia,
791 F.3d 1104 (9th Cir. 2015) 10, 12

Quinault Indian Nation v. Pearson,
868 F.3d 1093 (9th Cir. 2017) 9

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 15

United States v. Nagra,
147 F.3d 882 (9th Cir. 1998) 8

United States v. Olano,
507 U.S. 725 (1993) 10

Verizon Maryland, Inc. v. Pub. Serv. Com'n,
535 U.S. 635 (2002) 16, 17

Washington v. Confederated Tribes of Colville Indian Reservation,
447 U.S. 134 (1980) 32, 34

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 31, 32, 34

Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 14

Williams v. Lee,
358 U.S. 217 (1959) 17

Wilson v. Layne,
526 U.S. 603 (1999) 25

Ziglar v. Abbasi,
582 U.S. 120 (2017) 27, 28

Statutes

15 U.S.C. § 375(4) 23, 29

15 U.S.C. § 375(4)-(6) 17

15 U.S.C. § 375(5) 23

15 U.S.C. § 375(5)-(6) 29

15 U.S.C. § 375(6) 23

15 U.S.C. § 376a(a) 23, 29

15 U.S.C. § 376a(a)(3) 17, 30

15 U.S.C. § 376a(e)(2)(A) 23

15 U.S.C. § 376a(e)(2)(A)(ii) 23

15 U.S.C. § 378(c)(1)(A) 15

15 U.S.C. § 378(c)(1)(B) 13, 15, 16

15 U.S.C. § 378(c)(2) ..... passim

18 U.S.C. § 2341(2) 29

18 U.S.C. § 2341(2)(A) 30

18 U.S.C. § 2342 19

18 U.S.C. § 2342(a) 29

18 U.S.C. 1962(c) 19

PACT Act § 5(a), Pub. L. No. 111-154, 124 Stat. 1087, 1109-10, 15 U.S.C. § 375 Note 18, 24

PACT Act § 5(e), Pub. L. No. 111-154, 124 Stat. 1087, 1110, 15 U.S.C. § 375 Note 24

I. The PACT Act forecloses the use of *Ex parte Young* to circumvent tribal sovereign immunity.

A. Appellants have not waived their right to assert sovereign immunity against the PACT Act claim.

Contrary to California's first argument, Appellants' prior appeal from a preliminary injunction order (the "PI Appeal") did not waive Appellants' right to assert a sovereign immunity defense against the PACT Act claim. Tribal sovereign immunity is not so readily waived by litigation conduct, particularly where, as here, Appellants consistently maintained their sovereign immunity defense while the PI Appeal proceeded. *See Maverick Gaming LLC v. United States*, 123 F.4th 960, 978 (9th Cir. 2024); *Grondal v. United States*, 37 F.4th 610, 617-18 (9th Cir. 2022).

The waiver cases on which California principally relies did not involve waivers of tribal sovereign immunity. *See* Ans. Br. 23[1] (citing *United States v. Nagra*, 147 F.3d 882 (9th Cir. 1998) (defendants waived issue regarding validity of guilty pleas); *Jimenez v. Franklin*, 680 F.3d 1096, 1099 (9th Cir. 2012) (defendants waived issue regarding joint and several nature of attorney's fee award); *JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 550 F.3d 529, 532 (6th Cir. 2008) (prior appeal from final judgment, where appeal did not challenge zero lost profits award, waived right to relitigate lost profits issue on retrial)). Tribal sovereign immunity is not nearly as susceptible to waiver through litigation conduct as most other issues.

[1] Citations are to the CM-ECF header page numbers.

"It is well-established that a tribe's voluntary participation in litigation for a limited purpose does not constitute a blanket waiver of immunity from suit in general." *Maverick Gaming*, 123 F.4th at 978. "[A] tribe's participation in a lawsuit can 'effect a waiver for limited purposes,'" but only "[i]n rare instances." *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1097 (9th Cir. 2017). Ambiguity and implication cannot establish a waiver—the Court "demand[s] clarity that the tribe gave up its immunity," *id.* at 1098, and waivers by litigation conduct must be "tantamount to an express waiver" because "'waivers of tribal sovereign immunity may not be implied.'" *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017, 1018 (9th Cir. 2016). "The instances where tribal participation in litigation will constitute a waiver of tribal sovereign immunity must be viewed as very limited exceptions to the general rule that preserves tribal sovereign immunity absent an unequivocal expression of waiver in clear terms." *Grondal*, 37 F.4th at 618. And if immunity has been waived, "[t]he scope of the waiver depends on the particular circumstances, including the tribe's actions and statements as well as the nature and bounds of the dispute that the tribe put before the court." *Quinault* at 1097.

In the PI Order, the district court explained that because the issue of the *Ex parte Young* exception to tribal sovereign immunity was also raised in the motion to dismiss, the court only "consider[ed] defendants' arguments [on that issue] in the

context of defining whether the court has jurisdiction to grant the State's [PI] motion." PI Order, 1-ER-20 n.4. Thus, the PI Order's conclusion approving the use of *Ex parte Young* only operated as an exception to Rose's official-capacity sovereign immunity with respect to the preliminary relief the court granted. As a defense to the Complaint, including the PACT Act claim, sovereign immunity remained a live issue. By choosing not to focus the PI Appeal on the tribal sovereign immunity issue, Appellants at the most waived sovereign immunity from the preliminary relief against Rose that was at issue there. (Accordingly, proceedings to enforce the PI Order have continued in the district court even while the PACT Act claim is concededly automatically stayed pending this appeal.)

Moreover, by the time Appellants filed their opening brief in the PI Appeal on January 12, 2024, the district court had not yet ruled on the motion to dismiss—that order did not come until January 24, 2024, and Appellants promptly appealed it. Thus, Appellants did not relinquish or abandon their sovereign immunity defense altogether, but continued to defend against the Complaint on the basis of sovereign immunity. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("waiver is the intentional relinquishment or abandonment of a known right") (internal quotation marks omitted); *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (waiver may occur if defendant "does not invoke its immunity in a timely fashion and takes actions indicating consent to the litigation"). Furthermore, it would be unfair to

require Appellants to fully air in this Court an issue the district court decided on a preliminary and limited basis when a fuller and final district court decision was on the immediate horizon. Appellants' approach was not "inefficient and uneconomical," *Jimenez* at 1100, but was reasonable and necessary under the circumstances.[2]

Additionally, as a rule "[appellate] decisions at the preliminary injunction phase do not constitute the law of the case." *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (internal quotation marks omitted). Under an "exception to [this] rule," a "*fully considered* appellate ruling on an issue of law made on a preliminary injunction appeal" may be binding as the law of the case. *Id.* at 1091 (internal quotation marks omitted, emphasis in original). This Court's silence in the PI Appeal on the issues of sovereign immunity and *Ex parte Young* is not the "fully considered appellate ruling" that could constitute an exception to the general rule. California does not cite any case where the failure to raise an issue on an appeal from a preliminary injunction order, as opposed to an appeal from a final judgment, effected a waiver of the issue on a subsequent appeal in the case.

[2] Appellants attempted to avoid multiplying potential appeals by moving to consolidate consideration of the PI and dismissal motions, but California opposed, and the district court denied Appellants' request. 2-ER-276.

Finally, even if the issue were waived, the Court has "discretion to reach an otherwise-forfeited issue in appropriate circumstances, especially when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1154 (9th Cir. 2024). In *Cascadia Wildlands*, the timber company defendant's appeal from a preliminary injunction did not contest the district court's ruling on a "notice" issue, and the court of appeal did not consider the issue. *Id.* On remand, the company raised the issue again in the district court, did not prevail, and raised the issue on its appeal from the final judgment. *Id.* The *Cascadia* Court noted "it could be argued that Scott Timber forfeited its notice argument"—without deciding—but exercised its discretion to consider the argument regardless. *Id.* The Court (which newly held the notice requirement was not jurisdictional, *id.* at 1153) recognized the company "may have proceeded with the understanding that it could raise its jurisdictional argument at any time under our prior precedent," *id.* at 1154. By the same token, tribal sovereign immunity is a "quasi-jurisdictional" issue that "may be asserted at any time." *Pistor* at 1110, 1111 (internal quotation marks omitted); *see Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (defending case on merits does not foreclose assertion of immunity, which "sufficiently partakes of the nature of a jurisdictional bar that it may be raised at any point of the proceedings") (internal

quotation marks omitted); *see Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011) (noting sovereign immunity "may be raised for the first time on appeal … or raised sua sponte by the court," and holding appellant "did not waive its tribal immunity by failing to raise the issue in [a prior appeal]"). Thus, the nature of the issue is reason to consider it here notwithstanding any potential waiver arising from the prior appeal.

B. The PACT Act limits State enforcement against immune Indian tribes, preventing the use of equitable workarounds to sidestep the statute.

The PACT Act states that if a State (or a local government or Indian tribe) wishes to see the Act enforced against "any person not subject to State, local, or tribal government enforcement actions for violations of this Act," then the State "may provide evidence of a violation" by such person "to the Attorney General of the United States or a United States attorney, who shall take appropriate actions to enforce this Act." 15 U.S.C. § 378(c)(2).[3] An Indian tribe and its arms are "person[s] not subject to State, local, or tribal government enforcement actions for violations of this Act," because tribal sovereign immunity shields tribes and tribal arms from any unconsented lawsuit. The PACT Act affirmatively maintains tribal sovereign immunity in the immediately preceding paragraph. § 378(c)(1)(B).

[3] Statutory citations are to Title 15 of the U.S. Code unless otherwise specified.

In other contexts, a State confronting an immune Indian tribe alleged to be violating federal law might skirt sovereign immunity by suing a tribal officer for injunctive or declaratory relief under *Ex parte Young*. An *Ex parte Young* action, although nominally "against a [tribal] official in his or her official capacity[,] is not a suit against the official but rather is a suit against the official's office. … As such, it is no different from a suit against the [tribe] itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). The PACT Act, however, instructs States how to seek enforcement of the Act against a tribe itself—through referral to the federal government under § 378(c)(2).

By "speak[ing] directly to a question," in this case the question of enforcing the PACT Act against alleged violators who are not subject to enforcement actions by the State directly, Congress supplied the *only* answer cognizable under federal law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981). The *Ex parte Young* doctrine, like any federal common law doctrine, yields to "the paramount authority of Congress." *Id.* at 313 (internal quotation marks omitted). When Congress expressly provides for "one method of enforcing a substantive rule," that tends to mean "that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). This rule can "preclude[] a finding of a congressional intent to create a private right of action, even though other aspects of the statute … suggest the contrary." *Id.* *A fortiori*, a Congressional answer readily precludes any

alternative answer supplied by federal common law. Therefore, the fact that the PACT Act expressly affirms that States cannot sue Indian tribes directly, while providing States a specific mechanism for enforcing the Act against them, demonstrates Congress did not intend States to utilize *Ex parte Young* as an alternative method of enforcement. Respect for the legislative process requires the Court to leave the statutory enforcement mechanism as it stands, rather than supplement it with another method that upsets the statutory scheme.

Contrary to California's argument, the "broad" language of § 378(c)(1)(A) is not determinative. Ans. Br. 27. In *Seminole Tribe*, the Supreme Court noted that although one section of the statute in question there, taken alone, was arguably "broad enough to encompass both a suit against a State (under an abrogation theory) and a suit against a state official (under an *Ex parte Young* theory), [that section] cannot be read in isolation from" other statutory sections. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75 n.17 (1996). Here, too, although § 378(c)(1)(A) standing alone contains broad language providing for suits against "any person," that language cannot be read in isolation from § 378(c)(1)(B), which affirms that some persons nevertheless remain immune from suit, and § 378(c)(2), which specifies the enforcement procedure for persons immune from suit.

California also argues that, because of *Ex parte Young*, Indian tribes actually *are* "subject to State … enforcement actions." Ans. Br. 31 (quoting § 378(c)(2)).

But the fact remains that Indian tribes are immune from any unconsented lawsuit, notwithstanding the legal fiction of *Ex parte Young*. An immune sovereign "cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). And "official-capacity actions for prospective relief are not treated as actions against the [sovereign]" for purposes of sovereign immunity. *Id.* Therefore, Appellants' construction of the PACT Act does not contradict the Act's language, as California argues. An Indian tribe, being immune from suit, § 378(c)(1)(B), is not itself "subject to State … enforcement actions," § 378(c)(2). Nothing about this "expand[s]" or "modif[ies]" tribal sovereign immunity. § 378(c)(1)(B). What the Act does, however, is redirect the sovereign immunity workaround, steering away from the *Ex parte Young* method of naming a different defendant to reach the immune Indian tribe, toward the statutory method of finding a different plaintiff against whom the Indian tribe does not have immunity.[4]

California relies on *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), to argue the PACT Act does not displace *Ex parte Young* suits

[4] California attempts to explain § 378(c)(1)(2) with the argument that "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*." Ans. Br. 31 n.6. This construction, however, necessarily concedes that an Indian tribe is a "person not subject to State … enforcement actions for violations of this Act," contrary to California's primary argument.

because the Act does not restrict "the relief a court can award" or limit Indian tribes' liability. Ans. Br. 29 (quoting *Verizon* at 647-48). On the contrary, however, the PACT Act displaces *Ex parte Young* by restricting the mechanisms available to States to enforce the Act against Indian tribes—States may provide evidence of a violation to federal officials, "who shall take appropriate actions to enforce th[e] Act." § 378(c)(2). This remedial scheme contains statutory limitations arising from States' restricted enforcement authority, rather than from constraints on the relief courts can award, demonstrating Congressional intent not to limit the liability of Indian tribes in violation of the Act, but to shift enforcement authority to the federal government (which can obtain relief against a tribe that a State could not).

Contrary to California's assertions, it would certainly mark a troubling inflection point in federal Indian policy for Congress to authorize State lawsuits against Indian tribes (via *Ex parte Young*) seeking to compel tribal compliance with state laws. It is true, as California states, that PACT Act violations are "violations of federal law," Ans. Br. 30, but the principal substance of the Act is state law. *See* § 376a(a)(3) (requiring delivery sellers to comply with state laws); § 375(4)-(6) (defining "delivery seller" according to whether their purchaser is "lawfully operating"). Congress acts "consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Congress expressly gave its assurance the PACT Act would

not grant states any new regulatory power over Indian tribes, tribal members, tribal enterprises, or in Indian country. PACT Act § 5(a)(3), (4), Pub. L. No. 111-154, 124 Stat. 1087, 1109-10, 15 U.S.C. § 375 Note. And Congress—which holds the responsibility to set the terms of tribal-state interface and to dispense with or limit tribal immunity, *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991)—has never authorized states to bring *Ex parte Young*-type actions against tribal officials to enforce tribal governments' compliance with state civil regulatory laws. To find parallel authority here, where the PACT Act provides that federal authorities "shall take appropriate actions to enforce this Act" against "any person not subject to State … enforcement actions," § 378(c)(2), would give states power over Indian tribes at odds with the PACT Act's deliberate equilibrium. In keeping with the Act's provisions preserving tribal immunity and federal limits on state control over tribal conduct in Indian country, Congress determined, not without justification, that federal enforcement of the Act against tribes, with states in a support role, would help states enforce applicable state laws while accommodating the federal Indian policy goals of Indian self-government, self-sufficiency and economic development.

II. Qualified immunity bars the claims that seek to impose personal monetary liability upon tribal government officials.

A. Appellants' immunity from the PACT Act, CCTA, and RICO claims is properly before the Court.

California declines to address Appellants' immunity from claims under the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2342, and the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. 1962(c), because it asserts these claims are not before the Court. California's assertion is incorrect; the order denying qualified immunity is immediately appealable with respect to the PACT Act, CCTA, and RICO claims.

Appellants moved to dismiss on the ground that "qualified personal immunity protects Philip Del Rosa and Darren Rose from the personal-capacity claims asserted against them," including the claims based on alleged violations of the CCTA and RICO. 2-ER-103; *see* 3-ER-293-294, 297-299. The district court's short analysis distinguished between immunity from "damages for violation of [California's] rights" and immunity from the "enforce[ment of] Federal and State laws," and concluded "Defendants have not shown they are entitled to qualified immunity." 1-ER-10. The district court's citations to the parties' briefs shed more light on the meaning of the order. *Id.* After citing the entire section of Defendants' brief in support of its motion to dismiss devoted to qualified immunity, the district court then

cited "Opp'n at 31 n.7," a footnote in California's brief in opposition to the motion to dismiss which reads in relevant part:

> [I]t is unclear whether qualified immunity applies to state statutory enforcement actions in the first instance. The cases Defendants cite all address violations of constitutional or statutory *rights*, … but Defendants identify no allegations of rights violations in the Complaint. … [T]heir motion is properly denied on that basis.

From this, it is apparent the district court adopted California's distinction between "rights violations" and "statutory enforcement actions." Based on this rationale, the court rejected qualified immunity from the claims in this case across the board. 1-ER-10-11.

California now claims this denial of qualified immunity is not appealable. Ans. Br. 33 n.7. This, California argues, is because the district court dismissed the CCTA and RICO claims without prejudice on grounds other than qualified immunity. 1-ER-9, 12-13. To the contrary, however, the order denying qualified immunity is immediately appealable. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) ("a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of [28 U.S.C.] § 1291"); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 587 (9th Cir. 2008).

A definitive rejection of qualified immunity is not rendered unappealable simply because plaintiff's claims are dismissed on other grounds with leave to

amend. In the case on which California relies, *Greensprings Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064 (9th Cir. 2010), this Court explained that although ordinarily "[a]n order dismissing a case with leave to amend may not be appealed as a final decision under § 1291[,] … under certain limited conditions we have found that orders granted with leave to amend may be appealed immediately under the collateral order doctrine." *Id.* at 1068. It depends on whether the order was "inherently tentative" with respect to the disputed question, or was "made with the expectation that [it] will be the final word on the subject addressed." *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)).

Here, the denial of qualified immunity was the district court's final word on the subject. The court's conclusion that no legal authority supported "extending qualified immunity to tribal officers" for these claims cannot reasonably be construed as inviting Defendants to reopen the issue, as California implies. Ans. Br. 33 n.7. Nor did the court defer ruling on qualified immunity because it found other grounds to dismiss certain claims; rather, it categorically denied the claimed existence of immunity. *Cf. Miller v. Gammie*, 335 F.3d 889, 894 (9th Cir. 2003) (en banc) (order *deferring* ruling on motion to dismiss on grounds of absolute immunity is not conclusive or appealable, while order *denying* immunity is conclusive and appealable). And although California was allowed to amend the claims that were dismissed on other grounds, neither the dismissals nor the subsequent amendments

indicate the court expected any reason would arise to "reassess or revise" its categorial threshold denial of qualified immunity. *Greensprings* at 1068 (quoting *Gulfstream* at 277).

Moreover, even where a district court's order "expressly [leaves] the qualified immunity question open for reconsideration after the completion of discovery," that order is immediately appealable. *Moore v. Garnand*, 83 F.4th 743, 748-49 (9th Cir. 2023) (quoting *Ganwich v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003)). The rationale for this rule is that "forcing the defendant officers to undergo discovery, without the possibility of appeal…, would erode any qualified immunity to the burdens of discovery the officers might possess." *Id.* at 749 (quoting *Ganwich* at 1119). Therefore, even if the district court had denied qualified immunity as to the CCTA and RICO claims while expressly stating the issue could be reopened after further litigation on the amended claims, that order still would have been immediately appealable.

The Fifth Circuit case on which California relies is inapt. There, the district court *granted* without prejudice a motion to dismiss *based on qualified immunity*. *Club Retro, LLC v. Hilton*, 568 F.3d 181, 214 (5th Cir. 2009). That order was not immediately appealable, the court explained, unlike "a district court's *denial* of a claim of qualified immunity," which is appealable. *Id.* (quoting *Mitchell*, 472 U.S. at 530). Here, the denial of qualified immunity is appealable.

B. The PACT Act alone does not overcome Appellants' qualified immunity.

California incorrectly asserts the PACT Act presents an "obvious case" in which the statute clearly establishes the bounds of lawful conduct "even without a body of relevant case law." Ans. Br. 34 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). This argument glosses over the complications and judgment calls that federal Indian law principles introduce into the statute.

The PACT Act requires "delivery sellers" to comply with a list of requirements, § 376a(a), defines "delivery sellers" as persons who make remote cigarette sales to "consumers," § 375(5) & (6), and provides that a purchaser is not a "consumer" if they are "lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes," § 375(4). It also prohibits deliveries for persons named on a list of noncompliant delivery sellers, § 376a(e)(2)(A), with an exception for deliveries "to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes," § 376a(e)(2)(A)(ii).

For Indian tribes and tribal entities based in Indian country, "lawfully operating" (or "lawfully engag[ing]" in business) is not a simple matter of "compliance with State and Federal law as well as Tribal law," as California asserts, quoting a letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives. Ans. Br. 35 (quoting SER-134). The PACT Act expressly incorporates without modification the "limitations under Federal or State law, including Federal common

law and treaties, on State … tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country." PACT Act § 5(a)(3), Pub. L. No. 111-154, 124 Stat. 1087, 1110, 15 U.S.C. § 375 Note; *see also id.* § 5(e) ("Any ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in favor of this section."). As discussed in the Opening Brief, under the federal Indian law referenced in § 5 of the PACT Act, a variety of factors inform any determination of state law's application to Indian tribes and in Indian country. *See* Opening Br. 55-69. When tribal officials are faced with deciding how best to operate the tribe's tobacco enterprise, they may need (for instance) to weigh and balance the particular interests of the Indian tribe purchasing tribally manufactured cigarettes for retail sale at the tribe's gaming facility, the federal interests in promoting tribal self-government and self-sufficiency, and the state's interest in imposing a tax directed at off-reservation value, just to determine whether state taxes are likely to apply to the retail sales to non-Indians, and thus whether the tribal retailer, if it is not collecting that tax and remitting it to the state, is not "lawfully operating" under the PACT Act, potentially making the selling enterprise a "delivery seller."

California's primary argument is that none of this matters, and Appellants' statutory violations are clear to anyone reading the statute alone. This is a nonstarter,

given the PACT Act's incorporation of the complex body of law governing state authority in Indian country and the tribal identity and reservation location of Appellants, Azuma, and the Tribal Retailers. It is telling, moreover, that California looks beyond the PACT Act itself to support the claim that Azuma is "do[ing] what the PACT Act prohibits," relying on the "ATF's findings" and the preliminary injunction orders to illuminate how Appellants should have understood the PACT Act under the circumstances. Ans. Br. 37.[5] Not only is this contrary to California's argument that the "statute itself" is "sufficient," *id.* at 34, but also these decisions, which post-date the commencement of this case, could not have guided Appellants' decisions "at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. 183, 197 (1984); *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999) (sustaining immunity in the absence of "cases of controlling authority in [parties'] jurisdiction at the time of the incident which clearly established the rule on which [plaintiffs] seek to rely," or "a consensus of cases of persuasive authority").

[5] The ATF decision is currently under judicial review. *Azuma Corp. v. Garland*, No. 23-cv-01761-CKK (D.D.C., filed Jun. 16, 2023).

C. Federal Indian law principles are critical to determining whether Appellants' conduct violated clearly established law, even when raised as an affirmative defense.

California next argues the Court should ignore Indian law principles of preemption and infringement of tribal self-government because they arise here as an affirmative defense. Ans. Br. 38. This argument is contrary to the law.

Qualified immunity itself is an affirmative defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). "It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). "[T]he official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware." *Id.* at 641. And "the objective reasonableness of an official's conduct [is] measured by reference to clearly established law." *Harlow* at 818; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (measuring reasonableness "in light of clearly established law and the information the [defendant] officers possessed").

Here, Appellants' conduct was justified by an objectively reasonable belief that it was lawful, based on their consideration of the salient factors of federal Indian law that enable decisionmakers to determine whether and to what extent state civil regulatory laws govern tribal activities in Indian country. The success of this immunity defense "turns on the 'objective legal reasonableness' of [Appellants'] action … assessed in light of the legal rules that were 'clearly established' at the time

it was taken" and the information Appellants possessed. *Anderson* at 639 (quoting *Harlow* at 818, 819).

Additionally, much depends upon "the level of generality at which the relevant 'legal rule' is to be identified." *Anderson* at 639. To avoid "convert[ing] the rule of qualified immunity … into a rule of virtually unqualified liability" by alleging "extremely abstract" violations, the focus is "more particularized, and hence more relevant." *Id.* at 639-40; *see also Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) ("the dispositive question is whether the violative nature of *particular* conduct is clearly established") (internal quotation marks omitted). Here, the relevant alleged violation is not (for instance) Azuma's distribution of untaxed cigarettes in the abstract, but its distribution of untaxed tribally-manufactured cigarettes to tribal enterprises on Indian reservations for resale to tribal members and tribal casino guests. That "particularized" violation is governed not only by the legal rule of the PACT Act alone, but also, and more substantially, by the legal rules of federal Indian law.

The inapposite case on which California relies, *Anderson v. Morrow*, 371 F.3d 1027 (9th Cir. 2004), is not a qualified immunity case, but one in which a criminal defendant attempted to argue the statute he was charged with violating was unconstitutionally vague. *Id.* at 1032. He sought to support the argument by claiming he lacked scienter, which the Court held had no bearing on the statute's

vagueness. *Id.* None of this pertains to the instant case, where Appellants are not challenging statutes as vague, but asserting an objectively reasonable basis for concluding their actions on behalf of the Tribe complied with the applicable legal rules.

California condemns the possibility that government officials could be immunized by identifying an "affirmative defense that might apply." Ans. Br. 39. But this formulation seems indistinguishable from the established rule of qualified immunity: "if a reasonable officer *might not have known for certain* that the conduct was unlawful[,] then the officer is immune from liability." *Ziglar*, 582 U.S. at 152 (emphasis added). Here, Appellants are entitled to qualified immunity because, at the time of their conduct, the applicability of state cigarette laws to the on-reservation transactions involving Azuma and its customers (and, thus, the applicability of federal statutes that incorporate such state laws if permitted by federal Indian law principles) had not been clearly established. "[E]xisting precedent" did not place the legal question "in these circumstances 'beyond debate.'" *Mullenix v. Luna*, 577 U.S. 7, 13-14 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). After reasonably applying existing law to the facts before them, Rose and Del Rosa "might not have known for certain that the conduct was unlawful," *Ziglar* at 152, so they are immune from liability in the event they were mistaken.

D. Appellants did not violate clearly established law.

California argues Appellants' off-reservation activity is clearly unlawful because Azuma was required to, and did not, follow generally applicable state law while outside of Indian country. Ans. Br. 40. This argument, however, sidesteps the threshold issue of California's federal claims. The PACT Act claim is premised on the allegation that Appellants are "delivery sellers," meaning they make remote sales to "a consumer." *See* Complaint, 3-ER-292 ¶ 68-70; § 376a(a) (requiring "each delivery seller" to comply with a list of requirements) *id.* § 375(5)-(6) (defining "delivery sale" and "delivery seller"). If Azuma's customers, the Tribal Retailers, are not "consumers" because they are "lawfully operating" as cigarette retailers, § 375(4), then Azuma is not a delivery seller, and it cannot be in violation of the PACT Act's requirements for delivery sellers. This is why the key issue is the Tribal Retailers' compliance with applicable law and, critically, whether state law applies to them. California's assertion that Azuma violates state law is irrelevant to the alleged violations of the PACT Act delivery seller requirements if, as Appellants contend, Azuma is not a delivery seller.[6]

[6] Similarly, no CCTA violation (and no RICO violation predicated on the CCTA) occurs without cigarettes which should, but do not, bear a state tax stamp. 18 U.S.C. §§ 2341(2), 2342(a); *see* Complaint, 3-ER-293 ¶ 79, 86. CCTA liability is therefore dependent upon whether the on-reservation sales from Azuma to the Tribal Retailers are exempt from state tax.

Moreover, California's broad-brush approach does not account for the particularities of this case and therefore does not clearly establish Azuma's legal obligations, assuming for the sake of argument Azuma is a delivery seller under the PACT Act. In *Milhelm Attea*, on which California relies, the Supreme Court upheld against a preemption challenge New York's regulatory scheme for the sale of taxed and tax-exempt cigarettes on Indian reservations, which imposed requirements on wholesalers while providing detailed and "virtually automatic" mechanisms that left "ample room for legitimately tax-exempt sales," in an accommodation of tribal rights not shared by California's regulatory scheme. *See Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 76 (1994). Nor is it clear from *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), the other case on which California relies, how California laws that are ostensibly triggered merely by the possession of cigarettes en route from one Indian reservation to another, are "applicable to the *sale* of cigarettes" as they must be to come within the PACT Act's incorporation of state law." § 376a(a)(3) (emphasis added).

Additionally, cigarettes are not "contraband" under the CCTA while in the possession of a federally permitted manufacturer of tobacco products "or an agent of such person." 18 U.S.C. § 2341(2)(A). As agents of Azuma, which holds a federal tobacco manufacturing permit (Complaint, 3-ER-281 ¶ 8), Appellants are not in violation of the CCTA.

Next, California argues it is "'beyond dispute' that Azuma's customers are not 'lawfully operating.'" Ans. Br. 42. To begin, the Supreme Court has held that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country." *Okla. Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993). This presumption applies not only to state taxes, but to "state laws" generally, both "in the context of an assertion of state authority over the activities of non-Indians within a reservation," and, even more so, "when applied to the activities of tribes and tribal members within reservations." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.18 (1987).

California acknowledges that where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," the State's power depends upon "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." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *see* Ans. Br. 42. But California is incorrect to argue the relevant balancing of interests "has already been done." Ans. Br. 43. Decisions evaluating one set of facts cannot be used to "determine whether, in [a different] specific context, the exercise of state authority would violate federal

law." *Bracker* at 145. Rather, the determination is made "case-by-case." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992).

Here, in their effort to conform Azuma's business to applicable laws, Appellants identified and weighed the interests of the Indian tribes with jurisdiction over the reservations where the Tribal Retailers operate, and the state and federal interests, to ascertain whether the Tribal Retailers should be following state laws. They considered whether the state tax or regulation is aimed at "value generated on the reservation by activities involving the Tribes and … the taxpayer is the recipient of tribal services," or if the target is "off-reservation value and … the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980); *see Cabazon*, 480 U.S. at 219-20; *see* Opening Br. 60-62. They determined the Tribal Retailers' retail sales of Azuma's tribally manufactured cigarettes were much more similar to the tribal casinos at issue in *Cabazon* than the discount sales of non-tribal cigarettes to people who, if not for the tax discount, would have bought them from off-reservation stores, as in *Colville* or *Moe*. *See Colville* at 155; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976).

Appellants also considered the impact of *Big Sandy*, which dealt with an off-reservation wholesaler, not an on-reservation retailer, and therefore did not engage in *Bracker* balancing, although the Court confirmed (with emphasis) 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*," which describes the Tribal Retailers' circumstances, both as they purchase from Azuma and resell to any nonmembers. *Big Sandy* at 729.[7] While *Big Sandy* found, without balancing any tribal interests, that an off-reservation distributor is subject to the state's reasonable regulatory burdens, the strong tribal interests of the *on-reservation* retailers' tribes and the correspondingly minor interests of the state led Appellants to a different conclusion.

In making their decisions on behalf of the Tribe, Appellants also relied on the Supreme Court's holding in *Moe* that a state cannot require tribal members to possess a state license to sell cigarettes on their reservation, even where sales are to non-tribal members. *Moe* at 480; *see* Opening Br. 57-58. Additionally, *Colville*'s

[7] California claims that in *Big Sandy* the tribal seller "attempted to invoke the sovereignty of its customers to immunize its sales from state regulation," Ans. Br. 46, but the Court only referred to (and rejected) the claim that state law "infringes the Tribe's self-governance," meaning the Big Sandy Rancheria of Western Mono Indians, not its customers. *Big Sandy* at 730; *see also id.* at 729 (rejecting claim "that California hinders the Tribe's ability to govern its territory and members"); *see id.* at 714 (identifying "the Tribe"). Therefore, with respect to the regulation of Azuma's sales to the Tribal Retailers on their reservations, *Big Sandy* does not provide an answer because *Big Sandy* did not analyze the home tribes' interests, while at the same time holding such analysis would be necessary in those circumstances. *Id.* at 729. And *Big Sandy* did not involve PACT Act violations, so it did not address whether the tribal retailers were lawfully operating, an essential element of the alleged violation here.

decision upholding state recordkeeping requirements upon tribal sellers did not establish a rule of law definitively applicable to the Tribal Retailers because *Colville* based its conclusion purely on the complete absence of evidence about the reasonable necessity of those requirements. *Colville* at 160. Since this standard considers whether the regulatory burden "frustrates tribal self-government," *Moe* at 483, implicating a "particularized inquiry" that "does not depend on 'rigid rules' or on 'mechanical or absolute conceptions of state or tribal sovereignty,'" *Milhelm Attea* at 73 (quoting *Bracker* at 142, 145), this Court noted, despite *Big Sandy*'s extension of *Colville*'s limited holding, that the test ultimately "may favor the Tribal Retailers such that they are not unlawfully operating under the PACT Act." 2-ER-56. This possibility demonstrates the law's contours were not "beyond debate." *al-Kidd*, 563 U.S. at 741.[8]

California next unpersuasively contends Rose and Del Rosa "in particular" should have doubted the legality of Azuma's business because Rose was previously fined for violating state laws when he owned and operated his own cigarette stores. Ans. Br. 47-48 (citing *People ex rel. Becerra v. Rose*, 16 Cal.App.5th 317 (2017)). The instant case is readily distinguishable from *Becerra*, where the retail tobacco

[8] To the extent the Court may find *Big Sandy* clearly resolved a question relevant to Appellants' decisions on behalf of Azuma, this would not impact Appellants' immunity from personal liability with respect to their conduct predating *Big Sandy*, or beyond the limits of the issue resolved therein.

stores were owned by Rose, not by a tribal government, and located on an individual trust allotment, not an Indian reservation. Both factors were key to the case's outcome. The court emphasized that "the threat to Indian sovereignty [was] minimal, especially in a case such as this in which no tribe has expressed an interest in the matter." *Becerra* at 328. The stores' sales were "not on [Rose's] tribe's reservation," and they were all made to non-Indians, and as such "there [was] no tribal sovereignty issue involved in this case." *Id.* at 329. This is a far cry from the conduct alleged here, where the enterprise is an economic arm of an Indian tribe, is located on the Alturas Indian Reservation, only sells products manufactured on the Alturas Indian Reservation, and only sells to tribally owned retailers who operate on their respective Indian reservations. The sovereign interests of the Alturas Indian Tribe and the other Indian tribes that have authority to govern the commerce occurring on their reservations critically shift the balance. California's attempt to equate penalizing an individual business owner and penalizing a government official for his official government actions illustrates the State's low regard for the Tribe as a self-governing entity.

E. Qualified immunity applies to state enforcement actions against tribal government officials.

Appellants demonstrated in the Opening Brief that the qualified immunity doctrine applies to state actions against tribal government officials for alleged violations of civil regulatory statutes, for all the same reasons it protects government

officials from actions alleging violations of private rights. Opening Br. 48-55. Besides the typical interests underlying qualified immunity, here it is also supported by the important interest that tribal governments have in exercising their sovereign rights in the face of perpetual encroachment by more powerful states. California's criticism that Appellants have not cited authority on point, Ans. Br. 49-50, rings hollow, as California cites no cases where a state has targeted tribal government officials with personal liability as it has done here, nor argued any substantive reason for limiting the qualified immunity doctrine to the "familiar 'violation of rights' pattern." Ans. Br. 50. In a legal zone where so much depends upon the decisionmaker's discretionary judgment, balancing tribal interests against the state's, and guided by judicial opinions that are each bound to their specific factual contexts, qualified immunity prevents states from using the threat of personal liability to undermine tribal officials' duty to promote and preserve their tribe's prosperity and sovereignty.

CONCLUSION

Appellants respectfully ask the Court to reverse the district court's orders 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: May 5, 2025

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number 24-698

I am the attorney or self-represented party.

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Dated: May 5, 2025 *s/ Tim Hennessy*