

No. 25-2340

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWENTY-NINE PALMS BAND OF MISSION INDIANS, a Federally
Recognized Indian Tribe doing business as Twenty-Nine Palms
Distribution,

Plaintiff-Appellant,

v.

PAMELA J. BONDI, in her official capacity as Attorney General of the
United States; UNITED STATES DEPARTMENT OF JUSTICE; DANIEL P.

DRISCOLL, in his official capacity as Acting Director, U.S. Bureau of
Alcohol, Tobacco, Firearms, and Explosives; UNITED STATES BUREAU
OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of
California, No. 5:24-cv-00379-SSS-SP, Hon. Sunshine S. Sykes

BRIEF FOR APPELLEES

BRETT A. SHUMATE

Assistant Attorney General

BILAL A. ESSAYLI

United States Attorney

MICHAEL S. RAAB

LAURA E. MYRON

Attorneys, Appellate Staff

Civil Division, Room 7228

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, DC 20530

(202) 514-4819

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INTRODUCTION

The Prevent All Cigarette Trafficking (PACT) Act provides the federal government with tools to combat cigarette trafficking, including requiring certain cigarette sellers that transact remotely to comply with all state laws for cigarette sales in the States in which the cigarettes are sold. Twenty-Nine Palms Band of Mission Indians is an unlicensed distributor of cigarettes in California. In 2023, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) determined that in 2022-2023 plaintiff unlawfully imported millions of untaxed cigarettes from New York into California and sold them to unlicensed tribal retailers throughout the State who then sold them to the broader public without complying with the state excise tax and licensing requirements. As a result, ATF concluded that plaintiff had violated the PACT Act and added it to the list of non-compliant delivery sellers following the district court's summary judgment ruling. Plaintiff does not contest ATF's factual determinations about its sales, does not dispute that neither it nor its customers hold the required licenses, and has never suggested that it has paid any of the required excise taxes. Instead, plaintiff argues that the PACT Act does not apply to its sales because California cannot require on-reservation retailers to hold a license to sell

cigarettes without impinging on tribal sovereignty. This contention is contrary to precedent of both this Court and the Supreme Court. And adopting plaintiff's reasoning would allow tribal retailers free reign to sell cigarettes and tobacco products without any imposition of state regulatory oversight or collection of concededly valid state-excise taxes. This Court should affirm the district court's conclusion that plaintiff and its customers must comply with state law.

STATEMENT OF JURISDICTION

The district court had jurisdiction to hear this case under 28 U.S.C. § 1331. ER-155. The district court granted summary judgment for the defendants on February 27, 2025, and issued its final judgment on March 24, 2025. *See* ER-5-10; *see also* ER-3-4. Plaintiff filed a timely notice of appeal on April 9, 2025. ER-177. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The issues presented are whether ATF's decision that plaintiff Twenty-Nine Palms Band of Mission Indians – an unlicensed distributor of cigarettes – violated the PACT Act for failing to comply with California licensing, reporting and excise tax laws when it sold untaxed, unstamped

cigarettes to other unlicensed tribal customers across the State was arbitrary and capriciously or procedurally deficient under the APA.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The PACT Act provides the federal government with tools to combat cigarette trafficking, including requiring certain cigarette sellers that transact remotely to comply with all state laws for cigarette sales in the States in which the cigarettes are sold. Three provisions of the statute are relevant here. First, the PACT Act requires that any person engaged in the sale, transfer, or shipment of cigarettes into a State, locality, or Indian country that taxes cigarettes is required to register with ATF and comply with certain reporting requirements. *See* 15 U.S.C. § 376(a)(1)-(3).

Second, the statute requires anyone making a “delivery sale” into a State to comply with all applicable state, local, and tribal laws regarding cigarette distribution, including, as relevant here, payment of excise taxes. 15 U.S.C. § 376a(a)(3)-(4). The statute also provides that no “delivery seller

may sell or deliver to any consumer . . . any cigarettes or smokeless tobacco pursuant to a delivery sale unless” any “excise tax that is imposed by the State . . . has been paid to the State” and “any required stamps or other indicia that the excise tax has been paid are properly affixed or applied” to the product. *Id.* § 376a(d)(1)(A), (C); *see also id.* § 376a(a)(4).

A delivery sale is a sale of cigarettes or smokeless tobacco to a “consumer” who is not physically present when the purchase is submitted or delivered, such as sales placed by online order. 15 U.S.C. § 375(5). A consumer is defined as “any person that purchases cigarettes or smokeless tobacco” except those who are “lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.” *Id.* § 375(4). Thus, sales to entities that are not lawfully operating as a manufacturer, distributor, wholesaler, or retailer are sales to “consumers” under the statute.

Third, the PACT Act establishes a “non-compliant list” that provides a record of known delivery sellers that have failed to comply with the statute. 15 U.S.C. § 376a(e)(1)(A). This list is updated and distributed by ATF at least once every four months and includes delivery sellers that are reported by state, local, or tribal governments as being out of compliance

with their laws. *Id.* § 376a(e)(1)(C)-(D). A state, local, or tribal government may report to ATF allegations that a delivery seller is not in compliance with the PACT Act. Prior to placing it on the non-compliant list, ATF is required to provide notice to a delivery seller that it was reported and to investigate any allegations if the delivery seller challenges the allegations of non-compliance. *Id.* § 376a(e)(1)(E)(ii), (iv). Once a delivery seller is placed on the list, that seller's cigarettes may not be knowingly distributed further, including by common carriers. *Id.* § 376a(e)(2).

The Contraband Cigarette Trafficking Act (CCTA) is also relevant to this dispute. This federal statute makes it unlawful for any person to knowingly “ship, transport, receive, possess, sell, distribute, or purchase” “a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes,” unless the possessor is otherwise in possession of a license to distribute such cigarettes, is a common carrier, or is an officer or agent of the United States. 18 U.S.C. §§ 2341, 2342(a).

2. Two provisions of California law are relevant here as well. First, California requires cigarette manufacturers, distributors, wholesalers, and retailers to obtain a state-issued license to engage in the sale of cigarettes in

California. *See* Cal. Bus. & Prof. Code §§ 22972, 22975. Licensed entities must maintain certain transaction records and may only transact with other licensed entities. *See id.* §§ 22974, 22978.1, 22978.4-.5, 22979.4-.6, 22980.1(b)(1). Under the Licensing Act, distributors and wholesalers may not sell to unlicensed entities. *See id.* § 22980.1(b)(1).

Second, California imposes an excise tax on the distribution of cigarettes. The State defines distribution as including “[t]he sale of untaxed cigarettes or tobacco products in [the] state” and “[t]he placing in this state of untaxed cigarettes . . . in retail stock for the purpose of selling the cigarettes or tobacco products to consumers.” Cal. Rev. & Tax. Code § 30008; *id.* § 30011. Thus, a retailer may be considered a distributor if it is placing untaxed cigarettes in retail stock for consumers to purchase. Distributors of cigarettes must have a license and comply with state reporting requirements. *Id.* §§ 30140, 30182(a), 30183(a). To pay the excise tax, licensed distributors purchase tax stamps from the State and affix them to each package of cigarettes; the tax is then included in the price of the cigarettes and borne by consumers. *See California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 10-11 (1985) (per curiam) (holding

California may require tribes to collect cigarette tax from non-Indian consumers).

Cigarettes sold “by a Native American tribe to a member of that tribe on that tribe’s land” are “exempt from state excise tax pursuant to federal law.” Cal. Health & Safety Code § 104556(j). But where a vendor makes a sale that is taxable – such as a sale from a tribe to a non-tribal member – the vendor is responsible for collecting the tax from the consumer and remitting it to the State. *See Chemehuevi*, 474 U.S. at 11; Cal. Rev. & Tax. Code §§ 30008(b), 30107, 30108(a), 30184.

B. Factual Background

Plaintiff is a federally recognized tribe in California with an estimated 15 tribal members. ER-95 (SER-117).¹ It operates two casinos and a tobacco distribution business. ER-95 (SER-117). This case arises from an ATF investigation into a wide-ranging scheme designed to undercut state

¹ In district court, the defendants filed all relevant portions of the Administrative Record Materials as Exhibit 1 to their Motion for Summary judgment. *See* Dkt. 47-1; ER-186. Plaintiff’s Excerpts of Record contains some but not all of these materials. The government’s Supplement Excerpts of Record contains the exhibit in its entirety. Where a portion of the Administrative Record appears in both excerpts, we have cited to the ER and SER for the Court’s convenience.

tobacco tax enforcement. In July 2020, ATF reached a settlement with two participants in this scheme that are not parties in this case – Grand River Enterprises, Inc. (a Canadian manufacturer of cigarettes) and Native Wholesale Supply Company (a New York state importer of Grand River’s cigarettes). *See* SER-7-12. In 2021, as part of a follow-up inspection of Native Wholesale Supply Company’s operations, ATF uncovered sales by Native Wholesale Supply involving unstamped cigarettes to plaintiff, who is “not a properly licensed California distributor.” SER-67-68.

On February 23, 2022, the California Department of Justice sent plaintiff a letter regarding its compliance with the PACT Act, and receiving no response, reported plaintiff to ATF for inclusion on the non-compliant list on July 28, 2022. SER-16-17; ER-60-61 (SER-25-26). California told ATF that “third-party shipping records reveal 29 Palms’ regular receipt of millions of out-of-state cigarettes [and that] . . . 29 Palms-stamped cigarettes are being sold to non-tribal members” but that plaintiff has “failed to submit its PACT Act registration or any of its required monthly reports.” ER-60 (SER-25).

In August 2022, ATF notified plaintiff that it was considering whether plaintiff was in violation of the PACT Act and that plaintiff had 30

days to “send a formal written challenge and explanation to ATF.” ER-145-47 (SER-48-50). Specifically, ATF explained that “29 Palms does not hold a Federal manufacturer’s permit issued by the Alcohol and Tobacco Tax and Trade Bureau (TTB), nor is it registered with the California Department of Tax and Fee Administration (CDTFA) as a permitted manufacturer, importer, or distributor of cigarettes in the State of California.” ER-145 (SER-48). Nonetheless, “[t]hird-party shipping records show that in 2022, 29 Palms received millions of out-of-state cigarettes” which it sold “to non-tribal members on a reservation elsewhere in California,” ER-145 (SER-48), and to “unlicensed persons,” ER-146 (SER-49), without submitting the required monthly reports and invoices and without complying with the legal requirements to pay excise taxes, ER-145 (SER-48); *see also* ER-147 (SER-50). In October 2022, plaintiff responded, asserting that the PACT Act was inapplicable to the tribe’s sales because they were not sales in interstate commerce as defined in the statute. ER-150-51 (SER-54-55).

On June 5, 2023, ATF notified plaintiff that, notwithstanding California's withdrawal of the nomination,² the agency had determined that plaintiff was in violation of the PACT Act because it "continue[d] to engage in the sale and distribution of cigarettes or smokeless tobacco products to unlicensed persons operating within the State of California" and "fail[ed] to comply with payment obligations and legal regulatory requirements relating to the sale or delivery of the cigarettes and smokeless tobacco in violation of 15 U.S.C. § 376a(a)(3) and (4)." ER-68 (SER-82). ATF explained that:

Analysis of third-party shipping records, PACT ACT reports that [plaintiff] supplied to California and communications with attorneys representing Native Wholesale Supply . . . establish that from 2022-2023, 29 Palms purchased millions of untaxed, unstamped cigarettes and significant quantities of untaxed, smokeless tobacco products in the State of New York where it is not a licensed stamping agent. 29 Palms shipped these tobacco products across the United States into California. 29 Palms then shipped and sold unstamped cigarettes and untaxed smokeless tobacco to non-tribal members, who are not licensed on their reservation or elsewhere in California . . . in violation of California law and the CCTA.

² Although the State disagreed with plaintiff's legal analysis of the PACT Act, ER-62 (SER-57), it ultimately withdrew its nomination of plaintiff for the non-compliant list in April 2023 based on submission of required reports, ER-64 (SER-71).

ER-69 (SER-83); *see also* ER-66-67 (SER-79-80) (list of plaintiff's customers).

ATF further explained that "records associated with [plaintiff's] sales suggest that many of these sales are to entities on Tribal reservations that are not within any Tribal tobacco regulatory scheme and/or not casinos. As a result, sales to persons or entities in California that are not in compliance with California and Federal law are presumptively 'delivery sales' to 'consumers' under the PACT Act." ER-69 (SER-83). Because "[t]he Tribal retailers are unlicensed by the State of California," they are "ineligible to possess and/or sell unstamped, untaxed cigarettes and untaxed smokeless tobacco and thus not 'lawfully operating.'" ER-69 (SER-83). Since "these delivery sales of untaxed tobacco are in violation of applicable State and Federal law, these sales are in violation of 15 U.S.C. § 376a(a)(3) and (4) which requires that all delivery sales comply with State . . . laws applicable to the sales of cigarettes and smokeless tobacco." ER-69 (SER-83).

ATF also explained that this Court's recent decision in *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), rendered plaintiff's argument that its shipments did not travel in interstate commerce "unavailing" because it held that inter-tribal sales are considered "'off reservation' activity" subject to state regulation. ER-70 (SER-84). Moreover,

plaintiff's "sales of more than 10,000 unstamped, untaxed cigarettes and untaxed smokeless tobacco to the Tribal Retailers violate the CCTA as said sales constitute 'dispositions' to non-exempted persons." ER-71 (SER-85).

In its response, plaintiff presented a series of legal arguments contesting the application of the PACT Act to regulate its cigarette sales. *See* SER-88-105 (ER-73, ER-75-91). For example, plaintiff disagreed with ATF's interpretation of "applicable California tobacco laws" and argued that ATF had not identified the specific provision of California law that plaintiff had violated. SER-90-91 (ER-76-77). Plaintiff also argued that the PACT Act does not apply to its sales because they do not occur in interstate commerce. SER-95 (ER-81). Where both the distributor and retailer are untaxable federally-recognized Indian tribes or tribally owned entities, plaintiff argued that "the distributor is not required to collect and remit cigarette and tobacco product taxes from taxable consumers." SER-98 (ER-84). Rather, the retailer collects and remits such taxes. California law does not require, plaintiff argued, the distributor "to pre-collect or otherwise account for state excise taxes" nor does it require retailers to possess state licenses. SER-99-100 (ER-85-86). Plaintiff also argued that "impos[ing] state regulations requiring the licensing and registration of tribally owned

businesses operating on their own reservations” was contrary to Supreme Court precedent and that CCTA did not provide a basis for inclusion on the non-compliant list. *See* SER-102-03 (ER-88-89).

ATF subsequently rejected these legal arguments in a lengthy decision, SER-113-26 (ER-74, ER-92-104), reiterating its conclusion that “[u]nder the governing Supreme Court and Ninth Circuit precedent, it is clear that the sales to your customers are in violation of applicable California tax collection, stamping and licensing laws at the point of sale,” and the “failure to comply with these laws establishes that 29 Palms is in violation of 15 U.S.C. §§ 376a(a)(3) and (4),” SER-123 (ER-101), and that “29 Palms sold mass quantities of untaxed ‘contraband’ cigarettes to non-exempted persons that are prohibited from possessing said cigarettes” in violation of the CCTA, SER-124 (ER-102). ATF further notified plaintiff that effective November 20, 2023, it would be placed on the non-compliant list. *See* SER-126 (ER-104); *see also* ER-152 (SER-110) (letter from California confirming that none of plaintiff’s customers held cigarette distributor licenses and thus, none had collected or remitted any California cigarette taxes).

Pursuant to a settlement between ATF and Native Wholesale Supply, however, ATF agreed to defer placing plaintiff on the non-compliant list pending a “federal district court’s initial ruling on Twenty-Nine Palms’ request for injunctive relief.” SER-133. Plaintiff then filed this suit raising Administrative Procedure Act (APA) challenges to ATF’s determination.³

C. Prior Proceedings

On February 27, 2025, the district court granted summary judgment for defendants, upholding ATF’s decision to place plaintiff on the non-compliant list. *See* ER-5-10. The court rejected plaintiff’s claims that ATF’s decision to place it on the non-compliant list was arbitrary and capricious, explaining that “the administrative record reveals, and the Tribe does not dispute, that ATF has reason to believe the Tribe is selling cigarettes to non-Native Nation customers and it made its decision to place the Tribe on the non-compliant list on that basis.” ER-9. The court further concluded that ATF had “sufficiently considered the relevant issues and reasonably explained [its] decision.” ER-9. Following this decision, ATF thus informed

³ Plaintiff withdrew its initial motion for a preliminary injunction after the parties agreed that the issues raised in the complaint should be presented in a summary judgment motion. *See* Dkt. 43 at 2.

plaintiff that, pursuant to the settlement agreement negotiated with its business partner, it had been placed on the non-compliant list on March 10, 2025. This appeal followed.⁴

SUMMARY OF ARGUMENT

1. Plaintiff's sales are "delivery sales" to "consumers" within the meaning of the PACT Act, and therefore the Act requires plaintiff to comply with "all State, local, tribal, and other laws generally applicable to sales of cigarettes," including laws imposing "excise taxes" and "licensing and tax-stamping requirements." 15 U.S.C. § 376a(a)(3)(A)-(B). ATF correctly determined that plaintiff is not in compliance with California's state-law requirements imposed on delivery sellers of cigarettes and smokeless tobacco products when it imports millions of untaxed cigarettes into the State, and distributes them without a distributor's license to unlicensed retailers, who sell them to the public without paying the requisite excise taxes.

⁴ Plaintiff has also sought an injunction pending appeal before this Court. For the reasons explained in our opposition to the motion, plaintiff has failed to demonstrate it can satisfy any of the factors that would support such relief.

Plaintiff does not dispute that it is not a licensed distributor or that it is selling millions of untaxed cigarettes to unlicensed retailers, who sell them to the public, and that no party is paying the excise taxes on these sales. Instead, plaintiff argues that its customers are not “consumers” within the meaning of the PACT Act because they are “lawfully operating as . . . retailer[s] of cigarettes.” 15 U.S.C. § 375(4). Plaintiff argues that California may not require on-reservation retailers to be licensed to sell cigarettes without impinging on tribal sovereignty and therefore its unlicensed customers are operating “lawfully.” But both this Court and the Supreme Court have held that States may lawfully impose reasonable regulatory burdens to assist with the collection of a valid tax without running afoul of tribal sovereignty. Because the Supreme Court has already held that California’s excise tax is a valid state tax on cigarette sales (when applied to non-tribal members), and this Court has explained that the state licensing regime is a minimal burden designed to assist with the enforcement of said excise tax, this Court should reject plaintiff’s argument.

2. ATF complied with the procedural requirements of the APA when it determined that plaintiff was not in compliance with the PACT Act, including providing adequate notice, adequate explanation, and relying on

substantial evidence. First, ATF's June 5, 2023, letter notified plaintiff that ATF was considering it for placement on the non-compliant list based on its continued sale and distribution of cigarettes and smokeless tobacco products to unlicensed persons and its failure to comply with payment obligations and legal regulatory requirements. As required by statute, the letter provided the specific provisions of the PACT Act that formed the basis of ATF's allegation and plaintiff in fact responded with the arguments it is making before this Court. Second, ATF's final decision clearly lays out the legal and factual support for its conclusion and points to the relevant case law from this Court and the Supreme Court. And finally, ATF's decision is based on substantial un rebutted evidence that plaintiff is engaged in millions of dollars of sales of untaxed cigarettes and tobacco products in violation of California law and the PACT Act.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo. *See Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1151 (9th Cir. 1998).

ARGUMENT

I. THE INCLUSION OF PLAINTIFF ON THE NON-COMPLIANT LIST WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW.

ATF properly determined that the PACT Act applies to plaintiff and that plaintiff had failed to comply with the state-law requirements imposed on delivery sellers of cigarettes and smokeless tobacco products. The district court correctly upheld that determination against plaintiff's APA challenge.

The APA's arbitrary-and-capricious standard "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). This Court's "review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Id.* The "court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

A. ATF Reasonably Concluded That Plaintiff Is an Unlicensed Cigarette Distributor That Failed to Pay Excise Taxes on Cigarette Sales in Violation of the PACT Act.

The PACT Act imposes a specific set of legal requirements on those making "delivery sales" to "consumers." *See* 15 U.S.C. § 375(5) (defining "delivery sale"); *id.* § 376a(a)(1)-(4) (imposing requirements on delivery

sellers). The Act defines a delivery sale as the sale of cigarettes or smokeless tobacco to a “consumer” where the seller is “not in the physical presence of the buyer when the request for purchase or order is made,” including sales over the phone or internet. *Id.* § 375(5)(A). The statute further defines a “consumer” as “any person that purchases cigarettes or smokeless tobacco” but does not include “any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer” of such products. *Id.* § 375(4). As relevant here, the PACT Act requires that each delivery seller must comply with “all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco,” including laws imposing “excise taxes” and “licensing and tax-stamping requirements.” *Id.* § 376a(a)(3)(A)-(B).

Plaintiff does not dispute that it “purchased millions of untaxed, unstamped cigarettes and significant quantities of untaxed, smokeless tobacco products,” from New York, “where it is not a licensed stamping agent,” SER-117-18 (ER-95-96), “shipped these tobacco products across the United States into California,” SER-118 (ER-96), and sold them to more than 50 retailers, including markets, smoke shops, and gas stations, who sell them to the broader public, *see* ER-66-67 (SER-80-81). Plaintiff has also

not disputed that neither it nor its customers are licensed under California law to distribute or sell cigarettes and that at no point did it or its customers pay any California excise taxes. SER-118-20 (ER-96-98); *see also* Cal. Rev. & Tax. Code §§ 30008, 30011, 30140, 30182(a), 30183(a) (imposing an excise tax on the sale of untaxed cigarettes; requiring those who distribute cigarettes to have a distributor's license and file reports with the State on their distributions); SER-119 (ER-97) (explaining that a retailer must "maintain a state license to engage in the sale of cigarettes in California" (citing Cal. Bus. & Prof. Code § 22972)).⁵ And it does not dispute that these sales are "delivery sales," *i.e.*, sales that take place remotely, when it ships cigarettes to tribal retailers located across California. *See* ER-66-67 (SER-80-81).

Plaintiff's only substantive argument is that its customers are not "consumers" within the meaning of the statute because they are lawfully operating as retailers notwithstanding the fact that they are undisputedly

⁵ A "handful of 29 Palms' customers hold a cigarette retail license under the Cigarette and Tobacco Products Licensing Act of 2003. Such license, however, does not allow for the purchase of tax stamps, the collection or remittance of California cigarette taxes, or the possession of untaxed cigarettes." ER-152 (SER-110) (citation omitted).

unlicensed and not paying excise taxes.⁶ Accordingly, plaintiff argues that its sales are not subject to the PACT Act requirements. *See* 15 U.S.C. § 375(4) (defining a consumer as “any person that purchases cigarettes or smokeless tobacco” except those who are “lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco”). As explained below, this argument is unavailing. *See infra* Part B. ATF correctly concluded that plaintiff’s customers are not exempted under Section 375(4), and thus, the sales are delivery sales to consumers. Under the Act, plaintiff is required to comply with state laws imposing excise taxes and the tax collection requirements of Section 376a(d). *See* 15 U.S.C. § 376a(a)(3), (4). As the district court recognized, “the basis of ATF’s decision is that the Tribe must comply with state law under the PACT Act’s

⁶ California’s excise tax is generally collected using tax stamps, which are purchased by a licensed distributor from the State and affixed to each package of cigarettes before distribution. Cal. Rev. & Tax. Code §§ 30161, 30163(a); *see also* SER-118 (ER-96). As ATF explained, “29 Palms and its customers do not have the[] requisite licenses,” SER-118 (ER-96), and its “customers are generally not complying with any of the [California] requirements” for the distribution and sale of cigarettes. SER-120 (ER-98); *see also* ER-69 (SER-83) (ATF Letter dated June 5, 2023).

authority.” ER-8. Its undisputed failure to do so renders its inclusion on the non-compliant list not arbitrary, capricious, or contrary to law.

B. Plaintiff’s Customers Are Consumers Under the PACT Act.

As noted, plaintiff argues that its customers are lawfully operating as retailers notwithstanding the fact that they are unlicensed in California. Plaintiff contends that California may not impose licensing requirements on to on-reservation tribal retailers without impinging on tribal sovereignty. Br. 28-33. But decisions of this Court and the Supreme Court support the conclusion that California may require tribal retailers, including plaintiff’s customers, to comply with the Licensing Act because it is a minimal burden designed to assist with the collection of an undisputedly valid excise tax. *See California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985) (per curiam) (California excise tax is valid as applied to tribal sales); *see Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710 (9th Cir. 2021) (holding that a tribal wholesaler that makes cigarette sales to other tribes must comply with the licensing and distribution requirements in California’s Tax Law and Licensing Act).

California requires cigarette manufacturers, distributors, wholesalers, and retailers to obtain a state-issued license to engage in the sale of cigarettes in California. *See* Cal. Bus. & Prof. Code §§ 22972, 22975. The State uses this licensing regime to collect excise taxes on the sale of cigarettes and smokeless tobacco. Under California law, excise taxes are paid by the use of tax stamps. *See* Cal. Rev. & Tax. Code §§ 30161, 30163. Only licensed distributors may purchase and apply such tax stamps, *see id.* § 30166, and only licensed distributors can possess unstamped cigarettes, *see id.* § 30474. To pay the excise tax, licensed distributors purchase tax stamps from the State and affix them to each package of cigarettes; the tax is then included in the price of the cigarettes and borne by consumers. *See Chemehuevi*, 474 U.S. at 10-11 (holding California may require tribes to collect cigarette tax from non-Indian consumers). A retailer may be considered a distributor, and licensed as such, where it is “placing in [the] state . . . untaxed cigarettes . . . in retail stock for the purpose of selling the cigarettes or tobacco products to consumers.” Cal. Rev. & Tax. Code § 30008; *id.* § 30011.

California’s requirement that on-reservation retailers be licensed to sell taxable cigarettes does not interfere with the ability of a Tribe to sell

untaxed cigarettes to their members for individual consumption. An on-reservation retailer, licensed as a distributor, could lawfully hold untaxed cigarettes and sell both taxed and untaxed cigarettes on the reservation. But plaintiff and its customers have none of the required licenses or permits to engage in sales to non-members of their respective Indian tribes, and thus routinely possess, distribute, transport, and sell cigarettes to the public without paying excise taxes required under state law.

In plaintiff's view, the Licensing Act may not be applied to on-reservation retailers without impinging on tribal sovereignty. In *Big Sandy*, this Court held that "[t]ribal sovereignty principles do not preclude California from regulating the Corporation's intertribal wholesale cigarette sales" through its "licensing, recordkeeping, and reporting requirements." 1 F.4th at 728. Under plaintiff's reading of *Big Sandy*, the case does not extend beyond holding that a tribally owned corporation may be subject to state regulation when it sells cigarettes on other tribes' reservations. Br. 36. This view is incorrect and applying it would mean that—because California relies on a licensing regime to collect its excise taxes rather than a collect-and-remit scheme—no on-reservation retailers can be required to comply with the State's taxation regime even when they sell cigarettes to

non-tribal members. *But see Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred Assorted Brands of Cigarettes*, 282 F.3d 1175, 1178 (9th Cir. 2002) (“[T]ribal sellers are not entitled to be free from the state’s system of allocating tax-free status,” including requirement that “cigarettes destined for sale to Indians be pre-approved by the [State].”).

Although the plaintiff in *Big Sandy* had “not allege[d] that California s[ought] to regulate its transactions with non-Indians or nonmembers *on the [reservation]*,” 1 F.4th at 730, the decision makes clear that even as applied to an on-reservation retailer, this Court viewed the California licensing, recordkeeping, and reporting requirements as the kind of “minimal burden” that this Court and the Supreme Court have repeatedly upheld when applied to tribal businesses, *see id.* at 730-31 (quotation marks omitted) (“The Supreme Court’s reasoning in *Milhelm* further requires dismissal of the Corporation’s claims that the Statutes preempt . . . California’s licensing, recordkeeping, and reporting requirements.” (citing *Department of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 64-67, 74-76 (1994))). In *Milhelm*, the Supreme Court explained that even beyond collect-and-remit schemes, States may impose “reasonable

regulatory burdens” on tribal retailers “to assist enforcement of valid state taxes.” 512 U.S. at 74.

The *Big Sandy* Court explained that the plaintiff there could not plausibly argue that the California licensing, recordkeeping, and reporting “requirements are not ‘reasonable regulatory burdens’ imposed on Indian traders ‘to assist enforcement of valid state taxes.’” 1 F.4th at 731 (quoting *Milhelm*, 512 U.S. at 74). “Valid state taxes include the cigarette excise taxes that California seeks to collect from customers who purchase cigarettes on reservations to which they do not belong,” *id.*, the very same excise tax regime at issue here. Thus, this Court explained that “[t]hese minimal burdens may be imposed on Indian businesses that, like the Corporation, purport to engage only in tax-exempt transactions”; they are not “excessive burdens.” *Id.* After *Big Sandy*, there is no basis to conclude that California’s licensing requirements are more than a minimal burden and thus, they can lawfully be applied to on-reservation retailers.

Big Sandy rests on decades of Supreme Court precedent that supports the conclusion that States can use a licensing scheme as the means by which it collects a clearly valid excise tax on sales to non-tribal members without infringing on tribal sovereignty. For example, in the case on which

plaintiff principally relies, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the Supreme Court made clear that requiring an Indian tribe to collect state taxes on on-reservation sales to non-Indian consumers was a “minimal burden” that could be imposed by the State. The Supreme Court subsequently relied on *Moe* to uphold Washington’s comprehensive state tax, stamping, and recordkeeping requirements that applied to retailers operating on their own reservations, including the requirement that retailers maintain detailed records of taxable and nontaxable transactions. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); see also *id.* at 151 (“There is no automatic bar, therefore, to Washington’s extending its tax and collection and recordkeeping requirements onto the reservation. . . .”). As the Supreme Court subsequently explained, the *Colville* Court “rejected the proposition that ‘principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.’” *Milhelm*, 512 U.S. at 72 (quoting *Colville*, 447 U.S. at 155); see also *Big Sandy*, 1 F.4th at 731.

Moreover, in *Milhelm*, the Court rejected an argument that New York's tribal tobacco regulations unlawfully required "reservation *retailers* [to] obtain state tax exemption certificates," *i.e.*, licenses, that could be revoked for noncompliance with the law. 512 U.S. at 77; *see also id.* at 66-67. And the Supreme Court has also relied on *Moe* to uphold the imposition of licensing requirements for on-reservation liquor sales. *See Rice v. Rehner*, 463 U.S. 713, 720 (1983).

Contrary to plaintiff's assertion, *Moe* did not hold that States were barred from imposing licensing requirements on tribal retailers operating on their own reservations; it simply invalidated the vendor license fee at issue in that case as an impermissible tax upon sales from tribes to their own members. *See* 425 U.S. at 480-82. That issue of state taxation is not posed by California's statutory scheme, since California allows tribal retailers to waive the licensing fee. *See* Cal. Dep't of Tax & Fee Admin., *Other Taxes and Fees and Native Americans*, <https://perma.cc/9VNZBTWE>. The licensing and distribution requirements at issue are not taxes levied against on-reservation sales to tribal members; they are measures designed to enforce taxes levied against sales to non-tribal members. Similar measures were upheld by the Supreme Court in *Colville* and *Milhelm*, and

the specific licensing regime at issue was upheld as applied to wholesalers by this Court in *Big Sandy*.⁷

This Court recently made this point in even clearer terms in *California v. Azuma Corp.*, where it affirmed a preliminary injunction order that had found that a tribal supplier with a similar distribution scheme as the plaintiff here was unlikely to succeed on the merits in its challenge to the enforcement of its placement on the PACT Act non-compliant list. No. 23-16200, 2024 WL 4131831, at *3 (9th Cir. Sep. 10, 2024). In upholding the order, this Court noted that the tribal distributor – like plaintiff here – had failed to show that its retail customers “hold the requisite state licenses or collect and remit taxes to the State as required by California law,” and had thereby failed to show that the retailers operating smoke shops were lawfully operating. *See id.* (“As to the Tribal Retailers that operate ‘smoke shops,’ the Supreme Court has held that such sellers *are subject to a state’s licensing and taxation regulations.*” (emphasis added) (first citing *Moe*, 425

⁷ In the district court proceedings, plaintiff sought to distinguish this reasoning in *Big Sandy* as applying only to wholesalers. But the distinction between wholesalers and retailers makes no difference. *Cf. Milhelm*, 512 U.S. at 74 (“It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers . . . but that similar burdens could not be imposed on wholesalers . . .”).

U.S. at 483; then citing *Colville*, 447 U.S. at 159-60; and then citing *Chemehuevi*, 474 U.S. at 11-12)).

Finally, plaintiff has also failed to grapple with the numerous other reasons supporting ATF's decision finding it out of compliance with the PACT Act. Even assuming plaintiff is correct that California may not apply licensing requirements to retailers, ATF's decision also noted that the retailers failed to "file reports involving sales to non-Native American customers." SER-113 (ER-92). These reports are required under California law, *see* Cal. Rev. & Tax. Code §§ 30181-30183; *see also Colville*, 447 U.S. at 159 (upholding state requirement to "record and retain for state inspection" information on cigarette sales). In addition, because the cigarettes plaintiff is selling are untaxed, the retailers are failing to collect the California's tax applicable to cigarette sales to non-tribal members. *See* SER-113 (ER-92); SER-116 (ER-94). And the retailers violate California law by purchasing cigarettes from plaintiff, which is undisputedly an unlicensed entity. *See* SER-119-20 (ER-97-98) (noting that California's licensing regime prohibits retailers from "purchas[ing] cigarettes from unlicensed entities"). Thus, even setting aside the licensing requirement issue raised by plaintiff, the

customers are still not lawfully operating as retailers and thus are properly considered consumers under the PACT Act.

C. ATF's Determination to Place Plaintiff on the Non-Compliant List Was Not Arbitrary, Capricious, or Contrary to Law.

The district court correctly concluded that “Twenty-Nine Palms’ claims that ATF’s decision was arbitrary and capricious” were “unpersua[sive].” ER-8. As the district court explained “the basis of ATF’s decision is that the Tribe must comply with state law under the PACT Act’s authority. Under ATF’s reading of the statute, the Tribe is a ‘delivery seller’ and its customers are ‘consumers’ such that they are required to comply with the PACT Act.” ER-8 (citations omitted).

Plaintiff contends that the district court “misunderstood” ATF’s decision, and therefore its decision should be reversed. Br. 24, 27. But the district court walked through both sides’ arguments, explaining that “Defendants claim that the Tribe’s cigarette sales constitute “‘delivery sales’ to ‘consumers’ under the PACT Act” and “insist that Twenty-Nine Palms does not comply with the PACT Act by failing to adhere to California’s licensing, reporting, and recordkeeping requirements as well as failing to conduct valid stamping, collection, and remittance of State

excise taxes.” ER-7. The court was “unpersuaded by Twenty-Nine Palms’ claims” that ATF’s “decision to place them on the non-compliant list was arbitrary and capricious,” ER-8, because it “adopts a theory of state regulation over Indian country . . . expressly rejected by the Supreme Court,” ER-7. Although the district court decision is not a model of clarity, its fundamental conclusion that ATF’s decision was not arbitrary and capricious was correct. Plaintiff is not in compliance with the PACT Act because it is unlicensed and has not paid excise taxes any of the millions of cigarettes it sold to other tribes in California. *See* 15 U.S.C. § 376a(a)(3), (4).

And, even assuming the plaintiff is correct that the district court misunderstood the administrative record, the record itself supports the conclusion reached by the court and this Court should affirm its judgment for the reasons outlined above. *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam) (“We may affirm a district court’s judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.” (citing *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998))).

Plaintiff takes issue with two parts of the district court's opinion. First, plaintiff references the court's statement that "ATF's decision letter does not mention the argument that the Tribe's Native Nation customers are in violation of the California Licensing Act," ER-8. As plaintiff points out (Br. 25), contrary to this sentence from the district court, the ATF decision did state that "[plaintiff's] customers fail to have the required distributor licenses required under California law" and are thus, "not lawfully operating under California law." SER-113 (ER-92). It is unclear why this slight misstatement of the record would support reversal, however, given that the district court went on to explain that "the basis of ATF's decision is that the Tribe must comply with state law under the PACT Act" because it is a "'delivery seller' and its customers are 'consumers'" under the statute. ER-8.

Second, plaintiff contends the court erred when it indicated that "the administrative record reveals, and the Tribe does not dispute, that ATF has reason to believe the Tribe is selling cigarettes to non-Native Nation customers and it made [the] decision to place the Tribe on the non-compliant list on that basis." ER-9. The district court's opinion is best understood to use the term "Native Nation customer" as synonymous with

members of plaintiff's own tribe. *See* ER-9 (“The Court agrees that any sales by Twenty-Nine Palms to its Native Nation members are not subject to state taxes.”). When understood as reference to inter-tribal, *i.e.*, taxable sales, there is no basis to conclude the district court erred on this point. Plaintiff is selling cigarettes to non-Native Nation customers, *i.e.*, via transactions that should be considered taxable under California law, and undisputedly failing to pay any of the excise taxes on such sales. ATF's decision to place them on the non-compliant list is based on this conclusion and should be affirmed.

II. ATF'S DECISION COMPLIES WITH THE PROCEDURAL REQUIREMENTS OF THE APA.

ATF provided plaintiff with adequate notice and explanation of the basis for its inclusion on the non-compliant list and its decision is supported by substantial evidence. On June 5, 2023, ATF notified plaintiff that the agency had determined that plaintiff was in violation of the PACT Act because it “continue[d] to engage in the sale and distribution of cigarettes or smokeless tobacco products to unlicensed persons operating within the State of California” and had “fail[ed] to comply with payment obligations and legal regulatory requirements relating to the sale or

delivery of the cigarettes and smokeless tobacco in violation of 15 U.S.C. § 376a(a)(3) and (4).” ER-68 (SER-82). Plaintiff responded to this letter at length. SER-88-105 (ER-73, ER-75-91). On October 19, 2023, ATF then outlined its decision in a 14-page document provided to plaintiff notifying it that it would be placed on the non-compliant list effective November 20, 2023. SER-113-26 (ER-74, ER-92-104). Both ATF’s June 2023 notice and ultimate decision demonstrate that plaintiff had adequate notice and that ATF reasonably explained the basis for including it on the non-compliant list and the supporting evidence.

Plaintiff raises three procedural complaints: (1) that ATF failed to provide it with adequate notice; (2) that ATF failed to provide adequate explanation in the decision; and (3) that the decision was not supported by substantial evidence. Br. 39-45. All three claims are belied by the administrative record.

1. Notice: The PACT Act requires that ATF must “cite the relevant provisions of this chapter” — *i.e.*, the PACT Act itself — as well as “the specific reasons for which the delivery seller is being placed on the list.” 15 U.S.C. § 376a(e)(1)(E). ATF’s June 2023 notice letter complied with this requirement. The letter provided both the relevant provisions of the PACT

Act and why plaintiff was violating them. *See* ER-68, ER-70 (SER-82, SER-84) (noting that plaintiff was in violation of 15 U.S.C. § 376a(a)(3) and (4) for failure to comply with applicable legal requirements, including compliance with “California’s non-discriminatory licensing and excise tax statutes”). There is no requirement in the statutory text that ATF provide the individual subsections of California’s licensing and excise tax statutes that plaintiff was violating.

And in any event, plaintiff had actual notice and responded to ATF’s allegations that “the Tribe ‘engage[s] in the sale and distribution of cigarettes or smokeless tobacco products to unlicensed persons operating within the State of California, which are “delivery sales,” [while] failing to comply with the payment obligations and legal requirements relating to the sale or delivery of the cigarettes and smokeless tobacco in violation of 15 U.S.C. § 376a(a)3 and (4).’” SER-90-91 (ER-76-77) (alterations in original) (quoting ER-68 (SER-82)). In its response to ATF’s notice, plaintiff specifically raised the argument that it is making before this Court that plaintiff’s sales “do not violate [the PACT Act] because California’s laws regarding taxation and licensing do not apply,” SER-96 (ER-82) (capitalization altered), and that its customers are lawfully operating and

thus, not consumers under the act, SER-100 (ER-86). Its argument that it did not receive sufficient notice of ATF's reasoning is not credible.

2. Adequate Explanation: ATF's 14-page final decision clearly lays out legal and factual support for its conclusion that plaintiff violated the PACT Act as well as the California Tax Act and Licensing Act. *See* SER-113-26 (ER-74, ER-92-104); *see, e.g.*, SER-123 (ER-101) ("Under the governing Supreme Court and Ninth Circuit precedent, it is clear that the sales to your customers are in violation of applicable California tax collection, stamping and licensing laws at the point of sale. Thus, these are 'delivery sales' to 'consumers' under the PACT Act. The failure to comply with these laws establishes that 29 Palms is in violation of 15 U.S.C. §§ 376a(a)(3) and (4)."). Plaintiff raises two issues with the explanation: that it failed to cite *Wildlife Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), when explaining why the California licensing regime applies to plaintiff and its customers; and second, that it failed to consider the fact that California withdrew its nomination prior to ATF's issuance of the decision. *See* Br. 40-43. Neither of these arguments is availing.

First, in *Bracker*, relying on *Moe*, 425 U.S. at 480-81, the Supreme Court explained that a court should conduct a "particularized inquiry into

the nature of the state, federal, and tribal interests at stake” when a State asserts authority over on-reservation activity. 448 U.S. at 145; *see also Big Sandy*, 1 F.4th at 725. This Court has explained that such balancing is relevant when determining whether applying state regulations – like California’s licensing scheme – to on-reservation activity would infringe on tribal sovereignty. *Big Sandy*, 1 F.4th at 726. This Court has also explained that the Supreme Court has concluded that the balance favors “uph[olding] such regulations where they are ‘minimal burden[s] designed to avoid the likelihood that in [their] absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.’” *Id.* (second and third alteration in original) (quoting *Moe*, 425 U.S. at 483).

In its decision, ATF followed this Court’s example when it concluded that the *Bracker* balancing test does not apply to plaintiff’s “intertribal wholesale cigarette sales to the unlicensed Tribal retailers” because those sales are *off-reservation* activity that is undisputedly “subject to California’s non-discriminatory licensing and excise tax statutes.” SER-121 (ER-99); *see also Big Sandy*, 1 F.4th at 729. With respect to its conclusion that “the sales to [plaintiff’s] customers are in violation of applicable California tax collection, stamping and licensing laws at the point of sale,” SER-123 (ER-

101), plaintiff is correct that ATF did not cite *Bracker* directly. ATF did, however, outline extensive precedent to support its assertion, noting that “[t]he Supreme Court has repeatedly upheld minimal regulatory burdens regarding Tribal retailers,” SER-120 (ER-98); *see also* SER-120-23 (ER-98-101) (first citing *Chemehuevi*, 474 U.S. at 12; then citing *Moe*, 425 U.S. at 481-83; then citing *Colville*, 447 U.S. at 155-57; then citing *Milhelm*, 512 U.S. at 75; then citing *Big Sandy*, 1 F.4th at 729; and then citing *California v. Azuma Corp.*, No. 2:23-cv-743, 2023 WL 5835794, at *10-11 (E.D. Cal. Sep. 8, 2023)). Because the “minimal burdens” standard is derived from *Bracker* and the cases on which the *Bracker* Court relied, such as *Moe*, plaintiff cannot demonstrate that ATF’s explanation is inadequate. *See Milhelm*, 512 U.S. at 73 (“[T]hese cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes.” (citing *Bracker*, 448 U.S. at 142, 145; then citing *Colville*, 447 U.S. at 156-57; and then citing *Moe*, 425 U.S. 463)).

Second, contrary to plaintiff’s assertion (Br. 43), ATF did note that California had “withdr[awn] its request to place 29 Palms on the Non-Compliant list.” SER-116 (ER-94). California’s withdrawal of its request has no bearing on ATF’s obligation to determine whether plaintiff is in

violation of the PACT Act. Subsection 376a(e)(1)(A) requires that the “Attorney General of the United States shall compile a list of delivery sellers of cigarettes or smokeless tobacco that . . . are otherwise not in compliance with this chapter.” 15 U.S.C. § 376a(e)(1)(A). The Attorney General “shall include” those delivery sellers “identified by any State, local, or tribal government,” but nothing in the statute requires a State to have nominated a delivery seller as a prerequisite for inclusion on the list or requires removal from the list if such a nomination is withdrawn. And the administrative record demonstrates that when California withdrew its nomination it did so on the specific ground that plaintiff began submitting reports required by the PACT Act. *See* ER-64 (SER-71); ER-68 (SER-82). The withdrawn nomination does not reflect a conclusion by California that plaintiff was entirely in compliance with California law. In its final decision letter, ATF noted that “California provided ATF with the above-referenced information that 29 Palms continues to engage in the sale and distribution of cigarettes or smokeless tobacco products to unlicensed persons operating within the State of California.” SER-116 (ER-94).

3. Substantial Evidence: ATF explained in its decision that plaintiff is not licensed to distribute tobacco by the federal government or California,

and that “[a]nalysis of third-party shipping records, PACT Act reports supplied by [plaintiff’s] law firm to California, and communications with attorneys representing [Native Wholesale Supply] that were sent to [plaintiff’s] law firm establish that from 2022-2023, 29 Palms purchased millions of untaxed, unstamped cigarettes and significant quantities of untaxed, smokeless tobacco” from New York that it shipped into California and sold to third-party retailers who sold them to non-tribal members. SER-116-17 (ER-94-95). Plaintiff does not contest that it is not licensed, does not contest that its customers are selling untaxed cigarettes, and does not contest the sale of millions of cigarettes in the two years preceding ATF’s decision, nor does it suggest that it has changed its business model or customers since 2023. ATF rightly concluded plaintiff was operating in violation of the PACT Act. There is no basis to conclude that ATF lacked substantial evidence to support its decision or impermissibly relied on this evidence because they are “historical violations.” Br. 44. Indeed, to conclude that ATF cannot rely on evidence of unlawful sales from the preceding two years when there is no suggestion the seller has changed its business model would render it nearly impossible for ATF to ever demonstrate that a delivery seller was not in compliance with the law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

BILAL A. ESSAYLI
United States Attorney

MICHAEL S. RAAB
s/ Laura E. Myron

LAURA E. MYRON
*Attorneys, Appellate Staff
Civil Division, Room 7228
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4819
Laura.e.myron@usdoj.gov*

September 2025

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

s/Laura E. Myron

Laura E. Myron

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,367 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Book Antiqua 14-point font, a proportionally spaced typeface.

s/Laura E. Myron

LAURA E. MYRON

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§ 375. Definitions

(4) **Consumer:** The term “consumer” —

(A) means any person that purchases cigarettes or smokeless tobacco; and

(B) does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.

(5) **Delivery sale:** The term “delivery sale” means any sale of cigarettes or smokeless tobacco to a consumer if —

(A) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(B) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

§ 376a. Delivery Sales

(a) **In general** — With respect to delivery sales into a specific State and place, each delivery seller shall comply with —

(1) the shipping requirements set forth in subsection (b);

(2) the recordkeeping requirements set forth in subsection (c);

(3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing —

(A) excise taxes;

(B) licensing and tax-stamping requirements;

(C) restrictions on sales to minors; and

(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

(4) the tax collection requirements set forth in subsection (d).

* * *

(d) Delivery

(1) In general – Except as provided in paragraph (2), no delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender –

(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State;

(B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered has been paid to the local government; and

(C) any required stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

(2) Exception – Paragraph (1) does not apply to a delivery sale of smokeless tobacco if the law of the State or local government of the place where the smokeless tobacco is to be delivered requires or otherwise provides that delivery sellers collect the excise tax from the consumer and remit the excise tax to the State or local government, and the delivery seller complies with the requirement.

(e) List of unregistered or noncompliant delivery sellers

(1) In general

(A) Initial list – Not later than 90 days after this subsection goes into effect under the Prevent All Cigarette Trafficking Act of 2009, the Attorney General of the United States shall compile a list of delivery sellers of cigarettes or smokeless tobacco that have not registered with the Attorney General of the United States pursuant to section 376(a) of this title, or that are otherwise not in compliance with this chapter.