No. 25-2340

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWENTY-NINE PALMS BAND OF MISSION INDIANS,

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,

Appellee.

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

OPENING BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Plaintiff-Appellant Twenty-Nine Palms Band of Mission Indians respectfully requests oral argument. This appeal presents significant issues relating to tribal sovereignty and the scope of state regulatory authority over federally recognized Indian tribes. The Twenty-Nine Palms Band of Mission Indians submits that oral argument will assist the Court in resolving this appeal.

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INTRODUCTION

This case presents the question whether a state may require Native Nations, *i.e.*, federally recognized Indian tribes, to obtain licenses as a prerequisite to operating retail tobacco businesses on their own reservations. Under bedrock principles of federal Indian law, the answer is no. The Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") decision to the contrary should be vacated.

Plaintiff-Appellant Twenty-Nine Palms Band of Mission Indians (the "Tribe" or "Twenty-Nine Palms") is a federally recognized Indian tribe. The Tribe operates its own wholesale tobacco distribution business in which it sells tobacco products to businesses owned and operated by federally recognized Indian tribes and located on those tribes' reservations. Those tribes—which the Tribe refers to as its Native Nation customers—then re-sell those tobacco products on their own reservations.

At issue is the Tribe's compliance with the PACT Act. The PACT Act requires any "person," which includes "Indian tribal government," *id.* § 375(11), who sells tobacco products "into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco" to file certain reports with the U.S. Attorney General and state tobacco administrators. *Id.* § 376(a). There is no dispute that the Tribe complies with those requirements.

The PACT Act also includes a separate set of requirements with respect to "delivery sales into a specific State and place." *Id.* § 376a(a). A "delivery sale" is

defined as "any sale of cigarettes or smokeless tobacco to a consumer if" certain conditions are satisfied. *Id.* § 375(5). The Tribe's consistent position has been that it is not subject to those requirements because it is selling at wholesale to Native Nation customers and not selling to "consumer[s]" within the meaning of the PACT Act. *Id.* § 375(4)(B).

The statutory definition of "consumer" expressly excludes "any person *lawfully* operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco." *Id.* (emphasis added). At first blush, this exclusion in the statutory definition of "consumer" would appear to encompass the Tribe's Native Nation customers. But in this case, ATF took the position that the Native Nation customers *were* "consumers." By its terms, this exclusion applies only if a person is acting "lawfully," and ATF took the view that the Native Nation customers were not acting "lawfully." Therefore, according to ATF, the Tribe *was* subject to the PACT Act's requirements for "delivery sales," *see generally id.* § 376a, and because the Tribe did not satisfy those requirements, it violated the PACT Act.

ATF's decision hinged on its view that the Tribe's Native Nation customers were not acting "lawfully" because they failed to obtain licenses as required by California state law. This conclusion was wrong for a straightforward reason: Under federal law, a State cannot compel a Native Nation to obtain licenses as a prerequisite for conducting on-reservation business operations. "State laws generally are not

applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1031 (9th Cir. 2022) (quoting *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973)). Here, Congress did not expressly provide that California may impose its licensing laws on Native Nations. Hence, California's licensing laws do not apply, which means that the Tribe's Native Nation customers acted lawfully.

In reaching a contrary conclusion, ATF pointed to Supreme Court decisions establishing that States can require Native Nations to collect taxes from non-Native retail purchasers and remit those taxes to the States. *See, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463 (1976). However, California made clear during the administrative proceedings below—and ATF confirmed in its decision—that Native Nations have no way of complying with collect-and-remit requirements *unless* they obtain licenses. And obtaining licenses requires Native Nations to subject themselves to requirements going well beyond collecting and remitting taxes. For example, to obtain licenses, Native Nations must acquiesce to unannounced site inspections and must choose between waiving their sovereign immunity against enforcement or paying a $50,000 bond. *See, e.g.*, Cal. Bus. & Prof. Code § 22979(a)(3), (4). No case holds that a State may impose such onerous and intrusive requirements on a Native Nation's on-reservation operations.

In view of ATF's errors of federal law, the Tribe challenged ATF's decision in federal district court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* The district court rejected the Tribe's challenge based on a misunderstanding of the administrative record. The district court believed that the Tribe had sold tobacco to non-Native Nation customers. The record shows, however, that the Tribe has exclusively sold tobacco to Native Nation customers.

Under a correct understanding of the factual record, ATF's decision violates federal Indian law. The Court should therefore reverse the district court's judgment and remand with instructions to vacate ATF's decision.

Finally, setting aside ATF's core legal error regarding the scope of federal Indian law, ATF also made several procedural errors. It failed to give the Tribe adequate notice of its legal theories prior to its final decision, gave an inadequate explanation for its decision, and did not support its conclusions with record evidence. At minimum, vacatur is warranted to correct these procedural missteps.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this APA suit under 28 U.S.C. § 1331. The district court granted Defendants' motion for summary judgment on February 27, 2025, Excerpts of Record ("ER") 5–10, and issued its final judgment on March 24, 2025, ER-3–4. Plaintiff, the Twenty-Nine Palms Band of Mission Indians, timely filed its notice of appeal on April 9, 2025. This Court has

jurisdiction under 28 U.S.C. § 1291 because this appeal seeks review of a final judgment that disposes of all of Plaintiff's claims.

STATEMENT OF ISSUE PRESENTED

Whether ATF's decision to place Plaintiff Twenty-Nine Palms Band of Mission Indians on the Non-Compliant List established by the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010) (codified at 15 U.S.C. § 375 *et seq.*), violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

STATUTES

The PACT Act provides in relevant part: "With respect to delivery sales into a specific State and place, each delivery seller shall comply with … 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 … licensing and tax stamping requirements; [and] … tax collection requirements." 15 U.S.C. § 376a(a).

"The term 'delivery seller' means a person who makes a delivery sale." *Id.* § 375(6).

"The term 'delivery sale' means any sale of cigarettes or smokeless tobacco to a consumer," subject to two conditions. *Id.* § 375(5).

"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." *Id.* § 375(4).

> Nothing in [the PACT Act] … shall be construed to amend, modify, or otherwise affect …
>
> > (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal 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; [or]
> >
> > (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes.

Id. § 375 note.

STATEMENT OF THE CASE

I. THE TWENTY-NINE PALMS BAND OF MISSION INDIANS

Twenty-Nine Palms is a sovereign, federally recognized Indian tribe. *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 944, 946 (Jan. 8, 2024). The Tribe's reservation lands (collectively, the "Reservation") are held in trust by the United States for the Tribe's benefit and are located in California. *See* Dist. Ct. Dkt. No. 71-1 ¶ 4.

Twenty-Nine Palms' Tribal Council, pursuant to its authority under the Tribe's Constitution to manage the Tribe's affairs and assets, determined that it was in the Tribe's best interest to engage in Nation-to-Nation trade with other federally recognized Indian tribes. Dist. Ct. Dkt. No. 71-1 ¶ 5. Toward this end, the Tribe operates its own wholesale tobacco distribution business in which it sells tobacco products to businesses owned and operated by federally recognized Indian tribes and located on those tribes' reservations within the boundaries of the State of California ("Native Nation customers"). *See* ER-66–68; Dist. Ct. Dkt. No. 71-1 ¶¶ 5, 8; *see also* ER-38, 161 ¶ 35. The Tribe sells tobacco products exclusively to Native Nation customers.[1] *See* ER-66–68; Dist. Ct. Dkt. No. 71-1 ¶¶ 5, 9. It purchases those tobacco products it sells from the Shinnecock Indian Nation, another federally recognized Indian tribe, and those products are manufactured by Grand River Enterprises Six Nations, Ltd. ("GRE"), a Native American company located on the Six Nations of the Grand River Reserve in Ontario, Canada, and wholly owned by tribal members from the Six Nations, that is, the Haudenosaunee or Iroquois Confederacy. ER-38–39, 46, 95, 162 ¶ 38.

[1] These Native Nation customers include Twenty-Nine Palms itself, which owns and operates several businesses on the Reservation that purchase tobacco products directly from the Tribe's tobacco distribution business. *See* ER-66 (listing Spotlight 29 Casino, Tortoise Rock Casino, Tortoise Rock Smoke Shop, and Twenty-Nine Palms Smoke Shop). For the same reasons that California's licensing regime does not apply to the Tribe's other Native Nation customers as set forth herein, it equally does not apply to the Tribe's sales to its own businesses on the Reservation.

All tobacco products sold by Twenty-Nine Palms are listed on the California Tobacco Directory, which permits those products to be sold, offered, possessed, imported, and distributed within the State. ER-38, 46, 162 ¶ 37, 172 ¶ 92; *see* Cal. Rev. & Tax Code § 30165.1(e)(2). The Tribe has also worked cooperatively with the California Department of Justice since 2022 to provide the State with information on the Tribe's tobacco sales and to resolve any questions or issues raised by the State. *See, e.g.*, ER-62–63, 64, 75–76, 150–51.

The Tribe comprehensively regulates its tobacco sales through its Tobacco Ordinance, which requires all cigarettes purchased and sold by the Tribe's wholesale tobacco distribution business to bear serialized Twenty-Nine Palms stamps. *See* ER-89, 143–44, 163 ¶ 44; *see also* Dist. Ct. Dkt. No. 71-1 ¶¶ 6–7. Those stamps relate to applicable tribal taxes assessed by a Native Nation customer. ER-89, 163 ¶ 44. The Tribe purchased and operates cigarette stamping machines that affix these stamps to cigarettes prior to their sale to Native Nation customers. Dist. Ct. Dkt. No. 71-1 ¶ 7. The stamps enable the Tribe to track tobacco products through the supply chain, to prevent the trafficking of illicit products, and to conduct enhanced record keeping and quality control. *Id.*

Despite the highly competitive nature of tobacco product business, the Tribe successfully developed a customer base of Native Nation customers. ER-66–67; Dist. Ct. Dkt. No. 71-1 ¶ 18. Approximately twenty-four of those Native Nation

customers are gaming facilities owned and operated by federally recognized Indian tribes pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721, and tribal-state compacts executed by those tribes and the State of California. *See* ER-66–67; Dist. Ct. Dkt. No. 71-1 ¶ 18; *see also Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1096–98 (9th Cir. 2003) (describing IGRA and compacting framework).

The Tribe relies on revenues from its wholesale tobacco distribution to fund services to Tribal members and to support Tribal government operations. Dist. Ct. Dkt. No. 71-1 ¶ 13; ER-161 ¶ 33. The Tribe further utilizes these revenues to support other economic development ventures that the Tribe also wholly owns and operates on the Reservation. All told, the Tribe's enterprises collectively employ approximately 1,200 individuals, many of whom come from the surrounding community and receive essential benefits by virtue of their employment by the Tribe. Dist. Ct. Dkt. No. 71-1 ¶ 14. The Tribe also prides itself as a good neighbor, committing portions of its revenues to sponsorships and donations, including to the Boys and Girls Club of America and the Young Men's Christian Association, among others. *Id.* ¶ 15.

II. THE PACT ACT

Congress enacted the PACT Act to "[combat] illegal smuggling of tobacco products." 15 U.S.C. § 375 note. The PACT Act achieves this goal in two distinct

ways. First, it requires any "person," which includes "Indian tribal government," *id.* § 375(11), who sells tobacco products "into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco" to file (1) a statement with the U.S. Attorney General and state tobacco administrators of the relevant state that provides identifying information, and (2) monthly reports with state tobacco administrators "covering each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month" into that state. *Id.* § 376(a).

Second and separately, the PACT Act imposes specific requirements with respect to "delivery sales into a specific State and place." *Id.* § 376a(a). A "delivery sale" is defined as "any sale of cigarettes or smokeless tobacco to a consumer if" certain conditions are satisfied. *Id.* § 375(5). But "consumer" expressly "does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco." *Id.* § 375(4)(B). Therefore, tobacco sales do not trigger the PACT Act's delivery sale requirements when made to a lawfully operating tobacco manufacturer, distributor, wholesaler, or retailer.

For delivery sales that do trigger the PACT Act's specific requirements, those requirements relevant to this appeal provide:

[D]elivery sellers shall comply with …

> (3) [A]ll 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 …
>
> (B) licensing and tax stamping requirements; … and
>
> (4) the tax collection requirements set forth in subsection (d).

Id. § 376a(a).

The PACT Act further requires the Attorney General to create, maintain, update, and distribute to state attorneys general and state tax administrators a "List of unregistered or noncompliant delivery sellers" ("Non-Compliant List"). *Id.* § 376a(e) (capitalization omitted). Before placing a delivery seller on the Non-Compliant List, the Attorney General must, at least "14 days before including a delivery seller on the [L]ist" provide the delivery seller notice of the Attorney General's intent to place the delivery seller on the Non-Compliant List, and the notice "shall cite the relevant provisions of [the PACT Act] and provide the specific reasons for which the delivery seller is being placed on the [L]ist." *Id.* § 376a(e)(1)(E)(ii). The Attorney General must also "provide an opportunity to the delivery seller to challenge placement on the [L]ist." *Id.* § 376a(e)(1)(E)(iii).

The PACT Act requires state, local, and tribal governments to provide the Attorney General the information "of any delivery seller that … has failed to register with or make reports to the respective tax administrator as required by [Section 2(b) of the PACT Act, 15 U.S.C. § 376], or that has been found in a legal proceeding to have otherwise failed to comply with [the PACT Act]." *Id.* § 376a(e)(6). The

Attorney General must then undertake the process of adding a state-, locally-, or tribally-identified delivery seller to the Non-Compliant List. *See id.* § 376(e)(1)(D).

Non-Compliant List placement triggers a "[p]rohibition on delivery" requiring that "no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the [L]ist." *Id.* § 376a(e)(2) (capitalization omitted).

Separately, the PACT Act confers general enforcement authority on the Attorney General, and permits state attorneys general, local governments, and tribal governments to bring an action in federal court to "restrain violations of [the PACT Act]." *Id.* § 378(c). The PACT Act further exposes noncompliant delivery sellers to civil penalties of "$5,000 in the case of the first violation, or $10,000 for any other violation," and "for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation." *Id.* § 377(b)(1)(A). The PACT Act also subjects "whoever knowingly violates [the PACT Act]" to criminal penalties, which include "imprison[ment] for not more than 3 years, fine[s] under Title 18, or both" unless the punished entity is "a State, local, or tribal government." *Id.* § 378(a)(1), (2).

The PACT Act does not alter background principles of federal Indian law. Under a heading titled "EXCLUSIONS REGARDING INDIAN TRIBES AND TRIBAL MATTERS," the PACT Act provides:

> Nothing in [the PACT Act] … shall be construed to amend, modify, or otherwise affect …
>
> > (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal 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; [or]
> >
> > (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes.

Id. § 375 note.

III. CALIFORNIA'S LICENSING REGIME

California regulates the flow of tobacco products within its borders via its Cigarette and Tobacco Products Licensing Act of 2003 ("Licensing Act"), Cal. Bus. & Prof. Code §§ 22970–22991, and its Cigarette and Tobacco Products Tax Law ("Tax Law"), Cal. Rev. & Tax Code §§ 30001–30483. The Licensing Act requires tobacco retailers to "have in place and maintain a license to engage in the sale of cigarettes or tobacco products." Cal. Bus. & Prof. Code § 22972(a). A retailer must apply to the California Department of Tax and Fee Administration ("CDFTA") to obtain a retail license. *See id.* § 22973. As conditions of obtaining and holding a retail license, the Licensing Act requires a prospective licensee to file an application

with the Department and to pay an application fee, and to assent, among other things, to the State's unannounced site inspections, to the State's suspension of a license in the State's sole discretion, to the State's revocation of a license if sales continue after suspension, to the State's seizure of products the State deems noncompliant, and to the State's pursuit of potentially severe penalties. *See id.* §§ 22974.2, 22980, 22980.2, 22980.3, 22980.4, 22981; *see also id.* § 22980.5.

Additionally, the Tax Law requires anyone who sells cigarettes as a distributor to obtain a distributor's license. *See* Cal. Rev. & Tax Code § 30140. A distributor must apply to and file a bond with the CDFTA to obtain a distributor license, and the distributor must assent to the State's unilateral suspension of its license without notice, to the State's revocation of its license, to unannounced State site inspections, to seizure and forfeiture of products that the State deems noncompliant, and to the State's pursuit of similarly severe civil and criminal penalties. *See id.* §§ 30141–30142, 30163(c), 30435–30449, 30471–30472, 30473.5, 30474.

IV. THIS DISPUTE

A. ATF's Decision to Place the Tribe on the Non-Compliant List

The parties' dispute began on July 28, 2022, when the California Department of Justice ("CALDOJ") contacted ATF, a subagency of the U.S. Department of Justice, to request that the U.S. Attorney General add Twenty-Nine Palms to the Non-Complaint List. CALDOJ explained that the Tribe had not responded to its

request that the Tribe "register and report its sales activities to the State under the PACT Act." ER-60. CALDOJ "request[ed] that [the Tribe] be added" to the Non-Compliant List "for the violation of 15 U.S.C. § 376a(e)(6)(A)(i)(II) (providing for addition of any seller that 'has failed to register with or make reports to the respective tax administrator as required by this chapter')." ER-61. ATF sent the Tribe a letter on August 15, 2022, notifying the Tribe of its intent to place the Tribe on the Non-Compliant List on that basis ("2022 Letter"). ER-123–25.

The Tribe began corresponding with the State of California on a government-to-government basis, *see* ER 150–51, and it explained to ATF that it not received the State's prior correspondence and that it was attempting to resolve the State's issues directly with the State, *see* ER-148. The Tribe and the State successfully resolved the State's concern, and the Tribe began submitting monthly PACT Act reports under 15 U.S.C. § 376. *See* ER-64, 75. Accordingly, CALDOJ wrote to ATF on April 26, 2023 "confirmed that the [Tribe] has provided the PACT Act reports [CALDOJ] requested" and that "[CALDOJ] would therefore like to withdraw [its] July 28, 2022 request for [the Tribe] to be added to the PACT Act list of unregistered or noncompliant delivery sellers." ER-64.

Apparently determined to punish the Tribe, ATF sent the Tribe another letter on June 5, 2023, notifying the Tribe of its renewed intent to place the Tribe on the Non-Compliant List ("2023 Letter"), this time for an alleged violation of the delivery

sale provisions in 15 U.S.C. § 376a(a). ER-68–72. In contrast with the 2022 Letter, the State of California had not nominated the Tribe to be placed on the Non-Compliant List and had voiced no issue with the Tribe's sales to its Native Nation customers.

The 2023 Letter alleged that "[the Tribe] … shipped and sold unstamped cigarettes and untaxed smokeless tobacco to non-tribal members, who are not licensed on their reservation or elsewhere in California to possess and sell untaxed cigarettes or untaxed smokeless tobacco, in violation of California law." ER-69. The Letter next stated that "records associated with your sales suggest that many of these sales are to entities on Tribal reservations" and that these "Tribal retailers are unlicensed by the State of California, making them ineligible to possess and/or sell unstamped, untaxed, cigarettes and untaxed smokeless tobacco and thus not 'lawfully operating.'" ER-69. As a result, ATF concluded, "these sales are in violation of 15 U.S.C. § 376a(a)(3) and (4) which requires that all delivery sales comply with State, local, [and] Tribal laws applicable to the sales of cigarettes and smokeless tobacco in the State or locality." ER-69. Notably, the 2023 Letter did not identify a provision of California, local, or tribal law that the Tribe or its Native Nation customers were allegedly violating. The 2023 Letter concluded that "in light of the hundreds of past and present violations of the PACT Act spanning several years, we are placing [the Tribe] on the [N]on-[C]ompliant [L]ist." ER-71.

The Tribe presented a fulsome response to ATF, positing, among other things, that ATF failed to cite any provision of California law that the Tribe allegedly violated, ER-77, that the PACT Act did not purport to require federally recognized Indian tribes to comply with the full panoply of state law, *see* ER-78–80, that state taxes were not due on the Tribe's sales to its Native Nation customers, *see* ER-82–83, that the Tribe's Native Nation customers were lawfully operating, *see* ER-86–87, and that ATF failed to consider whether California law was preempted as to Native Nation customers' ultimate retail sales under the inquiry first set forth by the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *see* ER-88.

Nonetheless, ATF on October 19, 2023, issued a decision placing the Tribe on the Non-Compliant List (the "Decision"). *See* ER-92–104. ATF reasoned that the "Tribal distributors" (*i.e.*, the Tribe's Native Nation customers) were "not licensed and in compliance with California tax laws." ER-101. Therefore, in ATF's view, those Native Nation customers were not "lawfully operating" such that they were "consumer[s]" within the meaning of the PACT Act, 15 U.S.C. § 375(4)(B), thereby triggering the PACT Act's specific requirements applicable to delivery sales, *id.* § 376a(a); *see* ER-101. And because the Native Nation customers were not lawfully operating, ATF concluded, the Tribe itself "failed to adhere to its PACT Act obligations and therefore ATF … decided to place [the Tribe] on the Non-

Compliant [L]ist." ER-101. ATF further concluded that the Tribe violated the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 *et seq.*, again on the ground that the Tribe's Native Nation customers were unlicensed. ER-102–03. ATF ultimately placed the Tribe on the Non-Compliant List on March 10, 2025. Dist. Ct. Dkt. No. 71-1 ¶ 16.

As a result of ATF's erroneous Decision, the Tribe has been forced to cease its tobacco sales to its Native Nation customers altogether pending the outcome of this litigation, depriving the Tribe of much needed revenue. *Id.* ¶ 19; *see id.* ¶¶ 13–15. ATF's Decision threatens permanent and irreparable harm to the Tribe's wholesale tobacco distribution business because the Tribe's Native Nation customers would need to search for other tobacco suppliers, and the Tribe would be unable to reacquire those Native Nation customers once lost due to the highly competitive nature of the industry. *Id.* ¶¶ 18, 20. ATF's Decision also infringes on the sovereignty of all federally recognized tribes, including Twenty-Nine Palms, which has gone to great lengths to conform its conducts with all applicable legal requirements and to develop a cooperative partnership with the State of California. *Id.* ¶ 22; *see id.* ¶¶ 7–8. To date, California has not voiced any further issues with the Tribe's tobacco sales, let alone asserted that those sales violate any provisions of California law; nor has it informed the Tribe that it or its Native Nation customers must possess state licenses. *See id.* ¶ 11.

B. Proceedings Below

On February 16, 2024, the Tribe brought suit under the APA. ER-181; Dist. Ct. Dkt. No. 1. Defendants moved for summary judgment on June 7, 2024, ER-111–42, and the Tribe opposed the motion, ER-32–59.

On February 27, 2025, the district court granted Defendants' motion for summary judgment without holding a hearing. The district court concluded that the Decision was not arbitrary and capricious because "ATF has reason to believe the Tribe is selling cigarettes to non-Native Nation customers." ER-9. The district court also concluded that "ATF's [D]ecision focuses on sales from the Tribe to non-Native Nation customers and how, in their view, these are violations of the PACT Act and California law by extension." ER-10. The district court further concluded that even if it were to hold that the Decision was erroneous in part, the Decision "remains on solid ground" because ATF "had reason to believe [the Tribe] was non-complaint with California's Licensing Act." ER-9. The district court issued the corresponding judgment on March 24, 2025. ER-3–4.

The Tribe timely appealed from the district court's decision on April 9, 2025, ER-177; Dist. Ct. Dkt. No. 69, and moved in the district court for an injunction pending appeal, ER-71; Dist. Ct. Dkt. No. 71. The motion was fully briefed as of May 16, 2025. ER-189; Dist. Ct. Dkt. No. 77. At the time of filing this brief, the

district court has not yet ruled on the Tribe's motion, effectively preventing the Tribe from seeking the same relief from this Court. *See* Fed. R. App. P. 8(a).

SUMMARY OF ARGUMENT

ATF erred in concluding that California could compel Native Nations to obtain licenses as a prerequisite to conducting on-reservation operations. The district court incorrectly upheld ATF's decision based on a misunderstanding of the administrative record. The Court should reverse the district court and hold that the Tribe's Native Nation customers acted lawfully such that the Tribe did not violate the PACT Act.

First, the district court misunderstood the final agency action at issue. ATF grounded the Decision in its conclusion that the Tribe's Native Nation customers lack licenses issued by the State of California. But the district court affirmatively stated that this was not the reason that ATF decided to place the Tribe on the List, instead identifying the basis of the Decision as the Tribe's purported sales to "non-Native Nation customers." ER-9. But the Decision does not allege that the Tribe sells to non-Native Nation customers. To the contrary, the record conclusively establishes that the Tribe sells exclusively to Native Nation customers, and the parties do not dispute this point. This error alone warrants vacatur and remand.

Second, ATF's Decision was arbitrary and capricious in violation of the APA because federal Indian law preempts California's tobacco licensing requirements.

Fundamental principles of tribal sovereignty prevent states from infringing on tribes' power "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Application of California's licensing regime to the Tribe's Native Nation customers would violate that principle because it would allow the State to regulate the Native Nation customers' on-reservation operations. Moreover, subjecting the Native Nation customers to California's licensing regime would impermissibly subordinate their tribal sovereignty to the sovereignty of the State. *See, e.g.*, *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1031 (9th Cir. 2022). While a line of Supreme Court cases beginning with *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation* authorizes states to place "minimal burdens" on tribes and tribal members by virtue of state authority to tax non-Indians on Indian reservations in certain circumstances, *Moe* and its progeny do not authorize California to impose its licensing regime on the Tribe's Native Nation customers. 425 U.S. 463, 483 (1976).

Third, ATF failed to comply with other requirements of administrative law, rendering the Decision arbitrary and capricious. ATF initially failed in its 2023 Letter to apprise the Tribe of the "specific reasons for which [the Tribe was] being placed on the [L]ist" because the 2023 Letter did not cite a single provision of California law that had allegedly been violated. 15 U.S.C. § 376a(e)(1)(E)(ii); *see, e.g.*, ER-101. The Tribe was left to guess at the theory of wrongdoing that ATF

ultimately adopted and was thus deprived of a meaningful opportunity to challenge its placement on the List prior to the Decision.

ATF next failed to provide an adequate explanation for the Decision. ATF assumed that California could impose its licensing regime on the Tribe's Native Nation customers by focusing only on its tax-collection component and ignoring the remaining, impermissibly intrusive components of that regime. ATF also failed to conduct the requisite analysis under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), before concluding that California's licensing regime applies to the Tribe and its Native Nation customers for their on-reservation conduct. ATF relatedly failed to consider California's demonstrably minimal interest in this case and instead commandeered the State's authority to determine the scope and meaning of its own laws.

Finally, ATF's Decision was not supported by adequate evidence. ATF violated the PACT Act's requirement that ATF predicate List placement on ongoing violations by purporting to ground its decisions in "hundreds of past … violations … over the course of several years." ER-104. The Decision did not otherwise substantiate any ongoing violations. And even for those past violations, ATF failed to identify even a single sale that violated the PACT Act. Rather, the only record evidence cited in the Decision was information pertaining to the licensed status of the Tribe and its Native Nation customers, not to any actual tobacco sales.

STANDARD OF REVIEW

The Court "review[s] de novo a district court's grant of summary judgment," *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1216 (9th Cir. 2022), as well as "questions of statutory interpretation," *Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034, 1042 (9th Cir. 2023). "Because this is a record review case, [the Court] may direct that summary judgment be granted to either party based upon [the Court's] review of the administrative record." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012).

Section 706 of the APA, 5 U.S.C. § 706, requires federal courts to hold unlawful and set agency action as "arbitrary and capricious" when "'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,'" *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 36 (9th Cir. 2025) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1944)), which includes circumstances in which "the agency's decision is contrary to the governing law," *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). In reviewing agency action, the Court "may not substitute [its] judgment for that of the agency," *Mont. Wildlife Fed'n*, 127 F.4th at 36 (quotation marks omitted); rather, it

is a "well-established principle that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 878 (9th Cir. 2022) (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT MISUNDERSTOOD ATF'S ORDER.

The district court's summary judgment decision should be vacated because it reflects a misunderstanding of the agency order under review.

ATF concluded that the Tribe violated the PACT Act because the Tribe was purportedly engaging in "delivery sales" of tobacco products without complying with legal requirements for such sales. ER-98. The term "delivery sale" is statutorily defined as a sale to "a consumer." 15 U.S.C. § 375(5). The term "consumer" broadly encompasses "any person that purchases cigarettes or smokeless tobacco," but excludes "any person *lawfully* operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco." 15 U.S.C. § 375(4) (emphasis added). In ATF's view, the Tribe's customers—Native Nations that resold cigarettes on their own reservations—are "consumers" under the PACT Act, meaning that the Tribe was engaging in "delivery sales" subject to the PACT Act's regulatory restrictions. ER-101.

According to ATF, the Tribe's Native Nation customers do not fall within the statutory exclusion for persons "lawfully operating as a … retailer of cigarettes"

because they are unlicensed by the State of California and therefore cannot collect applicable state taxes, and hence do not operate "lawfully." 15 U.S.C. § 375(4); *see, e.g.*, ER-92 (noting that "your customers fail to have the requisite distributor licenses required under California law"); ER-101 ("Unlicensed distributors who are depriving California of tobacco taxes by distributing untaxed cigarettes to non-Tribal members and failing to collect and remit taxes and records in violation of California law are not 'lawfully operating' under applicable California law and as such are 'consumers' under the PACT Act."). ATF's finding that the Tribe violated the CCTA similarly hinged on its view that the Tribe's Native Nation customers illegally failed to obtain state licenses. ER-103 ("[Twenty-Nine] Palms' customers are not licensed distributors and therefore cannot possess unstamped cigarettes under California law and the shipment, receipt and possession of these cigarettes constitutes CCTA violations.").

The district court misinterpreted ATF's Decision. First, the court stated: "While ATF's decision letter does not mention the argument that the Tribe's Native Nation customers are in violation of the California Licensing Act, the basis of ATF's decision is that the Tribe must comply with state law under the PACT Act's authority." ER-8. To the contrary, the Decision *did* "mention the argument that the Tribe's Native Nation customers are in violation of the California Licensing Act." *Id.* Indeed, as just explained, that was ATF's core reason for its Decision. *See, e.g.*,

ER-97, 101. Further, the "basis of ATF's decision," ER-8, was *not* that "the Tribe must comply with state law under the PACT Act's authority," *id.*, but instead that the Tribe's *Native Nation customers* must comply with state licensing requirements.[2]

Next, the district court stated 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. This statement is also incorrect. The record establishes unequivocally that all of the Tribe's customers were Native Nations customers, *i.e.*, entities owned and operated by federally recognized Indian tribes on those tribes' reservations. *See* ER-66–68; Dist. Ct. Dkt. No. 71-1 ¶¶ 5, 8; *see also* ER-38, 161 ¶ 35. ATF did not conclude otherwise. Instead, ATF relied on the distinct theory that the Tribe's Native Nation customers were reselling cigarettes at retail to non-Native individuals without obtaining a license or collecting taxes associated with those sales. *See, e.g.*, ER-96 ("[Twenty-Nine] Palms then shipped and sold unstamped cigarettes and untaxed smokeless tobacco to California Tribal distributors who then sold these untaxed cigarettes to non-tribal members. These distributors violated California law by failing to collect taxes on sales, not filing

[2] The Tribe filed a motion for injunction pending appeal in the district court explaining the court's error. *See* Fed. R. App. P. 8(a)(1)(C) (requiring motion for injunction pending appeal to be filed in the district court in the first instance). As of this filing, that motion remains pending.

reports, and not possessing distributors' licenses.").

The district court later reiterated: "ATF's decision focuses on sales from the Tribe to non-Native Nation customers and how, in their view, these are violations of the PACT Act and California law by extension." ER-10. Again, as just explained, the Decision does not focus on sales "from the Tribe to non-Native Nation customers," but instead focuses on sales from the Tribe to Native Nation customers. Moreover, the district court's reference to "violations of the PACT Act and California law by extension" again misunderstands the Decision. It was the Native Nation customers' purported violation of *California law* that triggered an alleged violation of *the PACT Act* by extension, not the other way around.

II. ATF'S DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE FEDERAL LAW PREEMPTS CALIFORNIA'S LICENSING REQUIREMENTS.

Because the district court misunderstood ATF's Decision, the district court's judgment should, at a minimum, be vacated and remanded. However, to avoid further delay, this Court should take the further step of holding that the Tribe's Native Nation customers *were* operating "lawfully" and hence *were not* "consumers" under the PACT Act. As such, the Tribe is not subject to the PACT Act's requirements for "delivery sales" and is not violating the CCTA.

A. States Cannot Impose State Licensing Requirements on Tribal Entities for On-Reservation Conduct.

ATF concluded that the Tribe's Native Nation customers are operating unlawfully because they lack licenses issued by the State of California. *See* ER-101. However, neither federal Indian law nor the PACT Act authorizes California to impose its licensing regime on the Tribe's Native Nation customers for their on-reservation economic activity. Further, California's Licensing Act does not apply on its own terms because it expressly excludes entities that are exempt from state regulation—an exclusion that covers the Tribe's Native Nation customers. California law contains a similar exemption from the Tax Law. Hence, notwithstanding the lack of a license, those Native Nation customers were acting "lawfully." Therefore, they were not "consumers" under the PACT Act, and they were not selling contraband cigarettes under the CCTA.

California may not lawfully impose its licensing requirements on the Tribe's Native Nation customers. It is blackletter law that "state authority" presumptively "does not apply to tribes and tribal members in Indian country." *Cohen's Handbook of Federal Indian Law* § 7.03 (Nell Jessup Newton et al. eds., 2024); *see also id.* § 1.03 ("In general, states lack authority over Indian nations."). This precept flows from the axiom that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (alteration in original) (quoting *Rice v. Olson*, 324

U.S. 786, 789 (1945)). It is for this reason that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978), *superseded by statute as stated in United States v. Lara*, 541 U.S. 193 (2004)). That sovereign authority includes the tribes' power "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). As a result, "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *Chicken Ranch Rancheria*, 42 F.4th at 1031 (quoting *McClanahan*, 411 U.S. at 1031). And absent express congressional authorization, states are also prohibited from placing a "burden … []on Indian traders for trading with Indians on reservations." *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 691 (1965).

Application of California's licensing requirements—via both the Licensing Act and the Tax Law—to the Tribe's Native Nation customers would necessarily allow the State to regulate the Native Nation customers' trade with their own respective members. At bottom, a licensing requirement would subordinate federally recognized Indian tribes to State authority as a prerequisite to conducting business on their own reservations in derogation of the principle that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not

the States." *Chicken Ranch Rancheria*, 42 F.4th at 1031 (quoting *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980)).

That derogation is manifest throughout the Licensing Act, which, if applicable, would require the Tribe and each of its Native Nation customers to waive their sovereign immunity against enforcement or pay a $50,000 bond and to consent to state jurisdiction as preconditions of obtaining licenses. *See* Cal. Bus. & Prof. Code § 22979(a)(3), (4). The Licensing Act would also require the Tribe and its Native Nation customers to assent, among other things, to the State's unannounced site inspections, to the State's suspension of a license in the State's sole discretion, to the State's revocation of a license if sales continue after suspension, to the State's seizure of products the State deems noncompliant, and the State's pursuit of potentially severe penalties. *See id.* §§ 22974.2, 22980, 22980.2, 22980.3, 22980.4, 22981; *see also id.* § 22980.5. The same goes for California's separate licensing requirements in the Tax Law, which requires distributors to apply to and file a bond with CDFTA to obtain distributor licenses, and to assent to the State's unilateral suspension of licenses without notice, to the State's revocation of licenses, to unannounced State site inspections, to seizure and forfeiture of products that the State deems noncompliant, and the State's pursuit of potentially severe penalties. *See* Cal. Rev. & Tax Code §§ 30141–30142, 30163(c), 30435–30449, 30471–30472, 30473.5, 30474.

These measures effectively require cessions of tribal sovereignty to, payment to, and approval of California as preconditions of any federally recognized Indian tribe in California engaging in commerce on its own reservation, including with its own members. These measures would also subject that commerce to ongoing State scrutiny and allow the State to unilaterally interfere with that commerce as the State alone deems appropriate. As such, these requirements are not "minimal" and are not "reasonably tailored to the collection of valid taxes." *Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994). Instead, each of these assertions of state power is intolerably intrusive on tribal sovereignty and therefore incompatible with bedrock principles of federal Indian law.

The PACT Act does not change this result. To the contrary, the PACT Act provides that "[n]othing [therein] … shall be construed to amend, modify, or otherwise affect" existing "limitations under Federal … law, including Federal common law …, on State, … regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal members, or in Indian country," or "any Federal law, including Federal common law …, regarding State jurisdiction, or lack thereof, over any" of those entities. 15 U.S.C. § 375 note.

Like the PACT Act, California's Licensing Act respects background principles of federal Indian law, as it provides that "[n]o person is subject to the

requirements of this division if that person is exempt from regulation under the United States Constitution[or] the laws of the United States." Cal. Bus. & Prof. Code § 22971.4. The Licensing Act reiterates this exception with respect to the prohibitions on sale by and purchase from an entity lacking a business license by providing that those prohibitions "do[] not apply to any sale of cigarettes or tobacco products … that the [S]tate, pursuant to the United States Constitution[or] the laws of the United States, … is prohibited from regulating." *Id.* § 22980.1(b)(2). Because, under federal Indian law, the State is "prohibited from regulating" tribes' on-reservation activity, the Licensing Act does not apply by its own terms. This conclusion accords with the Licensing Act's legislative history, which confirms that its exemption applies to on-reservation retailers, like the Tribe's Native Nation customers. California Bill Analysis, A.B. 3092 Assem. Sen. (Aug. 23, 2004) ("The author indicates that distributors in the state may only sell products to licensed persons. Retailers on Indian Reservations … are not subject to the licensing requirements of the Cigarette and Tobacco Licensing Act of 2003. Nonetheless, the way the law is currently constructed, distributors cannot sell to those retailers. This exemption allows distributors to sell tobacco products to those retailers."). California law contains a similar carveout for federally recognized Indian tribes operating on their reservations. *See* Cal. Health & Safety Code § 104556(j) (exempting from excise tax "cigarettes sold ... by a Native American tribe to a

member of that tribe on that tribe's land" and tobacco transactions "otherwise exempt from state excise tax pursuant to federal law.").

Because, as a matter of both federal and state law, the Tribe's Native Nation customers were not required to obtain licenses, ATF erred in concluding that those Native Nation customers were acting unlawfully. And because ATF's Decision hinged on the purportedly unlawful conduct of the Tribe's Native Nation customers, the Decision is contrary to law and should be vacated.

B. No Case Law Supports ATF's Position that California May Impose its Licensing Requirements on Tribes' On-Reservation Activities.

In reaching a contrary conclusion, ATF relied on case law holding that "States can impose minimal regulatory burdens to assure that lawful taxes are collected." ER-98. The district court similarly included a footnote acknowledging the Tribe's "arguments concerning the applicability of state laws against sovereign tribes as infringement on their independent sovereignty," but stating that the court "need not reach these contentions with specificity since the U.S. Supreme Court has established clear framework for requiring sovereign tribes to document and remit state taxes for on-reservation sales made to non-tribal citizens." ER-9 (citing *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (1980)).

It is true that a line of Supreme Court cases holds that states may require tribes to collect and remit taxes from non-Indian retail customers, so long as the collect-

and-remit requirement is minimally burdensome. In *Moe*, the Supreme Court held that a state may require that an "Indian tribal seller collect a tax validly imposed on non-Indians" because the tax was imposed on "non-Indian purchas[ers]," not the tribe or tribal members themselves, and because the requirement was "a minimal burden" such that its imposition would not "frustrate[] tribal self-government." 425 U.S. at 482–83. The Supreme Court subsequently extended *Moe* to allow a state to impose additional collection and recordkeeping requirements that imposed a "simple collection burden." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 159 (1980); *accord Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985).

But that case law does not support ATF's Decision because California's licensing regime does *not* merely consist of "minimal regulatory burdens to assure that lawful taxes are collected," as ATF erroneously claimed. ER-98. Rather, it subjects regulated entities to extensive State oversight and scrutiny that, if applied to a federally recognized Indian tribe on its own reservation, would effectuate an unprecedented extension of state authority into Indian Country that is incompatible with core tenets of tribal sovereignty and basic precepts of federal Indian law.

Crucially, the only way for the Tribe's Native Nations customers to presently comply with California's tobacco taxation framework is to obtain distributor licenses. As California explained to ATF by letter prior to ATF's issuance of its

Decision, "a … distributor license under [California's] Cigarette and Tobacco Products Tax Law, Cal. Rev. & Tax Code §§ 30001–30483, … is required in order to purchase cigarette tax stamps or otherwise collect and/or remit California cigarette taxes." ER-152. "As none of [Twenty-Nine] Palms'[] customers have ever held such license," the State concluded, "they have not collected or remitted any California cigarette taxes." *Id.* ATF adopted this reasoning in its Decision verbatim. *See* ER-94. Thus, although the Supreme Court in *Chemehuevi* upheld the application of California's collect-and-remit framework to a federally recognized Indian tribe selling tobacco products to non-Indians on its reservation, *see* 474 U.S. 9, California presently enables compliance with that framework only through separate compliance with its distributor licensing requirements, *see* Cal. Rev. & Tax Code § 30140 (requiring distributor's license). As just described, however, the distributor licensing requirements are neither "minimal" nor "reasonably tailored to the collection of valid taxes." *Milhelm*, 512 U.S. at 73. To the contrary, licensees must pay a bond, subject themselves to unannounced site inspections, and face property seizures, forfeitures, and the State's pursuit of potentially severe civil and criminal penalties, all of which intolerably intrude on tribal sovereignty in violation of federal Indian law. *Supra*, at 14, 30.

Moe, *Colville*, and *Chemehuevi* hold that a state may impose a collect-and-remit requirement on tribes' on-reservation tobacco sales to non-Indians, but they

do not hold or suggest that a state may impose its full panoply of licensing requirements on tribes' on-reservation activity. To the contrary, *Moe* explicitly affirms that a "vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land" is preempted by federal Indian law. 425 U.S. at 480. And in a holding the Supreme Court did not disturb, the *Moe* district court held that Montana may not "require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license." *Confederated Salish & Kootenai Tribes of Flathead Rsrv. v. Moe*, 392 F. Supp. 1297, 1317 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976). Put simply, federal law bars the State from imposing its licensing requirements on tribes' on-reservation activity, and that principle does not change when the State declares those licensing requirements to be the sole way of complying with state tax law. *See Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 489 n.5 (2013) (federal law preempts state's effort to achieve federally prohibited result through "indirect means").

No other case supports ATF's decision. *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), on which ATF's decision relied, *see* ER-96–97, 99, is not on point. In *Big Sandy*, this Court held that a tribally-owned corporation "selling cigarettes on other tribes' reservations" was subject "to non-discriminatory state laws of general application," including the retail and distributor licensing requirements. 1 F.4th at 729. But this Court grounded its conclusion in the

corporation's "conce[ssion] that it leaves the [Alturas Indian] Rancheria to sell cigarettes to tribal retailers on other reservations." *Id.* at 728. This Court emphasized that the corporation did "not allege that California seeks to regulate its transactions with non-Indians or nonmembers *on the Rancheria* in a way that infringes on the Tribe's self-governance." *Id.* at 730.

By contrast, there is no off-reservation conduct at issue here. There is also no evidence that the Tribe's Native Nation customers leave their respective reservations to engage in tobacco sales, nor did ATF purport to rely on such conduct as forming any part of the basis of the Decision. Apart from this dispositive factual distinction, the *Big Sandy* corporation's tobacco products were not listed on the California Tobacco Directory. *See id.* at 718. Here, it is undisputed that the tobacco products sold by the Tribe's Native Nation customers are listed on the Directory. ER-38, 46, 162 ¶ 37, 172 ¶ 92; *see also* Cal. Off. of the Att'y Gen., California Tobacco Directory (updated Jan. 17, 2025), https://oag.ca.gov/tobacco/directory (listing GRE products). Moreover, *Big Sandy* was not an APA action and did not involve the PACT Act; rather, it was a suit brought by the corporation against CALDOJ seeking declaratory and injunctive relief. *See* 1 F.4th at 718–19.

Nor does *California v. Azuma Corp.*, No. 2:23-cv-00743, 2023 WL 5835794 (E.D. Cal. Sept. 8, 2023), on which ATF also relied, *see* ER-100, address the Tribe's argument here. In that case, the district court issued a preliminary injunction in a

suit brought by CALDOJ against a tribally-owned corporation based on its off-reservation tobacco shipments after the tribe had already been placed on the Non-Compliant List and was hence subject to the PACT Act's delivery prohibitions. This Court subsequently affirmed that injunction in an unpublished nonprecedential opinion. *California v. Azuma Corp.*, No. 23-16200, 2024 WL 4131831 (9th Cir. Sept. 10, 2024). Neither the Ninth Circuit nor the district court addressed the argument that the Tribe is advancing here—that California's licensing regime is preempted because it imposes regulatory burdens going far beyond a mere collect-and-remit requirement. Moreover, *Azuma* was factually different from this case in several respects. Unlike the products at issue in Azuma, the products sold by the Tribe are on the California Tobacco Directory, have had escrow deposited on them as required by California law, and are reported to California in PACT Act reports. ER-38, 46, 64, 75, 162 ¶ 37, 172 ¶ 92.

To sum up, federal law does not permit California to impose its onerous licensing requirements on the on-reservation operations of the Tribe's Native Nation customers. As such, notwithstanding their failure to obtain state licenses, the Tribe's Native Nation customers are operating "lawfully" and are hence not "consumers" under the PACT Act. 15 U.S.C. § 375(4)(B). As a result, the Tribe's sales to its Native Nation customers were not "delivery sales" within the meaning of the PACT Act, *see id.* § 375(5), rendering the PACT Act's specific requirements as to delivery

sales inapplicable, *see id.* § 376a(a). Likewise, the basis for ATF's finding of a CCTA violation—that "[Twenty-Nine] Palms' customers are not licensed distributors and therefore cannot possess unstamped cigarettes under California law," ER-103—hinged on the erroneous view that the Native Nation customers were required to obtain licenses. Therefore, ATF's decision to place the Tribe on the Non-Compliant List was contrary to law.

III. ATF'S DECISION DID NOT COMPLY WITH BASIC REQUIREMENTS OF ADMINISTRATIVE DECISIONMAKING.

In addition to ATF's core error of finding that the Tribe's Native Nation customers acted unlawfully, ATF committed several procedural violations that warrant vacatur of ATF's Decision.

A. ATF Failed to Provide Adequate Notice in the 2023 Letter.

ATF failed to satisfy its obligation to apprise the Tribe of the "specific reasons for which [the Tribe was] being placed on the [L]ist" in the 2023 Letter prior to issuing the Decision. 15 U.S.C. § 376a(e)(1)(E)(ii). While the 2023 Letter broadly alleged that the Tribe's sales to its Native Nation customers were "subject to California's non-discriminatory licensing and excise tax statutes," ER-70, it failed to cite a single provision of California law that the Tribe or its Native Nation customers purportedly violated. *See* ER-68–72. As such, the Tribe was left to guess at the theory of wrongdoing that ATF ultimately adopted in its Decision. Given this shortcoming, the Tribe notified ATF that "without notice as to what specific [s]tate,

local, or [t]ribal laws" ATF alleged it or its customers were violating, it was "unable to respond to ATF's allegations." ER-77. Yet rather than give the Tribe a meaningful opportunity to respond, ATF responded by issuing the Decision that resulted in the Tribe being placed on the Non-Compliant List. As such, the Tribe was thus deprived of a meaningful opportunity to "challenge placement on the [L]ist," *id.* § 376a(e)(1)(E)(iii), rendering ATF's action further inconsistent with the PACT Act.

B. ATF Failed to Provide an Adequate Explanation in the Decision.

ATF's explanation in its Decision was inadequate because it "entirely failed to consider an important aspect of the problem" in several respects. *Mont. Wildlife Fed'n*, 127 F.4th at 39 (internal quotation marks omitted). To begin, ATF entirely failed to grapple with the fact that subjecting federally recognized Indian tribes to a state licensing regime as a condition of doing business on their own reservations would violate the sovereign right of tribes to "make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Instead, it simply assumed that California could impose that licensing regime merely because tax collection is one component of that regime without considering the burdensome nature of the remaining components.

Additionally, ATF's explanation was inadequate because it improperly failed to conduct an analysis under *Bracker*. The premise of ATF's decision was that under *Moe* and its progeny, California was permitted to tax the non-Indian retail consumers

who purchased tobacco products from the Tribe's Native Nation customers, and was also permitted to mandate that the Tribe's Native Nation customers collect and remit that tax. But even setting aside the fact that California imposes licensing requirements far exceeding a collect-and-remit requirement, the Supreme Court's cases do not hold that States may *invariably* impose taxes on non-Indians arising from on-reservation transactions. Rather, whether a State may tax a non-Indian for an on-reservation transaction is governed by *Bracker*'s balancing test, which requires a "particularized inquiry" into the relevant state, federal, and tribal interests. *Id.* at 145. That inquiry is "inform[ed]" by "the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development," which serve as "barriers to the exercise of state authority over commercial activity on an Indian reservation." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 837–38 (1982).

Yet ATF expressly declined to conduct a *Bracker* analysis. Instead, it reasoned that "[Twenty-Nine] Palms' intertribal wholesale cigarette sales to the unlicensed Tribal retailers are 'off-reservation' activity that remain subject to California's non-discriminatory licensing and excise tax statutes." ER-99. But ATF overlooked a crucial point: ATF's basis for deeming the Tribe to be a "delivery seller" was that the Tribe' Native Nation customers were acting unlawfully. And

the Native Nation customers were not engaging in any off-reservation activity. To the contrary, they were operating tobacco businesses on their own reservations.

Although the State may have authority to tax non-Indians making purchases on Indian reservations in certain circumstances, ATF was still required to conduct a *Bracker* analysis before deciding whether California could lawfully impose its tax laws on the Tribe's Native Nation customers to facilitate that taxation. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (emphasizing propriety of *Bracker* analysis in "case[s] … involv[ing] a state burden on tribal Indians in the context of their dealings with non-Indians" on Indian reservations); *see also Azuma Corp.*, 2024 WL 4131831, at *2 ("[*Bracker*] balancing may favor the Tribal Retailers such that they are not unlawfully operating under the PACT Act, are not 'consumers' under the PACT Act, and thus Azuma is not violating the [PACT Act] by delivering cigarettes to them."). It failed to do so.

Next, ATF's reasoning was deficient because it failed to consider California's minimal interest in this case. Importantly, California *withdrew* its letter nominating the Tribe to the Non-Compliant List more than six months prior to ATF's issuance of the Decision because it cooperatively resolved its issues with the Tribe, and those issues concerned only the Tribe's alleged failure to submit PACT Act reports. ER-64, 78. Yet ATF made the unusual choice to place the Tribe on the Non-Compliant List based on a purported violation of California law even though California *itself*

was no longer of the view that the Tribe violated California law, and even though the record is devoid of any assertion by the State that the Tribe's Native Nation customers were violating state law. Not only did ATF "discount[] and ignore[] [these] crucial facts presented to it" by Twenty-Nine Palms in its response to ATF's 2023 Letter, *Golden Nw. Aluminum, Inc. v. Bonneville Power Admin.*, 501 F.3d 1037, 1052 (9th Cir. 2007); *see* ER-75–76, 83, 88–89, but it was also irrational for ATF to proceed to pursue adverse action against the Tribe based on a purported violation of California law after the State both withdrew the impetus for that action and affirmatively represented to ATF that the State and Tribe resolved the State's issues, *cf. Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 (9th Cir. 2011) (agency action arbitrary and capricious where agency determination was "irrational" based on the information before it).

At a minimum, ATF should have at least *mentioned* this glaring issue, especially given that the governing legal test, *Bracker*, specifically required consideration of the extent of the state's interests. But ATF never said one word about it. ATF therefore "failed to consider an important aspect of the problem … embedded in" the PACT Act's express preservation of the existing parameters of state law. *Montana Wildlife Fed'n*, 127 F.4th at 39 (internal quotation marks omitted).

C. ATF's Decision Was Not Supported by Adequate Evidence.

Finally, the factual basis for ATF's Decision was inadequate. Both the Letter and the Decision state that "[i]n light of the hundreds of past and present violations of the PACT Act over the course of several years, ATF is placing [the Tribe] on the [List]." ER-68, 104. But the PACT Act authorizes List placement only for those delivery sellers "that *are* ... *not* in compliance with" the Act. 15 U.S.C. § 376a(e)(1)(A) (emphasis added). Congress' use of the present tense here necessarily indicates that Congress authorized List placement is a means to "abate an ongoing violation," not to penalize a regulated party for past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). ATF's reliance on alleged historical violations as a basis to place the Tribe on the List was thus contrary to law, and it "entirely fails to consider an important aspect of the problem" "[b]y casting aside the proper [legal] standard" for List placement. *Barton v. Off. of Navajo*, 125 F.4th 978, 984 (9th Cir. 2025) (internal quotation marks omitted).

The Decision otherwise did not substantiate any ongoing violations by the Tribe. Even as to the alleged past violations, ATF failed to identify even a single sale that violated the PACT Act. In fact, the only record evidence that ATF referenced throughout the entire Decision was "information that [the Tribe] continues to engage in the sale and distribution of cigarettes or smokeless tobacco

products to unlicensed persons operating within the State of California." ER-94. That information is contained in a cursory, two-paragraph letter from CALDOJ to Jeffrey A. Cohen, Associate Chief Counsel of ATF, in which CALDOJ noted that "none of [the Tribe's Native Nation customers] hold a cigarette distributor license under the [Tax Code]," and that "a handful of [Twenty-Nine Palms'] Customers hold a cigarette retail license." *Id.*

That letter, however, does not identify any sales by the Tribe, let alone append supporting documentation. This Court has emphasized that "[w]ithout any evidentiary support in the … record, [an agency's] finding that [facts] exist is improper." *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018). Because this essential premise of ATF's finding was "[un]supported by bare assumptions" that violative sales have or are continuing to occur, it violates the APA. *Nat. Res. Def. Council v. EPA*, 857 F.3d 1030, 1042 (9th Cir. 2017).

CONCLUSION

For the above reasons, this Court should reverse the district court and remand with instructions for the district court to grant summary judgment to the Tribe.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and the word count is 10,813, excluding those portions of the brief identified in Federal Rule of Appellate Procedure 32(f).

/s/ Adam G. Unikowsky
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CERTIFICATE OF SERVICE

I certify that on June 20, 2025, I electronically filed the foregoing document and Excerpts of Record with the clerk of the court for the United States Court of Appeal for the Ninth Circuit, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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