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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

ATF does not meaningfully defend the district court's decision. Instead, it offers an alternative ground for affirmance that reflects an unprecedented and startlingly broad conception of state authority over tribes' on-reservation operations. This Court should reverse the district court and uphold bedrock principles of federal Indian law.

Plaintiff Twenty-Nine Palms Band of Mission Indians (the "Tribe") operates a wholesale tobacco distribution business in which it sells tobacco products to Native Nations, which in turn operate on-reservation businesses reselling those products to retail customers. In the administrative decision under review, ATF concluded that *the Tribe* should be banned from operating its wholesale tobacco business because *the Tribe's Native Nation customers* lack California retail and distributor's licenses. ATF's decision was wrong because California's licensing requirements, as applied to tribes' on-reservation operations, are preempted. On Indian reservations, tribes are entitled to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). A state may not require a tribe to obtain a license as a condition of operating a business on its own sovereign territory because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980).

The district court upheld ATF's decision on the ground that the Tribe was supposedly selling to non-Native Nation customers. ATF abandons that reasoning—and rightfully so. The record unambiguously shows, and no party disputes, that the Tribe sells tobacco products solely to Native Nation customers. As such, beyond ATF's wry observation that the decision below is "not a model of clarity," ATF Br. 31–32, ATF has little to say in the district court's defense.

Instead, ATF argues that California's licensing requirements can be applied to tribes under *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and its progeny. Those cases hold that state laws requiring tribes to collect and remit taxes from non-Indian retail customers are valid so long as the laws represent a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id.* at 483; *accord Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Brothers, Inc.*, 512 U.S. 61, 73 (1994) ("States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians."). But California's licensing laws neither represent a "minimal burden" nor are tailored towards collecting valid taxes. *Id.* Instead, they would subject the Tribe to the full panoply of state licensing requirements, ranging from bonds to mandatory inspections. ATF cannot identify any case that has upheld such burdensome state laws on Indian-run businesses operating in Indian country.

In addition to its legal error regarding the scope of state power in Indian country, ATF's decision also flunked basic norms of administrative decisionmaking. ATF's decision must be vacated.

ARGUMENT

I. THE DISTRICT COURT'S ORDER SHOULD, AT A MINIMUM, BE VACATED.

As the Tribe's opening brief explained, the district court's order is indefensible. The district court concluded 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. That is wrong. 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. Op. Br. 24–27; ER-66–67.

ATF offers the creative suggestion that when the district court *said* "non-Native Nation customers," it actually *meant* "non-members of plaintiff's own tribe." ATF Br. 33–34. That is wrong, as evidenced by the district court's other usages of the phrase "Native Nation customers." ER-8 (referring to the Tribe's arguments that "sales by certain Native Nation customers are untaxable").

In its discussion of the district court's order, ATF cites the district court's summary of the parties' arguments and characterizes the district court's analysis of

those arguments as "not a model of clarity." ATF Br. 32. ATF has nothing else to say in defense of the district court's reasoning. Because the district court plainly got this case wrong, the Court should at a minimum vacate the decision below.

II. ATF'S DECISION WAS CONTRARY TO LAW BECAUSE CALIFORNIA MAY NOT REQUIRE TRIBES TO OBTAIN LICENSES AS A PRECONDITION TO OPERATING ON-RESERVATION BUSINESSES.

To avoid further delay, the Court should take the further step of holding that the Tribe is entitled to summary judgment. *See, e.g.*, *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017, 1030 (9th Cir. 2012) (en banc). ATF's decision hinged on its determination that the Tribe's Native Nation customers violated California law by failing to obtain licenses. That decision was wrong because California's licensing requirements are preempted. The Tribe's Native Nation customers operate businesses on their own reservations. Hornbook principles of federal Indian law provide that a state may not impose licensing requirements on tribes as a precondition to operating businesses on their own reservations. Contrary to ATF's argument, California's licensing requirements are nothing like the minimally burdensome collection and reporting requirements that the Supreme Court has upheld. And ATF offered no alternative rationale for its decision that was independent of its erroneous view that California's licensing laws applied. Because

ATF's decision was predicated on a legal error regarding California's regulatory authority, it should be vacated.

A. California Lacks Authority to Impose Licensing Requirements on Tribes' On-Reservation Operations.

ATF concluded that the Tribe's Native Nation customers violated California law by failing to obtain distributor's licenses under California's Tax Law and retail licenses under California's Licensing Act. *See, e.g.*, ER-92 (noting that "your customers fail to have the requisite distributor licenses required under California law"); 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 reports, and not possessing distributors' licenses."); ER-94 (noting that "only a handful of 29 Palms' customers hold a cigarette retail license"). As a result of these purported violations by the Tribe's Native Nation customers, ATF reasoned, the Tribe's Native Nation customers were not "lawfully operating," 15 U.S.C. § 375(4)(B), and were thus "consumers" under the PACT Act, *id.* § 375(4), thus triggering the PACT Act's "delivery sales" requirements that the Tribe allegedly failed to meet. ER-101.

As the Tribe's opening brief explained, ATF's decision was wrong because California's licensing laws are preempted as applied to tribes' on-reservation businesses. "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)); *see Cohen's Handbook of Federal Indian Law* § 7.03 (Nell Jessup Newton et al. eds., 2024). No federal statute expressly provides that California may impose its licensing requirements on tribes' on-reservation businesses. To the contrary, the PACT Act preserves tribal regulatory authority: it 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 enterprises, 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. As such, California lacks the authority to impose those licensing requirements.

On appeal, ATF claims that "California may require tribal retailers, including [the Tribe]'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." ATF Br. 22. ATF relies on a line of cases beginning with *Moe*, which hold that states may require tribes to collect and remit taxes from non-Indian retail customers

so long as the law represents a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." 425 U.S. at 483; *see Milhelm*, 512 U.S. 73 ("States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.").

ATF is wrong. As the Tribe has also explained, Op. Br. 34–36, the Tax Law's distributor licensing requirements and the Licensing Act's retailer licensing requirements are neither minimally burdensome nor tailored to the collection of taxes. To the contrary, they are more intrusive than any state laws the Supreme Court has ever upheld on Indian reservations. ATF does not grapple with the fundamental differences between California's licensing laws and the collect-and-remit law that the Supreme Court upheld in *Moe*.

First, the premise of California's licensing laws is that a tribe must seek permission from the state as a precondition for opening an on-reservation tribal business. *See* Cal. Rev. & Tax. Code § 30140 (distributor's license); Cal. Bus. & Prof. Code § 22972(a) (retail license). Not only must the tribe seek permission, but it bears a financial burden: Although ATF cites California guidance saying that tribal retailers need not pay the Licensing Act's licensing fee, ATF Br. 28, it overlooks that the Tax Law separately requires licensees to adhere to bonding requirements as a precondition to opening their businesses, Cal. Rev. & Tax. Code §§ 30141,

30142(a). The requirement that a sovereign tribe ask permission, and incur out-of-pocket expenditures mandated by state law, before operating a business on its own sovereign territory strikes at the heart of the principle that on their reservations, tribes are entitled to "make their own laws and be ruled by them." *Williams*, 358 U.S. at 220; *see Crow Tribe of Indians v. Mont.*, 819 F.2d 895, 902 (9th Cir. 1987) (invalidating Montana taxes on coal mined from reservation because it interfered with the "geographical component" of tribal sovereignty in which "tribes have the power to manage the use of their territory and resources by both members and nonmembers"), *aff'd*, 484 U.S. 997 (1988).

Second, the Licensing Act exposes licensees to the full panoply of laws governing tobacco retailers. *See* Cal. Bus. & Prof. Code § 22973(a)(3), (5) (requiring all tobacco retailers seeking a license to affirm, on penalty of imprisonment, that they "will not violate or cause or permit to be violated any of the provisions of this division or any rule of the board applicable to the applicant or pertaining to the manufacture, sale, or distribution of cigarettes or tobacco products"). These include laws having nothing to do with tax collection, like laws banning the sale of tobacco to minors. Cal. Bus. & Prof. Code § 22958(a), (b) (authorizing revocation of license when retailer sells to minors). And, of particular concern, the Licensing Act—and parallel provisions in the Tax Law—require the Tribe's Native Nation customers to consent to California entering reservation lands

without warning to inspect those businesses, *see* Cal. Rev. & Tax. Code § 30435, Cal. Bus. & Prof. Code § 22980(b), and to California seizing tobacco products that California alone deems noncompliant, *see* Cal. Rev. & Tax. Code § 30436, Cal. Bus. & Prof. Code § 22974.2. A licensee's violation of its obligations, such as a refusal to permit inspection on demand, can lead to California's pursuit of potentially severe penalties for noncompliance. Cal. Rev. & Tax. Code § 30471 *et seq.*; Cal. Bus. & Prof. Code § 22980 *et seq.*[1] This licensing scheme is neither a "minimal burden[]" nor "reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm*, 512 U.S. at 73. A law that authorizes the state to send law enforcement agents onto Indian reservations, search a tribal business without warning, and seize the tribe's property, differs in kind from a law merely imposing the regulatory obligation to keep records and transmit taxes.

Moe does not authorize such laws. To the contrary, in a holding the Supreme Court did not disturb, the *Moe* district court had held that Montana may not enforce the exact type of state law ATF and California claim that California may impose on tribes, *i.e.*, one that would "require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license." *Confederated*

[1] California contends that one provision of the Licensing Act cited by the Tribe in its opening brief, Cal. Bus. & Prof. Code § 22979, would not apply to the Tribe's Native Nation customers. *See* Cal. Amicus Br. 12; Op. Br. 30. The Tribe accepts California's characterization of state law.

Salish & Kootenai Tribes of Flathead Rsrv. v. Moe, 392 F. Supp. 1297, 1317 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976). Indeed, the *Moe* Court referred to the district court's decision as "correct on the merits." 425 U.S. at 466. In subsequent cases, the Supreme Court has never suggested that states may impose such heavy-handed laws under the guise of facilitating tax collection. The Supreme Court has identified several ways a state may enforce collect-and-remit requirements against tribes, such as off-reservation regulatory action against wholesalers, *see Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991), but requiring licenses and mandating that tribes consent to on-reservation inspections is emphatically not on that list.

ATF does not seriously dispute the proposition that California's licensing requirements are more burdensome than the collect-and-remit requirements that the Supreme Court has upheld. Instead, ATF emphasizes that California "uses this licensing regime to collect excise taxes on the sale of cigarettes and smokeless tobacco." ATF Br. 23. Thus, ATF contends, because the Tribe's Native Nation customers do not possess licenses, they sell tobacco "without paying excise taxes required under state law." *Id.* at 24.

It is true that the collection of excise taxes is one component of California's licensing regime. Indeed, as both California and ATF acknowledged in the administrative proceedings, the sole mechanism under California law for the Tribe's

Native Nation customers to collect and remit California tobacco taxes is to obtain a distributor's license. *See* ER-94, 152; Op. Br. 34–35. And as ATF explained in its decision, the possession of a retailer license is a prerequisite to engaging in the sale of tobacco products at retail. ER-97; *see* Cal. Bus. & Prof. Code § 22972. In other words, the Tribe's Native Nation customers cannot collect and remit taxes *unless* they obtain distributor's licenses and retailer licenses.

But the fact that California has elected to lump its tax-collection provisions with its elaborate licensing scheme does not imply that California has acquired the authority to illegally put on-reservation tribal businesses under its thumb. It is California's obligation to pass laws that comply with federal Indian law. California is free to enact legislation analogous to the minimally-burdensome and tailored collect-and-remit requirement at issue in *Moe* or the minimally-burdensome and tailored recordkeeping requirement at issue in *Colville*. Until it does so, however, California may not impose the full panoply of its licensing laws on tribes' on-reservation operations without demonstrating why the regulatory framework recognized in *Moe* and *Colville* are inadequate and why asserting full regulatory jurisdiction over on-reservation tribally owned retailers at the expense of tribal sovereignty is "reasonably necessary" to facilitate collection of valid state taxes. *Colville*, 447 U.S. at 160.

Of note, in *State ex rel. Oklahoma Tax Commission v. Bruner*, 815 P.2d 667 (Okla. 1991), the Oklahoma Supreme Court rejected an argument virtually identical to the argument that ATF advances here. In that case, the state, finding that a tribal smoke shop was selling untaxed cigarettes, demanded that the smoke shop adhere to licensing requirements on the theory that it had "no cigarette retailer's license or permit from the State of Oklahoma for selling non-taxed cigarettes." *Id.* at 668. The Oklahoma Supreme Court rejected this argument in words that could be written for this case: "While state[-]imposed cigarette sales taxes and record keeping requirements can be applied to an Indian conducting business in Indian Country, we are not persuaded that Indian cigarette retailers may be required to obtain state licenses and permits." *Id.* at 669. "In protecting Tribal sovereignty from State jurisdiction and control, we hold that the Commission does not have a lawful right to impose or enforce its license and permit requirements upon tribally licensed Indian cigarette retailers doing business in Indian Country on behalf of the Tribe." *Id.* at 670.[2] The Court should reach the same conclusion here.

California's amicus brief attempts to minimize the burdensome nature of its licensing regime. For instance, California claims that certain provisions of state law apply only to "*unlicensed* entities," such as the law penalizing businesses for selling

[2] The *Bruner* court deemed it "reasonable that Indian retailers be required to register with the Commission." 815 P.2d at 670.

tobacco without a license. Cal. Amicus Br. 13–14. But by punishing businesses for not having licenses, this provision coerces businesses into obtaining licenses—the very requirement that infringes on tribal sovereignty. California's argument that it provides due process protections before suspending licenses (Cal. Amicus Br. 14) is irrelevant. The Tribe's argument is not that California affords insufficient process before determining *whether* a Native Nation customer violated licensing requirements; rather, the Tribe argues that California may not impose those requirements *at all*.[3]

California also argues that its inspection requirements apply to all businesses that sell tobacco and are hence "untethered to the license status of such places." Cal. Amicus Br. 13. To the extent California claims that state law enforcement officers could come onto an Indian reservation and engage in an unannounced and mandatory inspection of an *unlicensed* on-reservation tribal business, California is dead wrong. Such an infringement on sovereign tribal interests would almost certainly be preempted under federal Indian law. *See, e.g.*, *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands" and "concurrent

[3] The Court should reject California's reliance on statements by members of its Executive Branch, both because those statements are irrelevant to the preemption analysis—a question of law—and because those statements were stricken from the record. Cal. Amicus Br. 7–8, 8 n.3.

jurisdiction" with state sovereign "would effectively nullify the Tribe's authority" (internal quotation marks omitted)); *Crow Tribe*, 819 F.2d at 902–03 (invalidating tax that "limit[ed] the Tribe's ability to regulate" economic development derived from land use); *N.Y. Ass'n of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220, 222 (3d Dep't 2000) (emphasizing that, even under *Moe* and *Colville*, "State auditors cannot go on the reservations to examine the retailers' records"). It would also pose serious Fourth Amendment concerns. *City of Los Angeles v. Patel*, 576 U.S. 409, 428 (2015) (finding statute authorizing warrantless inspection of hotels to be facially unconstitutional).

In reality, California's mandatory inspection requirement is tethered to licenses. As noted above, under the Licensing Act, any license applicant must affirm under penalty of imprisonment that it will adhere to state law governing cigarette retailers, which includes the requirement that distributors submit to inspections without advance warning. Cal. Bus. & Prof. Code §§ 22973(a)(3), (5), 22980(b). Further, under both the Licensing Act and the Tax Law, licenses may be revoked if businesses do not comply with inspection requirements. *See* Cal. Bus. & Prof. Code §§ 22980, 22980.3; Cal. Rev. & Tax. Code §§ 30435, 30148. If licenses are mandatory, and if California conditions its licenses on compliance with inspection requirements, then California's licensing regime effectively coerces tribes into acquiescing to inspection requirements. A licensing scheme that forces tribes to

acquiesce to unannounced inspections of tribal businesses on sovereign tribal territory goes vastly beyond the unobtrusive collect-and-remit requirement the Supreme Court upheld in *Moe*.[4]

B. ATF's Cases Confirm That California's Licensing Requirements are Preempted.

ATF cites a laundry list of cases purporting to demonstrate that states may impose licensing requirements on tribes' on-reservation retail businesses. But none of ATF's cases establishes that such licensing requirements are lawful. To the contrary, they largely address state regulatory schemes that are designed *not* to regulate tribes' on-reservation activities precisely *because* such laws would be unlawful as applied to on-reservation activities.

Begin with *Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred (1,371,100) Assorted Brands of Cigarettes*, which ATF cites for the proposition that "tribal sellers are not entitled to be free from the state's

[4] As the Tribe's opening brief explained, California's Licensing Act, by its terms, does not even apply because it includes an exception for those that the State is "prohibited from regulating." Op. Br. 32; *see* Cal. Bus. & Prof. Code § 22980.1(b)(2). California insists that this carve-out does not apply to tribal retailers because it serves only as "an escape valve for *licensed* distributors and wholesalers"; it disagrees with the bill analysis of its own state legislature. Cal. Amicus Br. 10–12 & n.7. By its terms, however, this provision applies to sales by "any other person" to "any other person." Cal. Bus. & Prof. Code § 22980.1(b)(2). In any event, regardless of the precise scope of state law, federal law prohibits California from enforcing the Licensing Act as to Native Nation customers' on-reservation operations.

system of allocating tax-free status to tribes on a formula that estimates the number of cigarettes the member Indian population is likely to consume." 282 F.3d 1175, 1178 (9th Cir. 2002); *see* ATF Br. 25. *Grey Poplars* did not involve any regulatory requirements imposed on tribal sellers. Instead, it addressed a Washington law requiring cigarettes *destined* for Indian reservations to be pre-approved. 282 F.3d at 1178. Such laws pass muster precisely *because* they burden off-reservation sellers rather than tribal businesses on their own reservations. *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (explaining that "[s]tate authority over Indians is yet more extensive over activities . . . not on any reservation," and that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State" (collecting cases) (internal quotation marks omitted)).

ATF next relies on *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), to argue that this Court there "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." ATF Br. 25. But the Court's holding was rooted in the Court's view that the law at issue regulated the tribe's off-reservation, not on-reservation, activities. Relying on the tribal corporation's "conce[ssion] that it leaves the [Alturas Indian] Rancheria to sell cigarettes to tribal retailers on other reservations,"

1 F.4th at 728, the Court held that "[t]he Corporation does not remain 'on reservation' for purposes of the tribal-sovereignty analysis by selling cigarettes on *other tribes'* reservations." *Id.* at 729. Instead, "tribe-to-tribe sales made outside the tribal enterprise's reservation" were an "'off reservation' activity subject to non-discriminatory state laws of general application." *Id.* The Ninth Circuit summarized its holding as follows:

> Here, the Corporation does 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. Rather, the Corporation claims that the Directory Statute, as applied to the Corporation's sales activities *off the Rancheria,* infringes the Tribe's self-governance.

Id. at 730. The off-reservation nature of the tribe's activities was dispositive because federal Indian law would have prohibited California from imposing its licensing laws on the tribe's on-reservation activities.

ATF claims that *Big Sandy* "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." ATF Br. 25 (citing *Big Sandy*, 1 F.4th at 730–31). *Big Sandy* does not make that "clear" anywhere. In the portion of *Big Sandy* cited by ATF, the Court stated: "The Corporation does not plausibly allege that California's licensing, recordkeeping, and

reporting requirements, *as applied to its sales to nonmember Indian retailers*, are excessive burdens." 1 F.4th at 731 (emphasis added).

ATF quotes language in *Big Sandy* (ATF Br. 26) that cites *Milhelm*, but *Milhelm* does not support ATF either. *Milhelm* upheld a New York tax imposed on *non-Indian wholesalers* that sold to reservation Indians and were required to possess state licenses. 512 U.S. at 67. The Supreme Court held that the Indian Trader Statutes, 25 U.S.C. §§ 261–264, which are irrelevant to this case, did not preempt New York law as applied to non-Indians. *Milhelm*, 512 U.S. at 67–68. *Milhelm* concerned what limits may be imposed on a non-Indian entity involved in a commercial transaction *with* a tribe and as such has nothing to do with the scope of states' regulatory authority over Indians conducting commerce on their own reservations. Indeed, federal Indian law would have prohibited the state from imposing those requirements on reservation Indians themselves.

ATF notes that *Milhelm* "rejected an argument that New York's tribal tobacco regulations unlawfully required 'reservation *retailers* [to] obtain state tax exemption certificates,'" which ATF characterizes as "licenses." ATF Br. 28 (quoting *Milhelm*, 512 U.S. at 77. Those certificates were not "licenses." As *Milhelm* makes clear, New York required *wholesale distributors* to obtain licenses, not on-reservation retailers. 512 U.S. at 67. Instead, New York's regulations requiring retailers to obtain certificates did not "do anything more than establish a method of identifying

those retailers who are already engaged in the business of selling cigarettes." 512 U.S. at 77. And obtaining a certification was "'virtually automatic' upon submission of an application." *Id.* The certificates were not tied to mandatory bonding, inspection, or seizure requirements, and thus were nothing like California's licensing scheme.

Rice v. Rehner, 463 U.S. 713 (1983), on which ATF also relies (ATF Br. 28), similarly establishes the exact opposite of what ATF claims it does. In *Rice*, the Supreme Court upheld a state licensing requirement applied to on-reservation liquor sales. 463 U.S. at 720. The Court held that the licensing requirement applied based on a specific statute that recognized states' historical exercise of "concurrent authority" with the federal government "insofar as prohibiting liquor transactions with Indians was concerned," and that Congress in enacting the statute "intended to delegate a portion of its authority … to the [s]tates." *Id.* at 733. The Court's analysis of that specific statute was necessary *because* states lack authority to impose licensing requirements on on-reservation businesses. And in contrast with that statute, the PACT Act plainly disavows any impact on the balance of state and tribal power over Indian lands. *See* 15 U.S.C. § 375 note.[5]

[5] California's amicus brief cites *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 938–39 (8th Cir. 2019), as an example of a case that upheld a state penalty of license non-renewal for "failure to collect and remit valid use taxes." Cal. Amicus Br. 16. But *Flandreau* involved non-renewal of a *liquor license*. As the Eighth Circuit noted, "'Congress has divested the Indians of any inherent power to regulate'

ATF then tries to liken the case at hand to *Colville*, where the Supreme Court upheld a Washington state law requiring tribal smokeshops to collect and remit taxes on cigarettes sold to non-members and to keep records of those transactions. 447 U.S. 134, 159 (1980). The *Colville* Court merely applied *Moe*'s holding that states "may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax," and concluded that Washington's law imposed a "simple collection burden." *Id.* *Colville*'s focus on the simplicity of the collection burden would have been superfluous if states were free to impose more intrusive licensing requirements like California's.

For similar reasons, *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam), does not support ATF. In *Chemehuevi*, the Supreme Court held that California could require tribes to collect and remit taxes when selling cigarettes to non-Indian buyers. 474 U.S at 11–12. But *Chemehuevi* considered in isolation the collect-and-remit requirement of California's Tax Law, *see* Cal. Rev. & Tax. Code § 30108(a), to conclude that this provision "evidence[d] an intent to impose on the Tribe such a 'pass on and collect' requirement." 474 U.S. at 12. But here, it is undisputed that California presently enables the collection and remittance of state taxes only through separate compliance with its distributor

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the use and distribution of alcoholic beverages in Indian country." 938 F.3d at 937 (quoting *Rice*, 463 U.S. at 724).

licensing requirements—requirements not at issue or considered by the Supreme Court in *Chemehuevi*.

Finally, ATF invokes this Court's unpublished and nonprecedential decision in *California v. Azuma Corp.*, No. 23-16200, 2024 WL 4131831 (9th Cir. Sept. 10, 2024). But *Azuma* differs from this case. The tribe in *Azuma* did not advance, nor did this Court address, the argument that California's licensing regime is preempted as to a tribe's wholly on-reservation conduct because it imposes regulatory burdens going far beyond a mere collect-and-remit requirement. *Azuma* is also distinguishable on the facts. In *Azuma*, unlike here, California accused the tribally-owned corporation of violating the PACT Act's delivery prohibitions for shipments made off-reservation after the tribe had *already* been placed on the Non-Compliant List and was hence subject to the PACT Act's delivery prohibitions. *See Azuma*, 2024 WL 4131831, at *2. Further, in *Azuma*, the tribe failed to file reports required under the PACT Act, *see California v. Azuma Corp.*, No. 23-cv-00743, 2023 WL 5835794, at *3 (E.D. Cal. Sept. 8, 2023), whereas here, the products sold by Twenty-Nine Palms are on the California Tobacco Directory, have had escrow deposited as required by California law, and are reported to California in PACT Act reports. ER-38, 46, 64, 75, 162 ¶ 37, 172 ¶ 92. *Azuma* also emphasized the "limited and deferential" nature of its review of the district court's decision granting a preliminary injunction. 2024 WL 4131831, at *2 (internal quotation marks omitted).

In summary, ATF seeks to break new ground. Rather than adhere to the careful distinction courts have consistently drawn between on-reservation and off-reservation regulation, ATF asks the Court to reach the unprecedented conclusion that a state may impose licensing requirements on tribes as a precondition for operating their on-reservation businesses. Such a decision would not only conflict with longstanding Supreme Court precedent but would strike at the heart of bedrock principles of tribal sovereignty.

C. There Are No Alternative Grounds for Upholding ATF's Order.

ATF asks the Court to affirm based on "numerous other reasons supporting ATF's decision finding it out of compliance with the PACT Act." ATF Br. 30. That argument fails. When an agency makes an error, a court may uphold the agency's determination only when the error "clearly had no bearing on the procedure used or the substance of the decision reached." *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 560 (9th Cir. 2011) (quotation marks and alterations omitted). Here, all of ATF's rationales were intertwined with its erroneous view that the Tribe's Native Nation customers were subject to licensing requirements. That error therefore had a "bearing" on "substance of the decision reached." *Id.*

ATF points to statements in the decision that retailers failed to file required reports and collect sales taxes. ATF Br. 30. But ATF does not dispute the Tribe's core argument that under California's scheme, the only way for the Tribe's Native

Nation customers to comply with California's tobacco taxation framework is to obtain licenses. *Supra* 10–11. California could enact a stand-alone collect-and-remit requirement (as other states have done), but what it may not do is tie that collect-and-remit requirement to a mandatory and over-broad licensing scheme. Likewise, California's reporting requirement—which simply ensures that California can enforce its tax-collection requirement—is an aspect of California's licensing scheme. Cal. Rev. & Tax. Code § 30182 (entitled "Report by Licensed Distributor"); ER-96 (citing § 30182). ATF, moreover, treated the purported violations of the licensing requirements and the purported violations of the tax-collection and reporting requirements as intertwined. 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 further alleges that "the retailers violate California law by purchasing cigarettes from plaintiff, which is undisputedly an unlicensed entity," ATF Br. 30, but ATF merely cites a passing statement in the section of ATF's order offering a background description of California's licensing scheme. *Id.* (citing ER-97–98)). Further, this requirement is also an aspect of California's scheme: as California's amicus brief explains, "*once licensed*, each link in the distribution chain is required

to transact only with other licensed entities." Cal. Amicus Br. 14 (citing Cal. Bus. & Prof. Code § 22980.1(a)). As such, it cannot be said that ATF's faulty view of federal preemption "clearly had no bearing" on the decision reached. *Mont. Wilderness*, 666 F.3d at 560.

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

ATF's decision suffers from three other defects: (1) ATF failed to provide adequate notice in its pre-decisional letter as required by the PACT Act; (2) ATF failed to provide an adequate explanation in its decision because it failed to properly consider the governing principles of federal Indian law or the significance of California's withdrawal of its nomination to the Tribe to the PACT Act's Non-Complaint List; and (3) ATF's decision was not supported by adequate evidence. ATF's efforts to rehabilitate the decision are not successful.

First, 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). Although ATF's 2023 Letter cited the PACT Act, ATF's theory was rooted in allegations of *state-law* violations—yet ATF's 2023 Letter failed to cite a single provision of California law that the Tribe or its Native Nation customers purportedly violated. *See* ER-68–72. ATF insists that the PACT Act does not require "that ATF provide the individual

subsections of California's licensing and excise tax statutes that [the Tribe] was violating." ATF Br. 36. That view is incompatible with Congress' requirement that ATF be "specific" in its pre-decisional letter. And although ATF claims its failure was harmless and the Tribe had adequate notice, the Tribe specifically explained why this was not the case. *See* ER-77 (Tribe explaining that it was "unable to respond to ATF's allegations" in its pre-decisional letter "[w]ithout notice as to what specific [s]tate, local, or [t]ribal laws" ATF alleged the Tribe or its Native Nation customers were violating).

Second, ATF failed to apply the Supreme Court's balancing test under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), to the Native Nation customers' transactions. ATF attempts to excuse that failure based on the decision's discussion of case law upholding laws imposing "minimal regulatory burdens regarding Tribal retailers." ATF Br. 39 (pointing to portion of decision citing *Moe* and subsequent similar cases). But ATF misunderstands the relationship between those cases and *Bracker*. The question in the *Moe* line of cases is: *Assuming* a state can tax a non-Indian based on an on-reservation transaction, can the State require the Indians to bear minimal regulatory burdens in *collecting* that tax? 425 U.S. at 483 ("The State's requirement that the Indian tribal seller collect a tax *validly imposed on non-Indians* is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a

concededly lawful tax." (emphasis added)). By contrast, the question in *Bracker* is: *Can* a tax be imposed on a non-Indian when the transaction occurs on an Indian reservation? 448 U.S. at 150–51 (rejecting state's view that it "may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary" and instead requiring interest-balancing). ATF must resolve the *Bracker* question in California's favor (*i.e.*, whether it may require a non-Indian to pay tax on an on-reservation transaction) before it even gets to the *Moe* question (*i.e.*, whether, assuming the state may tax non-Indians' on-reservation transactions, any reporting or collect-and-remit requirements are minimally burdensome and reasonably tailored).

Here, ATF never resolved the *Bracker* question of whether California may tax Native Nation customers' on-reservation sales to non-Indians. ATF did apply *Big Sandy* to hold that *Bracker* did not apply to *the Tribe's own sales*. ER-99 ("Here, 29 Palms' intertribal wholesale cigarette sales to the unlicensed Tribal retailers are 'off-reservation' activity …. Therefore, the *Bracker* analysis does not apply."). But it did not apply *Bracker* to decide whether the *Native Nation customers'* transactions could be taxed—even though its ultimate decision hinged on those very Native Nation customers' failure to collect that tax. ATF therefore failed to consider "an important aspect of the problem." *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 39 (9th Cir. 2025) (internal quotation marks omitted).

Notably, the *Azuma* case on which ATF relies observed that "[i]t is conceivable that some of the Tribal Retailers generate so much economic value for the Tribe through casinos, resorts, and other business ventures that their on-site cigarette sales, even to non-Indian purchasers, may not be subject to California's requirement that the Tribal Retailers collect and remit taxes for the sale of tobacco products." 2024 WL 4131831, at *3. The *Azuma* Court ultimately concluded that the tribe had made an insufficient showing that California's law would be preempted at the preliminary injunction phase. *Id.* But unlike *Azuma*, this case is an APA case involving a challenge to federal agency action, so it is incumbent on the agency *in the administrative decision under review* to conduct an adequately reasoned analysis. *See Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1103 (9th Cir. 2006) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943)). Because ATF did not adequately consider this issue, its decision should be vacated.

Nor did ATF adequately address the fact that California withdrew its letter nominating the Tribe to the Non-Compliant List more than six months prior to ATF's issuance of the decision. ATF insists that "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." ATF Br. 40. But ATF is subject to the APA's requirement of rational decisionmaking and it should have at least *mentioned* this glaring issue. And although California now professes

to agree with ATF's position, it accurately states that its "referral was premised on Twenty-Nine Palms's lack of reporting," which was subsequently resolved. Cal. Amicus Br. 6. At the time ATF issued its decision, there was no evidence before ATF that California affirmatively believed the Tribe or its Native Nation customers to be violating California law. Rather, California simply observed that the Tribe's Native Nation customers largely lacked licenses, ER-152, which is entirely consistent with federal law's preemption of California's licensing requirements.

Finally, ATF erroneously based its decision on past violations rather than ongoing violations, and there is insufficient evidence of past violations in any event. Op. Br. 44–45. ATF insists it was entitled to infer ongoing violations from past violations based on the absence of evidence that the Tribe has "changed its business model." ATF Br. 41. But ATF cited minimal evidence of that "business model"—it relies on a cursory, two-paragraph letter from the California DOJ that does not identify any sales by the Tribe, let alone append supporting documentation. ER-95; *see* ER-152. More was needed before destroying the Tribe's business.

CONCLUSION

For the above reasons and those set forth in the Tribe's opening brief, 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 Local Rule 7.1(d)(2)(E), 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 6,708, excluding Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Adam G. Unikowsky
Adam G. Unikowsky

CERTIFICATE OF SERVICE

I certify that on October 16, 2025, I electronically filed the foregoing document 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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