

No. 25-2340

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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TWENTY-NINE PALMS BAND OF MISSION INDIANS,  
*Appellant,*

v.

PAMELA J. BONDI, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
UNITED STATES, *et al.*,  
*Appellees.*

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**On Appeal from the United States District Court  
for the Central District of California**

No. 24-cv-00379-SSS-SPx  
The Honorable Sunshine S. Sykes, Judge

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**Amicus Brief of the State of California in Support of Appellees**

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## INTEREST OF AMICUS CURAE

The Prevent All Cigarette Trafficking Act of 2009 (“PACT Act”), Pub. L. 111-154, 124 Stat. 1087 (codified at 15 U.S.C. §§ 375–378, 18 U.S.C. §§ 1716E, 2343), is “aimed primarily at combating three evils: tobacco sales to minors, cigarette trafficking, and circumvention of state taxation requirements.” *Gordon v. Holder*, 632 F.3d 722, 723 (D.C. Cir. 2011). Although the PACT Act is a federal statute, it requires compliance with state laws as part of its regulatory regime and provides enforcement mechanisms to both the federal and state governments to ensure such compliance. The instant appeal challenges the application of California’s cigarette laws as part of the PACT Act’s requirements. This appeal also raises questions about the construction of these state cigarette laws in ways not raised in the district court. Because California has a direct interest in maintaining the integrity of its cigarette tax regime and in the correct interpretation of its laws, it has a direct interest in the appeal. *Contra* Opening Br. 42 (claiming California has only a “minimal interest in this case”). The State of California, by and through California Attorney General Rob Bonta, therefore, submits this brief in support of Appellees.

## INTRODUCTION

Neither Twenty-Nine Palms Band of Mission Indians (“Twenty-Nine Palms” or the “Tribe”) nor its retailer customers hold a distributor’s license or are

otherwise authorized under California law to possess untaxed cigarettes. *See, e.g.*, Cal. Rev. & Tax. Code §§ 30008–30009 (defining a taxable “[d]istribution” as excluding “the sale of . . . cigarettes . . . or the keeping or retention thereof by a licensed distributor for the purpose of sale”). Nor does Twenty-Nine Palms or its customers collect or remit cigarette taxes to the State for any of their sales.

Accordingly, the Bureau of Alcohol, Firearms, Tobacco and Explosives (“ATF”) correctly determined that both Twenty-Nine Palms and its customers are not “lawfully operating” under the PACT Act, a federal statute that incorporates state law requirements. ATF has determined that “lawfully operating” means compliance with applicable federal, state, and tribal laws. *See* ATF,

IMPLEMENTATION OF THE PREVENT ALL CIGARETTE TRAFFICKING ACT OF 2009 (PACT ACT): TRIBAL CONSULTATION PROCESS 6 (Nov. 18, 2010).<sup>1</sup>

The Supreme Court has examined California’s cigarette taxes and affirmed that tribal sellers must collect and remit those taxes when making cigarette sales on-reservation to nonmembers.<sup>2</sup> *State Bd. of Equalization v. Chemehuevi Indian*

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<sup>1</sup> This document is available at [https://web.archive.org/web/20111013130059/http://atf.gov/press/releases/2010/12/122910-prevent-cigarette-trafficking-act%20\(2\).pdf](https://web.archive.org/web/20111013130059/http://atf.gov/press/releases/2010/12/122910-prevent-cigarette-trafficking-act%20(2).pdf).

<sup>2</sup> “Nonmembers” includes both non-Indians and Indians who are not members of the governing tribe, as such Indians “[f]or most practical purposes . . . stand on the same footing as non-Indians resident on the reservation.” *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980).

*Tribe*, 474 U.S. 9, 12 (1985) (per curiam) (“[T]he legal incidence of California’s cigarette tax falls on the non-Indian consumers of cigarettes . . . and . . . [the State] has the right to require [the Tribe] to collect the tax on [the State’s] behalf.”). This Court, too, has had occasion to examine California’s cigarette taxes and the mechanisms the State uses to collect such taxes, and concluded that “California’s licensing, recordkeeping, and reporting requirements” are permissible minimal burdens properly applied to Indian business. *Big Sandy Rancheria Enters. v. Bonta*, 1 F.4th 710, 731 (9th Cir. 2021) (“[T]ax enforcement schemes ‘with even more demanding requirements than those of California have been repeatedly upheld by the Supreme Court as imposing only a ‘minimal burden.’” (quoting *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1332–33 (E.D. Cal. 2019))); *see also California v. Azuma Corp.*, No. 23-16200, 2024 WL 4131831, at \*3 (9th Cir. Sept. 10, 2024) (upholding preliminary injunction under the PACT Act based on tribal customers not collecting or remitting state cigarette taxes).

Straightforward application of these precedents dictates the outcome of this appeal. The district court’s judgment concluding that Twenty-Nine Palms’s sales to unlicensed tribal retailers violate the PACT Act should be affirmed.

## ARGUMENT

### I. CALIFORNIA’S LICENSING, REPORTING, AND RECORDKEEPING REQUIREMENTS ARE PROPERLY APPLIED TO TRIBAL RETAILERS

The Supreme Court held more than 50 years ago that state cigarette taxes imposed on non-Indians are valid in Indian country. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976). Nine years later, the Supreme Court concluded that California’s cigarette taxes specifically are validly imposed on non-Indian purchasers in Indian country. *Chemehuevi*, 474 U.S. at 11–12. To the extent a balancing of interests regarding the reach of California’s tobacco tax program is required to assess ATF’s application of the PACT Act, that balancing exercise has already been done. The Supreme Court conducted such balancing in *Moe* to hold that States can impose “minimal burden[s]” on tribal businesses “to avoid the likelihood that in [their] absence non-Indians [or nonmember Indians] purchasing from the tribal seller will avoid payment of a concededly lawful tax.” 425 U.S. at 483. In the decades since, the Supreme Court has had further occasion to delineate the contours of permissible “minimal burdens” States may impose to ensure collection of valid state cigarette taxes like California’s.

The Ninth Circuit has recently considered whether the California tax and licensing scheme is properly applied as a “minimal burden” to Indian businesses in *Big Sandy*. Concluding that it is, the Court explained that “tax enforcement

schemes ‘with even more demanding requirements than those of California have been repeatedly upheld by the Supreme Court as imposing only a “minimal burden.”’” *Big Sandy*, 1 F.4th at 731 (quoting *Big Sandy v. Becerra*, 395 F. Supp. 3d at 1332–33) (citing *Dep’t of Tax. & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 64–67, 76 (1994); *Colville*, 447 U.S. at 159–60). Accordingly, the ATF correctly determined that the California scheme is properly applied to tribal retailers to ensure that cigarette taxes are collected when owed, and only when owed.

## **II. CALIFORNIA’S POSITIONS AND CALIFORNIA LAW**

### **A. California’s Positions**

In February 2022, the California Attorney General’s Office wrote to Twenty-Nine Palms regarding Twenty-Nine Palms’s PACT Act violations. That letter identified two kinds of violations. First, the letter informed Twenty-Nine Palms that it had failed to “register and submit monthly reports regarding [its] shipments to the State” as required. SER-16. Second, it explained that Twenty-Nine Palms’s sales “to unlicensed persons operating within the State of California” were “delivery sales” under the PACT Act because they were “[n]on-face-to-face,” that they must “comply with ‘all State . . . laws generally applicable to sales of cigarettes,’” and that “[c]igarettes sold . . . without valid stamping, collection, and remittance of State excise taxes are contraband subject to seizure and forfeiture.” *Id.* (first ellipsis in original) (quoting 15 U.S.C. § 376a(a)(3)). Receiving no

response, the Attorney General’s Office nominated Twenty-Nine Palms to the PACT Act non-compliant list. ER-60–61.

Though that referral was premised on Twenty-Nine Palms’s lack of reporting, the Attorney General’s Office never withdrew its prior analysis that Twenty-Nine Palms engaged in delivery sales in violation of the PACT Act. *Contra* Opening Br. 15 (“The Tribe and the State successfully resolved the State’s concern . . .”). Indeed, its nomination letter noted that Twenty-Nine Palms is not “registered with the California Department of Tax and Fee Administration (CDTFA) as a permitted manufacturer, importer, or distributor of cigarettes in the State of California,” and that California had evidence that Twenty-Nine Palms’s cigarettes “are being sold to non-tribal members on a reservation elsewhere in California.” ER-60. The choice of the Attorney General’s Office to allocate its enforcement resources to obtain compliance with the PACT Act’s reporting requirements does not indicate acquiescence to any other violations of law arising out of Twenty-Nine Palms’s cigarette sales.

In *Big Sandy*, this Court addressed an analogous tribal corporation that likewise sold cigarettes to retailers located “on *other tribes*’ reservations.” 1 F.4th at 729. Such “tribe-to-tribe sales made outside the tribal enterprise’s reservation,” this Court concluded, are “subject to non-discriminatory laws of general

application,” including California tax and licensing laws. *Id.*; accord Opening Br. 36.

The Attorney General’s Office has likewise consistently required that tribal retailers operating in Indian country comply with California’s tax, licensing, reporting, and recordkeeping requirements. For example, in *California v. Azuma Corporation*, No. 2:23-cv-00743-KJM-DB, 2023 WL 5835794 (E.D. Cal. Sept. 8, 2023), the Attorney General’s Office successfully argued that a tribal manufacturer and distributor violated the PACT Act by making deliveries to tribal retailers located on other tribes’ land “who do not have licenses as required by” California law, *id.* at \*11. Such retailers also were not “lawfully operating” because they “d[id] not remit applicable taxes to California.” *Id.* The Attorney General’s Office similarly has brought suit against tribal retailers who do not collect cigarette taxes for sales to nonmembers or otherwise comply with California law. *See, e.g., People ex rel. Becerra v. Huber*, 32 Cal. App. 5th 524, 528 (2019) (affirming summary adjudication against a tribal retailer for noncompliance with the Tax Law, among other state cigarette laws); *People ex rel. Brown v. Black Hawk Tobacco, Inc.*, 197 Cal. App. 4th 1561, 1564 (2011) (affirming preliminary injunction against selling untaxed cigarettes to nonmember of the governing tribe).

Indeed, in the instant case, ATF reached out to the Attorney General’s Office to confirm the Office’s interpretation of applicable law. Our office explained:

The California scheme requires licensing or permitting to possess or transport unstamped cigarettes and requires stamping or remittance of taxes on any cigarette sold to non-member Indians or other exempted groups. Twenty-Nine Palms and its customers possess none of the required licenses or permits to engage in sales to non-members of their respective Indian tribes, and thus routinely possess, distribute, transport, and sell “contraband” cigarettes under state law.

ECF No. 52-1, at 20 (AR-327).<sup>3</sup>

The California Department of Tax and Fee Administration (“CDTFA”), too, has made clear that tribal sellers must comply with licensing, reporting, and recordkeeping laws, as well as collect and remit taxes for sales to nonmembers. CDTFA has promulgated guidance explaining that “California law requires federally recognized Native American tribes to obtain and maintain the appropriate cigarette and tobacco products license(s) to sell cigarettes and tobacco products to businesses or consumers in California.” CDTFA, SALES TO NATIVE AMERICANS AND SALES IN INDIAN COUNTRY 24, Pub. 146 (Aug. 2023).<sup>4</sup> That guidance also confirms that “[w]hen a Native American retailer in California buys untaxed cigarettes . . . and then sells them to non-Native Americans in Indian country, the

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<sup>3</sup> The district court granted Twenty-Nine Palms’s motion to strike the Attorney General Office’s response from the administrative record, ECF No. 64, because the response was dated after ATF’s October 19, 2023, correspondence informing Twenty-Nine Palms that ATF was placing it on the non-compliant list.

<sup>4</sup> An updated version was published in January 2025, but the portions quoted here are unchanged from the August 2023 publication.

Native American retailer is required to collect the cigarette . . . excise tax from the purchasers and pay the excise tax to [the State].” *Id.*

## **B. California Law**

### **1. Licensing Requirements in Indian Country**

California requires licensing and recordkeeping up and down the distribution chain—manufacturers, importers, distributors, wholesalers, and retailers—after the Legislature found that “[t]he licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes,” Cal. Bus. & Prof. Code § 22970.1(d), and enacted the Cigarette and Tobacco Products Licensing Act of 2003 (the “Licensing Act”), Cal. Bus. & Prof. Code §§ 22970–22991. And once licensed, each link in the distribution chain is required to transact only with other licensed entities. *See* Cal. Bus. & Prof. Code § 22980.1(a) (“A manufacturer or importer shall not sell cigarettes . . . to a distributor, wholesaler, retailer, or any other person who is not licensed pursuant to [the Licensing Act] . . . .”); *id.* § 22980.1(b)(1) (“[A] distributor or wholesaler shall not sell cigarettes . . . to a retailer, wholesaler, distributor, or any other person who is not licensed pursuant to [the Licensing Act] . . . .”); *id.* § 22980.1(c) (“A retailer, distributor, or wholesaler shall not purchase packages of cigarettes . . . from a manufacturer or importer who is not licensed pursuant to [the Licensing Act] . . . .”); *id.* § 22980.1(d)(1) (“A retailer or wholesaler shall not purchase

cigarettes . . . from any person who is not licensed pursuant to [the Licensing Act] . . . .”). The lack of a license by a distributor also means, under the Licensing Act, that its customers are likewise not “lawfully engaged” as a cigarette business.

The Licensing Act includes an exception for those “that the state, pursuant to the United States Constitution, the laws of the United States, or the California Constitution, is prohibited from regulating.” *Id.* § 22980.1(b)(2). But it does not apply here. *Contra* Opening Br. 32 (citing this provision to claim “the Licensing Act does not apply by its own terms”).

First, the exception serves as an escape valve for *licensed* distributors and wholesalers, who would otherwise be threatened with revocation of their licenses for selling to those the State cannot compel to obtain licenses. *Compare* Cal. Bus. & Prof. Code § 22980.1(b)(1) (exempting sales by “a distributor or wholesaler” to a “person that the state . . . is prohibited from regulating”), *with id.* § 22980.1(a) (no exceptions for any sales from “[a] manufacturer or importer” to “a distributor, wholesaler, [or] retailer”), *and id.* § 22980.1(c)–(d) (no exceptions for purchases into “[a] retailer, distributor, or wholesaler”). Businesses located in California, even those operating in California Indian country, ER-60, are undoubtedly within the authority of the State. *See Moe*, 425 U.S. at 483 (holding that States have authority to tax on-reservation sales to nonmembers); *Big Sandy*, 1 F.4th at 731

(explaining that States can impose minimal burdens aimed at tax-collection “on Indian businesses that . . . purport to engage only in tax-exempt transactions”).

Second, the Licensing Act does not create any additional exemption from regulation not already required by federal law, but instead recognizes that California’s authority to regulate persons is limited by federal law.<sup>5</sup> That federal law makes clear that the State has authority to impose a “minimal burden” on on-reservation retailers aimed at collecting taxes lawfully owed. *Moe*, 425 U.S. at 483. The Supreme Court has specifically addressed California’s cigarette tax and held that California properly “require[s] [tribal smokeshops] to collect the tax on [the State’s] behalf” when they sell cigarettes to nonmembers. *Chemehuevi*, 474 U.S. at 12. This Court has also specifically addressed California’s licensing, reporting, and recordkeeping regime and found them to be permissible minimal burdens.<sup>6</sup> *Big Sandy*, 1 F.4th at 731 (“[T]ax enforcement schemes ‘with even more demanding requirements than those of California have been repeatedly upheld by the Supreme

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<sup>5</sup> Indeed, by tacking the Licensing Act to the outer limits of California’s authority under federal law, the Act’s requirements would expand or contract in response to any developments in federal law expanding or contracting that authority.

<sup>6</sup> Notably, tribal cigarette sellers do not have to engage in any taxable transactions to be properly subject to California’s “minimal burdens.” *See Big Sandy*, 1 F.4th at 731 (“These minimal burdens may be imposed on Indian businesses that . . . purport to engage only in tax-exempt transactions.”).

Court as imposing only a “minimal burden.”” (quoting *Big Sandy v. Becerra*, 395 F. Supp. 3d at 1332–33)). Such retailers, accordingly, do not fall into the category of “person[s] that the state . . . is prohibited from regulating.” Cal. Bus. & Prof. Code § 22980.1(b)(1).<sup>7</sup>

## 2. Other Requirements Under the Licensing Act and Tax Law

The Licensing Act would not “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 a precondition of obtaining licenses.” Opening Br. 30. The provision cited applies only to manufacturers and importers. *See* Cal. Bus. & Prof. Code § 22979(a) (imposing requirements on “[e]very manufacturer and every importer”). Sourcing cigarettes from others within the United States, Opening Br. 7, the cited provisions do not apply to distributors or to their customers.<sup>8</sup>

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<sup>7</sup> The State also notes that it has never abided by the legislative bill analysis for Assembly Bill 3092, the Licensing Act, dated August 23, 2004. *Cf.* Opening Br. 32. For the reasons given, the analysis is incorrect, and the Attorney General’s Office has thus specifically resisted its application. *See, e.g.,* Appellee’s Answering Br. 22–23, *Azuma Corp.*, 2024 WL 4131831.

<sup>8</sup> The cited provisions are aimed at compliance with the California Tobacco Directory and the tobacco Master Settlement Agreement statute the Directory helps enforce. *See* Cal. Bus. & Prof. Code § 22979(a)(4) (requiring surety bond to enforce compliance with sections 104555 to 104557 of the California Health and Safety Code (tobacco Master Settlement Agreement statute)). All of Twenty-Nine Palms’s cigarettes are on the Directory. Opening Br. 8, 37–38.

Additionally, certain provisions of the Licensing Act apply regardless of whether any person or entity is subject to California’s licensing requirements. Thus, even assuming they are preempted as to tribal businesses, they have no impact on the applicability of licenses to tribal businesses. For example, California Business and Professions Code section 22980 allows for inspections “at any place at which cigarettes or tobacco products are sold, produced, or stored,” or where there might be evidence of noncompliance with California cigarette laws, untethered to the license status of such places. Cal. Bus. & Prof. Code § 22980(a)(2)–(3). The same is true of the Cigarette and Tobacco Products Tax Law (the “Tax Law”), Cal. Rev. & Tax. Code §§ 30001–30483. Namely, California Revenue and Taxation Code sections 30435 and 30436 to 30449 do not turn on the possession of a license, but instead apply broadly to the licensed and unlicensed alike. *See* Cal. Rev. & Tax. Code § 30435 (authorizing inspection of “[a]ny building, facility, site, or place at which cigarette or tobacco products are sold, produced, or stored, or any building, facility, site, or place for which there is evidence” of noncompliance with California cigarette laws without reference to license); *id.* §§ 30436–30449 (setting out when cigarettes are subject to seizure and the procedures for seizure without reference to license); *id.* § 30473.5 (prohibiting dealing in fraudulent stamps). Other provisions are specifically addressed only to *unlicensed* entities. *See* Cal. Bus. & Prof. Code § 22980.2 (imposing penalties for

one who “engages in the business of selling cigarettes . . . in this state . . . without a valid license”); Cal. Rev. & Tax. Code § 30474 (exempting licensed distributors from the prohibition on “keep[ing], store[ing], or retain[ing] for the purpose of sale” unstamped cigarettes).

Finally, suspension of licenses is subject to due process under the Licensing Act—whether imposed criminally, civilly, or administratively—allowing for licensed entities to challenge to the bases of any such suspension under applicable law. *See* Cal. Bus. & Prof. Code § 22980.3(a) (imposing suspension only “upon . . . conviction of a violation.”); Cal. Code Regs. tit. 18, § 35057 (setting out the appeal process for violations). Similar protections apply to suspension under the Tax Act. *See, e.g.*, Cal. Rev. & Tax. Code § 30144 (providing hearing rights to anyone whose license is suspended upon cancellation of his or her bond); *id.* § 30148 (allowing for suspension or revocation of license for other violations only “upon hearing”); *id.* § 30459.6 (requiring 60 days’ notice before suspension under sections 30144 and 30148).<sup>9</sup>

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<sup>9</sup> The Opening Brief also cites 30163(c) of the California Revenue and Taxation Code. Subsection (a) of section 30163 requires all lawfully taxable cigarettes to bear a tax stamp, and subsection (b) prohibits affixing stamps to so-called gray-market cigarettes. *See* Anthony Ciolli, *Gray Market Cigarettes*, 11 DEPAUL J. HEALTH CARE L. 119, 119 (2008) (“Such cigarettes—often labeled ‘gray market’ cigarettes—are ‘cigarettes manufactured for sale overseas’ that are then ‘re-imported and sold without the manufacturer’s permission.’”). And subsection (c) provides for license revocation under the procedures of section

(continued...)

### III. CALIFORNIA’S CIGARETTE REGIME IS NOT PREEMPTED BY FEDERAL LAW

As explained above, this Court already examined California’s licensing, recordkeeping, and reporting regime in *Big Sandy* and found them to constitute a permissible “minimal burden.” 1 F.4th at 731; *see also Colville*, 447 U.S. at 160 (explaining that a party challenging application of state law in Indian country “bear[s] the burden of showing that the . . . requirements which they are challenging are invalid”).

Each of the requirements imposed on licensed entities is a “reasonable regulatory burden[]” aimed at keeping cigarettes within the observable licensed distribution chain and thus “assist enforcement of valid state taxes.” *Milhelm Attea*, 512 U.S. at 74. Indeed, even the enforcement provisions imposing penalties for noncompliance, *see* Cal. Bus. & Prof. Code §§ 22980.3–.5, 22981 (imposing penalties for violations of the Licensing Act); Cal. Rev. & Tax. Code §§ 30141–30142 (bonding requirement for collection of unpaid taxes); *id.* §§ 30471–30472 (penalties for failure to file required reports or for filing false reports); *id.* § 30473.5 (penalties for dealing in fraudulent tax stamps), are aimed directly at ensuring compliance with the “minimal burdens” imposed by California to collect

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30148 for violations of subsections (a) and (b). The cigarettes at issue in this case are lawfully imported, but do not bear California-issued tax stamps.

taxes lawfully owed, each of these is “reasonably necessary as a means of preventing” transactions that flout California’s taxes. *Colville*, 447 U.S. at 160; *cf. Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 938–39 (8th Cir. 2019) (upholding state penalty of license non-renewal for “failure to collect and remit valid use taxes”).

Even assuming, for the sake of argument, that imposition of penalties for violations of the Licensing Act and Tax Law might be preempted in some circumstances, such preemption would not obviate the entire licensing, reporting, and recordkeeping regime. For example, in *Moe*, the Supreme Court struck down a vendor license fee as a “personal property tax on personal property located within the reservation,” 425 U.S. at 480, but left the rest of Montana’s cigarette tax regime in place. Similarly, California’s own imposition of license fees, *see, e.g.*, Cal. Bus. & Prof. Code § 22977.1 (distributor and wholesaler license fee), does not abrogate the rest of California’s regime. Indeed, in recognition of *Moe*, California waives such fees for a “federally recognized tribe operating all business activities on their own reservation.” CDTFAs, SALES TO NATIVE AMERICANS AND SALES IN INDIAN COUNTRY 25, Pub. 146 (Aug. 2023). Similarly, the record demonstrates that no penalties have been imposed on Twenty-Nine Palms or its customers.

## CONCLUSION

The federal Bureau of Alcohol, Tobacco, Firearms and Explosives correctly applied applicable California law in determining whether the PACT Act by distributing untaxed cigarettes to unlicensed tribal retailers throughout California. The judgment of the district court should be affirmed.

Dated: September 26, 2025

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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complies with the length limit designated by court order dated \_\_\_\_\_.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Peter F. Nascenzi Date Sept. 26, 2025  
(use "s/[typed name]" to sign electronically-filed documents)