No. 21-678

In The Supreme Court of the United States

BIG SANDY RANCHERIA ENTERPRISES,
a federally recognized Indian tribe incorporated
under the Indian Reorganization Act,

Petitioner,

v.

ROB BONTA, in his official capacity as
Attorney General of the State of California; and
NICOLAS MADUROS, in his official capacity as
Director of the California Department
of Tax and Fee Administration,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The questions presented here are critically important to self-government and commerce among the hundreds of federally recognized Indian tribes in the United States. Amicus curiae Flandreau Santee Sioux Tribe, et al., ably demonstrated the long history of intertribal trade in indigenous America and the substantial history of federal supremacy over states in Indian affairs, including tribal and intertribal commerce. In the decision below, the Ninth Circuit dealt two significant blows to Indian tribes' ability to exercise their federally protected rights to engage in commerce, including reservation-to-reservation trade, largely free from state taxation and regulation in Indian country.

The court held it lacked jurisdiction to entertain a challenge to the imposition of state taxes because petitioner Big Sandy Rancheria Enterprises ("BSRE") came to court in its federally chartered commercial capacity, rather than its political capacity. The court misapprehended the nature of Indian tribes incorporated under section 17 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5124, and misjudged the purpose and effect of 28 U.S.C. § 1362, which opens federal courts to such suits by Indian tribes, regardless of how they are organized.

The court also upheld California's entire tobacco regulatory regime as applied to BSRE's sales of tribally manufactured cigarettes to Indian tribal retailers on the retailers' home reservations. It treated BSRE's activity as occurring off-reservation, and therefore

rejected considerations of "tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development," which should have informed the preemption analysis. *Ramah Navajo School Bd., Inc. v. Bureau of Rev. of New Mexico*, 458 U.S. 832, 838 (1982). The court failed to balance the State's limited power to impose minimally burdensome regulations reasonably tailored to the collection of valid taxes from non-Indians against the regime's interference with tribal sovereignty and federal law.

On both questions, the court below contravened this Court's decisions and created or perpetuated splits of authority among lower courts. Both questions warrant this Court's review.

ARGUMENT

I. The status of federally recognized, federally incorporated Indian tribes as "Indian tribes" authorized by 28 U.S.C. § 1362 to bring federal actions to enjoin unlawful state taxes is an important question that requires Supreme Court review.

The Court should grant review on the § 1362 question because Congress did not intend to deny incorporated Indian tribes the important right to challenge in federal courts any federally preempted state taxes imposed upon them.

Most Indian tribes engage in commercial activities to pay for the kind of governmental services that states

would generally fund with tax revenues. Many tribes choose to do business as a § 17 corporation, in part because § 17 corporations clearly possess full federal protections and tribal immunity from state and federal taxation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n.13 (1973); *Uniband Inc. v. Comm'r*, 140 T.C. 230, 261-64 (2013). But even though Congress allowed "any Indian tribe or band" to sue in federal court to protect federal rights, 28 U.S.C. § 1362, including immunity from state taxation, *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473-75 (1976), the decision below denies such access to Indian tribes or bands incorporated under § 17.

Respondents' Brief in Opposition ("BIO") promises that "they would have no jurisdictional objection to the suit if the Tribe joined as a plaintiff," so BSRE faces no real impediment. BIO at 16. The Court should not accept this cavalier "no harm, no foul" approach to interpreting a federal statute, but should grant review to ensure § 1362 is applied as Congress intended, without the need for a workaround that depends on the grace of the tribal plaintiff's state adversary. BSRE's inclination to litigate this question, rather than avoid it, allows this Court to confront a divisive issue uniquely impacting the rights of tribes incorporated under the IRA.

The opinion below conflicts with the Tenth Circuit's decision in *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, which held that even though the plaintiff United Keetoowah Band ("UKB") was "a federally chartered corporation," it nevertheless remained a "tribe" for purposes of § 1362. 927 F.2d

1170, 1174 (10th Cir. 1991). Respondents attempt to distinguish *United Keetoowah Band* because the Department of the Interior listed UKB by that name in its list of federally recognized Indian tribes. *See* BIO at 17. In fact, however, the circumstances in *United Keetoowah Band* are materially identical to this case. "In 1950, the Secretary of the Interior approved the constitution and bylaws of the [UKB] and issued a corporate charter to the UKB Corporation. The corporate charter authorized the UKB Corporation to hold, manage, operate, and dispose of real property." *Cherokee Nation v. Bernhardt*, No. 12-cv-493-GKF-JFJ, 2020 WL 1429946, *1 (N.D. Okla. Mar. 24, 2020). In *United Keetoowah Band* and this case, the tribe chose to bring suit as a federally chartered corporation, rather than as a political body organized under a constitution. The only difference was the result: the Tenth Circuit held the corporation was a "tribe" for purposes of § 1362, while the Ninth Circuit held it was not. This Court's review would resolve the split.

Cherokee Nation also shows that the Department of the Interior views federally incorporated Indian tribes the same way BSRE does. In a conclusion the court upheld, the Assistant Secretary of the Interior found that although "the tribal government and the tribal corporation are separate entities, . . . 'the UKB Corporation is merely the tribe organized as a corporation.'" *Cherokee Nation* at *6.

The United States Tax Court reached the same conclusion, agreeing with the Commissioner of Internal Revenue that "a section 17 corporation is a form of

the tribe. It is part of the organizational structure of the tribe just as much as is a tribal government formed under section 16." *Uniband*, 140 T.C. at 260. "[T]he tribe exists, at least in part, through its section 17 corporation, notwithstanding the fact that the corporation is a distinct legal entity." *Id.* at 262.

Thus, while Respondents emphasize that the corporation and the political body are "separate entit[ies]," BIO at 14, the foregoing authorities hold, at odds with the decision below, that each entity is merely a form of the tribe. Respondents claim § 17 "distinguishes between 'the tribe' and an 'incorporated tribe,'" BIO at 14, but in fact, § 17's text plainly indicates that each one is the Indian tribe, organized one way or another under the IRA, each under a governing body recognized by the Secretary of the Interior. *See Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (holding "the language of Section 17 itself—by calling the entity an 'incorporated tribe'—suggests that the entity is an arm of the tribe.").

Nothing in § 1362's generic language—"any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior"—unambiguously suggests Congress intended to restrict the statute to just one of the forms in which Indian tribes might organize under the IRA or otherwise. Respondents attempt to draw a negative inference from the fact that § 1362 does not expressly reference § 17 corporations, citing for comparison a single statute that does. BIO at 15. However, no language in § 1362 suggests exclusion by

deliberate choice, while the characteristics of § 17 corporations and the nature of the problem Congress was addressing in § 1362 favor an interpretation that encompasses Indian tribes incorporated under § 17. Respondents point to the "distinct functions" of the different tribal forms, BIO at 15, but cannot point to anything in § 1362 expressing an intention to promote one set of functions while excluding the other. To the contrary, federal policy dating back to the IRA has sought "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

Further, any doubt about the statute's meaning must be resolved in favor of Indian tribes. *Bryan v. Itasca Co., Minn.*, 426 U.S. 373, 392 (1976); *see McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174-76 (1973) (invoking Indian canon of construction and perceiving "no reason to give this [statutory] language an especially crabbed or restrictive meaning.").

Respondents discount the recent decision, *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S.Ct. 2434 (2021), but its lessons clearly apply here. The term "Indian tribe" does not invariably mean the same thing throughout the United States Code. Whether the term is given a tangled definition, as in the Indian Self-Determination and Education Assistance Act discussed in *Yellen*, or goes undefined, as in § 1362, a "term of art construction" drawn from other Acts, such as the Federally Recognized Indian Tribe List Act of

1994 on which the decision below relied, cannot reliably untangle the term's meaning if the statutory context and history indicate Congress intended something else. *Yellen* at 2443-47.

This Court has found in § 1362 "a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe*, 425 U.S. at 472. As discussed in the petition at 24-26, that purpose encompasses claims by § 17 corporations. So too does the congressional rationale that the unique relationship of Indian tribes to the federal government—which includes the special status accorded to § 17 corporations—justifies providing a federal forum for the federal questions that impact them, such as the preemption of state taxing jurisdiction. *Moe* at 474 n.13; H.R. Rep. No. 89-2040, p. 3146 (1966). Respondents merely note that *Moe* did not address § 17 corporations, but it is nevertheless inescapable that *Moe*'s reasoning and its solicitous construction of § 1362 compels the conclusion that the statute applies to Indian tribes incorporated under § 17 of the IRA.

II. Federal preemption of state authority to regulate intertribal commerce in Indian country is an important question that requires Supreme Court review.

The preemption question warrants review because the opinion below violates decades of the Supreme Court's Indian country preemption decisions. It holds

that the Indian tribes who govern the reservations where BSRE sells cigarettes to them and their members have no sovereign right to make their own laws to regulate the sales. Instead they must follow state law, which denies them access to any cigarettes except those approved by California, subject to California fees, and sold by California licensees. Respondents repeatedly acknowledge tribal members' right to buy tax-free, fee-free, off-directory cigarettes on their home reservations, BIO at 1, 24, but the California law upheld by the Ninth Circuit tramples those rights because it is not "reasonably tailored" to avoid violating tribal rights, contrary to *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). To protect the plenary power of Congress to regulate commerce with Indian tribes and the tribes' independence from state authority in Indian country, this Court should review the decision below.

The Ninth Circuit was wrong to hold *Bracker* balancing does not apply to BSRE's preemption claims. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Looking at "who" and "where" California seeks to exercise its authority, as Respondents emphasize, BIO at 18, shows that the State would regulate BSRE on the Indian reservations of other tribes. BSRE is an Indian tribal entity. But on reservations other than its home reservation, it is treated as a non-Indian entity for purposes of the preemption analysis. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980). This circumstance is precisely where *Bracker* balancing applies—"where, as

here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Bracker* at 144-45; *see Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005).

Respondents defend the Ninth Circuit's view that *Mescalero*, not *Bracker*, controls. BIO at 18-19; *see Mescalero*, 411 U.S. at 148-49 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). They rely on *Mescalero* and *Wagnon*, both of which involved taxes imposed outside of any tribe's reservation. Those cases are inapposite because here, California asserts authority to regulate *on-reservation* transactions. Respondents fail to rebut petitioner's argument that under *Bracker* and all its predecessors and progeny in this Court, a state's authority to regulate the reservation conduct of non-Indians or nonmembers "must always" be weighed against federal statutes illuminated "by the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker* at 143, 144-45. With respect to BSRE's activities on other reservations, the sovereignty and independence of the other tribes are fundamental to the inquiry. The Ninth Circuit chose to disregard these interests in favor of virtually unchecked state authority in Indian country, perpetuating a simmering trend led by the two cases out of Oklahoma to erode this Court's precedents. *See* Pet. App. 36 (citing *Muscogee (Creek) Nation v. Pruitt*, 669

F.3d 1159 (10th Cir. 2012); *Edmondson v. Native Wholesale Supply*, 237 P.3d 199 (Okla. 2010)).

Respondents implausibly argue that, after the Ninth Circuit held BSRE's sales were "subject to nondiscriminatory state laws of general application" and that "the district court properly declined to balance federal, state, and tribal interests under *Bracker*," Pet. App. 37, 38, the court nevertheless went on to apply the *Bracker* test. BIO at 20. Respondents are wrong.

The decision below contains no evidence of the interest balancing that defines *Bracker*. The circuit court read the Indian Trader Statutes skeptically, *see* Pet. App. 38-39, not against the backdrop of tribal self-government or in terms of "the broad policies that underlie [the statutes]," failing at the first step to consider the relevant tribal and federal interests as *Bracker* requires. *Bracker* at 144-45; *see McClanahan*, 411 U.S. at 172. In so doing, the court of appeals actively rejected this Court's repeated characterization of the Indian Trader Statutes as "comprehensive federal regulation of Indian traders" such as BSRE. *Milhelm*, 512 U.S. at 70; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 688 (1965).

Likewise, the court's discussion of the Directory Statute (Cal. Rev. and Tax. Code § 30165.1), Pet. App. 39-40, utterly neglects to apply the *Milhelm* standard that is supposed to reflect a careful balancing of interests: state regulation of any person's sales to Indians

in Indian country must be "reasonably necessary to the assessment or collection of lawful state taxes." *Milhelm*, 512 U.S. at 75. The state laws must be "reasonably necessary" (or "reasonably tailored," *id.* at 73) in the sense that they must not unduly burden sellers governed by the Indian Trader Statutes or "unnecessarily intrud[e] on core tribal interests." *Id.* at 75. The reasonableness inquiry therefore has to account for the relevant federal and tribal interests in the particular case. These include whether the state burden is imposed upon "value generated on the reservation by activities involving the Tribes," to highlight one such interest identified (but absent) in *Milhelm* and especially pertinent here, where the cigarettes are tribally manufactured and the participants in their distribution are Indian tribes, tribal entities, and tribal members. *See Milhelm* at 73 (quoting *Colville*, 447 U.S. at 156-57). The decision below fails to acknowledge any such interests.

"Reasonably necessary" also means the state law must be designed and implemented to serve a state interest of sufficient importance that it justifies its burden or intrusion. California's law fails. In *Milhelm*, the state interest was collecting valid taxes from non-Indians, but the Directory Statute advances different state goals, limiting the kind of goods available to tribal members for reasons of state policy unrelated to deterring consumer tax evasion. The distinct set of state interests requires conducting a new "particularized inquiry" to weigh them and balance them "in the

specific context," *Bracker* at 145, not merely reciting *Milhelm*'s conclusion.

Respondents proudly announce that California "recognizes tribal sellers' ability to sell cigarettes on the tribe's reservation to tribal members that are not subject to state tax or escrow fees[.]" BIO at 24. Yet the Ninth Circuit blithely concluded that BSRE may only distribute cigarettes that are subject to escrow fees. Pet. App. 40. Clearly the court did not judge the Directory Statute under the *Milhelm* standard, because the state law cannot be "reasonably tailored" when it bars access to the fee-exempt cigarettes that tribal members have an undisputed right to buy.

Insisting that California's statutory and regulatory scheme makes room for the sale of tax-exempt and fee-exempt cigarettes, Respondents sweepingly cite entire divisions and multiple chapters of state codes and regulations. BIO at 24. They cannot be specific because no specific mechanism exists in California law to allow these sales. And they cannot have it both ways. If, as the Ninth Circuit held, BSRE cannot lawfully distribute fee-exempt cigarettes on reservations for sale by tribal retailers to tribal members, then California has failed to tailor its laws to respect tribal self-government and independence from state authority in Indian country.

With no methodology for getting fee-exempt cigarettes into the hands of tribal sellers and tribal member consumers, California law violates *Milhelm* just like the New York enforcement efforts in *Cayuga*

Nation of New York v. Gould, 14 N.Y.3d 614, 648-51 (2010). The decision below grants California plenary authority to guarantee that all cigarettes circulating in Indian country are directory listed, escrow paid, and tax stamped, while leaving no discernable path for tribal members in Indian country to exercise their federally protected rights to obtain cigarettes free of these state burdens. It thereby conflicts with *Cayuga*. The petition should be granted to redirect increasingly misguided lower courts back to the course this Court prescribed in *Bracker*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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