No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Indian tribe incorporated by federal charter under section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. § 5124) is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" authorized to bring suit under 28 U.S.C. § 1362.

2. Whether the Indian Trader Statutes (25 U.S.C. §§ 261-263) or the *Bracker* balancing test (*see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)) preempts the State of California's regulation of intertribal cigarette sales, where an Indian tribe sells tribally manufactured cigarettes to Indian tribal buyers on their home reservations.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

As an incorporated Indian tribe organized under a federal charter pursuant to 25 U.S.C. § 5124, petitioner is a governmental corporation for the purpose of Supreme Court Rule 29.6. Petitioner has no parent corporation and no publicly held company owns 10% or more of petitioner's stock.

RELATED PROCEEDINGS

Big Sandy Rancheria Enterprises v. Becerra, No. 1:18-cv-00958-DAD-EPG, United States District Court for the Eastern District of California. Judgment entered August 13, 2019.

Big Sandy Rancheria Enterprises v. Bonta, No. 19-16777, United States Court of Appeals for the Ninth Circuit. Judgment entered June 16, 2021.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1[1]) is reported at 1 F.4th 710. The district court's opinion (Pet. App. 57) is reported at 395 F. Supp. 3d 1314.

JURISDICTION

The court of appeals entered its judgment on June 16, 2021. Pet. App. 1. It denied petitioner's timely petition for rehearing en banc on August 6, 2021. Pet. App. 99. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix, Pet. App. 100-103: The Indian Trader Statutes, 25 U.S.C. §§ 261-264; Section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124; and 28 U.S.C. § 1362.

STATEMENT OF THE CASE

This case involves two distinct and important questions on which courts have split. The first is a matter of statutory construction that affects whether federally recognized, federally incorporated Indian tribes

[1] "Pet. App." refers to the Petitioner's Appendix.

may challenge state taxation in federal courts, as unincorporated tribes may. Indian tribes use the federal incorporation structure Congress provided in § 17 of the Indian Reorganization Act of 1934 ("IRA") to conduct commercial activities. Therefore, when states attempt to impose taxes on tribal commerce, those taxes frequently fall upon § 17 corporations. Congress specially authorized Indian tribes to bring federal actions to enjoin unlawful state taxes, 28 U.S.C. § 1362, overriding the general statutory bar against such tax injunction actions, 28 U.S.C. § 1341. The inclusive language of § 1362, the express terms of § 17, and the purposes of both § 1362 and § 17 to protect Indian tribes' rights and privileges under federal law all reveal that Congress intended the special authorization for Indian tribes to encompass "incorporated tribes" under § 17. The lower court disagreed, relegating to state tribunals Indian tribes organized under § 17 and leaving them more vulnerable to intrusive state taxation. The decision is at odds with *United Keetowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991).

The second issue asks the Court to return to the complicated questions that arise when states attempt to regulate transactions between tribal members and nonmembers within Indian country. In this field, the Court has developed a rubric for analyzing the limits that federal law and tribal sovereignty impose on state authority. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) ("*Bracker*"). The decision below unsettles fundamental precepts of

that jurisprudence. The Ninth Circuit's rewritten rules inequitably inhibit intertribal trade and disregard the Indian Trader Statutes, 25 U.S.C. §§ 261-264, Congressional acts dating to the founding era which place the regulation of trade with Indians in Indian country under the presumptive control of federal and tribal governments. The lower court rejected Supreme Court authority applying those statutes and exposed a conflict with the highest court of the State of New York regarding whether to enforce the rule that states must carefully tailor their regulations in Indian country to avoid interfering with federal and tribal interests. *See Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) ("*Milhelm*"); *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614 (2010).

Supreme Court review is necessary to clarify the law on these important and divisive federal questions.

A. Big Sandy Rancheria Enterprises

Petitioner Big Sandy Rancheria Enterprises ("BSRE") is the corporate form of the Big Sandy Band of Western Mono Indians (the "Tribe"), one of 109 federally recognized Indian tribes in California. Pet. App. 9-10. After tumultuous decades that saw the Tribe pushed onto largely unusable land, which was then broken up and sold as the Tribe's federal relationship was terminated, then partly regained when the Tribe's status was restored, the Tribe reorganized. It adopted a constitution under its inherent sovereign power, eschewing the process called for under § 16 of the IRA.

See 25 U.S.C. § 5123(a); *id.* § 5123(h) (providing that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in [section 16]").

The Tribe also petitioned the Secretary of the Interior ("Secretary") to issue it a charter of incorporation under § 17 of the IRA, 25 U.S.C. § 5124, for the purpose of advancing the Tribe's economic opportunities. ER 105-106 (FAC ¶ 92-101).[2] The Secretary issued the § 17 charter in 2012, establishing BSRE as the "incorporated tribe." 25 U.S.C. § 5124; Pet. App. 9-10. BSRE's federal charter is the Tribe's only governing document that has or requires the Secretary's approval. The elected Tribal Council is the Tribe's governing body under the constitution and, sitting as the corporate Board of Directors, under the charter. Pet. App. 10.

BSRE distributes tobacco products to tribal-government-owned retailers and tribal-member-owned retailers located on their respective Indian reservations in California. Pet. App. 12. It offers cigarettes manufactured by a tribal-government-owned company based on that tribe's reservation in Northern California. Pet. App. 11, n.5. BSRE sells no cigarettes outside of Indian country, or to non-tribal purchasers, or to consumers. Pet. App. 12.

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[2] "ER" refers to the Excerpts of the Record petitioner filed in the Court of Appeals. "FAC" means petitioner's First Amended Complaint.

The Tribe's reservation was economically depressed and experiencing chronic unemployment before the Tribe began its tobacco distribution enterprise. ER 111 (FAC ¶ 132). The Tribe uses BSRE's revenues to support Tribal social welfare programs. ER 106 (FAC ¶ 101). The enterprise has created dozens of jobs for Tribal members and has improved the social and economic well-being of the Tribe's members, the reservation, and surrounding areas. ER 111 (FAC ¶ 133).

B. California's Directory Statute and the Master Settlement Agreement

California's regulation of cigarettes is largely a product of a 1998 settlement agreement between four major cigarette manufacturers and 46 states, the District of Columbia, and five United States territories (but no Indian tribes). Pet. App. 6. The Master Settlement Agreement ("MSA") released the major cigarette manufacturers from liability for their campaign to lie about the health effects of smoking, while advertising cigarettes to children and developing technologies to increase nicotine delivery. ER 89-91 (FAC ¶ 21-28). In exchange for a perpetual stream of revenue from major manufacturers' cigarette sales, California and the other MSA states and territories promised to enact and diligently enforce legislation to ensure the major manufacturers would not lose their share of the market they had schemed over decades to dominate. ER 93-96 (FAC ¶ 33-46); Pet. App. 6. These state laws regulate the price of cigarettes made by manufacturers who are not parties to the MSA ("non-participating

manufacturers") and restrict access to cigarette brands not approved by state authorities.

In fulfilment of its MSA promises, California enacted the "Escrow Statute," Cal. Health & Safety Code §§ 104555-104558. Like virtually identical laws in the other MSA states, the Escrow Statute requires non-participating manufacturers whose cigarettes are sold in California to either join the MSA, making all contractually required payments to the State, or deposit equivalent funds into an escrow account at a specified rate per "unit[] sold." Cal. Health & Safety Code § 104557(a). "Units sold" generally includes all cigarettes sold in California, but excludes "cigarettes sold . . . by a Native American tribe to a member of that tribe on that tribe's land, or that are otherwise exempt from state excise tax pursuant to federal law." *Id.* § 104556(j). California takes MSA payments into its general fund and, rather than using the billions it collects for anti-smoking or public health programs, the State dedicates the money to debt service on a series of bond obligations. ER 96-98 (FAC ¶ 47-53). In contrast, non-participating manufacturers' escrow deposits are held for 25 years, then released back to the manufacturer with interest. Cal. Health & Safety Code § 104557(b).

To enforce the Escrow Statute, California (like the other MSA states) enacted a "Directory Statute," Cal. Rev. & Tax. Code § 30165.1. Under the Directory Statute, the Attorney General of California maintains a directory of cigarette brands approved for sale in California. *Id.* § 30165.1(c). To be listed on the

directory, a non-participating manufacturer must certify that has complied with the Escrow Statute and state licensing requirements. *Id.* § 30165.1(b). Off-directory cigarettes sold or possessed for sale or personal consumption "in th[e] state" are deemed contraband. *Id.* § 30165.1(e)(2). The tribally manufactured cigarettes BSRE sells are not listed on the directory.

C. California Cigarette Taxes

California also imposes excise taxes on the distribution of cigarettes. Cal. Rev. & Tax. Code §§ 30101, 30123(a), 30130.51(a), 30131.2(a). Ordinarily, distributors pay the excise taxes by purchasing stamps from the State to affix to each cigarette package before distribution. *Id.* §§ 30161, 30163(a). However, "if the vendors are untaxable," then state law "place[s] on consumers the obligation to pay the tax for all previously untaxed cigarettes." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985); *see* Cal. Rev. & Tax. Code § 30108(a). In this circumstance, the state imposes on the vendor not a tax but a "'pass on and collect' requirement," while "the legal incidence of the tax falls on the consuming purchaser." *Chemehuevi* at 11, 12; *see* Cal. Rev. & Tax. Code §§ 30107, 30187. Further, since the purchaser also may be untaxable, an untaxable vendor is required to collect and remit the tax only if and when the purchaser becomes obligated to pay the tax. *Id.* § 30108(a).

Thus, where tribal tax immunities are involved, California law does not establish early in the

distribution chain which cigarettes are taxable. Instead, often it is impossible to know whether a given cigarette is subject to tax until the circumstances of each transaction are analyzed – including whether the tax is imposed in Indian country, whether the legal incidence falls on a tribal member or person trading with Indians, and how the relevant governmental interests balance. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005) (emphasizing the "significant consequences" of "the 'who' and the 'where' " of a challenged tax). If tax is owed, the reservation retail seller, not the wholesale distributor, is expected to collect and remit it. *Chemehuevi* at 11-12. Critically, California has not implemented a system that *predetermines* the taxability of cigarettes to be sold in Indian country, like the New York system the Court upheld nearly thirty years ago. *See Milhelm*, *supra*.

The relationship between the excise tax and the Directory and Escrow Statutes bears emphasis. As noted above, cigarettes that are "exempt from state excise tax pursuant to federal law" do not count as "units sold" for purposes of the Directory and Escrow Statutes. Cal. Health & Safety Code § 104556(j). In the context of tribal distributions in Indian country, where tribal vendors are "untaxable" and taxes are owed, if at all, only by non-member consumers, *Chemehuevi* at 11-12, no cigarette qualifies as a "unit sold" unless and until it is involved in a taxable use or consumption by a nonmember consumer. Therefore, such tax-exempt cigarettes are also exempt from any MSA or escrow obligation, and do not need to be listed on the State's

directory. *See Muscogee (Creek) Nation v. Henry*, 867 F.Supp.2d 1197, 1206-07 (E.D. Okla. 2010), *aff'd sub nom. Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012) (holding that Oklahoma's equivalent Escrow and Directory Statutes do not apply to tax-exempt cigarettes sold to tribal members); ER 83 (Def. Mem. in Supp. of Mot. to Dismiss, emphasizing that tax-exempt transactions "are already beyond the [Escrow and Directory Statutes'] intended reach").

Additionally, the Directory Statute is intended to ensure manufacturers' compliance with MSA and escrow obligations. Pet. App. 8-9. It is not designed to enforce cigarette tax obligations. In fact, the reverse is true, as a tax stamp confirms not only payment of the tax but also the brand's inclusion on the directory. Cal. Rev. & Tax. Code § 30165.1(e)(1).

D. Licensing, Reporting and Recordkeeping

California also requires cigarette distributors to hold two state-issued licenses. Cal. Rev. & Tax. Code § 30140; Cal. Bus. & Prof. Code § 22975(a). Generally, unlicensed distributors may not buy or sell cigarettes. Cal. Bus. & Prof. Code § 22980.1. However, an exception is provided for persons "exempt from regulation under the United States Constitution [or] the laws of the United States." *Id.* § 22971.4.

Each month, licensed distributors report their total taxable and tax-exempt distributions. Cal. Rev. & Tax. Code §§ 30182(a), 30183(a); 18 Cal. Code Regs. § 4031(a); ER 32-46 (Cigarette Distributor's Tax

Report and Instructions). Licensed distributors also maintain more detailed records of their purchases and sales for possible State review. Cal. Bus. & Prof. Code § 22978.5; Cal. Rev. & Tax. Code § 30453; 18 Cal. Code Regs. § 4026(a).

E. Proceedings Below and the Preemption Rules of Federal Indian Law

After receiving correspondence from the Attorney General of California accusing BSRE of violating the Directory Statute, the cigarette tax laws, and California licensing requirements, BSRE brought this action for declaratory and injunctive relief to contest California's application of its civil-regulatory laws upon purely intertribal commerce in Indian country. Pet. App. at 12-13. BSRE premised the district court's jurisdiction on 28 U.S.C. §§ 1331 (federal question) and 1362 (federal question in an action brought by an Indian tribe). ER 86 (FAC ¶ 5).

BSRE's action sought to clarify its obligations, if any, under California law, in light of the immunities that federal law affords to Indian tribes and Indian traders in Indian country. Over the years, the Court has derived the following rules to define these immunities.

1. "States are categorically barred from placing the legal incidence of an excise tax 'on a tribe or on tribal members for sales made inside Indian country' without congressional authorization." *Wagnon*, 546 U.S. at 101-02 (quoting *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995)).

2. Aside from "the special area of state taxation," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("*Mescalero I*"), there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) ("*Cabazon*"). "[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("*Mescalero II*")). The only significant "exceptional circumstance" the Court has identified involves retail tribal smokeshops, where states can impose a "minimal burden" on tribal retailers "to aid in collecting and enforcing" taxes that may be validly imposed on nonmember consumers. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159 (1980) ("*Colville*"); *see also Milhelm* at 73 ("States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.").

3. "State authority over Indians is yet more extensive over activities . . . not on any reservation," that is, "outside of Indian country." *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). Thus, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero I* at 148-49; *see Wagnon* at 112-13.

4. Where a state tax or civil regulation falls on a *nonmember* engaged in a transaction with tribes or tribal members in Indian country, federal law preempts the tax or regulation if it fails the balancing test articulated in *Bracker*, *supra*. *See Wagnon* at 102, 110; *Cabazon* at 216; *Mescalero II* at 331-36. *Bracker* "call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. The Court has distinguished between "the governing Tribe" and its "constituent[]" members on their *home* reservation and Indian tribes and tribal members in the Indian country of *other* tribes, holding that for the purpose of the preemption analysis, nonmember Indians "stand on the same footing as non-Indians." *Colville*, 447 U.S. at 161; *see Rice v. Rehner*, 463 U.S. 713, 721 & n.7 (1983); *Arizona Dep't of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32, 34 (1999).

5. The Indian Trader Statutes, 25 U.S.C. §§ 261-264, preempt state taxes and other burdens that regulate "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians," *id.* § 261, "imposed upon Indian traders for trading with Indians on reservations," *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 691 (1965), with the important singular exception that such traders "are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes," *Milhelm* at 75.

In short, unless Congress has expressed a different rule, an Indian tribe or tribal member is *strongly* protected against state regulation on its home reservation and categorically shielded from state taxation there, *minimally* protected while entirely outside Indian country, and subject to state authority while within another tribe's reservation *only if the state interest outweighs the tribal and federal interests*. *Wagnon*, 546 U.S. at 110-13.

Four of BSRE's five claims alleged that federal common law, tribal sovereignty, and the Indian Trader Statutes preempt California's Directory Statute and license-related requirements as applied to BSRE's intertribal cigarette sales in Indian country. Pet. App. 13.

In the fifth claim, BSRE sought a declaration that neither BSRE nor its purchasers incur any cigarette tax liability for BSRE's distribution of cigarettes. Pet. App. 13.

The district court dismissed the first four claims for failure to state a claim and dismissed the fifth for lack of subject matter jurisdiction. Pet. App. 97. The Ninth Circuit affirmed, then denied BSRE's petition for rehearing en banc. Pet. App. 45, 99.

The court of appeals held the fifth claim was barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides that federal district courts cannot enjoin state tax enforcement.[3] Pet. App. 15-25. Congress

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[3] The Tax Injunction Act states, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of

exempted from the Tax Injunction Act "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." 28 U.S.C. § 1362; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976). Leaning on an inapt Ninth Circuit opinion, *Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228 (9th Cir. 1979), and construing the statutory exception restrictively while disregarding the uniquely tribal character of section 17 corporations under the IRA, the court held that because BSRE is an "incorporated tribe," it does not qualify for the exemption. *Id*. Its decision conflicts with the Tenth Circuit's opinion in *United Keetowah Band*, *supra*. Judge Berzon filed a separate opinion "acquiescing dubitante," in which she expressed doubts about the majority's conclusion. Pet. App. 45-56. The court did not decide whether California may tax BSRE's intertribal transactions. Pet. App. 25 n.8.

The court also dismissed BSRE's claims that federal law preempts the application of the Directory Statute and licensing provisions to BSRE's intertribal commerce. Pet. App. 25-44. First, the court rewrote the "geographical" rule expressed in *Mescalero I* and held that since BSRE engages in activities "on *other tribes'* reservations," these activities are "subject to non-discriminatory state laws of general application." Pet. App. 35-38. "In these circumstances," the court held, "the district court properly declined to balance federal, state, and tribal interests under *Bracker*." Pet. App. 37.

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any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

Next, the court flouted three Supreme Court decisions interpreting the Indian Trader Statutes. It held the statutes do not "comprehensively" regulate on-reservation trade with Indians in the absence of hands-on federal involvement, contrary to *Central Machinery* and *Warren Trading Post*. Pet. App. 38-39; *see Central Machinery* at 163; *Warren Trading Post* at 688. Defying *Milhelm*, the court neglected to analyze whether the Directory Statute is "reasonably necessary to the assessment or collection of lawful state taxes." Pet. App. 39-40; *Milhelm* at 75. The court counterfactually equated the carefully tailored New York probable-demand system of *Milhelm* and the blunderbuss California scheme, in conflict with *Cayuga*, *supra*.

REASONS FOR GRANTING THE WRIT

Review is necessary to resolve important federal questions of statutory construction and the preemption of state civil authority in Indian country. Both questions have divided lower courts and deeply impact statutory protections for Indian tribes and their right to engage in commerce on their reservations, including trade with other Indian tribes, free from undue state interference.

I. Section 1362 grants jurisdiction in civil actions brought by any federally recognized Indian tribe, including those incorporated by federal charter under the IRA.

A. Recognizing section 17 corporations as incorporated Indian tribes is essential to modern tribal sovereignty.

The Ninth Circuit's unprecedented ruling limits Indian tribes' ability to defend their federally protected sovereign right to engage in business without unjustified state taxation, based only on the particular form in which they choose to conduct their business. In holding that a § 17 corporation "is not an 'Indian tribe or band' within the meaning of § 1362," and "therefore may not invoke § 1362 to avoid the Tax Injunction Act's jurisdictional bar," Pet. App. 18, the Ninth Circuit relegated Indian tribes organized under § 17 to second-class status. It erected a barrier blocking § 17 tribes within the circuit from litigating their tax preemption claims in federal courts, unlike Indian tribes organized in any other structure authorized by the IRA.

Congress enacted § 17 of the IRA in 1934 to "permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations." S. Rep. No. 73-1080, p. 1 (1934). Section 17 thus provides one of the primary tools Congress developed to advance a cornerstone objective of the IRA – "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero I* at 152 (quoting H.R. Rep.

No. 73-1804, p. 6 (1934)). Congress and the President viewed this central principle of the IRA as an existential imperative necessary to stave off the "impending extinction, as a race," of the country's indigenous nations. S. Rep. No. 73-1080, p. 4 (reprinting letter from President Franklin D. Roosevelt to Sen. Wheeler).

Still today, "tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues . . . due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenues through more traditional means." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (internal quotation marks omitted). "Self-determination and economic development are not within reach if Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219. Section 17 of the IRA "encouraged" Indian tribes "to revitalize their self-government . . . through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe," so that "a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." *Mescalero I* at 151. The Secretary chartered BSRE and other § 17 corporations nationwide to accomplish these objectives.

In pursuit of these goals and in light of Indian tribes' "historic immunity from state and local control," *Mescalero I* at 152, the Department of the Interior and the Supreme Court have always held that "[a]n Indian

tribe, whether incorporated or unincorporated, is entitled to the same degree of exemption from State taxation[.]" *Wheeler-Howard Act Interpretation*, Opn. M-27810 (Dec. 13, 1934), *reprinted in* 1 *Dep't of the Interior, Opns. of the Solicitor Relating to Indian Affairs 1917-1974*, p. 491. An Indian tribe organized under § 17 has the same immunity under federal law from state taxation as one organized in any other manner, as "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." *Mescalero I* at 157 n.13.[4]

Congress in 1966 lifted jurisdictional barriers to allow all Indian tribes ready access to federal court to protect their rights arising under federal law, 28 U.S.C. § 1362, including their immunity from state taxation, *Moe*, 425 U.S. at 473-74 & n.13. This congressional expansion of Indian tribes' access to federal court carved out an exception from the Tax Injunction Act for actions by Indian tribes under § 1362 seeking to enjoin the enforcement of state tax laws. *Moe* at 474-75. Section 1362 "reflect[s] a congressional policy against relegating Indians to state court." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983).

Section 1362 and § 17 both serve critical functions in the cornerstone federal Indian policies of tribal self-sufficiency and self-government. In the decision below,

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[4] Similarly, for federal tax purposes, tribes incorporated under § 17 are not considered "separate entities" from the tribe. 26 C.F.R. § 301.7701-1(a)(3). Neither organization is subject to federal income tax. *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 261-64 (2013).

the Ninth Circuit significantly diminished the utility of both statutes, limiting Indian tribes' access to justice and economic opportunities. The Court's review on this issue of exceptional importance is necessary to ensure the enactments are interpreted and applied in the manner Congress intended.

B. Supreme Court review is necessary to resolve an inter-circuit conflict and correct the Ninth Circuit's unprecedented statutory construction.

Before this case, no court had held that § 1362 shuts the courthouse doors to § 17 corporations, relegating to state courts their claims that federal law preempts the enforcement of state taxes imposed upon them.

The decision below conflicts with a Tenth Circuit decision involving a federally chartered Indian tribe incorporated under the Oklahoma Indian Welfare Act's § 17 analogue. *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170, 1174 (10th Cir. 1991).[5] The Tenth Circuit held that even though the United Keetoowah Band was "a federally chartered corporation," it nevertheless came before the federal court "as a sovereign entity" to assert "its claim

[5] Modeled on the IRA, the Oklahoma Indian Welfare Act provides in relevant part: "The Secretary of the Interior may issue to any such organized group [of Indians residing in Oklahoma] a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting." 25 U.S.C. § 5203.

of immunity from state regulation," and easily fit within "the plain language of § 1362." *Id.* The Ninth Circuit did not acknowledge the earlier decision or the newly created circuit split.

The Ninth Circuit's interpretation of the phrase "Indian tribe or band" in § 1362 started with the inference that the term "Indian tribe" ordinarily means "a group of native people with whom the federal government has established some kind of *political relationship* or 'recognition.'" Pet. App. 19 (internal quotation marks omitted). The court immediately turned to the legislative history of the Federally Recognized Indian Tribe List Act of 1994 ("List Act"), 25 U.S.C. § 5131, which was enacted three decades *after* § 1362. Based on legislators' 1994 explanation of what it means for an Indian tribe to be formally "recognized" within the meaning of that "legal term of art," H.R. Rep. No. 103-781, p. 2 (1994), the court inferred that in 1966, Congress intended the phrase "Indian tribe or band" to be "limited to 'the Tribe in its constitutional form,' as distinct from its corporate form." Pet. App. 20.

This was an extraordinary stretch, and contrary to basic principles of statutory construction as well as recent decisions of this Court. The court's charge is "to ascertain and follow the original meaning of the law" in question. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2468 (2020). "Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed." *Id*. "Post enactment legislative history is not only oxymoronic but inherently entitled to little weight." *Massachusetts v. E.P.A.*, 549 U.S. 497, 530 n.27 (2007).

Sources that postdate § 1362, such as the List Act, do not demonstrate that § 1362's language carried a specialized meaning at the time of its adoption. *See Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S.Ct. 2434, 2445 (2021).

The Ninth Circuit's statutory construction cannot be squared with *Yellen*, in which the Court rejected a similar effort to "backdate[ ]" the List Act's terminology to define the term "Indian tribe" in earlier legislation. *Id.* at 2445-46. *Yellen* also observed that the term "'[r]ecognized' is too common and context dependent a word" to "always connot[e] political recognition . . . wherever it appears, even in laws concerning Native Americans." *Id.* at 2444-45. Likewise here, one cannot conclude Congress meant to exclude entities that would otherwise be "Indian tribes or bands" simply for not appearing on the list of federally recognized tribes created pursuant to the List Act, not least because no such list existed in 1966 when Congress enacted § 1362.

To the extent the court of appeals believed its resort to far-flung legislative history was necessary to clear up an ambiguous phrase, *id.* at 2468, 2469, the court also discounted its self-admonishment that "statutes passed for the benefit of Indian tribes, such as § 1362, are to be liberally construed, with doubtful expressions being resolved in Indians' favor." Pet. App. 18 (internal quotation marks omitted); *see Bryan v. Itasca Co., Minn.*, 426 U.S. 373, 392 (1976); *see also McGirt* at 2470 (reiterating rule that treaties, like statutes, "are to be construed in favor of, not against, tribal rights").

Instead, the court claimed circuit precedent required the opposite rule, "to 'narrowly construe' the § 1362 'exception to the Tax Injunction Act for Indian tribes.'" Pet. App. 24 (quoting *Ashton v. Cory*, 780 F.2d 816, 820-21 (9th Cir. 1986)). The Ninth Circuit's narrow construction in this case contravenes *Moe*, in which the Court needed no more than an "[]equivocal statement of intent" found in the legislative history to override the "explicit jurisdictional limitation[]" of the Tax Injunction Act. *Moe*, 425 U.S. at 473. *Moe* reflects a pointedly liberal construction of § 1362 that favors Indian tribes, consistent with the "eminently sound and vital" Indian canon of construction. *Bryan*, 426 U.S. at 392.

The Ninth Circuit emphasized that BSRE does not "exercise governmental functions," and the Secretary's issuance of a § 17 charter did not "recognize[]" BSRE "as a distinct political entity or government." But nothing in § 1362 suggests an intent to restrict the statute to a political or governmental entity. On the contrary, § 1362 applies to "*any* Indian tribe or band," without distinguishing among any of the structures in which an Indian tribe or band may be organized.

Two such structures were well known to Congress in 1966 – the tribe organized under a constitution and bylaws pursuant to § 16 of the IRA, and "the incorporated tribe" organized under a federal charter pursuant to § 17 of the IRA. Under § 17, the entity to which the Secretary issues a charter is the "tribe," and § 17 identifies the chartered entity as a type of "tribe." 25 U.S.C. § 5124. The IRA's architects offered tribes these parallel organizational structures to "give the Indians

the control of their own affairs and of their own property; to put it in the hands of either an Indian council or in the hands of a corporation to be organized by the Indians." 78 Cong. Rec. 11125 (1934). They recognized that to entrust tribal property to a chartered corporation, "you have got to have a corporation as wide as the tribe," and drafted § 17 accordingly. To Grant the Indians the Freedom to Organize . . . , Hearing on S. 3045 Before the Senate Comm. on Indian Affairs, 73rd Cong., 254 (1934).

In the years between the enactment of the IRA and § 1362, the leading authority on federal Indian law explained that § 17 was "consistently interpreted by the administrative authorities of the Federal Government and by the tribes themselves as modifying only the structure of the tribe[.]" Felix S. Cohen, *Handbook of Federal Indian Law*, ch. 14 § 4, p. 279 (1941, photo. reprint 1988); *accord* Dept. of Interior, *Federal Indian Law*, ch. VI § B.4 (1958). The Department of the Interior reported that by 1947, "[m]ost tribes" had "supplemented their constitutions and by-laws by adopting charters." U.S. Indian Service, *Ten Years of Tribal Government Under I.R.A.* (Pub. 10M), p. 3 (1947); *id.* Table B (showing 84% of IRA tribes had federal charters). Congress's choice not to limit the scope of § 1362 to actions brought by tribes in their constitutional form demonstrates that Congress intended the law to include actions brought by tribes in their chartered form as well. *See* Pet. App. 48-50 (Berzon, J., acquiescing dubitante); *see also White Mountain Apache Tribe v.*

Williams, 810 F.2d 844, 868 (9th Cir. 1985) (Fletcher, J., dissenting).

Further, the "Indian tribe or band" authorized to bring an action under § 1362 is one "with a governing body duly recognized by the Secretary of the Interior." Again, Congress chose language that encompasses not only a tribe with a recognized *government* or a *political* governing body. Rather, the provision is broadly worded to include tribes with a *corporate* governing body. Section 17 corporations plainly have corporate governing bodies recognized by the Secretary, as it is the Secretary who issues the corporate charter establishing the governing body for the incorporated tribe.

The Ninth Circuit found additional support in its sole reference to § 1362's legislative history, citing "the 'unique *governmental status* of Indian tribes'" as a reason for tribes' "desire to have a Federal forum for matters based upon Federal questions." Pet. App. 20 (quoting H.R. Rep. No. 89-2040, p. 3146 (1966)). In fact, the House Committee was more expansive, citing "the unique relationship which exists between [Indian tribes] and the federal government" – which includes the one-of-a-kind charter issued by the federal government under § 17. H.R. Rep. No. 89-2040, p. 3146. Even more telling, the Committee specifically intended to provide a federal forum "in cases involving tribal lands that either are held in trust . . . or are held by the tribe subject to restriction against alienation imposed by the United States." *Id.* Congress's specific concern applies equally to a tribal government and a § 17 corporation, as § 17 expressly authorizes the charter "to convey to

the incorporated tribe . . . the power to purchase restricted Indian lands" and to own "trust or restricted lands included in the limits of the reservation." 25 U.S.C. § 5124.

Finally, *Moe*'s reasons for holding that the Tax Injunction Act does not bar an Indian tribe's action under § 1362 apply equally to this case. *Moe* involved an "attack on the State's assertion of taxing power" based on the claim that "state taxing jurisdiction has been preempted by . . . federal legislation," read "against the 'backdrop' of the Indian sovereignty doctrine." *Moe*, 425 U.S. at 473, 474 n.13, 475 (quoting *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973)). As *Moe* held, Congress deemed it essential for the plaintiff to have a federal forum hear this type of claim, despite the Tax Injunction Act. Federal laws and tribal sovereignty principles protect "an Indian chartered corporation pursuant to [§ 17]" the same as an Indian tribe that "chooses to conduct its business" in any other form. *Mescalero I*, 411 U.S. at 157 n.13. Therefore, the substantive federal rights that Congress wants adjudicated by federal courts are the same for "any Indian tribe or band," regardless of its structure.

Moe also emphasized the "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* at 472. Congress knew when it enacted § 1362 that the United States could and did represent the interests of § 17 corporations in litigation, as the government had done in a case decided contemporaneously with the

passage of § 1362. *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), *cert. denied sub nom. Maryland Cas. Co. v. Seminole Tribe of Fla., Inc.*, 87 S.Ct. 227 (1966). Again, *Moe*'s rationale compels the conclusion that § 1362 encompasses § 17 corporations.

The Ninth Circuit's atextual, ahistorical and exceptional decision to block incorporated tribes from asserting tax preemption claims in federal courts requires the Supreme Court's review.

II. Federal Indian law preempts California's regulation in Indian country of intertribal commerce.

A. The Ninth Circuit's ruling treats *Indians* on another tribe's reservation worse than *non-Indians* in the same circumstances.

The court below held the *Bracker* balancing test applies when a non-Indian challenges a state's regulation of their on-reservation transactions with the governing Indian tribe, but does *not* apply when the challenger is a nonmember Indian. Pet. App. 35-38. This was an extraordinary departure from the rules set out by the Supreme Court, most recently in *Wagnon*. 546 U.S. at 110-13. Because the Ninth Circuit was not the first court to woefully misread the Court's opinions in this manner, *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012); *Edmondson v. Native Wholesale Supply*, 237 P.3d 199, 216

(Okla. 2010), it is essential for this Court to set the record straight.

In one sense, it is easy to see where the Ninth Circuit and the other courts went wrong. *Bracker* explained that the interest-balancing test addresses the "difficult questions" that arise where "a State asserts authority over the conduct of *non-Indians* engaging in activity on the reservation." 448 U.S. at 144 (emphasis added); *see also Wagnon* at 112 (the "interest-balancing test" applies "exclusively to on-reservation transactions between a *nontribal entity* and a tribe or tribal member") (emphasis added). Furthermore, *Mescalero I* stated, "[a]bsent express federal law to the contrary, Indians going *beyond reservation boundaries* have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. Since BSRE is an Indian entity (not a "non-Indian" or "nontribal entity") and its activity is "beyond" the boundaries of its home reservation, then maybe the *Mescalero I* standard governs and *Bracker* does not apply. But this selective application of imprecise language leads to a wrong and absurd conclusion.

Unpacking the Court's shorthand is required. When *Bracker* said the balancing test applies to the conduct of "non-Indians" on reservations, it meant the conduct of *nonmembers* – including both non-Indians and members of Indian tribes other than the governing tribe of the reservation in question. *Colville*, 447 U.S.

at 160-61.[6] For the purpose of assessing a state's authority over the conduct of Indians who are "on the reservation but not enrolled in the governing tribe," *id.* at 160, "those Indians stand on the same footing as non-Indians . . . on the reservation," *id.* at 161. When BSRE engages in activity on the reservation of another tribe, it is a *nonmember Indian* with respect to its activity in that location. As a nonmember Indian, BSRE is treated as a non-Indian for purposes of the *Bracker* analysis. Under *Bracker*, therefore, a "particularized inquiry into the nature of the state, federal and tribal interests at stake" is required to determine whether California may assert authority over BSRE's conduct on other tribes' reservations. 448 U.S. at 145.

Clarifying the shorthand of *Mescalero I*'s phrase, "beyond reservation boundaries," starts with that opinion's immediately preceding sentence, in which the Court noted, "'State authority over Indians is yet more extensive over activities . . . *not on any reservation*.'" *Mescalero I* at 148 (quoting *Organized Village of Kake*, 369 U.S. at 75) (emphasis added). *Organized Village of Kake* was addressing state authority to police and arrest Indians fishing "outside of Indian country." *Organized Village of Kake* at 75. The Court has since reiterated that "a State may have authority to tax or regulate tribal activities occurring within the State but

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[6] *Bracker*, *Colville*, *Mescalero I* and other decisions also use the term "reservation" as shorthand for "Indian country," which includes more than formally designated reservations. *See* 18 U.S.C. § 1151 (defining "Indian country"); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-26 (1993).

outside Indian country." *Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 755 (1998) (emphasis added); *see also Wagnon* at 112 (Court has not applied interest-balancing test "when a State asserts its taxing authority outside of Indian country"). Thus, when *Mescalero I* held that non-discriminatory state law generally applies "beyond reservation boundaries," it meant that state authority is at its apex "outside of Indian country," beyond the boundaries of *any reservation*.

Only this understanding of the Court's rulebook makes sense. Tribal sovereignty and its "geographical component" are the "backdrop against which the applicable treaties and federal statutes must be read." *Wagnon* at 112; *see Bracker* at 151 (emphasizing the "significant geographical component to tribal sovereignty . . . which remains highly relevant to the pre-emption inquiry"). Outside of Indian country, beyond the boundaries of any reservation, absent express federal laws or treaties to the contrary, "the special geographic sovereignty concerns that gave rise to th[e interest-balancing] test" are not present. *Wagnon* at 113.

But within Indian country, "[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control,' . . . and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *Mescalero II*, 462 U.S. at 332 (quoting *Mescalero I* at 152; *Colville* at 153). "The sovereignty retained by tribes" includes the power to regulate

nonmembers present on the reservation, whether "to exclude nonmembers entirely or to condition their presence on the reservation," *Mescalero II* at 333, or to otherwise "'regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing,'" or (even on fee lands within the reservation) whose conduct affects the tribe's "'political integrity, . . . economic security, or . . . health and welfare,'" *United States v. Cooley*, 141 S.Ct. 1638, 1643 (2021) (quoting *Montana v. United States*, 450 U.S. 544, 565-66 (1981)). Tribes possess this power to regulate nonmembers within Indian country in part because it serves the "broad federal commitment" of encouraging "tribal self-government, . . . 'tribal self-sufficiency and economic development.'" *Mescalero II* at 334-35 (quoting *Bracker* at 143). Therefore, a state's assertion of authority over nonmember conduct in Indian country is always judged for its interference or incompatibility with federal and tribal interests reflected in federal law, against the backdrop of the tribe's sovereign authority to have its own laws govern its relationships with nonmembers within its territory. *Mescalero II* at 334; *Cabazon*, 480 U.S. at 216; *see Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (confirming that "tribes retain considerable control over nonmember conduct on tribal land"); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.").

The Ninth Circuit jettisoned all of this for a superficial gloss of the relevant decisions. By characterizing BSRE's activities within the Indian country of other tribes as "beyond reservation boundaries," and therefore subject to virtually all state authority, the court set up a discriminatory double standard, in which tribal entities engaged in intertribal commerce receive less protection from overreaching state regulation in Indian country than non-Indians would receive in the same circumstances. The disparity not only disadvantages tribal sellers like BSRE, but also devastates the sovereignty of the purchasing tribes on their home reservations.

The Supreme Court previously rejected as "anomalous" and "perverse" similar distinctions that would allow states to impose burdens upon tribal sellers but not non-tribal sellers. *Milhelm*, 512 U.S. at 74. The Court's review is again necessary to halt the corruption of the Court's framework for protecting what remains of tribal sovereignty in Indian country.

B. Supreme Court review is the last bulwark against eroding the Federal commitment to preserve tribal sovereignty and prevent state interference.

The Indian Trader Statutes provide that the "'sole power and authority'" to make "'rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians'" lies in the Department of the Interior. *Central*

Machinery, 448 U.S. at 163 (quoting 25 U.S.C. § 261). Only the "President is authorized to prohibit the introduction of any article into Indian land." *Id.* (citing 25 U.S.C. § 263). "[D]etailed regulations . . . implement these statutes." *Id.* The Indian Trader Statutes implement the Constitutional rule that the "general laws of trade and intercourse are inapplicable" to Indian country "unless otherwise provided," and that "trade and intercourse among the tribes" must be regulated "either by the United States, or by the tribes." H.R. Rep. No. 23-474, p. 19 (1834).

Over fifty years ago, the Supreme Court held that since the dawn of the republic, Congress has comprehensively regulated reservation trade with Indians through the Indian Trader Statutes and their predecessors. *Warren Trading Post*, 380 U.S. at 686-89. The Court was then compelled to say so again, and to emphasize to states reluctant to accept limitations on their authority over commerce within their borders, that the "existence of the Indian trader statutes . . . not their administration, . . . pre-empts the field of transactions with Indians occurring on reservations." *Central Machinery*, 448 U.S. at 165. So long as the statutes remain on the books and the transaction is an on-reservation sale to an Indian tribe or tribal member, "[i]t is irrelevant that [the seller] is not a licensed Indian trader." *Id*.

In the decision below, the Ninth Circuit spurned the clear directive of *Warren Trading Post* and *Central Machinery*, refusing to accept that the Indian Trader Statutes represent the federal government's

comprehensive regulation of sales to Indians in Indian country. Pet. App. 38-39. Only the continued "existence of the Indian trader statutes" is needed; licensing and other federal "administration" of the statutes is "irrelevant." *Central Machinery* at 165. Yet the Ninth Circuit required that the federal government actively "exercise[]" its oversight authority, either by licensing BSRE as an Indian trader, approving its sales, or issuing regulations more pointedly targeting cigarette sales. Pet. App. 39; *cf.* 25 C.F.R. § 140.17 ("No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.").

Only Supreme Court review is likely to set things right. Congress has been satisfied with the state of the Indian Trader Statutes for over a century. It last amended any of the statutes in 1903. 25 U.S.C. § 262. The oldest is unchanged since 1834. 25 U.S.C. § 263; *see* Act of June 30, 1834, ch. 161, § 3, 4 Stat. 729. The Bureau of Indian Affairs ("BIA") stopped regularly issuing Indian trader licenses decades ago, around the same time *Central Machinery* confirmed that having a federal license was irrelevant to the preemption of state taxation, and in keeping with the burgeoning federal policy favoring tribal self-government over intrusive federal involvement in reservation affairs. *See United States ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401, 403 (8th Cir. 1980) ("bureaucratic nonfeasance makes it impossible to obtain the federal trader's license"), *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) (reinstating action to require federal officials to adopt and enforce regulations governing

traders doing business on Navajo Indian Reservation); *Flandreau Santee Sioux Tribe v. Terwilliger*, 496 F.Supp.3d 1307, 1318, 1361 (D.S.D. 2020) (noting that local BIA did not issue Indian trader licenses, and instead "delegate[d] the responsibility for regulating on-reservation trade to tribes"); Traders With Indians, 81 Fed. Reg. 89,015, 89,016 (Dec. 9, 2016) (proposing to modernize Indian trader regulations "consistent with the Federal policies of tribal self-determination and self-governance"); *see also* 25 U.S.C. § 4301(b)(5), (c) (expressing federal policy encouraging intertribal trade, specifically aimed at Indian-owned businesses governed by tribal laws or the Indian Trader Statutes); *id.* § 5301(a) (expressing federal policy favoring tribal control of Indian people's relationships among themselves and with non-Indians).

This lack of active federal administration created the licensure void that required the *Central Machinery* Court to reaffirm that the Indian Trader Statutes are *inherently* comprehensive and preemptive, and remain so "[u]ntil Congress repeals or amends" them. *Central Machinery* at 166. Since it is this pronouncement the Ninth Circuit's ruling would unravel, and since the administration of the Indian Trader Statutes has not changed materially since then, it falls to this Court again to confirm the position of the Indian Trader Statutes in defining the relationship among the federal government, the states, and Indian tribes.

C. California's cigarette regulations fail the exacting scrutiny required by *Milhelm* and unduly interfere with Federal policy and reservation Indians' right to self-government.

Fourteen years after *Central Machinery*, the Court decided *Milhelm*, and again characterized the Indian Trader Statutes as part of Congress's "'sweeping' and 'comprehensive federal regulation' over persons who wish to trade with Indians and Indian tribes." *Milhelm*, 512 U.S. at 70 (quoting *Warren Trading Post* at 687-89). But while *Warren Trading Post* and *Central Machinery* suggested "that no state regulation of Indian traders can be valid," *Milhelm* tempered the absolute pitch of those decisions by admitting a tailored exception the Court deemed minimally burdensome and "reasonably necessary" to preventing the evasion of valid taxes "without unnecessarily intruding on core tribal interests." *Milhelm* at 71, 75. *Milhelm* held that "Indian traders are not wholly immune from state regulation that is *reasonably necessary to the assessment or collection of lawful state taxes*." *Id.* at 75 (emphasis added); *see id.* at 73 (basing Indian trader standard on existing rule permitting "*minimal burdens reasonably tailored to the collection of valid taxes from non-Indians*") (emphasis added). State regulations on Indian traders are preempted when they fail to meet this standard of exacting scrutiny. *See Cayuga*, 14 N.Y.3d at 647-53; *see also Americans for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383 (2021) (similar test in First Amendment context labeled "exacting scrutiny").

The Ninth Circuit's truncated discussion of *Milhelm* and the Directory Statute neglected to apply or even acknowledge the *Milhelm* standard, and therefore upheld a regulatory system that does not comply with the Supreme Court's requirements. Pet. App. 39-40. Its decision not only rejects *Milhelm*, but also conflicts with *Cayuga*, in which the high court of the State of New York correctly applied *Milhelm*'s exacting test to state regulations that, like California's, disregarded the federally protected right of tribal members to buy goods and services in Indian country free from unwarranted state burdens. *Cayuga*, 14 N.Y.3d at 647.

The Directory Statute fails *Milhelm*'s exacting scrutiny because the circumstances that permitted minimal state regulation in *Milhelm* are not present here. The Directory Statute has nothing to do with "the collection of lawful state taxes," *Milhelm* at 75, but serves the entirely different purpose of ensuring compliance with the Escrow Statute, which is designed to increase the retail price of non-participating manufacturers' cigarettes to protect the market share of participating manufacturers. Cal. Rev. & Tax. Code § 30165.1(b); Cal. Health & Safety Code § 104557(a); ER 94-95 (FAC ¶ 36-40). The Directory Statute is therefore not "reasonably necessary" or "reasonably tailored" to the only legitimate government interest the Supreme Court has recognized as sufficient to justify the intrusion into tribal commerce.

The decision below is also flawed in its insistence that the Directory Statute leaves BSRE "'free to sell Indian tribes and retailers as many cigarettes' as it

wishes, 'of any kind, and at whatever price.'" Pet. App. 40 (quoting *Milhelm* at 75); *cf.* 25 U.S.C. § 261. That was true in *Milhelm* only because the Court assumed New York's "probable demand" calculations would allow an adequate number of tax-free cigarettes to be available to tribal member customers, so that "tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption." *Milhelm* at 75. The Directory Statute, however, allocates *zero* off-directory cigarettes to tribal member consumers. It therefore dictates that the brands or kinds of cigarettes available to tribal members are only those on the California directory, substituting the State's policy judgments for those of the members' tribal governments.

The acute divergence from *Cayuga* illustrates why this Court's review is needed to harmonize the opposing approaches to preemption under the Indian Trader Statutes. *Cayuga* arose when New York officials replaced the *Milhelm*-approved system with one that sought to regulate reservation sellers but now lacked "an overarching methodology for adapting the tax scheme to the unique context of [tax-exempt] reservation sales." *Cayuga*, 14 N.Y.3d at 650; *see Milhelm* at 65. *Cayuga* recognized that "[t]he careful analysis undertaken by the Supreme Court in *Milhelm* would have been unnecessary if no specialized mechanism is needed to apply a general tax stamping scheme to sales by Indian retailers." *Cayuga* at 650. The new "ad hoc" system provided no way for sellers to know how

many unstamped cigarettes a retailer may lawfully possess and so created such uncertainty that it was judged "unduly burdensome." *Id.* at 651 (quoting *Milhelm* at 76).

California's Directory Statute presents the same problem: even though tribal members on their home reservations are unquestionably entitled to obtain tax-exempt cigarettes to which the Directory and Escrow statutes do not apply, California law nevertheless bars BSRE from selling off-directory cigarettes to them. Absent a specialized mechanism that ensures cigarettes exempt from state regulation may be lawfully delivered and sold to Indians in Indian country, the California regulation fails to meet *Milhelm*'s standard because it is not reasonably tailored to accomplish a valid state purpose while leaving tribal rights intact. This action presents the opportunity for the Court to repair the widening gulf among lower courts as they address these issues that are critical to tribal economies and self-government.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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