No. ____

In The
Supreme Court of the United States

SCOTT B. MAYBEE D/B/A SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM AND ORDERSMOKESDIRECT.COM

Petitioner,

v.

STATE OF IDAHO, BY AND THROUGH LAWRENCE G. WASDEN, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1998, the Attorneys General of 46 states, five U.S. territories and the District of Columbia (the "Settling States") settled various legal actions involving antitrust, product liability and consumer protection claims against the nation's four largest tobacco companies. In exchange for substantial sums of monies, tied in part to sales volume, to be paid by settling manufacturers, each Settling State agreed to enact and diligently enforce a qualifying escrow statute that would artificially inflate costs for other tobacco manufacturers and which "effectively and fully neutralizes the cost disadvantage that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers." The question presented to the Court is whether a Settling State may prohibit the sale of certain brands of cigarettes manufactured by tobacco companies that have never been sued, or otherwise alleged or found culpable for conduct giving rise to liability.

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OPINION BELOW

The opinion of the Supreme Court of the State of Idaho ("Idaho Supreme Court") is reported at 148 Idaho 520, 224 P.3d 1109 (2010) and is reprinted in the Appendix, App. 1-37. The memorandum decision and order of the District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Ada ("District Court"), granting summary judgment in favor of Respondent and affirmed by the Idaho Supreme Court, is unreported, but is reprinted in the Appendix, App. 38-49.

JURISDICTION

The Idaho Supreme Court filed its opinion on January 15, 2010, affirming the judgment entered by the District Court on February 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 1

Article I of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Const. Art. I, § 8, cl. 3

The Commerce Clause of the United States Constitution provides, "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian

Tribes."

U.S. Const. Art. I, § 10, cl. 2

The Import-Export Clause of the United States Constitution provides, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; . . . ."

U.S. Const. Art. VI, cl. 2

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Idaho Code § 39-8401

The Tobacco Master Settlement Agreement Complementary Act (the "Complementary Act"), codified at Title 39, Chapter 78 of the Idaho Code, was enacted as "procedural enhancements [to] help prevent violations of Idaho's tobacco master settlement agreement act and thereby safeguard the master settlement agreement, the fiscal soundness of the state and the public health."

Idaho Code § 39-8403

The Complementary Act contains a certification provision, codified at Idaho Code § 39-8403(1), which provides:

> Every tobacco product manufacturer whose cigarettes are sold in this state whether directly or through a wholesaler, distributor, retailer or similar intermediary or intermediaries shall execute and deliver . . . a certification to the attorney general . . . certifying, under penalty of perjury, that . . . such tobacco manufacturer is either: a participating manufacturer [to the Master Settlement Agreement] or in full compliance with [the escrow payment requirements set forth in] section 39-7803(b), Idaho Code, including all quarterly installment payments required by section 39-8405(5), Idaho Code. . . .
>
> (b) A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families that were sold in the state at any time . . .
>
> (d) A tobacco product manufacturer may not include a brand family in its certification unless: . . . .
>
> (ii) In the case of a nonparticipating manufacturer, said non-

> participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of [calculating escrow payments pursuant to] section 39-7803(b), Idaho Code.

The directory provision, Idaho Code § 39-8403(2), provides:

> [T]he attorney general shall develop and publish on his website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (1) of this section, and all brand families that are listed in such certification . . .

The prohibitive provision, Idaho Code § 39-8403(3), provides:

> It shall be unlawful for any person:
>
> (a) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory;
>
> (b) To sell, offer or possess for sale in this state, cigarettes of a tobacco manufacturer or brand family not included in the directory;
>
> (c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribu-

> tion or sale in the state in violation of this subsection (3)

The Complementary Act is re-printed in the Appendix, App. 69-81.

STATEMENT OF THE CASE

The case concerns the authority of a State to prohibit interstate sales of certain cigarette brands manufactured by companies that are not parties to the Master Settlement Agreement.

A. Factual Background

Scott B. Maybee ("Maybee") is an enrolled member of the Seneca Nation of Indians ("Seneca Nation"), a federally recognized Indian tribe whose tribal territory is located within western New York State. Maybee is authorized and licensed by the Seneca Nation to conduct business as a tobacco retailer on the Seneca Nation Allegany Territory.

From his place of business on tribal land, Maybee offers adult smokers nationwide a variety of tobacco products for their personal use and consumption. Those tobacco products include cigarette brands not commonly available in brick-and-mortar stores, manufactured by small domestic or foreign manufacturers. Native American manufacturers are among the domestic and foreign manufacturers whose brands are sold by Maybee. All manufacturers or their importers hold federal permits and pay federal excise taxes, authorizing these brands to be sold in the United States.

Age-verified Idaho adults are among Maybee's consumers who purchase cigarettes and other tobacco products in non-face-to-face transactions, known as "delivery sales." Maybee receives tobacco orders from adult consumers via phone, mail, fax or other electronic transmissions, and then completes these non-face-to-face sales by delivering products to the United States Postal Service. Maybee completes these delivery sales without leaving his place of business on the Seneca Nation Allegany Territory.

Maybee has no outlets, offices, employees, sale representatives, agents, inventory or other tangible property in Idaho. His only contact with his Idaho consumers is through instruments of interstate commerce. Having no substantial nexus to Idaho, he has sold cigarettes to Idaho smokers, for which Idaho taxes have not been pre-collected through the affixing of Idaho tax stamps. Maybee, however, informs his delivery customers they are responsible for the payment of all applicable state and local tobacco taxes. He then reports all interstate sales and shipments to the State taxing authority pursuant to the provisions of the Jenkins Act, 15 U.S.C. § 375 *et seq.*

The State of Idaho, by and through Lawrence G. Wasden, Attorney General ("Idaho") brought this action against Maybee seeking to enjoin him from offering or selling, in interstate commerce, certain cigarette brands to Idaho consumers. The brands at issue are manufactured by tobacco companies that are not parties to the 1998 Master Settlement Agreement ("non-participating manufacturers"). Because these manufacturers have never been sued, or otherwise alleged or found culpable for conduct giv-

ing rise to liability, they are not parties to any settlement agreement. Nonetheless, Idaho asserts, under state law, brands manufactured by these non-participating manufacturers may not be sold to Idaho consumers.

B. Statutory Background

On November 23, 1998, the Attorneys General of 46 states, five U.S. territories and the District of Columbia (the "Settling States") settled various legal actions involving antitrust, product liability and consumer protection claims against the nation's four largest tobacco companies, Phillip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson. The agreement became known as the Master Settlement Agreement.

In exchange for releases of past, present and certain future claims brought against them, these settling manufactures ("participating manufacturers") agreed "to pay substantial sums" to the Settling States on an annual basis. The original participating manufacturers knew they would have to substantially raise cigarette prices to pay for their annual financial obligations to these Settling States. They also knew, by raising their prices, other non-participating manufacturers would have a competitive price advantage reducing the overall market share for participating manufacturers.

As part of the agreement, Settling States agreed to enact and diligently enforce qualifying escrow statutes that "effectively and fully neutralize" competition from non-participating manufacturers. Such statutes impose financial obligations on non-

participating manufacturers by requiring them to make escrow payments based on the number of stamped cigarettes sold in a Settling State. To ensure compliance with the terms of the Master Settlement Agreement, the settling parties attached a model qualifying statute to the agreement. Most, if not all, Settling States have enacted the model qualifying statute that obligates non-participating manufacturers to make escrow payments.[1] Idaho is one of the Settling States.

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[1] *Compare* Idaho Code § 39-7803 (2010) *with* Ala. Code § 6-12-3n (2010); Alaska Stat. § 45.53.020 (2010); Ariz. Rev. Stat. Ann. § 44-7101 (2010); Ark. Code Ann. § 26-57-261 (2010); Cal. Health & Safety Code § 104557 (West 2010); Colo. Rev. Stat. § 39-28-203 (2010); Conn. Gen. Stat. § 4-28i (2010); Del. Code Ann. tit. 29, § 6082 (2010); D.C. Code § 7-181.02 (2010); Ga. Code Ann. § 10-13-3 (2010); Haw. Rev. Stat. § 675-3 (2010); 30 Ill. Comp. Stat. Ann. 168/15 (West 2010); Ind. Code § 24-3-3-12 (2010); Iowa Code Ann. § 453C.2 (West 2010); Kan. Stat. Ann. § 50-6a03 (2010); La. Rev. Stat. Ann. §13:5063 (2010); Me. Rev. Stat. Ann. tit. 22 § 1580-I (2010); Md. Code Ann., Bus. Reg. § 16-403 (West 2010); Mass. Gen. Laws ch. 94E, § 2 (2010); Mich. Comp. Laws § 445.2052 (2010); Mo. Rev. Stat. § 196.1003 (2010); Mont. Code Ann. § 16-11-403 (2010); Neb. Rev. Stat. § 69-2703 (2010); Nev. Rev. Stat. § 370A.140 (2010); N.H. Rev. Stat. Ann. § 541-C:3 (2010); N.J. Stat. Ann. § 52:4d-3 (West 2010); N.M. Stat. § 6-4-13 (2010); N.Y. Pub. Health Law § 1399-pp (McKinney 2010), N.C. Gen. Stat. § 66-291 (2010); N.D. Cent. Code § 51-25-02 (2010); Ohio Rev. Code Ann. § 1346.02 (West 2010); Okla. Stat. Ann. tit. 37 § 600.223 (West 2010); Or. Rev. Stat. § 323.806 (2010); 35 Pa. Stat. Ann. § 5674 (West 2010); R.I. Gen. Laws § 23-71-3 (2010); S.C. Code Ann. § 11-47-30 (2010); S.D. Codified Laws § 10-50B-7 (2010); Tenn. Code Ann. § 47-31-103 (2010); Utah Code Ann. § 59-22-203 (2010); Vt. Stat. Ann. tit. 33, § 1914 (2010); Wash. Rev. Code § 70.157.020 (2010); W. Va. Code § 16-9B-3 (2010); Wyo. Stat. § 9-4-1202 (2010); Guam Code Ann., tit.5,§ 221203 (2010); P.R.

In 1999, Idaho enacted the Tobacco Master Settlement Agreement Act, codified at Title 39, Chapter 78 of the Idaho Code, as its qualifying escrow statute (the "Escrow Statute" or "MSAA"). The Escrow Statute imposes on non-participating manufacturers "selling cigarettes to consumers within the state" an obligation to make escrow payments on the number of stamped cigarettes sold in Idaho. Idaho Code § 39-7803.

Not all brands sold to Idaho consumers are subject to escrow payments. Participating manufacturers are not subject to such payments. *Id.* Non-participating manufacturers that have never been sued or found culpable for conduct giving rise to liability are the only manufacturers required to make escrow payments. *Id.*

Escrow funds are payable to the State only if a non-participating manufacturer is later found culpable for conduct giving rise to liability to the State. Idado Code §§ 38-7801(f), 39-7803(b)(2). If no culpable conduct is ever established, these funds are released from escrow and returned to the non-participating manufacturer after 25 years. Idaho Code § 39-7803(b)(2).

By requiring non-participating manufacturers to make payments prior to a court finding culpable conduct, the Escrow Statute achieves its real objective -- artificially inflating costs for non-participating manufacturers and thereby "effectively and fully neutralizes the cost disadvantage" that participating

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Laws Ann. tit. 24, § 15002 (2010); 27 V.I. Code R. § 305d (Weil 2010).

manufacturers would have suffered by raising their prices to cover their settlement costs. Ironically, consumers and non-participating manufacturers ultimately pay the cost for the alleged culpable conduct of settling manufacturers.

Non-participating manufacturers are required to make escrow payments based on the number of "units sold" in Idaho (i.e. the number of stamped cigarettes sold in the State). Idaho Code §§39-7802(j); 39-7803(b)(1). Since escrow payments are based on the number of "units sold," not the "units used," in Idaho, unstamped cigarettes sold in interstate commerce are not considered "cigarettes sold in the state" for purposes of the Escrow Statute. Consequently, Idaho concedes unstamped cigarettes sold by Maybee do not trigger the application of the Escrow Statute.

In 2003, the Idaho Legislature found violations of the Escrow Statute threatened the integrity of the Master Settlement Agreement, the fiscal soundness of the State and the public health. Idaho Code § 39-8401. The Tobacco Master Settlement Agreement Complementary Act (the "Complementary Act"), codified at Title 39, Chapter 78 of the Idaho Code, was enacted so non-participating tobacco manufacturers could not avoid their escrow obligations under the Escrow Statute. (App. 3) ("[T]he goal of the Complementary Act was to prevent end-runs around the fee requirement of the MSA and the escrow requirement" of the Escrow Statute). It imposes obligations not only on tobacco manufacturers, but also on any "wholesaler, distributor, retailer, or similar intermediary or intermediaries"

(collectively, "tobacco dealers") that distribute cigarettes for sale in Idaho. Idaho Code § 39-8401 *et al.*

The Complementary Act requires "[e]very tobacco manufacturer whose cigarettes are sold in this state" to certify to the Idaho Attorney General "a complete list of all of its brand families that were sold in the state at any time." Idaho Code § 39-8403(1)(b). A non-participating manufacturer may only include on its certified list brands that are subject to escrow payments. Idaho Code § 39-8403(1)(d).

From these manufacturers' certifications, the Attorney General develops and publishes a directory of all cigarette brands that are certified and approved for sale in Idaho (the "Directory"). Idaho Code § 39-8403(2). Cigarettes not listed on the Directory may not be distributed, sold, stamped, offered, or possessed "for sale in this state." Idaho Code § 39-8403(3).

C. State Court Proceedings

On September 22, 2006, Idaho filed its verified complaint in the District Court. The complaint alleges Maybee violated the Complementary Act by selling and offering for sale to Idaho consumers cigarettes not listed on the Directory. After hearing cross-motions for summary judgment, the Honorable Kathryn A. Sticklen granted summary judgment in favor of Idaho. (App. 48). After denying Maybee's motion for reconsideration, the District Court entered a judgment enjoining Maybee from selling cigarettes not listed on the Directory. (App.50-53).

Maybee appealed to the Idaho Supreme Court. He argued the Complementary Act could not be statutorily or constitutionally enforced against an out-of-state Native American delivery seller who sells unstamped cigarettes outside of Idaho, which are delivered to Idaho consumers by the United States Postal Service. The Idaho Supreme Court rejected Maybee's argument and affirmed the District Court's judgment.

In an opinion issued on January 15, 2010, the Idaho Supreme Court ruled although the Escrow Statute "regulates only stamped cigarettes," "the plain language of the Complementary Act demonstrates a legislative intent to regulate the sale of all cigarettes," both stamped and unstamped. (App. 18). The Court found:

> [U]nder Maybee's proposed interpretation, Non-Participating Manufacturers based outside of Idaho could avoid their escrow obligations altogether by simply selling their cigarettes directly to Idaho consumers through the mail, or through an out-of-state retailer who would sell directly to Idaho consumers through the mail, rather than through in-state wholesalers and retailers. . . .[T]his argument glosses over the fact that . . . Non-Participating Manufacturers that do not comply with the MSAA's escrow requirements deprive the State of financial assets, which are needed to defray medical care costs that have arisen as a result of tobacco-related health issues.

(App. 18). For these reasons, the Court held Idaho had the statutory authority to enforce the Complementary Act against Maybee.

The Idaho Supreme Court then rejected Maybee's constitutional defenses. In regard to the dormant aspects of the Interstate Commerce Clause, the Court ruled:

> There is no evidence that Idaho's Complementary Act treats interstate sellers any differently from intrastate sellers, that the burdens on interstate commerce outweigh the local benefits, nor that the Act is attempting to regulate activities occurring wholly outside of Idaho. Therefore, we hold that the Complementary Act, as interpreted, is not preempted by the Interstate Commerce Clause.

(App. 26-27). Finally, the Court found no violation of the Indian Commerce Clause, ruling "the regulated conduct occurred off-reservation, and so the *Bracker* balancing test does not apply." (App. 34).

D. Enactment of the PACT Act

After the Idaho Supreme Court issued its opinion, President Barack Obama signed the Prevent All Cigarette Trafficking ("PACT") Act into law on March 31, 2010. PACT Act, Pub. L. No. 111-154, 124 Stat. 1087. The PACT Act amends three federal statutes: the Jenkins Act, 15 U.S.C. § 375 *et seq.;* the Postal Crime Act, 18 U.S.C. § 1691 *et seq.;* and the Cigarette Contraband Trafficking Act ("CCTA"), 18

U.S.C. § 2341 *et seq.* All amendments, except those to the CCTA, will take effect on June 29, 2010. PACT Act, Pub. L. No. 111-154, § 6, 124 Stat. 1087, 1110-11.

After June 29, 2010, delivery sellers will be required to pay state and local tobacco taxes on cigarettes and smokeless tobacco sold in interstate commerce to consumers. *Id.*, § 2, 124 Stat. at 1093. Any required tax stamps or other indicia must be properly affixed or applied to cigarettes before being shipped to consumers in interstate commerce. *Id.* The PACT Act is not in any way "meant to create a precedent regarding the collection of State sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State entities that do not have a physical presence within the taxing State." *Id.* § 8, 124 Stat. at 1111.

In an earlier version of the PACT Act, its initial sponsors intended tobacco manufacturers and importers to be subject to those state laws requiring escrow payments on all cigarettes bearing state tax stamps. *Compare* 155 Cong. Rec. S5859-60 (daily ed. May 21, 2009)(Sec. 4. Compliance with Model Statute or Qualifying Statute) *with* Pub. L. No. 111-154, §§ 3-5, 124 Stat. 1087, 1103-10. The Senate removed these provisions from the final version which was signed into law. *Id.* Additionally, nothing in the PACT Act should be construed to amend, modify, or otherwise effect:

> any limitation under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax

> and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country [or] . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . .

Pub. L. No. 111-154, § 5, 124 Stat. at 1110. Consequently, the PACT Act preserves for review Maybee's constitutional challenges to Idaho's Escrow Statute and Complementary Act.

REASONS FOR GRANTING THE PETITION

A State, like Idaho, has a legitimate interest in stopping its citizens from smoking and in raising revenues to cover the smoke-related medical costs incurred for its citizens. States, therefore, may impose a nondiscriminatory tax or otherwise regulate the distribution, sale and possession of all cigarettes, which come within their respective borders, as part of the "regulatory sphere traditionally occupied by . . . the States" for the health, safety and welfare of its citizens. *General Motors Corp. v. Tracy*, 519 U.S. 278, 313 (1997) (Scalia, J., concurring). Yet, despite its health-effects, no State, including Idaho, has banned adult smokers from purchasing or using cigarettes. Cigarettes are, therefore, a lawful product available for sale in local gas stations, drug

stores, grocery and convenience stores within Idaho, and through vendors who sell and ship in interstate commerce.

I. THE CONFLICT PRESENTED BY THE IDAHO TOBACCO SCHEME RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND DRAWS INTO DOUBT THE VALIDITY OF STATUTES ADOPTED BY A MAJORITY OF STATES.

The Framers of the United States Constitution envisioned a national, free market, unobstructed by state and local boundaries and restraints, "to ensure the liberty and progress of the whole Nation and its people." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 362 (2008) (Kennedy, J., dissenting).

> [E]very farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949). *Id.* at 206-07.

In this case, Petitioner asserts Idaho and other Settling States have strayed from their traditional exercise of police powers and have usurped the authority given to Congress under the Constitution. The Court is called upon to review state tobacco statutes limiting access to certain brands sold in interstate commerce and which artificially inflate costs for some cigarettes sold in interstate commerce. The avowed purpose "effectively and fully neutralizes the cost disadvantage" experienced by large tobacco manufacturers. The financial incentives given by these large tobacco manufacturers to Settling States for enacting and diligently enforcing such statutes does not justify the burdens placed on their smaller competitors that ultimately shoulder the burdens of these financial incentives.

A. The Idaho Opinion Offers this Court Another Opportunity to Debate the Constitutional Scope of the Negative Commerce Clause.

Article I of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. Among the enumerated powers granted to Congress in Article I is the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. Although the Commerce Clause does not expressly reserve power to, or restrain the power of "the several States," the Court has read a negative implication limiting the exercise of State regulatory authority in the absence of express congressional

consent. *Davis*, 553 U.S. at 337; *but see Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part) ("The historical record provides no grounds for reading the Commerce Clause to be other than what it says -- an authorization for Congress to regulate commerce.").

The Court's dormant cases have invalidated two types of local barriers to a free and open national market. First are laws discriminating against interstate commerce. Second are laws imposing unreasonable burdens upon interstate commerce. *Davis*, 553 U.S. at 338-39.

In recent years, the Court has "struggled (to put it nicely) to develop a set of rules . . . [to] preserve a national market without needlessly intruding upon the States' police powers." *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997) (Scalia, J., with whom Chief Justice Rehnquist, Justices Thomas and Ginsburg joined, dissenting). Some members of the Court have commented the "negative Commerce Clause jurisprudence has drifted far from its moorings," designed originally to foster a national market for commercial activity. *Id.* at 595. But one thing is certain -- the Court's perception of the negative Commerce Clause is shifting.

Courts, attorneys and legislators throughout the Nation look to this Body to guide them as to the constitutional limits placed on governmental power.

> People want to know under what circumstances and how far they will run

> the risk of coming against what is so much stronger than themselves, and hence it becomes a business [for lawyers] to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

Petitioner is a Native American tobacco seller who has sold cigarettes to Idaho consumers. Under the Uniform Commercial Code § 2-401(2), codified at Idaho Code § 28-2-401(2), Petitioner's sales to Idaho consumers took place outside of Idaho, on the Seneca Nation territory located in western New York State. Idaho's Complementary Act prohibits a person from selling or offering unlisted cigarettes "for sale in this state." Idaho Code § 39-8403(3)(b). The Complementary Act does not define a sale or an offer for sale. Petitioner reasonably believed his sales of unstamped cigarettes did not trigger the application of the Complementary Act.

Idaho had home "court" advantage in arguing these questions of first impression. In regard to Maybee's statutory claims, the Idaho Supreme Court ruled, without citation to any common or statutory law, in favor of Idaho and held:

> [T]he Uniform Commercial Code is irrelevant to the determination of where Maybee's cigarette sales took place, and that those cigarette sales did, in fact,

> take place in Idaho for purposes of the Complementary Act.

(App. 23).

Petitioner now seeks review by this Court of his constitutional claim and a determination as to which "path" the negative Commerce Clause will take with respect to these challenged statutes adopted by 46 states, the District of Columbia and five United States territories.

1. *The Tobacco Scheme Discriminates Against Goods Sold in Interstate Commerce.*

Nothing on the face of the Complementary Act discriminates against interstate commerce. The Idaho Supreme Court found the Complementary Act "prohibits both intrastate and interstate parties from selling or offering for sale, Noncompliant Cigarettes in Idaho. *See* I.C. § 39-8403(3)." (App. 25). However, when the Complementary Act is read *in pari materia* with the Escrow Statute, the scheme reveals its discriminatory effect. *Compare* Idaho Code § 39-7803 *with* Idaho Code § 39-8403.

An out-of-state delivery seller cannot sell brands unless the tobacco manufacturer has certified the brand for sale in the state with the Attorney General. Idaho Code § 39-8403(3)(b). (App. 23). The Attorney General will not certify a brand unless the brand has been stamped and sold in the State at one time, thereby triggering the tobacco manufacturer's obligation under the Escrow Statute. *Cf.* Idaho Code § 39-8403(1)(d)(ii). Although tobacco manufacturers

are not obligated to make escrow payments on unstamped cigarettes sold in interstate commerce, the current scheme creates an unconstitutional "catch-22" for both the manufacturer and the delivery seller. *Compare* Idaho Code § 39-7802(j) *with* Idaho Code § 39-7803(1)(b).

A manufacturer cannot certify a brand unless the cigarettes are subject to escrow payments and only cigarettes stamped and sold in the State are subject to escrow payments. *Compare* Idaho Code § 39-8403(1)(d)(ii) *with* Idaho Code § 39-7803(1)(b). Based on the ruling of the Idaho Supreme Court, a delivery seller cannot sell unstamped brands in interstate commerce to Idaho consumers unless those brands have been certified for sale (App. 36) and therefore, must been sold by in-state tobacco sellers at one time. In other words, an out-of-state delivery seller can sell or offer for sale only brands previously available to consumers by in-state sellers. Idaho consumers are denied access to interstate delivery sellers offering a wide variety of brands, not available for sale at local brick-and-mortar outlets. Small manufacturers are closed out of the local market by in-state brick-and-mortar sellers that have not and will not carry their brands due to their limited retail shelf space and distribution agreements with large tobacco manufacturers, which restrict offering competing brands. More importantly, Idaho consumers have no reason to purchase brands already available locally from out-of-state delivery sellers. The only competitive advantage delivery sellers once had was the ability to offer consumers a wide variety of brands at affordable prices. This advantage is "effectively and fully"

eliminated by this regulatory scheme. The scheme, therefore, benefits local interests by burdening out-of-state competitors. *Davis*, 553 U.S. at 337.[2]

2. *The Tobacco Scheme Directly Regulates and Unduly Burdens Interstate Commerce.*

The negative Commerce Clause debate within the Court has focused on the "undue burden" rule to which various balancing tests have been applied. On one side of the debate are those who argue the doctrine "remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act." *Davis*, 553 U.S. at 364-65 (Kennedy, J., with whom Justice Alito joined, dissenting). On the other side are those who argue "balancing of various values" should be left to Congress, "which is precisely what the Commerce Clause . . . envisions." *United Haulers Assn., Inc. v.*

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[2] In rejecting Petitioner's statutory argument that his out-of-state sales do not trigger the application of either the Escrow Statute or the Complementary Act, the Idaho Supreme Court found:

> [U]nder Maybee's proposed interpretation, Non-Participating Manufacturers based outside of Idaho could avoid their escrow obligations altogether by simply selling their cigarettes directly to Idaho consumers through the mail, or through an out-of-state retailer who would sell directly to Idaho consumers through the mail, rather than through in-state wholesalers and retailers. Such a result would violate not only the spirit of the [Master Settlement Agreement] but also Idaho public policy, and would be detrimental to the fiscal soundness of the State. (App. 18)

Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 349 (2007) (Scalia, J., concurring in part); *Camps,* 520 U.S. at 619 (Thomas, J., with whom Chief Justice Rehnquist and Justice Scalia joined, dissenting). Inevitably, the majority of the Court has refrained from preempting State authority in cases in which "a cost-benefit analysis would be a very subtle exercise." *Davis*, 553 U.S. at 353-54; *see also id.* at 360 ("It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. . . . Of course you cannot decide which interest 'outweighs' the other without deciding which interest is more important to you.") (Scalia, J., concurring in part). The negative Commerce Clause analysis in this case, however, would not require the Court to engage in a "subtle" exercise of deciding "whether three apples are better than six tangerines."

Prior to the enactment of the PACT Act, non-participating manufacturers had no obligation to make escrow payments on unstamped cigarettes sold in interstate commerce to consumers. The Idaho Supreme Court, however, would prevent these manufacturers' brands from being directly sold to consumers in interstate commerce. (App. 18). After the PACT Act goes into effect, all cigarettes sold in interstate commerce will be required to be stamped prior to sale, thereby triggering the application of qualifying escrow statutes in 51 jurisdictions.

The escrow and certification requirements mandated by these qualifying and complementary statutes impose obligations on both domestic and foreign manufacturers exporting products into one of

the 51 Settling States. These requirements can only be satisfied by these manufacturers, and not by an importer, "wholesaler, distributor, retailer or similar intermediary." A non-participating manufacturer whose brands are sold in any Settling State must establish a separate escrow account for each State. Given the chain of distribution between the manufacturer and the ultimate consumer, the certification procedure is cumbersome, particularly for foreign manufacturers. A non-participating manufacturer does not have access to records kept by State stamping agents or State taxing authorities, which would show the number of cigarettes stamped for sale in a particular State. In many Settling States, this information is not subject to public disclosure and is confidential. This information, however, is necessary for the non-participating manufacturer to fulfill its post-PACT Act escrow and certification obligations.

This challenge also presents a new wrinkle yet to be explored by the Court. At the core of each dormant case analysis conducted by this Court has been a regulatory scheme to which a State claimed a present interest in the activity being regulated. *See, e.g., Quill v. North Dakota*, 504 U.S. 298 (1992) (reviewing a nondiscriminatory sales tax from in-state and out-of-state vendors); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (reviewing milk subsidies to local farmers). Petitioner has discovered no dormant cases in which the Court has been confronted by a State regulatory scheme seeking to preserve an "anticipatory" interest in an uncertain future event. The Court, however, has resolved such conflicts in the context of the Indian Commerce

Clause. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

In Indian Commerce Clause cases, the Court has held a State's interest in an unrealized event does not permit a State to regulate activities taking place on an Indian reservation by tribal and non-tribal members. In *Cabazon,* California's sole interest in enforcing its state gaming laws on tribal gambling enterprises was the possibility high stakes gaming might attract organized crime. 480 U.S. at 220-21. California did not allege "any present criminal involvement" with these tribal gambling enterprises. *Id*, at 221. Consequently, the Court was unconvinced such remote interests were "sufficient to escape the pre-emptive force of federal and tribal interests" implicated in that case. *Id.*

In *Mescalero*, New Mexico attempted to enforce state hunting and fishing laws against non-tribal members on tribal land. The Court stated a "State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." 462 U.S. at 336.

To justify the exercise of State authority, New Mexico claimed in *Mescalero* it had an interest in wildlife conservation and in the collection of state licensing fees. *Id.* at 342-43. New Mexico conceded, on-reservation hunting by tribal and non-tribal members had no adverse impact on fish and wildlife outside the reservation. *Id.* at 342. New Mexico's "general desire to obtain revenue" from the collection

of licensing fees was, in the Court's view, "inadequate to justify the assertion of concurrent jurisdiction" with the tribe. *Id.* at 343. Even though New Mexico could point to a possible off-reservation effect, the Court ruled those possible effects were not sufficient to justify state intervention to regulate the on-reservation conduct of ***non-tribal*** members. *Id.* at 342-343.

Unlike non-discriminatory excise taxes collecting public revenues, Idaho and other Settling States require non-participating manufacturers to make payments into a State-specific escrow account. Escrow funds are held in private accounts, identified and reserved for the State. These "reserve funds" are not assets of the State and are subject to recovery by a State only if it has reached a settlement with the manufacturer or the manufacturer has engaged in culpable conduct for which a court has rendered a judgment in favor of the State. Idaho Code §§ 39-7801(d), 7803(b)(2)(A). These "reserve funds" are released after 25 years if no settlement or judgment has depleted such funds. The State's interest in this escrow scheme can be called, at best, contingent or, at worst, speculative. The Court needs to examine whether a State's anticipatory interest in an uncertain event sufficiently justifies burdens currently placed on interstate commerce.

B. The Court Should Grant Certiorari and Examine the Textual Limitations Imposed by the Import-Export Clause on State Authority.

Several members of the Court have written "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps,* 520 U.S. at 610 (Thomas, J., with whom Chief Justice Rehnquist and Justice Scalia joined, dissenting) *citing Tyler*, 483 U.S. at 263 (Scalia, J., concurring in part and dissenting in part). Justice Thomas has not only urged the Court to "confine itself to interpreting the text of the Constitution," but also to re-examine the textual provision of the Import-Export Clause, "which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce." *Camps,* 520 U.S. at 621 (Thomas, J., with whom Justice Scalia joined, dissenting).

Article I, § 10, cl. 2, of the Constitution provides "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports...."

> To the 20th-century reader, the Clause appears only to prohibit States from levying certain kinds of taxes on goods imported from or exported to *foreign* nations. But a strong argument can be made that for the Constitution's Framers and ratifiers-representatives of States which still viewed themselves as

> semi-independent sovereigns -- the terms "imports" and "exports" encompassed not just trade with foreign nations, but trade with *other States* as well.

Camps, 520 U.S. at 621 (Thomas, J., with whom Justice Scalia joined, dissenting); *cf Woodruff v. Parham*, 68 U.S. (8 Wall.) 123 (1869) (holding the Import-Export Clause applied only to foreign trade). Justice Thomas suggests the Court's Civil War era decision in *Woodruff* was "wrongly decided" given "the common 18th-century understanding of the "terms 'imports' and 'exports'. . . ." *Camps,* 520 U.S. at 621-36. For this reason, Petitioner requests the Court re-examine its holding in *Woodruff* and examine the Escrow Statute and Complementary Act in the context of the Import-Export Clause.

II. THIS CASE RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION INVOLVING A STATE'S REGULATORY AUTHORITY OVER RESERVATION CONDUCT, IS INCONSISTENT WITH THE CONSTITUTIONAL BENCHMARKS SET FORTH BY THIS COURT IN ITS PRIOR DECISIONS, AND DEMANDS FURTHER REVIEW BY THIS COURT

Although "the Interstate Commerce and Indian Commerce Clauses have very different applications," both are "grant[s] of authority to the Federal Government at the expense of the States." *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Seminole Tribe of Florida v. Florida*,

517 U.S. 44, 62 (1996). "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Id.* The Idaho Supreme Court, however, gave short shrift to both defenses, each asserting Idaho lacked civil regulatory authority to enforce its escrow and complementary statutes.

In prior Indian jurisprudence cases, this Court has resolved regulatory conflicts arising from the on-reservation activities of Indians and non-Indians ***within*** a State's borders. *See, e.g., California v. Cabazon*, 480 U.S. 202; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Mescalero*, 462 U.S. 324; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Williams v. Lee*, 358 U.S. 217 (1959). But the Court has never had the occasion to examine conflicts concerning on-reservation conduct taking place outside of a State. Nonetheless, it logically follows a State should have more, not less, regulatory authority over conduct within its borders as compared to conduct outside its borders.

A. The Idaho Supreme Court Misapplied the Who/Where Preemption Analysis Established in *Wagnon v. Prairie Band Potawatomi Nation.*

This Court has set forth several basic benchmarks with respect to the civil regulatory authority of States involving the conduct of Indians and non-Indians. *Bracker*, 448 U.S. at 141. When a State's civil regulatory authority is being challenged, "who"

is being impacted by a state statute and "where" the conduct being regulated takes place are two questions "hav[ing] significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005).

Undisputedly, a State has the authority to regulate the off-reservation conduct of non-Indians taking place within its borders. *See, e.g., Wagnon,* 546 U.S. 95 (ruling Kansas may tax a non-Indian distributor's off-reservation receipt of fuel without being subject to the *Bracker* interest-balancing test). When tribal nations or their members leave the physical boundaries of their reservation, they may also be "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (holding a state could impose a nondiscriminatory gross receipts tax on a tribe-operated ski resort on off-reservation land). States, therefore, are not preempted from regulating off-reservation conduct absent express federal law.

"[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation. . . [I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 331-32. The most difficult questions arise where a state asserts authority over on-reservation conduct of non-Indians. *Bracker*, 448 U.S. at 144. In these instances, a state must have a significant regulatory interest outweighing federal and tribal interests. *Id.* at 145. When reservation conduct involving only Indians is at issue, state laws are generally inapplic-

able. *Id.* at 144. In these instances, the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Id.* (citing *Moe*, 425 U.S. at 480-81). Federal preemption of on-reservation conduct "is not limited to cases in which Congress has expressly -- as compared to impliedly -- pre-empted the state activity," even when such conduct involves non-Indians. *Cotton*, 490 U.S. at 176-77 (1989).

The Idaho Supreme Court correctly observed:

> In determining how to analyze any state statute that allegedly is in conflict with the Indian Commerce Clause, it is crucial to determine, as a preliminary inquiry: (1) whether the regulated conduct occurs on or off a reservation; (2) whether or not the party being regulated is a tribal member; and (3) if the conduct being regulated does occur on a reservation, whether State interests outside the reservation are implicated. (App.31)

It found although the Complementary Act:

> regulate[s] the activities of Maybee, a member of the Seneca Nation. . . the [Act did] not regulate Maybee's on-reservation activities, but rather his off-reservation conduct of: selling, and offering for sale, Noncompliant Cigarettes, in Idaho . . . Whether Maybee delivers Noncompliant Cigarettes to Idaho

> consumers personally, or through a common carrier, this conduct is ultimately traceable to Maybee. (App. 32).

The Idaho Supreme Court found "one case from the Supreme Judicial Court of Maine" to be "particularly instructive on this point" of where the regulated conduct took place. (App. 33). *See Dept. of Health and Human Services v. Maybee*, 975 A.2d 55 (Me. 2009) (the "Maine Case").[3]

In the Maine Case, the court found "Maybee's customers are not on the reservation" when they purchased "their cigarettes through the Internet or by mail order, and accept delivery in Maine." *Id.*, ¶ 8, A.2d at 57. The Maine Supreme Judicial Court ruled the *Bracker* balancing test only applies when a State "seeks to regulate conduct that takes place ***entirely*** on a reservation." *Id.*, ¶ 11, A.2d at 57. (emphasis added).

> Maybee's interactions with consumers in Maine extend beyond the boundaries of the reservation. Activity of tribal members that takes place within the reservation but has an impact outside

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[3] In the Maine Case, Petitioner Maybee argued that Native American tobacco sellers were not subject to state licensing requirements, citing for support, *Confederated Salish and Kootenal Tribes v. Moe,* 392 F. Supp. 1297 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976). After the case was held by Maine's highest court, the Maine Legislature repealed the statute at issue, 22 Me. Rev. Stat. Ann. § 1555-C.

> the reservation may be regulated by the states.

Id., ¶ 12, A.2d at 57.

Under this rationale, both Maine and Idaho could claim to have regulatory authority over Maybee's out-of-state wholesale suppliers since cigarettes not listed on their directories are "ultimately traceable" to them, as well. Just as these wholesalers conduct their business transactions outside of Idaho, Maybee's activities occur on the Seneca Nation territory and therefore, his culpability is traceable to on-reservation conduct with the off-reservation effect of introducing cigarettes into Idaho. For this reason, Idaho's assertion of authority is subject to analysis under *Bracker*.

B. The Idaho Supreme Court Should Have Applied the *Bracker* Interest-Balancing Test.

Because Idaho customers do not physically enter the reservation to purchase goods, the Idaho Supreme Court bypassed the interest-balancing analysis and treated Maybee's conduct as if it took place off the reservation. (App. 33-34). For this reason, the opinion failed to address the effect Petitioner's on-reservation conduct had in Idaho.

The Complementary Act regulates tobacco sellers, not consumers. Although consumers placing orders "through the Internet or by mail" do not come onto the reservation, the *Bracker* analysis is still applicable. This Court has examined other cases concerning reservation Indians selling tobacco

products to non-Indians for their off-reservation use. *See, e.g., Moe,* 425 U.S. 463, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), *Dep't of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). Those cases, however, dealt with consumers who physically came onto the reservation to purchase cigarettes, but it is a distinction without a difference.

Reservation delivery sales cannot be distinguished from face-to-face reservation sales in the preemption analysis. Both are made by tobacco sellers from businesses on the reservation. Both involve sales to non-Indian consumers for their off-reservation use. Neither tobacco seller is involved in the transporting of tobacco products off the reservation. In face-to-face transactions, consumers transport the product off the reservation, and in delivery sales, the United States Postal Service or a common carrier transports the product off the reservation. In *Moe*, the tribal retailer benefited from highways passing by the reservation bringing off-reservation consumers to the reservation smokeshop. In this case, Petitioner benefits from the information superhighway (i.e. the Internet) attracting consumers to his reservation business. The material facts for face-to-face sales and delivery sales are the same and warrant the same analysis under *Wagnon* and *Bracker*.

CONCLUSION

Congress has plenary power to regulate Indian commerce. *Cotton,* 490 U.S. at 192. It has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams,* 358 U.S. at 220-21. Recently, Congress enacted the Native American Business Development, Trade Promotion and Tourism Act, codified at 25 U.S.C. § 4301 *et seq.* In this Act, Congress stated:

> [T]he twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available[,] to address the challenges faced by those groups . . .the resources of the private market . . . [and] by encouraging the formation of new businesses . . . and the expansion of existing businesses[,] and . . . facilitating the movement of goods to and from Indian lands . . .

25 U.S.C. § 4301 (a)(12)-(b)(1)(B).

Earlier this year, Congress enacted the PACT Act to regulate the distribution, sale and use of cigarettes in the United States. Although the PACT Act requires state, local and tribal taxes to be collected prior to any retail sale, Congress did not sanction any State law enacted for the avowed purpose of "effectively and fully neutraliz[ing]" the playing field between large and small tobacco manufacturers in a national, free market open for competition. Importantly, Congress specifically

stated the PACT Act should not be construed to amend, modify, or otherwise effect:

> any limitation under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country [or] . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . .

Pub. L. No. 111-154, § 5, 124 Stat. at 1110.

The record in this case contains an "Information Report on Internet Cigarette Sales" prepared by Philip Morris USA, Inc. In that report, Philip Morris observes:

> Native American Internet sites extend their retail customer base from adjacent non-tribal customers to customers around the Nation . . . . A key distinction between Native American and non-Native American sites is that Native American sites use the Internet to gain a broad geographic reach for brands they manufacture. Some examples of

> Native American-manufactured brands include Seneca, Native and Sky-dancer.

Clearly, Philip Morris views these Native businesses as its competitors. In a national market, Philip Morris may freely use its resources to compete with such Native American businesses. However, Idaho and other Settling States have no business picking favorites or fixing the market by restraining free trade through their laws. Such *ultra vires* laws, in any case, exceed "the regulatory sphere traditionally occupied by . . . the States" for the health, safety and welfare of its citizens and are subject to constitutional challenges. *Cf. Tracy*, 519 U.S. at 313.

Petitioner Maybee is one, among hundreds of tobacco dealers, licensed and authorized by tribal governments to sell tobacco products from their tribal territories. These Native American tobacco dealers include importers, manufacturers, distributors and retailers, offering a wide variety of tobacco products for sale nationwide. These Native American businesses are accorded by Congress and the Constitution the right to "have free access to every market in the Nation," to have their goods exported from their tribal lands and to have "no foreign state . . . by customs, duties or regulations exclude them" from local markets. *Hood,* 336 U.S. at 539. Petitioner and other Native American tobacco dealers need to know whether they can constitutionally be subject to such state laws so, in the words of Oliver Wendall Holmes, they "know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves."

For these reasons, Petitioner respectfully requests this Court grant his Petition for Certiorari.

Respectfully submitted,

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