No. 19-985

In the
Supreme Court of the United States

NATIVE WHOLESALE SUPPLY COMPANY,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL.
XAVIER BECERRA, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Third Appellate District

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The Brief in Opposition ("response") argues the issues on the merits instead of addressing the reasons this Court should grant certiorari. For example, Respondent fails to confront the central issue raised in the petition: the improper projection of state regulatory power beyond state borders and beyond constitutional limits. That issue is central both to the state's improper desire to exercise specific personal jurisdiction over out-of-state conduct by this foreign corporation, and to the state's attempt to prevent an Indian tribe from leaving the state to trade with other Indians. Similarly, Respondent begins its response with argument of state laws that have no bearing on the petition. The merits of Respondent's state laws are simply not at issue in this petition. Good or bad, those laws cannot be applied to an out-of-state company that Respondent concedes does not conduct business in California. Respondent's desire to stem a "stream of commerce" through litigation in state court, no matter how well intentioned, cannot survive application of this Court's precedent rejecting this "stream of commerce" approach. Instead of considering Respondent's merits argument, the Court should grant the petition so that the merits of the jurisdictional and other issues raised in the petition may be fully briefed by both parties and ruled upon by this Court.

I. THE CALIFORNIA COURT'S PERSONAL JURISDICTION DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

A. Denial of Native Wholesale's Prior Petitions Does Not Support Denial of the Present Petition.

Respondent argues that because this Court denied prior petitions filed by Native Wholesale challenging lower court personal jurisdiction rulings, the present petition should also be denied. Resp. 11.[1] However, the prior petitions referenced by Respondent were decided *before* this Court's recent pivotal personal

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[1] Prior petitions cited at Resp. 11, n.4, include: **(1)** *Native Wholesale Supply Co. v. Oklahoma ex rel. Edmondson*, 563 U.S. 960 (2011) (No. 10-754), which concerned the Oklahoma Supreme Court's now abrogated 2010 decision (*State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199 (Okla. 2010)); **(2)** *Native Wholesale Supply Co. v. Oklahoma ex rel. Pruitt*, 135 S. Ct. 1512 (No. 14-919), *reh'g denied* 135 S. Ct. 1888 (2015), concerning the Oklahoma Supreme Court's 2014 final judgment in that same case and which did not involve the question of personal jurisdiction, other than to reiterate what the court previously stated in its 2010 decision (*State ex rel. Pruitt v. Native Wholesale Supply*, 338 P.3d 613 (Okla. 2014)); **(3)** *Native Wholesale Supply Co. v. Idaho ex rel. Wasden*, 573 U.S. 931, 134 S. Ct. 2839 (2014) (No. 13-838), which concerned the Idaho Supreme Court's 2013 decision finding personal jurisdiction, reported as *State ex rel. Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257 (Idaho 2013); and **(4)** *Native Wholesale Supply Co. v. Superior Court of Cal., Sacramento County*, 573 U.S. 931, 134 S. Ct. 2841 (2014) (No. 13-1117), which concerned the California court's 2011 decision finding personal jurisdiction that is challenged in this petition.

jurisdiction opinions. Based on *Walden and Bristol-Myers*, the Oklahoma Supreme Court abrogated the very 2010 Oklahoma decision Respondent argues in opposition to the present petition, and in doing so rejected the "stream of commerce" theory that it applied in that 2010 decision:

> In Bristol-Myers, supra, and Walden, supra, the [United States Supreme] Court, relying on its previous minimum contacts cases, clarified specific jurisdiction analysis and omitted from that analysis any previous "stream of commerce" analysis.
>
> ....
>
> [T]he "totality of the contacts" or "stream of commerce" is no longer the analysis this Court will use to determine specific personal jurisdiction.

Montgomery v. Airbus Helicopters, Inc., 414 P.3d 824, 831-34 (Okla. 2018).

B. The California Court Did Not Apply the "Purposeful Availment" Standard.

Respondent argues that the California court applied the "purposeful availment" standard. Resp. 18. But neither the 2011 nor 2019 decision supports that argument. In 2011, the California court applied a "stream of commerce" theory to find specific personal jurisdiction:

> we conclude that NWS has purposefully derived benefit from California activities under the stream of commerce theory, sufficient to invoke

> personal jurisdiction. Indeed, for personal jurisdiction purposes, we see not just a stream of commerce, but a torrent.

126 Cal. Rptr. 3d 257, 260 (Pet. App. C, 49-50).[2] The California court relied on the now abrogated 2010 Oklahoma decision applying the stream of commerce theory:

> As evident from our extensive quoting of the *Edmondson* decision, we find "Oklahoma is OK" on this point. Such persuasion was not available to the trial court when it granted NWS's motion to quash. In line with *Edmondson,* we conclude that NWS has minimum contacts with California sufficient for the State to assert personal jurisdiction over the company consistent with due process.

126 Cal. Rptr. 3d at 264 (Pet. App. C, 58). In 2019, the California court chose not to correct its earlier decision to align with the recent personal jurisdiction opinions issued by this Court and various Circuit Courts of

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[2] The California court articulated the theory it was applying as:

> Placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment, as long as the conduct creates a "substantial connection" with the forum state; for example, if the income earned by a manufacturer or distributor from the sale or use of its goods in the forum state is "substantial."

126 Cal. Rptr. 3d at 263 (Pet. App. C, 51).

Appeals, and instead continued to apply the stream of commerce theory:

> placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment.

249 Cal. Rptr. 3d 445, 453 (Pet. App. B, 14). The California court refused to follow *Walden* and *Bristol-Myers*, opining:

> Neither of those cases demands a different result or requires us to revisit jurisdiction. As we explained in the 2011 opinion, NWS is subject to personal jurisdiction under the stream of commerce theory -- a theory of personal jurisdiction neither addressed nor applied in *Walden* or *Bristol-Myers*.

Id. at 453 (Pet. App. B, 13).

C. The California Court's Application of the Tort-Based "Stream of Commerce" Theory in a Contract-Based Action Requiring "Purposeful Availment" Conflicts with This Court's Precedent and with Decisions of the Courts of Appeals.

The California court improperly relied on the tort-based "stream-of-commerce" theory to find specific personal jurisdiction in this contract-based action. *See supra* section I(B). That decision ignores the historic development of the differing standards applicable in

tort and contract actions and conflicts with recent precedent confirming the distinction. Pet. 17-29.

D. There Are Bounds to Respondent's Assertion of Specific Personal Jurisdiction.

Respondent argues that "this case is neither a tort nor a contract suit, but rather a civil enforcement action by State authorities seeking to enforce state laws" and that it "is not clear that the jurisdictional analysis governing a state law enforcement authority's suit to prevent evasions of state law would match that for civil disputes" (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality) for the proposition that "'in some cases' a State may be able to exercise jurisdiction where purposeful availment is absent but defendant has 'attempt[ed] to obstruct [the State's] laws')." Resp. 19. But Respondent's parenthetical omits the relevant language from the cited case:

> As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson,* 357 U.S., at 253, 78 S.Ct. 1228, though in some cases, **as with an intentional tort**, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws."

J. McIntyre, 564 U.S. at 880 (emphasis added). Respondent does not take the position that its action

lies in tort,[3] and it fails to articulate what standard it believes would apply if not the contract standard.

E. Respondent's General Jurisdiction and Stream of Commerce Facts Do Not Support Exercise of Specific Jurisdiction.

Citing to the facts section of the California court's 2011 decision, Respondent asserts that Native Wholesale: "made the arrangements for its cigarettes to be transported into California's borders. Pet. App. 53. Though it sold the cigarettes as a first step to Big Sandy, petitioner knew and intended that their ultimate destination would be the California general public." Resp. 13. First, that is insufficient to establish specific personal jurisdiction in a contract-based action, and instead simply reargues the rejected stream of commerce theory. Second, Respondent's argument conflates sales to an Indian tribe from an Indian vendor doing business in Indian country outside California (which is the only scenario present here),[4] with subsequent alleged sales by third party retailers to consumers on Indian reservations in California. These subsequent alleged sales of product to consumers by third parties cannot Constitutionally subject an out-

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[3] "The state never can sue in tort in its political or governmental capacity." W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 2, at 7 (5th ed. 1984).

[4] Pet. 27 and 2011 California court decision 126 Cal. Rptr. 3d at 262 (Pet. App. C, 53) ("A sales transaction occurs when Big Sandy places an order with NWS. NWS then releases the cigarettes from storage and arranges for their transport . . .").

of-state Indian who was not a party to the alleged retail transactions to the state's jurisdiction.

II. THE CALIFORNIA COURT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Congressional Power is the Issue in This Case.

California wants to reach outside its borders to regulate the kind and price of cigarettes purchased by an Indian tribe from an Indian vendor doing business in Indian country outside California. The United States Constitution vests that regulatory authority exclusively in Congress. U.S. Const. art. I, § 8, cl. 3; *Seminole Tribe of Fla. v. Florida.*, 517 U.S. 44, 62 (1996). The Indian Commerce Clause requires congressional permission before states can regulate the sale of liquor, apply state health and education laws, or regulate other commercial activities by Indians on reservations.[5] Congress has not granted such authority over the Indian commerce at issue here.

B. The Indian Commerce Clause Protects Intertribal Trade.

The California court incorrectly held that: (1) the Indian Commerce Clause is "inapplicable" because Native Wholesale is not an Indian;[6] and (2) even if

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[5] Pet. 31, n.22.

[6] This erroneous holding is addressed in Section III *infra*.

Native Wholesale is an Indian "there is no constitutional or statutory right afforded to an Indian of one tribe (such as Montour) to conduct business free from state regulation with an Indian of a different tribe (such as a member of Big Sandy) under the Indian Commerce Clause." 249 Cal. Rptr. 3d at 459, n.9 (Pet. App. B, 27, n.9). The Response persists with this false premise. Resp. 22 ("any transactions that purportedly occurred on petitioner's reservation involved other entities (such as Big Sandy) who were not members of petitioner's own tribe"); Resp. 23 ("Petitioner and Big Sandy are neither the same tribe nor members of the same tribe. California's regulation of the transactions between the two entities therefore does not interfere in tribal self-governance."). The notion that the Indian Commerce Clause only protects intratribal trade from state intrusion, but not intertribal trade is nonsensical and ignores the historical context of extensive trading among Indian nations and the Constitutional and statutory provisions and case law stemming from that history. Pet. 32-34. The single authority cited by Respondent in support is *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), but that case addressed a state's attempt to tax sales to non-members occurring on a reservation located within the state's borders. It is inapplicable to California's attempt to regulate the kind and price of cigarettes an Indian tribe in that state can purchase from Indians outside California.

C. Supreme Court Cases Allowing Taxation of *Sales* to Non-members Do Not Condone State Regulation of a Tribe's *Purchase* of Goods Out-of-state.

Respondent argues that "the Court has upheld many State laws regulating the on-reservation sale of tobacco." Resp. 22-23. In support, Respondent cites to the line of cases permitting assessment of state cigarette taxes to on-reservation sales to non-members. Resp. 23, n.12. But this is not a tax case.[7] The California law at issue does not impose a tax, or any type of financial obligation for that matter, on Native Wholesale. Cal. Rev. & Tax. Code § 30165.1(e).[8] Respondent nevertheless attempts to bootstrap its limited power to tax on-reservation sales to non-members into a general power to regulate the kind and price of cigarettes Big Sandy can purchase from Indians outside California. Yet the right to require a tribe to help collect state taxes on the in-state reservation *sale* of goods *to non-members* does not

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[7] Pet. 7 ("The complaint did not raise tax issues, health claims, or allegations of product differences between the cigarettes manufactured by California's contract partners and the cigarettes distributed by Native Wholesale.").

[8] Subpart (2) provides, "No person shall sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state … cigarettes of a tobacco product manufacturer or brand family not included in the directory."

empower the state to regulate the kind and price of goods *a tribe* can *purchase* from Indians out-of-state.[9]

D. Cigarette Regulation Has Been Preempted by the Federal Government.

Even within its boundaries, California's power to regulate cigarettes is limited: it cannot require those shipping cigarettes into California to use delivery companies that provide recipient age verification [*Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 365 (2008)] and it cannot regulate the type of cigarettes bought by tribes, nor establish a minimum price [*Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994)]. Because selling cigarettes is not illegal in California, and because the cigarettes bought by Big Sandy comply with all federal requirements, California has no authority to dictate which cigarettes the Tribe can purchase from out-of-state Indians. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-10 (1987) (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); *Milhelm Attea & Bros.*, 512 U.S. at 75.

III. CONSTITUTIONAL PROTECTIONS APPLY TO NATIVE WHOLESALE.

The California court's decision that a company wholly owned by a member of a federally recognized

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[9] *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976) (state vendor licensing fees on reservation Indians preempted).

Indian Tribe is not an Indian for purposes of the protections afforded under the Indian Commerce Clause and Equal Protection Clause conflicts with this Court's holding that closely held corporations take on the constitutionally enshrined rights of their owners. Respondent argues that application of this Court's holding in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) should be restricted to only the Religious Freedom Restoration Act (Resp. 24, n.14), but that approach ignores the legal and historical underpinnings of this Court's decision:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. **When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.**

Id. at 706-07 (emphasis in bold added). Respondent offers no justification – because there is none – as to why this established legal principal would afford constitutional protections to corporate entities owned by non-Indians but not corporate entities owned by Indians. In fact, courts applying *Hobby Lobby* do not take the restrictive view advocated by Respondent and instead hold that case supports affording protections to corporate entities owned by Indians. *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 548 (2d Cir. 2019) ("the district court correctly interpreted 'Indian in

Indian country' to include King Mountain, an entity wholly owned by a member of the Yakama Nation . . . This interpretation is supported by recent analysis of the Supreme Court [in *Hobby Lobby*]").

Respondent next argues that whether Native Wholesale is considered an Indian is "immaterial to the claims in this case." Resp. 24. Not only is that incorrect, this issue was a central tenet in the California court's rulings that Native Wholesale asks this Court to review. With regards to the Indian Commerce Clause, the California court held:

> . . . *Hobby Lobby* is wholly irrelevant to the issue at hand.
>
> NWS has provided no legitimate basis for concluding it qualifies as a tribal member. It is thus considered a non-Indian for purposes of the Indian Commerce Clause analysis.

249 Cal. Rptr. 3d at 460 (Pet. App. B, 29). As to Equal Protection, the California court held:

> Our review rests on the resolution of one pivotal question: Is the corporation considered an "Indian"? That is because NWS's defense is grounded in the singular argument that the Directory Statute "impacts or singles out an identifiable group of people for particular or special treatment, in this case, Indians," like NWS.

249 Cal. Rptr. 3d at 463 (Pet. App. B, 34). The California court erred by finding Native Wholesale is not an Indian and using that as a basis for its holdings

permitting California to usurp the exclusive authority reserved to Congress and act as a regulator of purely Indian commerce. This runs afoul of protections afforded Indians under federal law.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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