No. _____

In the
Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Petitioner,

v.

MARK BOUGHTON, Commissioner,
CONNECTICUT DEPARTMENT OF REVENUE SERVICES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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August 23, 2021

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QUESTIONS PRESENTED

1. Whether Connecticut impermissibly regulates or controls conduct beyond the boundaries of the State in violation of the dormant Commerce Clause when, as a condition of allowing a manufacturer's products to be sold in the state, Connecticut forces the manufacturer to obtain and provide private sales and shipping information possessed by non-Connecticut distributors doing no business in Connecticut and having no nexus with Connecticut.

2. Whether Connecticut violates Due Process protections when it bans a manufacturer's products from being sold in the state, if the manufacturer fails to obtain and provide to Connecticut private sales and shipping information possessed by non-Connecticut distributors relating to their distribution of products in jurisdictions other than Connecticut.

3. Whether Connecticut violates the Supremacy Clause when, as a condition of allowing a manufacturer's products to be sold in the state, Connecticut forces the manufacturer to obtain and provide private sales and shipping information possessed by non-Connecticut distributors who conduct no business in Connecticut nor distribute the manufacturer's products to, or in, Connecticut.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Grand River Enterprises Six Nations, Ltd. has no parent company, and no public company owns ten percent or more of the company's stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Grand River Enterprises Six Nations, Ltd. respectfully petitions for a writ of certiorari to review the United States Court of Appeals for the Second Circuit's opinion in *Grand River Enterprises Six Nations, Ltd. v. Boughton*, No. 20-1044-CV (Feb. 8, 2021).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114 (2d Cir. 2021), and is reprinted in the Appendix (App. A, 1-36). The Second Circuit's denial of Petitioner's petition for rehearing is not reported, and is reprinted in the Appendix (App. E, 60). The opinion of the United States District Court for the District of Connecticut granting Respondent's motion to dismiss is reported as *Grand River Enterprises Six Nations Ltd. v. Sullivan*, No. 3:16-CV-01087-WWE, 2018 WL 4623024 (D. Conn. Sept. 26, 2018), and is reprinted in the Appendix (App. B, 37-46). The District Court's judgment is not reported, and is reprinted in the Appendix (App. C, 47). The opinion of the United States District Court for the District of Connecticut denying Petitioner's motion for reconsideration is reported as *Grand River Enterprises Six Nations, Ltd. v. Biello*, No. 3:16-CV-01087 (JAM), 2020 WL 1027803 (D. Conn. Mar. 3, 2020), and is reprinted in the Appendix (App. D, 48-59).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision denying Petitioner's petition for rehearing on March 24, 2021. App. E, 60. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed by the required deadline as extended by the March 19, 2020, Order of the Supreme Court for a period not exceeding 150 days. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

"The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. amend. XIV, § 1

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

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

"This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . ."

Conn. Gen. Stat. § 4-28m(a)(3)(C)

"(3) The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes: . . . (C) a nonparticipating manufacturer's total nation-wide

reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 USC 375 et seq. [PACT Act], as from time to time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy."

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES.

A. State Collection of Private Business Data.

This petition involves a unique state statute with nationwide reach. Under Connecticut law, certain tobacco products must be preapproved by the Connecticut Commissioner of the Department of Revenue Services, before the products may be sold in the State. As a condition of approving Petitioner Grand River Enterprises Six Nations, Ltd.'s ("GRE") products for sale, Connecticut requires all importers and downstream sellers of GRE's products nationwide to produce their federal tax returns and private shipping records to Connecticut authorities, without regard to whether the importers and downstream sellers do any business in, or have any nexus to, Connecticut, and regardless of whether these reported transactions involve Connecticut importers, wholesalers, or consumers. Connecticut further requires that GRE sell only to importers that agree to provide Connecticut with their federal tax returns and private shipping records, even if those importers and

downstream sellers engage in commerce solely outside Connecticut. If these out-of-state businesses do not provide their confidential business information to Connecticut, GRE's products are banned from sale in Connecticut.

B. Grand River Enterprises Six Nations, Ltd.

Petitioner GRE is a Canadian corporation owned by Native American individuals who are members of the First Nations comprising the Six Nations (also known as the Iroquois Confederacy). JA97, ¶ 11.[1] GRE manufactures tobacco products at its facility on the Six Nations of the Grand River Reserve, in Ohsweken, Ontario, Canada. GRE does not sell its products directly into Connecticut, nor to Connecticut consumers, nor to any Connecticut business or entity, nor to any other consumers in the United States. Rather, GRE sells to independent and unaffiliated U.S. importers – each of which possesses a valid, federal license to import tobacco products. JA47-52 (permits included in Exhibit B as referenced at JA103, ¶ 35).[2]

C. The Five Importers of GRE's Products.

GRE's products are sold worldwide. With respect to the United States, and at the time the Complaint was filed in this case, GRE sold its products to five independent and unaffiliated U.S. importers, none of which were (nor are) located in Connecticut.[3] JA103-04, ¶¶ 38-39; JA47-52. Only one of these importers sold GRE

[1] Unless otherwise stated, facts are taken from the Second Amended Complaint, JA94-117, which is the operative complaint for purposes of this petition.
[2] GRE attached four exhibits to its First Amended Complaint. JA37-59. These exhibits were discussed and incorporated by reference in the Second Amended Complaint. JA103, ¶¶ 34-35 (Exhibits A and B); JA105, ¶ 46 (Exhibit C); JA106, ¶ 53 (Exhibit D).
[3] GRE currently sells only to three of these importers.

products to cigarette wholesalers in Connecticut. JA104, ¶ 39; JA44, JA47 (Tobaccoville USA, Inc., a non-Indian company located in South Carolina).

The importers of GRE's tobacco products are responsible for filing Federal Form 5220.6 reports and paying federal excise tax for each GRE tobacco product they import into the United States. JA103, ¶ 35; JA43. Depending on the circumstances of their downstream sale and shipment, the importers also are responsible for filing state mandated reports with tax administrators of the respective States into which the importers sell or ship GRE products in interstate commerce. JA44. GRE does not file federal excise tax reports or make excise payments of its own, and its transactions with importers are not subject to state filing requirements. JA43-44.

D. Federal Cigarette Regulation.

The United States government has a comprehensive statutory and regulatory scheme governing the domestic manufacture, import, and sale of tobacco products. *E.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) (the FCLAA precludes States or localities from imposing any requirements or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes");[4] *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (states are without authority to require cigarette retail businesses to use delivery companies that provide recipient age verification); Prevent All Cigarette Trafficking Act of 2009, 15 U.S.C.

[4] Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended; 15 U.S.C. §§ 1331 *et seq*.

§§ 375 *et seq.*; Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq*. The permissible scope of state regulation of tobacco products is limited. *Id*.

E. Connecticut's Cigarette Law and Regulation.

Connecticut has enacted a statute that "tasks GRE with gathering sales or shipping information from out-of-state importers and distributors of its cigarettes so that GRE in turn may . . . submit the required data [to] . . . the Connecticut [Department of Revenue]." 2020 WL 1027803, at *3 (App. B, 53); Conn. Gen. Stat. § 4-28m(a)(3)(C). Much of the data is not otherwise collected by federal or state authorities. 2020 WL 1027803, at *6 (App. B, 58) ("Connecticut seeks certain sales and shipping information that goes beyond what the PACT Act otherwise requires to be reported"); 988 F.3d at 123 (App. A, 21) ("the number of cigarettes reported on federal excise tax forms may conflict with the number of cigarettes reported pursuant to the PACT Act because PACT Act filings exclude intrastate sales, cigarette inventory, and – as Grand River argues – sales within 'Indian Country'").

Connecticut enacted Conn. Gen. Stat. § 4-28m(a)(3)(C) as part of a regulatory scheme adopted subsequent to the State's execution of the Tobacco Master Settlement Agreement of 1998 ("MSA"). 988 F.3d at 123 (App. A, 6-7).[5] Companies that join Connecticut's MSA contract are allowed to have their cigarette brands sold in the State, without being subject to the requirements of § 4-28m(a)(3)(C).

Companies that have not joined the MSA are known as Nonparticipating Manufacturers ("NPMs"). *Id*. at 7-8. GRE is an NPM. JA98, ¶ 16. Under the

[5] The MSA is available at: https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/MSA.pdf (last visited August 23, 2021).

umbrella of the MSA's enabling legislation, Connecticut adopted laws and regulations that only permit the sale of "approved" cigarette brands in Connecticut, and that outlaw the sale of brands that are not "approved" by the Commissioner of the Department of Revenue Services (the "Commissioner"). Conn. Gen. Stat. § 4-28m(a). The Commissioner maintains a directory ("Tobacco Directory") listing all tobacco product manufacturers that have provided "current and accurate certifications" establishing an NPM's compliance with Connecticut law. Conn. Gen. Stat. § 4-28m(a) ("Directory Law").

In 2014, Connecticut amended the Directory Law to add the reconciliation requirement at issue in this petition ("Reconciliation Requirement"). Conn. Gen. Stat. § 4-28m(a)(3)(C). The Reconciliation Requirement bars an NPM and its products from listing on the Tobacco Directory if the NPM fails to reconcile two figures: (1) the total number of cigarettes imported by companies that import the NPM's cigarettes nationwide (as evidenced by the importers' federal excise tax returns); and (2) the number of cigarettes those importers report under federal law as being shipped in interstate commerce throughout the United States, or shipped intrastate. Connecticut imposes this Reconciliation Requirement on GRE notwithstanding that GRE has no right to, nor control of, the information Connecticut demands GRE provide. With the exception of one importer, no importers make sales in or into Connecticut, do any business in Connecticut or with Connecticut residents or entities, nor otherwise have any nexus or connection with Connecticut.

The first figure required by the Reconciliation Requirement is taken from amounts reported on federal excise tax returns. All cigarettes manufactured in or imported into the United States are subject to a federal excise tax. *See* 26 U.S.C. § 5701(b). The entities responsible for paying this federal excise tax file monthly Form 5220.6 reports with the Department of the Treasury. U.S. Dep't of Treas. Alcohol and Tobacco Tax and Trade Bureau, Form 5220.6 (Feb. 28, 2013), https://www.ttb.gov/images/pdfs/forms/f52206.pdf.[6] For cigarettes produced domestically, U.S. manufacturers file the reports and pay the excise tax. For cigarettes produced outside the U.S., federally licensed importers pay the excise tax.

The second figure is the total number of the NPM's cigarettes shipped interstate and intrastate nationwide. For purposes of determining interstate shipment, the Reconciliation Requirement relies on reports filed by importers under the Prevent All Cigarette Trafficking Act ("PACT Act"), 15 U.S.C. §§ 375 *et seq*. The PACT Act requires "[a]ny person who sells, transfers, or ships" cigarettes in interstate commerce to report to the Tax Administrator of a state or Indian tribe on a monthly basis the number of cigarettes shipped or sold into that jurisdiction. 15 U.S.C. § 376(a).[7] Because the PACT Act only applies to interstate shipments of tobacco products, reports filed under the PACT Act do not reflect intrastate shipments of tobacco products, including within Indian Country (as that term is

[6] Form 5220.6 reports are confidential federal tax returns of the importers. *See* 26 U.S.C. § 6103.
[7] PACT Act reports are confidential under federal law and may only be used for purposes of determining compliance with the PACT Act's reporting requirements. *See* 15 U.S.C. § 376(c). Reconciling federal tax paid on a manufacturer's cigarettes imported nationwide and determining compliance with Connecticut's Tobacco Directory laws is not a use contemplated by the federal law mandating the filing of PACT Act reports.

defined under federal law) after importation into the United States. 2018 WL 4623024, at *1 (App. B, 38).

The Reconciliation Requirement is unique to Connecticut and a small minority of other states with similar provisions,[8] however as discussed below, this extraordinary attempt to exert extraterritorial jurisdiction has far-reaching implications.

II. PROCEDURAL HISTORY.

A. Administrative Proceedings.

In April 2016, GRE submitted its Directory Law certification for the 2015 calendar year, to the Connecticut Department of Revenue Services ("DRS"). JA102, ¶ 33. DRS requested additional information, claiming that GRE had failed to explain how its compliance had been verified through the Form 5220.6 and PACT Act reports filed by U.S. importers of GRE cigarettes. *Id*. ¶ 34. DRS threatened that if GRE did not provide the requested information, it could result in exclusion from the Tobacco Directory. *Id*.

In response, GRE explained that only one importer of GRE's products had any nexus or connection with Connecticut – i.e., the importer that transacted business with Connecticut wholesalers. JA44. The remaining importers neither sold nor shipped GRE products in, into, or within Connecticut, nor had any business or nexus with Connecticut. GRE had not submitted with its certification copies of the Form 5220.6 and PACT Act reports filed by its importers, because it did not

[8] *See* Ark. Code Ann. § 26-571303(b)(3)(C); Neb. Rev. Stat. Ann. § 69-2709(14); Nev. Rev. Stat. Ann. § 370.698(2)(g).

possess its importers' records which contained confidential federal tax and related information that could not be demanded by GRE or Connecticut. JA43-44. But in an effort to cooperate and address the concerns of DRS without prejudice and under a reservation of rights, at GRE's request some of this information was provided to GRE by its importers, which GRE forwarded to Connecticut. *Id.*

GRE explained to DRS that the figures from PACT Act reports (which exclude intrastate and Indian Country shipments) would not capture all of the GRE products that are distributed in the United States and, as a result, the two figures subject to the Reconciliation Requirement necessarily would not reconcile within the margin required by the statute. JA103, ¶ 36. Three of the importers did not file PACT Act reports because they distributed exclusively within Indian Country. *Id.* ¶ 37; 2018 WL 4623024, at *1 (App. B, 38-39).[9] And because the PACT Act does not provide for reporting intrastate shipments, reports filed by the other two importers would not reflect those shipments. JA104, ¶ 39. Finally, a number of GRE products are held by importers in inventory that carries over from prior years or into the next calendar year. JA95, ¶ 5. These cigarettes would be reflected on the importers' federal excise tax returns, but not on the PACT Act reports for the same year.

In sum, a substantial number of GRE cigarettes are either sold by importers in transactions that are not subject to the PACT Act reporting requirements or held in inventory. As a result, the total number of cigarettes reported on PACT Act

[9] During the course of this litigation, the Second Circuit Court of Appeals held that the PACT Act applies to certain shipments to Indian Country that cross state lines. *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019).

reports of the importers could never be reconciled with the total number of cigarettes reported on federal excise tax returns within the margin required by Connecticut's Reconciliation Requirement. JA103, ¶ 36. Yet DRS was forcing GRE to reconcile on a nationwide basis separate reports required under two unrelated federal laws in ways that not even those federal laws – or any other federal law – required. DRS took the position that it would ban the sale of GRE products in Connecticut if GRE refused to obtain and produce the federal reports of its importers and reconcile their figures on a nationwide basis.

B. Proceedings in the District Court.

1. Respondent's Motions to Dismiss.

In response to the Commissioner's imminent threat to remove GRE's products from the Tobacco Directory, GRE filed a complaint against Respondent challenging Conn. Gen. Stat. § 4-28m(a)(3). In the original complaint, GRE alleged that its removal would violate GRE's rights to procedural and substantive due process as required by the U.S. and Connecticut Constitutions, the Commerce Clause of the U.S. Constitution, and the Supremacy Clause of the U.S. Constitution. GRE also sought a declaration that it had complied with the Reconciliation Requirement based on its explanation of why the number of cigarettes reported on its importers' federal excise tax returns could not be reconciled with the number of cigarettes reported by them under the PACT Act.[10] GRE also separately moved for injunctive relief to prevent DRS from removing it from the Tobacco Directory. JA3,

[10] GRE later filed a First Amended Complaint raising the same claims with the exception of procedural due process. JA29-33.

#3, #4. The district court granted GRE a temporary restraining order on July 1, 2016, and enjoined the Commissioner from removing GRE from the Tobacco Directory. JA5, #21.

A few days after the district court entered its temporary restraining order, DRS formally notified GRE of its decision to not include GRE in the Tobacco Directory. JA105, ¶ 46. DRS maintained that GRE had failed to cure or satisfactorily explain the discrepancy between the number of cigarettes reported by importers of its products nationwide on their federal excise tax forms and the number of cigarettes reported by those importers as shipped nationwide under the PACT Act. *Id.* ¶ 47. DRS said that if the importers refused to provide this private data to GRE, then GRE could stop doing business with importers which do not file PACT Act reports or otherwise force the importers to prepare and submit the documentary equivalent of PACT Act reports to DRS. JA54 ("Grand River Enterprises could utilize other importers or could require its importers to submit to DRS the documentary equivalent of PACT Act reports.").[11]

In February 2017, the Commissioner moved to dismiss the First Amended Complaint. JA60. In May 2017, the Commissioner moved to vacate the temporary restraining order. JA8, #51. The Commissioner wished to terminate the temporary restraining order because in April 2017 – almost one year after GRE had submitted its annual certification – DRS reversed course and informed GRE that it was in

[11] DRS later notified GRE that it would not require GRE to demonstrate compliance with the Reconciliation Requirement with respect to its importers that distribute exclusively within Indian Country. JA62-63. GRE would still have to demonstrate compliance with respect to the other importers, including the importers with no nexus to Connecticut.

compliance with the Reconciliation Requirement for the 2015 calendar year and would remain on the Tobacco Directory for the remainder of the period. JA106, ¶ 54.

In the interim, GRE had filed its annual certification for the 2016 calendar year. JA106, ¶ 55. Again, DRS demanded that GRE gather from its importers and produce to DRS private data from third parties unrelated to Connecticut including all PACT Act Reports, federal excise tax returns, monthly Form 5220.6 reports, and documentation of intrastate sales. JA107, ¶ 56. GRE again faced the threat of having its product banned in Connecticut.

After a June 2017 hearing, the district court granted the motion to vacate the temporary restraining and denied the Commissioner's first motion to dismiss. JA8, #63; JA9, #65. The district court subsequently granted GRE leave to file a Second Amended Complaint, and the Commissioner again moved to dismiss. JA118. The district court granted this second motion to dismiss. 2018 WL 4623024 (App. B, 37-46).

2. Motion for Reconsideration in the District Court.

GRE moved for reconsideration of the dismissal of its Commerce and Supremacy Clause claims, and reserved its rights to appeal the dismissal of its other claims. JA131-32. The district court denied GRE's motion for reconsideration. 2020 WL 1027803 (App. D, 48-59).

C. The Second Circuit Court of Appeals' Rulings on GRE's Appeal.

The Second Circuit held GRE had standing to pursue its claims [988 F.3d at 121 (App. A, 15)] and affirmed the district court on the remaining issues raised on appeal.

In addressing whether the Reconciliation Requirement is prohibited by the dormant Commerce Clause, the Court of Appeals confirmed that a state statute violates the dormant Commerce Clause "if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question" [988 F.3d at 123 (App. A, 23)] and the court recognized that GRE grounded "its theory of extraterritoriality in the effect Connecticut's Reconciliation Requirement has upon its importers, even though the directly regulated party is Grand River itself." 988 F.3d 124 (App. A, 24). But the Court of Appeals then failed to analyze the practical effect of the Reconciliation Requirement's *extraterritorial control* of the unrelated out of state importers, simply stating: "While it requires reporting of interstate transactions, the Reconciliation Requirement neither regulates nor precludes them." 988 F.3d at 125 (App. A, 29). Yet the test is not absolute regulation or prohibition, but instead is whether the practical effect is extraterritorial control of commerce occurring entirely outside the boundaries of the state in question. 988 F.3d at 123 (App. A, 23). By forcing businesses outside of its jurisdiction to disgorge confidential business information if they want to engage in commerce with a company whose products happen to be sold in Connecticut, the Reconciliation Requirement has the practical effect of *extraterritorial control* of commerce occurring entirely outside Connecticut's boundaries.

The Court of Appeals also held that the Reconciliation Requirement was "rationally related to a legitimate state interest" and therefore not violative of substantive due process; that the Reconciliation Requirement was not preempted by federal law; and that the District Court did not error in refusing to consider GRE's claim for declaratory judgment on compliance with the Reconciliation Requirement. GRE's request for en banc rehearing was denied.

REASONS FOR GRANTING THE PETITION

This Court should grant a petition for writ of certiorari and review the Second Circuit Court of Appeals' Opinion for two reasons.

First, the opinion conflicts with relevant decisions of this Court and decisions of the Courts of Appeals which limit the constitutionally permissible scope of a state's extraterritorial jurisdiction. Most notably, the Second Circuit Court of Appeals erroneously concluded that the extraterritorial effect of the Reconciliation Requirement was "indirect," and that Connecticut can require all importers of GRE's products nationwide, including Indian Tribes, to produce their private business data, without regard to whether the importers do any business in, or have any nexus to, Connecticut.

Second, the Second Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, decided by this Court: whether a state may constitutionally deny a business the right to access state markets solely based upon a requirement that the business provide data from Indian Tribal and other businesses located outside the State's jurisdictional reach

and to which neither the business nor the State has any legal right or access. This issue includes whether the United States Constitution allows a state to prohibit certain companies from trading with Indians outside the state unless those Indians provide business data for subsequent transmittal to Connecticut.

I. THE SECOND CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

A. The Court of Appeals' Application of This Court's Extraterritorial Effect Analysis Conflicts With This Court's Precedent and With Decisions of Other Courts of Appeals.

1. Extraterritorial Control of Commerce Occurring Entirely Outside the State.

This Court and the Courts of Appeals repeatedly have held that a state law that has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question violates the dormant Commerce Clause. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003). The Second Circuit Court of Appeals agreed with this statement of the law, but concluded that the extraterritorial effect of the Reconciliation Requirement was "indirect" and "incidental to the purpose of the statute." 988 F.3d at 124 (App. A, 24-25). In so holding, the Court of Appeals overlooked the admissions by the State and the well-pleaded allegations of GRE's complaint that demonstrate the contrary.

The "inputs" to the Reconciliation Requirement include not only confidential federal tax filings such as Form 5220.6, and PACT Act reports that are prepared by the importers and downstream sellers, but also confidential business and Indian tribal records that are not filed with any state or federal governmental agencies – and all of which is confidential business information that is not in GRE's possession or control. JA95 ¶¶ 34-35; JA43. During the period relevant to this petition, GRE had five importers, two of which were Indian Tribes, one of which was Indian owned, with only one of the remaining two non-Indian businesses transacting with cigarette wholesalers in Connecticut. JA103 ¶ 37; JA44.

In order to comply with the Reconciliation Requirement and avoid being removed from the Tobacco Directory, GRE and other similarly situated NPMs must obtain these proprietary tax and shipping records from out-of-state importers and downstream sellers of their products and produce these records to DRS. This is precisely what GRE did when, in 2016, it was able to convince its importers to provide it with copies of the Form 5220.6 and PACT Act reports on a confidential basis. JA103 ¶ 35. In line with DRS's admonition, GRE had to demand these records as a condition of continuing to do business with importers and downstream sellers notwithstanding that they do not engage in business in Connecticut, nor do they engage in business affecting Connecticut. Connecticut took the position that if these out of state Tribes and businesses refused to provide their confidential records for production to DRS, GRE would need to stop doing business with them.

This statutory arrangement – where a regulated entity is compelled to obtain and produce records belonging to unrelated Tribal and private businesses that have no nexus to Connecticut – violates the dormant Commerce Clause because: 1) it has a direct effect reaching out-of-state transactions between GRE and its importers (which Connecticut concedes); 2) it dictates how and with whom these businesses (and GRE) can do business in other states; and 3) it subjects sovereign Tribes to the jurisdiction of a state in which they are not located, in which they do no business, and with which they have no nexus.

2. The State Law's Direct Effect on Out of State Commerce.

DRS does not deny that the Reconciliation Requirement has a direct effect reaching out-of-state transactions between GRE and its importers. Indeed, DRS put in writing its demand that GRE simply stop doing business with out-of-state importers who do not want to turn over their records: "Grand River Enterprises could utilize other importers or could require its importers to submit to DRS the documentary equivalent of PACT Act reports." JA54. Nothing in that statement is anything but forward-looking. And the Court of Appeals itself recognized that the Reconciliation Requirement controls interstate transactions. 988 F.3d at 125 (App. A, 29).

Yet the Court of Appeals incorrectly assumed at the pleading stage that the Reconciliation Requirement merely "requires reporting of [cigarette sales], regardless of the terms, after the fact." *Id.* (App. A, 27). This assumption was contrary to GRE's well-plead allegations that the provision has the practical effect of dictating *in advance* the terms of wholly out-of-state transactions between GRE

and its importers. The Reconciliation Requirement is a *before-the-fact* regulation because, if GRE were to do business with entities without a commitment to turn over their private business data and records, GRE will be unable to comply with the statute when DRS demands the production of these records. Connecticut's Reconciliation Requirement limits GRE to doing business in other states with importers who will agree to produce their confidential tax and shipping records to Connecticut. This is not a small ask when the records at issue are confidential tax and sales documents belonging to the unrelated importers and downstream sellers, and is not information to which either Connecticut or GRE has any legal right of access.

Moreover, as a practical matter it is necessary for GRE to ask for this permission in advance and as a condition of its doing business with out-of-state importers. Otherwise, GRE risks having an importer later deny access to its records, which would, in turn, cause the Commissioner to remove GRE from the Tobacco Directory.

3. State Access to Private Business Data to Which the State Otherwise has no Legal Access Right.

The Court of Appeals erred when it concluded that Connecticut's state law requirement could not rise to the level of a dormant Commerce Clause violation, particularly when, as here, the relevant records belong to out-of-state third parties with no nexus to Connecticut. 988 F.3d at 124-25 (App. A, 25-28).

Although the decisions the Court of Appeals cited involved different forms of extraterritorial control of interstate business, that alone is insufficient given that

this Court has made clear that the analysis under the dormant Commerce Clause is not bound by formalism and focuses on the *practical effect* of the state law. *Healy*, 491 U.S. at 336. Moreover, the Reconciliation Requirement is quite different from the requirement in *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018), the single case on which the Court of Appeals primarily relied. 988 F.3d at 124 (App. A, 26). In *VIZIO, Inc.*, the Second Circuit rejected a dormant Commerce Clause challenge to a state law that used readily *available public data* regarding national market share to calculate state electronics recycling fees to be paid by television manufacturers whose products are sold in Connecticut. *Id*. at 256.[12]

There was no suggestion in VIZIO, Inc. that the regulated party needed to obtain private business data from unrelated businesses with no nexus to the state, and then reconcile the private business data of downstream sellers of the regulated party's products as a condition to approving those products for sale in Connecticut. In short, review by this Court on writ of certiorari is warranted because the Court of Appeals ignored the control of out-of-state commerce imposed by Connecticut's Reconciliation Requirement and because the Court of Appeals' decision conflicts with decisions of this Court and other Courts of Appeals regarding extraterritorial control of commerce. *E.g., Healy*, 491 U.S. at 336; *Edgar*, 457 U.S. at 642-43; *Am. Booksellers Found.*, 342 F.3d at 104.

[12] Other Circuits have adopted precisely this type of analysis when concluding that a state law has the practical effect of dictating the terms of out-of-state commerce. *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 661 (7th Cir. 1995) (concluding that the practical effect of state law was to impose requirements on out-of-state waste generators); *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-39 (9th Cir. 1993) (holding that state law had the effect of requiring the NCAA to follow procedural rules in out-of-state enforcement proceedings).

4. State Access to Private Indian Tribal Data to Which the State Otherwise has no Legal Access Right.

As noted, during the period relevant to this petition, GRE had three out of five importers that distributed exclusively within Indian Country and had no nexus whatsoever to Connecticut. Only one of the remaining two non-Indian importers transacted business with cigarette wholesalers in Connecticut. JA103 ¶ 37; JA44. In order to comply with the Reconciliation Requirement, however, GRE and other similarly situated NPMs must obtain and produce to DRS tribal tax and shipping records from sovereign, federally recognized Indian tribes that import and sell their products.

Even in instances where a Tribe is located within its boundaries (which is not the case here), Connecticut's power to regulate cigarettes is limited at best. Connecticut cannot, for example, regulate the type of cigarettes bought by Tribes located in the state, nor establish a minimum price. *Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994) ("Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price" (emphasis supplied)). Nor does Connecticut have, or claim to have, tax jurisdiction over the sales at issue in this case – an obvious concession that Connecticut has no jurisdiction over out-of-state sales of GRE products. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 18 (2010) ("New York City . . . cannot, consistent with the Commerce Clause, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax") (Ginsberg, J., concurring).

It would be particularly harmful if Connecticut, which is jurisdictionally prohibited from taxing these out of state Tribal sales, could nevertheless extend its jurisdiction to collect confidential business data from out of state Indian Tribes with no nexus to Connecticut, and in doing so prohibit Grand River from selling product to an out of state Indian Tribe or private business unless they disgorge confidential business data to Grand River in connection with sales over which Connecticut has no jurisdictional power. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (if state does not prohibit, but merely regulates conduct, Tribes may engage in the conduct free of state regulatory oversight). Yet that is exactly the result reached by the Second Circuit below. Because Connecticut has no such jurisdiction, this Court should review the Second Circuit's opinion which is in direct conflict with opinions of this Court and other Courts of Appeals.

B. The Second Circuit Court of Appeals' Opinion Conflicts with this Court's Precedent Confirming That Out of State Business Activities Cannot Subject a Foreign Corporation to a State's Jurisdiction.

It is a fundamental concept of due process that a state only has jurisdiction over non-residents to the extent of their activities within that state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular"). As a result, activities of a non-resident defendant, legal where they occurred, and taking place outside a state seeking to exercise jurisdiction, cannot form the basis for the state's exercise of jurisdictional authority. *Accord BMW of N. Am. v. Gore*, 517 U.S. 559,

572-73 (1996) ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). A defendant's business activities outside a forum state simply cannot have any impact on the scope of the forum state's jurisdictional power.

As this Court has confirmed:

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).

The constitutional rights addressed by this Court in *International Shoe* apply with as much force today as they did at the time this Court rendered that decision, and those rights preclude forcing GRE to obtain confidential business data from Indian Tribes operating solely in a jurisdiction where Connecticut does not have jurisdiction.[13] *Accord Cote v. Wadel*, 796 F.2d 981, 984-85 (7th Cir. 1986) ("personal jurisdiction over nonresidents of a state is a [consequence] … of the state's extending protection or other services to the nonresident . . . [L]itigants and the public will benefit substantially in the long run from better compliance with the

[13] *Int'l Shoe,*, 326 U.S. at 316; *see Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny").

rules limiting personal jurisdiction"); *Froning & Deppe, Inc. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (allowing exercise of personal jurisdiction in Illinois "would positively *hinder* the underlying policies of the several states which favor the free flow of commerce") (emphasis in original).

Sales were initiated by the out of state Tribe's and not GRE; and once title transferred shipment was conducted by a third party not involved in this case and acting the entire time as the agent of the Tribes. *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1264 (Ala. 2000) (no personal jurisdiction where sale took place in the seller's state, and was shipped by a third party carrier "acting, the entire time, as the agent" of the buyer). No sales took place in Connecticut, and the out of state Tribes have not otherwise purposefully availed themselves of the privilege of doing business in Connecticut.

It would be contrary to this Court's long-standing jurisdiction jurisprudence to force GRE to obtain confidential third-party information and then provide that to Connecticut involving contracts entered into and performed entirely outside of Connecticut. Indeed, as this Court noted in *Hanson v. Denckla*:

> [a state] does not acquire jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [defendant]. As we have indicated, they are insufficient to sustain the jurisdiction.

Hanson, 357 U.S. 235, 254 (1958).

Similarly, constitutional due process protections do not permit Connecticut to exercise jurisdiction over these out of state businesses simply because they of their

own accord imported product and brought it back to Indian reservations all done outside the boundaries of Connecticut. This Court consistently has confirmed that these types of actions by a third party cannot expose it to a state's jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *accord Amsleep, Inc. v. Am. Mattress Ctrs., Inc.*, No. 01 C 6456, 2002 WL 1400369 at *5 (N.D. Ill. June 27, 2002) ("That a product sold in Defendant's Indiana location may someday be transported by an Illinois resident into Illinois does not convert Defendant's Indiana contacts into Illinois contacts").

Due Process protections prohibit Connecticut's attempts to regulate out of state sales. The Second Circuit disagrees, requiring this Court's review of its decision on writ of certiorari.

II. WHETHER A STATE MAY, AS A CONDITION OF DOING BUSINESS IN THE STATE, REQUIRE THIRD-PARTY OUT OF STATE BUSINESSES WITH NO NEXUS TO THE STATE TO DISGORGE PRIVATE BUSINESS DATA DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. States Should not be Able to Gain Access to Private Data of out of State Businesses Using Their Regulatory Power Over Unrelated Businesses Whose Products are Sold in the State.

Connecticut's demand for private business data is part of an increasingly common trend towards government demands for data held by the private sector. Yet there has been relatively little discussion of the complex legal and political

issues associated with state government demands for access to data held by private sector businesses that have no nexus to the state which is demanding the data. *Accord* USA: Data Protection Laws and Regulations, June 7, 2021, available at: https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa (last visited August 23, 2021); *see also* F. Cate and J. Dempsey, Bulk Collection: Systematic Government Access to Private-Sector Data, Oxford Scholarship Online, Oct. 2017, DOI: 10.1093/oso/9780190685515,001,0001.

An *en banc* opinion of the First Circuit Court of Appeals, reversing the panel opinion, addressed an analogous taking of private business information by a state, and recognized:

> Specific laws simply cannot destroy property interests. In fact, this is precisely what the Takings Clause is designed to prevent: "a State, by *ipse dixit,* may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of governmental power."

Philip Morris, Inc. v. Reilly, 312 F.3d 24, 32 (1st Cir. 2002) (*en banc*) (citing and quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). The district court decision affirmed by the First Circuit recognized:

> If the condition to sales in Massachusetts involved simply disclosing information about a product that did not amount to a trade secret, the burden would be slight and constitutionally inoffensive. In fact, however, the condition at issue here requires the surrender of a valuable property right. That would be significant enough if the surrender were confined to the Massachusetts market, *see Philip Morris,* 159 F.3d at 677, 679, but it will not be. The condition imposed on the right to sell products within Massachusetts requires the general abandonment of whatever economic value inures to the plaintiffs from their [trade] secrets anywhere in the world. The record developed by the parties in this case indicates that would be a substantial loss.

Phillip Morris Inc. v. Reilly, 113 F. Supp. 2d 129, 150 (D. Mass. 2000), *rev'd* 267 F.3d 45 (1st Cir. 2001), *on reh'g en banc*, 312 F.3d 24 (1st Cir. 2002), and *aff'd sub nom. Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002).

Because Connecticut's demand for private business data from third party out-of-state businesses effectuates an uncompensated taking of those business' private property, it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the State, and therefore violates the dormant Commerce Clause. *Healy*, 491 U.S. at 336; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. at 579; *Edgar v. MITE Corp.*, 457 U.S. at 642-43; *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003).

Moreover, because the Reconciliation Requirement results in a taking of confidential data from sales occurring wholly outside of the State's borders, it should be found invalid, no matter how great the local benefit, and no matter how small its out-of-state burden. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) Sutton, Circuit Judge, concurring (*citing and quoting Healy*, 491 U.S. at 336.[14] Connecticut's law that requires disgorgement of confidential business information from unrelated third party Tribes and private businesses based solely on GRE's listing in the Connecticut Tobacco Directory regulates "commerce that

[14] *Accord Dean Foods Co. v. Brancel*, 187 F.3d 609, 614 (7th Cir. 1999) ("extraterritorial regulation is barred by the federal constitution"); *McCormick v. Statler Hotels Delware Corp.*, 195 N.E.2d 172, 174 (Ill. 1963) ("legislation is presumptively territorial only and confined to the limits over which the law-making power has jurisdiction").

takes place wholly outside of the State's borders," and therefore is invalid. As this Court noted in *Healy*:

> A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . [T]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.

Id. (internal quotations and citation omitted). These constitutional concepts apply with equal force to both legislative and judicial exercise of jurisdiction. *BMW of N. Am. v. Gore*, 517 U.S. at 572 n.17.

Connecticut's lack of authority to demand this private data from out of state third-party businesses is an important question of federal law that has not been, but should be, decided by this Court.

B. Connecticut Cannot Prohibit a Business From Selling Its Products to Indian Tribes.

1. Congress has Taken the Business of Indian Trading on Reservations so Fully in Hand That no Room Remains for State Laws Imposing Additional Burdens.

Regulating trade "with the Indian Tribes" is the most fundamental power granted to the United States Congress by the Indian Commerce Clause.[15] Allowing a state to usurp that exclusive congressional power through state regulation controlling a Tribe's purchase of goods outside the State not only ignores the plain

[15] "Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 692, n.18 (1965).

meaning of the Indian Commerce Clause, it undermines comprehensive federal statutory schemes adopted by Congress under its Indian Commerce Clause powers,[16] and eviscerates centuries of this Court's jurisprudence on this very subject.[17] Yet that is exactly what the Second Circuit Court of Appeals did in its decision below.

Connecticut cannot enjoin a business from selling to Indians on their reservations – either inside or outside of the State.[18] Indeed, not only is there no reported case allowing states to regulate an Indian tribe's purchases absent congressional authorization, just the opposite is true. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. at 690 ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation").[19] As a result,

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[16] *E.g.*, 19 Stat. 200, 25 U.S.C. § 261 ("The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."); 4 Stat. 729, now 25 U.S.C. § 263 (empowering the President in the public interest to forbid introduction of any or all goods into the territory of a tribe); 4 Stat. 729, as amended, now 25 U.S.C. § 264 (penalties for trading without a license); 18 U.S.C. § 3113 (forbidding unlawful introduction of liquor into Indian country).

[17] "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *see also United States v. Mazurie*, 419 U.S. 544, 554 (1975).

[18] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 987 (10th Cir. 1987).

[19] This Court has recognized limited state jurisdiction over non Indians operating on reservation, but has never recognized any state power to regulate from whom Indian Tribes can purchase goods absent congressional enactment. *Mazurie*, 419 U.S. at 558.

congressional permission is required before states can regulate the sale of liquor, apply state health and education laws, or regulate similar activities by Indians on reservation.[20]

Yet Connecticut's Reconciliation Requirement seeks to prohibit a business from selling its products to Tribal businesses by prohibiting that business from having its products sold in Connecticut unless those out of state Tribes disgorges out of state confidential tribal business information to Connecticut.

Whether a state can prohibit a business from selling to an Indian tribe located outside the State's boundaries is an important question of federal law that has not, but should be, addressed by this Court on writ of certiorari.

2. The Power to Regulate Indian Commerce Between Tribes Lies Exclusively in Congress.

Connecticut is jurisdictionally without authority to regulate commerce of any kind occurring completely outside of its boundaries. *E.g., BMW*, 517 U.S. at 572-73 ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"). This prohibition applies with greater force here, given that Connecticut's attempt at extraterritorial regulation involves prohibiting purchases by an Indian tribe from a vendor doing business in Indian Territory outside Connecticut.

The Constitution vests regulatory authority over trade by Indian tribes exclusively in Congress. U.S. Const. art. I, § 8, cl. 3. In interpreting this delegation of power exclusively to Congress, this Court confirmed:

[20] *E.g.*, 18 U.S.C. § 1161; 25 U.S.C. § 231; 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

> [T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but the States have been divested of virtually all authority over Indian commerce and Indian tribes.

Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996). The divestiture of state authority is confirmed in its historical underpinnings.[21]

Under the Indian Commerce Clause, trade with Indian nations has long been encouraged by the federal government free from state regulation. Not only has Congress never passed legislation authorizing the incursion into Indian commerce Connecticut seeks here, just the opposite is true: Congress repeatedly has recognized and encouraged trade with Indians free of state regulation. *See, e.g.*, Native American Business Development Act, 25 U.S.C. § 4301(b)(5).

Only Congress can regulate the right of tribes to engage in commerce. Here, the Connecticut Reconciliation Requirement allows the State directly to interfere with Congress' power to regulate Indian commerce, and unduly burdens such commerce, all in violation of the Indian Commerce Clause.

3. Federal Indian Law Preempts the State Regulations at Issue in This Case.

Federal preemption of state law as applied to Indian reservations is not controlled by the standards of preemption in other areas of law. Instead, the analysis requires a particularized examination of the relevant federal, state, and

[21] Francis Paul Prucha, Documents of United States Indian Policy (3d ed. 2000) p. 10; Francis Paul Prucha, American Indian Policy in the Formative Years (1962) p. 29 ("[T]here was fundamental agreement that Indian affairs was one area that belonged to the central government").

tribal interests, including the federal trust responsibility and the tribal interest in promoting economic development, self-sufficiency and strong tribal government. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982).

When on-reservation conduct is at issue, state law cannot be enforced, for the state's interest is minimal and the federal interest in encouraging tribal self-government is at its strongest. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144; *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-83; *McClanahan*, 411 U.S. at 171-72. In *Moe*, this Court held that vendor licensing fees the state sought to impose upon reservation Indians were preempted. *Moe*, 425 U.S. at 480-81. Here, similar to the vendor licensing fees this Court rejected in *Moe*, the burden falls on Indians conducting on reservation business, and the State's Reconciliation Requirement cannot be used to force a business to stop selling its products to a Tribe that will not disgorge confidential tribal information because the state is forcing disgorgement of private business data from Tribes (not non-Indian consumers), and is doing so by dictating those businesses from which the Tribe can purchase goods outside Connecticut. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995); *Central Machinery Co. v. Ariz. St. Tax Comm'n*, 448 U.S. 160 (1980) (state law imposing burdens upon reservation traders cannot be enforced); *Bracker*, 448 U.S. at 144-45.

The state law here, seeking to dictate that a business cannot sell to a Tribe unless that Tribe releases its private business data, is preempted. Indeed, because

the cigarettes purchased by the tribal importers comply with federal regulatory requirements, Connecticut has no authority to regulate the Canadian based business from which the Tribes purchase and import cigarettes. *Cabazon*, 480 U.S. at 207-10 (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); accord *Milhelm Attea & Bros.*, 512 U.S. at 75 (1994) ("By imposing a quota on tax-free cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' *Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price"* (emphasis added)).

The Second Circuit incorrectly decided this important question of federal law that has not been, but should be, addressed instead by this Court.

CONCLUSION

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

Respectfully Submitted,

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