No. 21-678

In the Supreme Court of the United States

BIG SANDY RANCHERIA ENTERPRISES,

Petitioner,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE ATTORNEY GENERAL

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QUESTIONS PRESENTED

1. Whether petitioner Big Sandy Rancheria Enterprises is an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" under 28 U.S.C. § 1362.

2. Whether the court of appeals properly rejected petitioner's claims that its cigarette-distribution business is exempt from state licensing, reporting, and other regulatory requirements.

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STATEMENT

1. Like other States, California regulates and taxes cigarette sales within its borders. The State imposes a per-cigarette excise tax and requires entities at each stage of the distribution chain—manufacturers, distributors, and retailers—to comply with various licensing, reporting, and other regulatory requirements.

a. California's cigarette excise tax totals $2.87 per pack and is generally paid by distributors affixing a tax stamp at or near the time of sale to a retailer. Cal. Rev. & Tax. Code §§ 30011, 30101, 30123(a), 30130.51(a), 30131.2(a), 30161, 30163. The tax funds a number of programs, such as medical research, healthcare services, and tobacco-related education. *See, e.g.*, *id.* § 30122; Cal. Bus. & Prof. Code § 22970.1(a).

The State's excise tax does not apply to certain sales, including cigarettes sold by a tribe or licensed tribal retailer to a member of the tribe on that tribe's land. Pet. App. 4. Thus, where a licensed distributor sells cigarettes only to tribal retailers for sale to tribal members on that tribe's land, the distributor is not required to affix a tax stamp or otherwise pay the excise tax.

When a licensed distributor sells cigarettes to a tribal retailer for on-reservation sales, but the ultimate consumer is not a member of the tribe, the non-Indian consumer owes the tax. *See* Cal. Rev. & Tax. Code § 30107; *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11-12 (1985) (per curiam) (where vendor is untaxable, legal incidence of tax is on non-Indian purchaser). In such circum-

stances, the on-reservation seller is responsible for collecting the owed tax and remitting it to the State. Cal. Rev. & Tax. Code §§ 30108(a), 30184; Pet. App. 4.

b. To facilitate collection of these taxes, all participants in the distribution chain, including manufacturers, distributors, and retailers, are required to be licensed by the State. Cal. Bus. & Prof. Code §§ 22975 *et seq.* (Cigarette and Tobacco Products Licensing Act of 2003); Cal. Rev. & Tax. Code §§ 30140 *et seq.* (Cigarette Tax Law). Sales to unlicensed entities are generally prohibited. Cal. Bus. & Prof. Code § 22980.1. Distributors have been required to obtain licenses since 1959. Cal. Rev. & Tax. Code § 30140; 1959 Cal. Stat. 3061, 3065. The Legislature expanded the State's licensing scheme in 2003, finding that unlawful distributions and untaxed sales of cigarettes had contributed to the loss of hundreds of millions of dollars in tax revenue per year. Cal. Bus. & Prof. Code § 22970.1(b). It concluded that "[t]he licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products." *Id.* § 22970.1(d).

All licensees, including distributors, are required to maintain copies of transaction records. Cal. Bus. & Prof. Code §§ 22974, 22978.1, 22978.5, 22979.4, 22979.5. Distributors must also make regular reports to the California Department of Tax and Fee Administration. Cal. Rev. & Tax. Code §§ 30182, 30183. Those reports provide information on the number of stamps purchased, the number of stamps affixed, the number of cigarettes on which taxes were required to be collected, and the number of tax-exempt cigarettes sold. *See id.* § 30182(a); Cal. Dep't of Tax & Fee Admin., *Cigarette Distributor/Importer Tax Report*,

CDTFA-501-CD Rev. 15 (2020).[1] By identifying exempt sales, the reports inform state regulators of the potential number of transactions for which taxes may become due and owing later in the distribution chain, such as at the point of retail sale. *See* Pet. App. 42-44, 92-94.

c. In addition to licensing and taxing the distribution of cigarettes, California law imposes certain regulatory obligations on manufacturers. Under the 1998 tobacco Master Settlement Agreement between major cigarette manufacturers and 52 States and territories, participating manufacturers are required to make annual payments to California and the other signatories. Pet. App. 6. These payments help offset the costs of treating smoking-related illnesses caused by the manufacturers' products. *Id.*

Like other state parties to the Agreement, California has adopted statutes implementing and enforcing it. Those laws address the concern that manufacturers that did not participate in the Agreement could use their "cost advantage to derive large, short-term profits in the years before liability" arises, without the State "hav[ing] an eventual source of recovery from them if they are proved to have acted culpably." Cal. Health & Safety Code § 104555(f). Under California's Escrow Statute, manufacturers that are not party to the original Agreement must either join the Agreement or make payments to an escrow account based on the number of cigarette "unit[s] sold." Cal. Health & Safety Code § 104557; *see* Pet. App. 8. "'Units sold'" do not include cigarettes "sold by a Native American tribe to a member of that tribe on that tribe's land."

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[1] Available at https://www.cdtfa.ca.gov/formspubs/cdtfa501cd.pdf (last visited Jan. 3, 2022).

Cal. Health & Safety Code § 104556(j). The escrowed funds are available to compensate the State or other parties in the event of claims against a non-participating manufacturer. *Id.* § 104557(b)(1). Any funds that remain in the escrow account for 25 years are released back to the manufacturer with interest. *Id.* § 104557(b)(3).

Under California's Directory Statute (also called the Complementary Statute), manufacturers must certify to the state Attorney General that they have complied with either the Agreement or their escrow obligations. Cal. Rev. & Tax. Code § 30165.1(b). Manufacturers that provide such assurances and make escrow payments when required are placed on the tobacco "directory." *Id.* § 30165.1(c). Cigarettes of non-compliant manufacturers—often referred to as "off-directory" cigarettes—are considered contraband and generally may not be sold within the State. *See id.* § 30165.1(e)(2).

2. The Big Sandy Rancheria of Western Mono Indians of California (the Tribe) is a federally recognized Indian tribe with offices on the Big Sandy Rancheria in California. Pet. App. 2, 9. The Tribe has adopted a constitution under its inherent sovereign powers rather than under the procedures provided by Section 16 of the Indian Reorganization Act, which permits Indian tribes to "adopt an appropriate constitution and bylaws" that become effective when ratified by a majority of the tribe's members and approved by the Secretary of the Interior. 25 U.S.C. § 5123(a), (h)(1); Pet. App. 9-10, 72. The Tribe's governing body is the Tribal Council. Pet. App. 10. The Tribe is not a party to this case.

The petitioner is Big Sandy Rancheria Enterprises, a federally chartered tribal corporation that is wholly

owned by the Tribe. Pet. App. 2. Petitioner operates under a charter issued under Section 17 of the Indian Reorganization Act. *Id.* at 10. That statute provides that, "upon petition by any tribe," the Secretary of the Interior may "issue a charter of incorporation to such tribe." 25 U.S.C. § 5124. That "charter shall not become operative until ratified by the governing body of such tribe." *Id.* An approved charter "may convey to the incorporated tribe" specified powers, such as the power to purchase, own, and manage property, as well as "such further powers as may be incidental to the conduct of corporate business, not inconsistent with law." *Id.* Petitioner's Board of Directors is composed of the same individuals who serve on the Tribal Council of the Tribe. Pet. App. 10.

Petitioner operates a cigarette wholesale distribution business through various subdivisions. Pet. App. 10-11. It purchases cigarette products from manufacturers operating outside the Rancheria and receives those products at warehouse facilities on the Rancheria. *Id.* at 11, 64. Petitioner sells to tribal retailers operating on other reservations within the geographic boundaries of the State. *Id.* at 12. Those retailers then sell to individual customers on the retailers' reservations. *Id.*

In 2008, before obtaining a Section 17 charter, the Tribe applied for a state distributor's license. Pet. App. 12. After the State sought clarifying information concerning the application, however, the Tribe did not further pursue a license. *Id.*

Also in 2008, the State brought an enforcement action against Native Wholesale Supply Company, a tribal corporation headquartered on an Indian reservation in New York, for sales of contraband cigarettes

into California. *People ex rel. Harris v. Native Wholesale Supply Co.*, 196 Cal. App. 4th 357, 362-363 (2011). In 2007 alone, Native Wholesale shipped and sold approximately 80 million cigarettes to Big Sandy Rancheria. *Id.* at 363-364. Those cigarettes were ultimately sold to the general public, and California sued Native Wholesale for violating the State's Directory Statute and state cigarette fire-safety laws. *Id.*

Between 2011 and 2016, the California Attorney General's Office communicated various concerns to the Tribe's leadership about non-compliance with state cigarette laws. Pet. App. 12. The State acknowledged that on-reservation sales to members of Big Sandy Rancheria were generally exempt from state taxes. C.A. Dkt. 9-2 at 164 (Excerpts of Record) (letter from Attorney General's Office to Tribal Chairperson). But because petitioner was distributing to retailers who were not members of Big Sandy Rancheria, it was required to comply with the State's licensing and regulatory requirements, which allow the State to track cigarettes further down the distribution chain. *See id.* To date, petitioner has not obtained a state license. D. Ct. Dkt. 13 (¶ 179).

In 2018, the Attorney General's Office communicated with Azuma Corporation, a manufacturer that supplies petitioner, about Azuma's cigarette distribution in California. Pet. App. 11 n.5; C.A. Dkt. 22-2 at 1-2. It also brought Azuma's practices to the attention of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which subsequently concluded that Azuma was non-compliant with federal law. C.A. Dkt. 22-2 at 1-13. ATF observed that "[i]t appears that at least some of Azuma's customers, in particular, [petitioner], who is not licensed by the State of California and is not compliant with State directory laws and

safety laws, are not lawfully operating under applicable California and Federal laws[.]" *Id.* at 9.

3. a. In 2018, petitioner sued respondents the California Attorney General and the Director of the California Department of Tax and Fee Administration. Pet. App. 13. As amended, petitioner's complaint alleged five claims: The first four claims asserted that California's licensing and directory statutes are preempted by federal common law, principles of tribal sovereignty, and the Indian Trader Statutes, 25 U.S.C. §§ 261-264. Pet. App. 65. The fifth claim sought a declaration that petitioner has no tax liability—"'either directly or pursuant to a collection and remittance requirement'"—for the State's cigarette and tobacco taxes. *Id.* at 67-68.

With respect to the fifth claim, the complaint referenced the Tax Injunction Act, 28 U.S.C. § 1341, which generally bars suits seeking to restrain the collection of state taxes. D. Ct. Dkt. 13 (¶ 8). But it alleged that 28 U.S.C. § 1362, which grants district courts jurisdiction over "civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," conferred jurisdiction over the claim. *Id.*; *see* Pet. App. 71.

In response to this assertion, counsel for respondents informed petitioner's counsel that they would have no jurisdictional objection if the Tribe were joined as a plaintiff. *See* C.A. Dkt. 20 at 8, 27. The Tribe, however, did not join the suit.

b. The district court dismissed the complaint. Pet. App. 57-98. It first held that the Tax Injunction Act divested the court of jurisdiction over petitioner's fifth claim. *Id.* at 67-79. The court recognized this Court's decision in *Moe v. Confederated Salish & Kootenai*

Tribes of the Flathead Reservation, 425 U.S. 463 (1976), which held that Section 1362 provides an exception to the Tax Injunction Act's jurisdictional bar for suits brought by Indian tribes. Pet. App. 71. But because petitioner is a federally chartered corporation that is distinct from the Tribe, it was not an "Indian tribe or band" within the meaning of the statute. *Id.* at 73-77.

The court explained that petitioner's original complaint had described petitioner as a "'federally-chartered corporation,'" that was "'wholly owned by the Big Sandy Rancheria Band of Western Mono Indians.'" Pet. App. 73 (quoting D. Ct. Dkt. 1 (¶¶ 9, 79, 80)). But in response to respondents' motions to dismiss, petitioner filed an amended complaint that "ostensibly attempt[ed] to obfuscate the distinction between itself and the Tribe," by describing both itself and Big Sandy Rancheria Band of Western Mono Indians as "the 'Tribe.'" *Id.* Notwithstanding this "artful pleading," *id.*, the court held that petitioner could not avail itself of the jurisdictional exception in Section 1362 because petitioner, as a federally chartered corporation, is legally distinct "from the Tribe in its constitutional form," *id.* at 75.

The court further concluded that even if petitioner qualified as an "Indian tribe or band" within the meaning of Section 1362, petitioner did not have a "'governing body duly recognized by the Secretary of the Interior.'" Pet. App. 77-79. "The allegations of [petitioner's] own complaint acknowledge that it is 'Big Sandy Rancheria of Western Mono Indians of California'"—and not petitioner—"that is recognized by the Bureau of Indian Affairs." *Id.* at 77.

The court dismissed the remaining claims for failure to state a claim. Pet. App. 79-97. The court concluded that because petitioner conducted cigarette sales activities off the Rancheria, it was properly subject to non-discriminatory state laws like California's Directory Statute. *Id.* at 90-91. With respect to petitioner's challenge to the State's licensing requirements, the court explained that this Court had rejected similar preemption challenges to "state programs involving similar, but also more demanding, licensing and recordkeeping requirements to that of California." *Id.* at 97. Accordingly, petitioner's "attempt to retread old ground will not be permitted to proceed." *Id.*

c. The court of appeals affirmed. Pet. App. 1-45. It first held that Section 1362's exception to the Tax Injunction Act did not authorize petitioner's declaratory relief claim. *Id.* at 15-25. The court recognized that "statutes passed for the benefit of Indian tribes, such as § 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor." *Id.* at 18 (internal quotation marks and alterations omitted). But it noted that the term "Indian tribe" in federal Indian law ordinarily refers to tribal entities recognized by the federal government in their constitutional or governmental—and not their corporate—form. *Id.* at 19-20. Here, petitioner did not allege that, in issuing a Section 17 corporate charter, the federal government recognized petitioner as a distinct political or governmental entity. *Id.* at 20.

The court further explained that the text of Section 17 itself "plainly distinguishes between the tribe and the incorporated tribe." Pet. App. 21. That statute permits "'any *tribe*' to petition for a charter of incorporation, which—once ratified 'by the governing

body of *such tribe*'—may convey certain powers to the 'incorporated tribe.'" *Id.* When Congress adopted Section 1362 decades after enacting Section 17, it "could have used the phrase 'incorporated tribe' or cross-referenced section 17." *Id.* But "[i]t did not do so." *Id.* The court of appeals thus affirmed the district court's jurisdictional holding. *Id.* at 18, 45. It declined to address "the distinct question whether [petitioner] has a duly recognized governing body" within the meaning of Section 1362. *Id.* at 25 n.8.

The court of appeals rejected each of petitioner's remaining claims on the merits. Pet. App. 25-45. It explained that, under this Court's precedents, the extent of state regulatory authority over tribal commercial activities depends on "who" the State is regulating (Indians or non-Indians) and "where" the regulated activity takes place (on or off a tribe's reservation). *Id.* at 28 (emphasis omitted) (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005)). "[W]hen a tribe or tribal members act outside their reservation, they are subject to 'non-discriminatory state law otherwise applicable to all citizens of the State,' 'absent express federal law to the contrary.'" *Id.* at 30 (alterations omitted) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973)). In contrast, when a State asserts authority over the activities of non-Indians on a reservation, courts apply the balancing test adopted in this Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Pet. App. 28-29. Under that test, courts "conduct 'a particularized inquiry into' and balance the 'state, federal, and tribal interests at stake.'" *Id.* at 28 (quoting *Bracker*, 448 U.S. at 145).

Applying these principles, the court held that petitioner's intertribal wholesale cigarette sales should be

treated as off-reservation activity properly subject to non-discriminatory state laws. Pet. App. 35-38. The court observed that petitioner did not allege that the State "has enforced or threatened to enforce the Directory Statute *on* the Rancheria." *Id.* at 37 n.10. It recognized petitioner's concession that petitioner "leaves the Rancheria to sell cigarettes to tribal retailers on other reservations." *Id.* at 35. And it reasoned that petitioner could not be regarded as remaining "'on-reservation' for purposes of the tribal-sovereignty analysis by selling cigarettes on *other tribes'* reservations." *Id.* at 36. Tribal sovereignty contains a significant geographical component, and petitioner had not plausibly alleged that California was interfering with the Tribe's ability to govern its own territory and members by prohibiting petitioner's unlicensed sales outside the Rancheria. *Id.* The court thus "join[ed]" both the Tenth Circuit and the Oklahoma Supreme Court "in treating tribe-to-tribe sales made outside the tribal enterprise's reservation as 'off-reservation' activity subject to non-discriminatory state laws of general application." *Id.* Because petitioner did not allege that California's law was discriminatory, its claim failed. *Id.* at 35.

The court next rejected petitioner's claim that the Indian Trader Statutes preempted the challenged laws. Pet. App. 38. The court explained that "the transactions that [petitioner] seeks to immunize from state regulation are fundamentally different from the transactions that have led [this] Court to deem the Statutes preemptive of state regulation as applied to Indian traders." *Id.* at 38-39 (discussing *Warren Trading Post v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965), and *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980)).

The court further reasoned that this Court's decision in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), required dismissal of petitioner's claims. Pet. App. 39. With respect to petitioner's challenge to the Directory Statute, the court explained that state law prohibits petitioner "from selling certain tobacco products based solely on the product manufacturer's violation of state law and without regard to the type, price, or quantity of the product itself." *Id.* at 39-40. As long as petitioner sources cigarettes from compliant manufacturers, it "'remains free to sell Indian tribes and retailers as many cigarettes' as it wishes, 'of any kind, and at whatever price.'" *Id.* at 40 (alteration omitted) (quoting *Milhelm*, 512 U.S. at 75). With respect to petitioner's challenge to California's licensing, recordkeeping, and reporting requirements, the court observed that schemes "with even more demanding requirements than those of California have been repeatedly upheld by the Supreme Court as imposing only a minimal burden." *Id.* at 42 (internal quotation marks omitted).

Judge Berzon joined the majority's dismissal of petitioner's first four claims, but acquiesced dubitante in its jurisdictional holding. Pet. App. 45. She was "puzzled as to why the Big Sandy Rancheria tribal council—a body that, by the § 17 charter, is identical in its membership to [petitioner's] Board—chose not to sidestep the jurisdictional question altogether by bringing suit *qua* tribal council." *Id.* at 52. But confronting the jurisdictional question in light of the corporate entity that actually brought the suit, she expressed doubts about the majority's conclusion, although she was "not prepared to say it is certainly wrong." *Id.* at 45; *see also id.* at 45-46 (concerns "not of sufficient weight to convince me to reject the majority's ultimate holding").

The court denied petitioner's request for rehearing en banc, with no judge requesting a vote on the petition. Pet. App. 99.

ARGUMENT

Petitioner asks this Court to review both of the court of appeals' holdings: that the district court lacked jurisdiction to consider petitioner's challenge to state tax-related requirements and that petitioner's other preemption claims fail on the merits. Neither question warrants this Court's review. The court of appeals properly held that petitioner, a federally chartered tribal corporation, was not an "Indian tribe or band" within the meaning of Section 1362. In addition, it correctly applied settled precedent in concluding that States like California are permitted to impose licensing and other regulatory requirements to ensure compliance with lawful taxes and fees that could easily be evaded through sales of exempt cigarettes on Indian reservations. Those conclusions do not conflict with decisions of other courts. And there is no other reason for further review.

I. PETITIONER'S CHALLENGE TO THE COURT OF APPEALS' JURISDICTIONAL HOLDING DOES NOT WARRANT REVIEW

Petitioner contends that the court of appeals erred in holding that petitioner is not an "Indian tribe or band" within the meaning of 28 U.S.C. § 1362 and that the court's jurisdictional holding conflicts with the Tenth Circuit's decision in *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991). *See* Pet. 16-26. Neither contention is correct.

The court of appeals properly concluded that petitioner is not an "Indian tribe or band" within the

meaning of Section 1362. Petitioner is a federally chartered corporation under Section 17 of the IRA. Section 17 makes clear that chartered tribal corporations are distinct from the chartering tribe itself. As the court of appeals noted, the statutory text distinguishes between "the tribe" and an "incorporated tribe," directing that a federal corporate charter may be granted only upon a petition by "any tribe" and subject to ratification "by the governing body of such tribe." 25 U.S.C. § 5124; *see* Pet. App. 21.

Consistent with that text, the Solicitor of the Department of the Interior has long concluded that a Section 17 corporation is not the same legal entity as the tribe itself. *See Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act*, 65 Interior Dec. 483, 484 (1958). The Solicitor's 1958 opinion explains that the IRA authorized tribes to establish a political structure for self-governance under Section 16 and separately allowed those tribes to charter a "business corporation" under Section 17 to facilitate business activities. *Id.* Such a "corporation, although composed of the same members as the political body, is to be a separate entity." *Id.* And "the powers, privileges and responsibilities of these tribal organizations materially differ." *Id.*

The sample Section 17 charter provided by the Bureau of Indian Affairs further confirms the distinction between a tribe and a chartered tribal corporation. It states that a chartered corporation "is a legal entity wholly owned by . . . a federally recognized Indian tribe, but distinct and separate from the Tribe."[2]

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[2] Bureau of Indian Affs., *Federal Charter of Incorporation Issued by the United States of America: Example Tribe for Example Corporation* 2, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc-001806.pdf (last visited Jan. 4, 2022).

In light of this established distinction, it is significant that Section 1362 uses the term "Indian tribe" and not "incorporated tribe" or another similar term. Pet. App. 21. When Congress has intended to include tribal corporations within a statute, it has done so expressly. *See, e.g.*, 25 U.S.C. § 5136(a) (authorizing the Secretary of Agriculture to make certain loans "to any Indian tribe recognized by the Secretary of the Interior or tribal corporation established pursuant to the Indian Reorganization Act (25 U.S.C. [§] 477)").[3]

The court of appeals was also correct in recognizing the distinct functions of a tribe on the one hand and a Section 17 corporation on the other. Pet. App. 16-20. "Federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship or 'recognition.'" *Id.* at 19 (alteration and emphasis omitted) (quoting *Cohen's Handbook of Federal Indian Law* § 3.02[2] (Newton ed., 2012)). Petitioner does not dispute that it exercises no governmental functions and has not been federally recognized as a political entity. *See* Pet. 22. It is instead a business enterprise constituted to engage in commercial activities that will promote economic opportunities for tribal members. *See* Pet. App. 10.

Petitioner argues that the court of appeals' focus on tribes that have a governmental relationship with the federal government is inconsistent with this Court's decisions in *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021), and *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). *See* Pet. 20-21, 25-

[3] Before being transferred to 25 U.S.C. § 5124, Section 17 was codified at 25 U.S.C. § 477.

26. That is not correct. *Yellen* held that Alaska Native Corporations qualified as "Indian tribe[s]" under the Indian Self-Determination and Education Assistance Act, even though they are not federally recognized as having a governmental relationship with the United States. 141 S. Ct. at 2438, 2440. But that Act expressly defines "Indian tribe" to include not only "any Indian tribe" but also "regional or village corporation[s]" established under the Alaska Native Claims Settlement Act. 25 U.S.C. § 5304(e). As noted above, Section 1362 contains no similar reference to Section 17 tribal corporations.

In *Moe*, this Court held that Section 1362 operates as an exception to the jurisdictional bar of the Tax Injunction Act. 425 U.S. at 472-475. But there, unlike here, the tribe itself initiated suit, and the Court recognized that "the Tribe, *qua* Tribe" suffered a discrete claim of injury with respect to the challenged state taxes. *Id.* at 465-466, 468 n.7. *Moe* never addressed whether a Section 17 corporation—which does not act as the "Tribe, *qua* Tribe"—qualifies as an "Indian tribe" under Section 1362.

Finally, petitioner is wrong in claiming (Pet. 16) that the court of appeals' holding impairs tribal sovereignty and improperly closes the federal courthouse door to tribal challenges to state tax laws. It is well established that governmental bodies of recognized tribes may challenge state taxes in federal court under Section 1362. *E.g.*, *Moe*, 425 U.S. at 473-475. The present litigation is a case in point. In proceedings below, respondents informed petitioner that they would have no jurisdictional objection to the suit if the Tribe joined as a plaintiff. But "puzzl[ingly]," the Tribe never did so. Pet. App. 52 (concurring opinion).

Petitioner also argues that the decision below conflicts with the Tenth Circuit's 1991 decision in *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*. Pet. 19-20. That too is mistaken. There, the court held that the United Keetoowah Band of Cherokee Indians qualified as a "tribe" under Section 1362 because there was "no indication in the pleadings or briefs that the tribe [came] before the federal court in any manner other than as a sovereign entity." *United Keetoowah Band*, 927 F.2d at 1174. Indeed, the United States had "expressly recognize[d] the [United Keetoowah Band of Cherokee Indians] as a governing body." *Id.* The circumstances here are different. Petitioner is not a federally recognized tribe. *Supra* pp. 4-5. And it does not exercise governmental or political authority. *See* Pet. App. 20; Pet. 22.

II. PETITIONER'S CHALLENGES TO THE COURT OF APPEALS' PREEMPTION HOLDINGS DO NOT WARRANT REVIEW

Petitioner also seeks this Court's review of the court of appeals' dismissal of petitioner's preemption challenges to the Directory Statute and to California's licensing, reporting, and recordkeeping requirements. Pet. 26-38. It challenges the court of appeals' conclusion that the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), was not required. Pet. 26-31. And it contends that the court below misapplied the Indian Trader Statutes and in so doing split with the New York Court of Appeals. *Id.* at 31-38. These contentions do not warrant this Court's review.

1. a. The court of appeals reasonably declined to apply *Bracker* balancing to petitioner's preemption

challenge. This Court has applied different frameworks when considering tribal preemption challenges depending on "who" or "where" a State is regulating. *Supra* p. 10. "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State," "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). But when a State asserts authority over the activities of non-Indians on a reservation, courts balance the state, federal, and tribal interests. *Bracker*, 448 U.S. at 144-145.

In *Mescalero*, for example, this Court considered a challenge to the application of a state gross receipts tax to a tribally owned and operated ski resort on land that bordered the tribe's reservation but was not part of it. 411 U.S. at 146. The Court concluded that because the tax was non-discriminatory and applied off the tribe's reservation, New Mexico could lawfully collect its tax. *Id.* at 148-149, 157-158. Likewise, in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), the Court rejected the contention that a tax on a tribe's non-Indian fuel distributor with respect to transactions off the reservation was subject to the *Bracker* test. *Id.* at 110-114. Because the legal incidence of the tax was off reservation and the tax was non-discriminatory, the Court held that it was valid. *Id.* at 115.

Under these authorities, the courts below reasonably regarded petitioner's activities as "off reservation." According to petitioner's allegations, petitioner receives cigarette supplies on the Rancheria, but its distribution activities take place off the Rancheria. D. Ct. Dkt. 13 at 25 (¶¶ 122-124). Petitioner's brief below asserted that it "transports the cigarettes from the

Big Sandy Rancheria to other Indian country in California, during which time it goes off-reservation." C.A. Dkt. 15 at 31. As contemplated by *Mescalero* and *Wagnon*, petitioner's cigarette-distribution enterprise extends beyond the Rancheria.

Petitioner asserts that *Bracker* balancing should apply because its cigarette distribution takes place on reservations of other tribes. Pet. 28. But the *Bracker* test is grounded in "special geographic sovereignty concerns" that protect tribal sovereignty on a tribe's own reservation. *Wagnon*, 546 U.S. at 113; *see id.* at 112-113; *cf. Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 161 (1980) (weighing interests of reservation tribe and not interests of non-member Indians' tribes). Here, the central concern asserted by petitioner was its *own* interest in advancing economic opportunities for the Tribe and its members and in raising revenue to support the Tribe's social welfare programs. *See* Pet. 5; D. Ct. Dkt. 13 at 22 (¶¶ 100-101). And as the court of appeals concluded, petitioner "fail[ed] to plausibly allege that California hinders the Tribe's ability to govern its territory and members" by prohibiting petitioner's unlicensed activities "outside the Rancheria." Pet. App. 36.

b. Petitioner does not claim that the court of appeals' conclusion conflicts with any decision of another lower court. To the contrary, it asserts that two other courts to have considered the question likewise declined to apply *Bracker* balancing. Pet. 26-27.

In *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012), the Tenth Circuit affirmed the dismissal of a challenge to Oklahoma's cigarette excise tax, escrow statute, and directory statute by a tribe operating a tobacco wholesale business. *Id.* at 1162,

1165. The court determined that "when the legal incidence of a tax falls on an Indian engaged in an activity outside of his or her Indian country, [courts] need not apply the *Bracker* test to determine whether the preemption barrier prevents the state from applying the tax." *Id.* at 1172. The escrow statute and directory statute were not subject to *Bracker* balancing because there was no claim that they were enforced in the tribe's Indian country. *Id.* at 1181-1183.

Similarly, in *State ex rel. Edmondson v. Native Wholesale Supply*, the Oklahoma Supreme Court held that a tribal distributor's sales to another tribe on another reservation was "off-reservation conduct by members of different tribes." 237 P.3d 199, 216 (Okla. 2010), *abrogated on other grounds by Bristol-Meyers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017). Accordingly, Oklahoma's enforcement of its directory law "passe[d] muster without even evaluating it under the *Bracker* interest-balancing test." *Id.*

c. And even if petitioner were correct that the court of appeals erred in not applying the *Bracker* balancing test, that would make no difference to the outcome here. The court of appeals applied this Court's precedents using the *Bracker* test to reject petitioner's separate argument that the Indian Trader Statutes preempt California's licensing and reporting requirements. Pet. App. 41-44; *see Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73-75 (1994) (applying *Bracker* balancing test to claim under Indian Trader Statutes). In that context, the court of appeals explained that California's licensing, recordkeeping, and reporting structure facilitates the collection of lawful state taxes and that the scheme imposes even more modest burdens than similar regimes previously upheld by this Court. Pet. App. 41-44. Thus,

even if the court of appeals erred in regarding petitioner's business activities as off reservation, its further analysis of the State's laws makes clear that the outcome would be the same under *Bracker*'s test for on-reservation conduct.

Moreover, this Court's settled precedents demonstrate that, under *Bracker*, States may impose the kind of licensing, reporting, and directory requirements that petitioner challenges here. This Court has repeatedly upheld state regulations that facilitate the collection of taxes when they are owed. For example, in *Moe*, the Court held that States may require tribal sellers to collect and remit taxes when they sell to non-Indian purchasers. 425 U.S. at 483. In *Colville*, the Court upheld a State's recordkeeping scheme, which required "detailed records of both taxable and nontaxable transactions." 447 U.S. at 159-160. And in *Milhelm*, the Court rejected a challenge to state requirements that distributors "maintain detailed records on tax-exempt transactions" and comply with quotas limiting the quantity of untaxed cigarette sales. 512 U.S. at 75-76, 78; *see also Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("the decisions of this Court have already foreclosed" the argument that licensing requirements on tribal sellers selling on reservation to non-Indians or non-members "infringe upon tribal sovereignty") (footnote omitted).

2. Petitioner's argument that the Indian Trader Statutes preempt California's Directory Statute (Pet. 31-38) also provides no basis for review.

Petitioner principally contends that the decision below "spurned" this Court's decisions in *Warren Trading Post* and *Central Machinery*. Pet. 32. In particular, petitioner focuses on *Central Machinery*'s holding that the Indian Trader Statutes preempted a

state tax on a company doing business with a tribe on that tribe's reservation, even though the company was not a licensed Indian trader. *Id.* at 32-33; *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 164-165 (1980) ("It is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations.") (footnote omitted).

Petitioner's arguments misapprehend the decision below. The court of appeals observed, "[a]s a preliminary matter," that petitioner lacked a federal Indian trading license and that no federal regulations comprehensively regulated the field of Indian cigarette sales. Pet. App. 38-39. But the court went on to explain that the Indian Trader Statutes do not preempt the Directory Statute because the Directory Statute only prohibits petitioner "from selling certain tobacco products based solely on the product manufacturer's violation of state law and without regard to the type, price, or quantity of the product itself." *Id.* at 39-40. As long as petitioner sources cigarettes from compliant manufacturers, it "'remains free to sell Indian tribes and retailers as many cigarettes' as it wishes, 'of any kind, and at whatever price.'" *Id.* at 40 (alteration omitted) (quoting *Milhelm*, 512 U.S. at 75).

Petitioner's arguments based on *Warren Trading Post* and *Central Machinery* also cannot be squared with this Court's later determination that those cases do not broadly foreclose state authority. In *Milhelm*, the Court explained that, "[a]lthough language in *Warren Trading Post* suggests that no state regulation of Indian traders can be valid, . . . subsequent decisions have undermined that proposition." *Milhelm*, 512 U.S. at 71 (internal quotation marks and altera-

tion omitted). And the Court clarified that, while *Warren Trading Post* could be read to prohibit state measures designed to prevent evasion of lawful taxes owed by non-Indians, "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes." *Id.* at 75.

The petition further errs in claiming that the decision below misapplied *Milhelm*. *See* Pet. 36. Petitioner recognizes that *Milhelm* upheld state regulations that are reasonably necessary to preventing avoidance of lawful state taxes, but it claims that *Milhelm*'s rationale does not apply to the State's Directory Statute because that law does not enforce a formal tax. *Id.* at 35-36. Petitioner identifies no case, however, limiting *Milhelm*'s reasoning in that way. *See id.* at 36. And one case that petitioner does cite, *id.* at 26, applied *Milhelm* to *reject* challenges to another State's directory law. *See Muscogee (Creek) Nation*, 669 F.3d at 1181-1182, 1182 n.12 (Oklahoma's provisions "do not prevent [the Nation] from obtaining particular brands of cigarettes so long as the manufacturer complies" with the escrow and directory laws) (emphasis omitted).

Finally, the decision below does not conflict with the New York Court of Appeals' decision in *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010). *See* Pet. 36-38. In that case, counties sought to criminally prosecute Indian retailers for failing to collect sales taxes on cigarettes. *Cayuga*, 930 N.E.2d at 240-242. The court held that because the State had failed to develop a methodology for calculating and collecting taxes on on-reservation retail sales to non-Indian consumers while respecting those retailers' rights to sell untaxed cigarettes to tribal members,

retailers could not be sanctioned for failing to comply with the cigarette tax. *Id.* at 253.

That is not the situation here, where California has a statutory and regulatory structure that the *Cayuga* court deemed lacking in New York. *See* Cal. Bus. & Prof. Code §§ 22970 *et seq.*; Cal. Rev. & Tax. Code §§ 30001 *et seq.*; Cal. Health & Safety Code §§ 104555 *et seq.*; Cal. Code Regs. tit. 18, §§ 4001 *et seq.*; Cal. Code Regs. tit. 11, §§ 999.10 *et seq.*; *supra* pp. 1-4. As explained above, that scheme recognizes tribal sellers' ability to sell cigarettes on the tribe's reservation to tribal members that are not subject to state tax or escrow fees; it also imposes licensing, reporting, and recordkeeping requirements that allow the State to track downstream purchases and prevent widespread evasion of lawful state taxes. The court of appeals properly rejected petitioner's challenge to those important requirements, and that decision does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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