No. ______

In the
Supreme Court of the United States

NATIVE WHOLESALE SUPPLY COMPANY,
Petitioner,
v.

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

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

PETITION FOR A WRIT OF CERTIORARI

Randolph H. Barnhouse
Counsel of Record
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (Telephone)
(505) 842-6124 (Facsimile)
dbarnhouse@indiancountrylaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether a contract for the purchase of goods entered into, and fully performed by, an Indian Tribe outside the exterior boundaries of the state in which the Tribe's reservation is located can constitutionally subject the out of state vendor to the specific personal jurisdiction of the buyer's state, under state laws purporting to regulate the sale of those goods in the buyer's state.

2. Whether a state has specific personal jurisdiction to regulate a purchase of goods contract between an Indian on an Indian reservation outside the state and an Indian Tribe located within the state's boundaries when the contract is performed on the out of state Indian reservation.

3. Whether there is a constitutional or statutory right afforded to an Indian of one tribe to conduct business free from state regulation with an Indian of a different tribe, both of which are located in Indian country, under the Indian Commerce Clause.

4. Whether a tribally chartered corporation wholly owned by a member of a federally recognized Indian Tribe is an Indian for purposes of the protections afforded to Indians under federal law.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Native Wholesale Supply Company has no parent company, and no public company owns ten percent or more of the company's stock.

STATEMENT OF RELATED PROCEEDINGS

- *People ex rel. Becerra v. Native Wholesale Supply Co.*, No. S257409 (Cal. Sup. Ct.) (petition denied Sept. 25, 2019)
- *People ex rel. Becerra v. Native Wholesale Supply Co.*, Nos. C084031, C084961 (Cal. Ct. App.) (opinion issued July 2, 2019)
- *People ex rel. Harris v. Native Wholesale Supply Co.*, No. C063624 (Cal. Ct. App.) (opinion issued June 8, 2011)
- *People ex rel. Harris v. Native Wholesale Supply Co.*, Case No. 34-2008-00014593 (Cal. Super. Ct.) (complaint filed June 30, 2008; amended notice of entry of judgment filed Jan. 24, 2017)

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

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PETITION FOR A WRIT OF CERTIORARI

Native Wholesale Supply Company respectfully petitions for a writ of certiorari to review the California Court of Appeal's opinion in *People ex rel. Becerra v. Native Wholesale Supply Co.*, No. C084031/C084961 (July 2, 2019).

OPINIONS BELOW

The California Supreme Court's denial of review is not reported, and is reprinted in the Appendix (App. A, 1). The opinions of the California Court of Appeal are reported as *People ex rel. Becerra v. Native Wholesale Supply Co.*, 249 Cal. Rptr. 3d 445 (Cal. Ct. App. 2019), *review denied* (Sept. 25, 2019), which is reprinted in the Appendix (App. B, 2-47) and as *People ex rel. Harris v. Native Wholesale Supply Co.*, 126 Cal. Rptr. 3d 257 (Cal. Ct. App. 2011), *review denied* (Sept. 21, 2011), which is reprinted in the Appendix (App. C, 48-61). The first underlying decision of the California Superior Court which was reversed by the California Court of Appeal is reported as *People of the State of California v. Native Wholesale Supply Co.*, 2009 WL 3100995 (Cal. Super. Ct., Sept. 25, 2009) and is reprinted in the Appendix (App. D, 62-78). The second underlying decisions of the California Superior Court which were affirmed by the California Court of Appeals are not reported and are *People of the State of California v. Native Wholesale Supply Co.*, Order Granting People's Motion for Summary Judgment (Cal. Super. Ct., Dec. 28, 2016) reprinted in the Appendix (App. E, 79-97); *People of the State of California v. Native Wholesale Supply Co.*, Order Denying Native Wholesale Supply Co.'s Motion for Summary Judgment (Cal. Super. Ct.,

Dec. 28, 2016) reprinted in the Appendix (App. F, 98-110); and *People of the State of California v. Native Wholesale Supply Co.*, Amended Notice of Entry of Judgment (Cal. Super. Ct., Jan. 24, 2017) reprinted in the Appendix (App. G, 111-116).

JURISDICTION

The California Supreme Court entered its decision denying review on September 25, 2019. On December 5, 2019, Justice Kagan granted an extension of time, until February 3, 2020, in which to file this petition. (App. H, 117-118). 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 a Justice of the Supreme Court for a period not exceeding sixty days pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5. This Court has jurisdiction to review the judgment of the California Court of Appeal pursuant to 28 U.S.C. § 1257.

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; . . . ."

Cal. Civ. Proc. Code § 410.10

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Cal. Rev. & Tax. Code § 30165.1(e)

"(2) No person shall sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory."

Cal. Health & Safety Code § 14951

"(a) A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements: . . . [testing, certification and marking requirements of cigarette fire safety statutes]."

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES.

A. Native Wholesale Supply Company.

Native Wholesale Supply Company ("Native Wholesale") is a tribally chartered Indian corporation that sells Native Indian manufactured tobacco products at wholesale to Native Indian Nations. 249 Cal. Rptr. 3d at 449 (App. B, 4-5). Native Wholesale does not manufacture the products it sells. *Id.* Tobacco products sold by Native Wholesale are sold on an F.O.B (Freight On Board) Seneca Nation basis, with title and risk of loss transferring to the buyer at the point of sale outside the State of California. Hill affidavit ("Hill Aff.") at ¶ 5 (App. I, 121); Cal. Com. Code § 2401(2)(a). The Native Indian Nations purchasing the product provide shipping direction for the products, or pick up the products in purchaser-owned trucks, from facilities regulated by U.S. Customs, including Foreign Trade Zones in New York and Nevada and a bonded warehouse on the Seneca Nation. 249 Cal. Rptr. 3d at 449 (App. B, 5). No sales or shipments are made in California. Hill Aff. at ¶ 5 (App. I, 121). All sales are made from Native Wholesale's corporate headquarters located on the Seneca Nation, within the exterior boundaries of the State of New York. Hill Aff. at ¶¶ 2, 5 (App. I, 120-121).

Native Wholesale "does not have an office, personnel, mailing address, bank accounts, sales agents, telephone, real estate or vehicles in California." (App. D, 64). Native Wholesale has no office or other presence in California. *Id.*

Native Wholesale is a corporation chartered by the Sac and Fox Nation. 249 Cal. Rptr. 3d at 449 (App. B, 6). Its sole shareholder (now deceased) was a Native American enrolled in the Seneca Nation. *Id*. Native Wholesale operates on the Seneca Nation under license from that Nation. Both the Sac and Fox Nation and the Seneca Nation are federally recognized Indian tribes and their lands are defined as Indian Country under federal law. 84 Fed. Reg. 1200, 1203 (Feb. 1, 2019). The Sac and Fox Nation is the "Delaware" of Indian Country, as it was the first Nation (and remains one of the few) to adopt a Business Corporation Law for the chartering of businesses in forms similar to those found in most U.S. States.

B. Big Sandy Rancheria of Western Mono Indians of California.

Big Sandy Rancheria of Western Mono Indians ("Big Sandy") is a federally recognized Indian Tribe. 84 Fed. Reg. 1200, 1201 (Feb. 1, 2019). Its reservation is within the exterior boundaries of the State of California. 249 Cal. Rptr. 3d at 449 (App. B, 81). Big Sandy went outside of California to obtain title to the cigarettes it purchased from Native Wholesale. Hill Aff. at ¶ 5 (App. I, 121).

C. Cigarette Regulation.

The United States has a comprehensive statutory and regulatory scheme governing the manufacture and sale of cigarettes. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); Prevent All Cigarette Trafficking Act of 2009, 15 U.S.C. §§ 375-378;

Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-2346. State regulation of cigarettes is limited. *Lorillard*, 533 U.S. 525 and *Rowe*, 552 U.S. 364. States have no authority to regulate interstate sales of cigarettes.

D. California's Contract with the Major Tobacco Companies.

In 1998, California entered a contract with major tobacco companies called the Master Settlement Agreement or MSA. 249 Cal. Rptr. 3d at 450 (App. B, 6). The MSA allows companies that join the MSA, and thus contract with California, to sell their cigarette brands in California, but only if they pay California a share of the profits in the form of settlement payments. *Id.* These are profits paid pursuant to contract; they are not a tax. *Id.* In return for its share of the profits, California has agreed to "diligently" protect the market share of its tobacco company partners. MSA, § IX(d)(2)(B).[1] To do so, California only permits the sale of "approved" cigarette brands, and it outlaws brands not "approved" by the California Attorney General. Cal. Rev. & Tax. Code § 30165.1(e)(2); Cal. Health & Safety Code §§ 104555-104558; 249 Cal. Rptr. 3d at 450 (App. B, 5-7).

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[1] Master Settlement Agreement, available at https://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf (last visited Feb. 3, 2020).

II. THE CURRENT LITIGATION.

A. Initial Proceedings Addressing Personal Jurisdiction.

1. Superior Court.

California filed suit against Native Wholesale pursuant to California laws that protect the market share of its tobacco company partners. (App. J, 123-143). The complaint alleged that Native Wholesale sold cigarette brands to Big Sandy that were not "listed on California's Tobacco Directory." (App. J, 124, Compl. at 2, 7-8).[2] The complaint did not raise tax issues, health claims, or allegations of product differences between the cigarettes manufactured by California's contract partners and the cigarettes distributed by Native Wholesale. Native Wholesale is not a manufacturer, and the complaint did not allege cigarette manufacturer violations. The complaint only challenged Native Wholesale's distribution (wholesale) activities conducted outside of California. California's complaint sought civil penalties, and injunctive relief preventing Native Wholesale from selling cigarettes to Big Sandy outside California. (App. J, 128, Compl. at 10-12).

[2] The complaint also alleged violations of state fire safety law (Cal. Health & Safety Code § 14951) and unfair competition law (Cal. Bus. & Prof. Code § 17200). (App. J, 137-140, Compl. at 8-10).

The Superior Court granted Native Wholesale's motion to quash service for lack of personal jurisdiction, holding:

> Plaintiff has cited no authorities, and the Court is aware of none, holding that sales by an out-of-state corporation to an Indian tribe on a reservation located in this state constitute minimum contacts with this state that will support personal jurisdiction over the out-of-state corporation.
>
> ....
>
> Authorities in other jurisdictions applying a minimum contacts analysis involving Indian reservations have concluded that activities taking place solely on Indian lands do not constitute contacts with the forum state.

Rejecting California's argument that "where state interests outside the reservation are implicated, a state may regulate the activities of even tribe members on tribal land, such as sales of cigarettes on reservation land by tribal entities to nonmembers from off the reservation," the court held:

> Recognition by the courts that states have the power to impose taxes on the on-reservation sales of cigarettes to non-Indians *is not authority that the states may regulate* on-reservation sales in general, or NWS' sales to Big Sandy in particular. As the U.S. Supreme Court explained in [*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)] state taxing schemes on cigarettes and other goods sold to non-Indians have been upheld because

> the legal incidence of the tax fell on the non-Indian purchaser.
>
> ....
>
> [T]he legal incidence of the statutes at issue in this case would not fall on non-Indian consumers. These statutes do not impose a tax that can be passed along to the non-Indian consumer. Rev. & Tax. Code section 30165.1 imposes an absolute ban on the sales of certain brands of cigarettes that are not listed on the Attorney General's directory .... The legal incidence of this ban, if applied here, would fall directly on Big Sandy as an importer as well as NWS as a seller of unregistered cigarettes.
>
> Of even more significance, NWS' sales to Big Sandy constitute not only commerce between Indian-owned entities but also interstate commerce. ... Plaintiff has not cited, and this Court is not aware of any authority permitting a state to regulate interstate commerce between Indian tribes or tribal entities. Such activities are more properly subject to Congressional regulation, which has plenary power to regulate Indian commercial activities.

(App. D, 65-70) (emphasis added). The Superior Court also rejected California's contention that purposeful availment can be shown by placing goods in the stream of commerce, noting:

> There is no evidence supporting an inference that NWS exercised any control over Big Sandy's downstream sales. ... While it may have been foreseeable to NWS that cigarettes sold to Big

> Sandy would be resold to others, foreseeability alone is insufficient to support specific jurisdiction.

(App. D, 70-73).

2. Court of Appeal's June 2011 decision.

The California Court of Appeal reversed the Superior Court, and held that California had specific personal jurisdiction. 126 Cal. Rptr. 3d 257 (App. C, 48-61).

B. Proceedings on Remand.

1. Superior Court.

The Superior Court granted California's motion for summary judgment (App. E, 79-97), and denied Native Wholesale's motion for summary judgment (App. F, 98-110).

2. Court of Appeal's July 2019 decision.

The Court of Appeal affirmed on July 2, 2019. 249 Cal. Rptr. 3d 445 (App. B, 2-47). It held that placing goods in the stream of commerce with the expectation that they eventually will be purchased by consumers in the forum state indicates an intention to serve that market and constitutes purposeful availment. 249 Cal.

Rptr. 3d at 453 (App. B, 14).[3] Addressing Indian Commerce Clause preemption, the court stated:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where ... a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.

249 Cal. Rptr. 3d at 454-55 (citation omitted) (App. B, 15, 17-18).

The court then held that Native Wholesale is "considered a non-Indian for purposes of the Indian Commerce Clause analysis," disregarding that California's own statute defines the term "Indian" to include "corporations organized under tribal authority

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[3] In both the 2011 and 2019 decisions, the Court of Appeal assumed that downstream sales were to "the general public" based on the number of members of Big Sandy compared to the number of cigarettes Big Sandy purchased from Native Wholesale, and relying on an Oklahoma case making a similar comparison. But unlike the cigarette tax system analyzed in the Oklahoma case, California's tax system does not predetermine the number of taxable and tax-exempt cigarettes based on probable demand of a tribe's members. Moreover, the Oklahoma case on which the California court relied – *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199 (Okla. 2010) – was abrogated by *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018), which found the "stream of commerce" test insufficient to establish Oklahoma jurisdiction following this Court's opinion in *Bristol-Myers Squibb v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017).

and wholly owned by Indians."[4] 249 Cal. Rptr. 3d at 459-60 (App. B, 25-29). The court held that this definition has no application because it is located in a different part of the code than either the Directory statute or the Fire Safety Act. *Id.*

Rejecting the argument that *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) requires treating Native Wholesale as an Indian, the court held that *Hobby Lobby* is "wholly irrelevant" here:

> NWS argues *Hobby Lobby* supports the conclusion that "closely held corporations, like NWS, take on the constitutionally enshrined rights of their owners." It believes the case "makes it clear that Arthur Montour, an Indian, was not divested of his status as an Indian simply because he elected to incorporate, rather than operate as a sole proprietorship."
> ....
> The United States Supreme Court did not consider or discuss the extension of any protections from a company's owners to the corporation outside the context of RFRA. More specifically, the Indian Commerce Clause does not contain the word "person" as defined by the Dictionary Act or as discussed in *Hobby Lobby*.

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[4] Cal. Code Regs., tit. 18, § 1616, subd. (d).

249 Cal. Rptr. 3d at 459-60 (App. B, 26-29). The court opined that even if Native Wholesale were an Indian, the transactions with Big Sandy would not be governed by the Indian Commerce Clause:

> That is because there is no constitutional or statutory right afforded to an Indian of one tribe (such as Montour) to conduct business free from state regulation with an Indian of a different tribe (such as a member of Big Sandy) under the Indian Commerce Clause.

249 Cal. Rptr. 3d at 459, n.9 (App. B, 27). The court further reasoned:

> NWS's non-Indian status does not, however, dispose of the preemption defense. If the liability-creating conduct occurred on-reservation, we must further conduct a balancing-of-the-interest analysis as provided in *Bracker* [448 U.S. at pp. 144-145]. On the other hand, if the liability-creating conduct occurred off-reservation, no such analysis is necessary and we may conclude the Indian Commerce Clause does not apply.

249 Cal. Rptr. 3d at 460-61 (App. B, 29). With regards to the location of the alleged violations at issue, the court held that "NWS's activity in this case involved violations of the Directory Act occurring off-reservation." 249 Cal. Rptr. 3d at 461 (App. B, 30):

> Revenue and Taxation Code section 30165.1, subdivision (e)(2) provides that a corporation shall not ship or otherwise distribute contraband

> cigarettes *into* or *within* California (irrespective of where the cigarettes were ultimately sold).

249 Cal. Rptr. 3d at 461 (emphasis in original) (App. B, 30). The court then held:

> the legal incidence of the penalties and liability under the Directory Statute attached before the contraband cigarettes reached Big Sandy's reservation - while the cigarettes were on their way to their final destination and after they breached the California border.

Id. (App. B, 31). But the California court disregarded the fact that the cigarettes were owned, possessed, and transported by Big Sandy at the time they "breached" the California border.[5] And the regulatory restrictions of California's Directory statute do not attach at the point cigarettes "breach" the border; rather, those regulatory restrictions are dependent upon the end retail sale to a "consumer." Cal. Health & Safety Code § 104556(j), § 104557(a). The court stated that "location of the conduct to which the Fire and Safety Act liability attaches is not as clear; but, as we explain, preemption nonetheless does not apply." 249 Cal. Rptr. 3d at 462 (App. B, 32). The court reasoned:

> Whether the sales of the contraband cigarettes occurred on the Seneca reservation, the Big Sandy reservation, or somewhere in between is immaterial to the outcome of this case. That is

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[5] App. I, 121, ¶ 5; Marc Benjamin, *Feds return cigarette shipment to Fresno County tribe* (May 22, 2015, 2:48pm), https://www.fresnobee.com/news/local/article21718116.html (last visited Feb. 3, 2020).

> because California's interests in regulating the conduct at issue are sufficient to justify the assertion of state authority under the *Bracker* balancing-of-the-interests test.

Id. (App. B, 32-33).[6]

Lastly, the court held that Native Wholesale's "equal protection defense fails for lack of standing and we need not address the merits."

> Our review rests on the resolution of one pivotal question: Is the corporation considered an "Indian"? That is because NWS's defense is grounded in the singular argument that the Directory Statute "impacts or singles out an identifiable group of people for particular or special treatment, in this case, Indians," like NWS.
>
> ....
>
> [N]either California Code of Regulations section 1616, title 18, subdivision (d) nor *Hobby Lobby* supports the conclusion that NWS is an Indian.

249 Cal. Rptr. 3d at 463 (App. B, 34-35).

C. California Supreme Court.

The California Supreme Court denied review. (App. A, 1).

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[6] Big Sandy certified that all the cigarettes it purchased from Native Wholesale satisfy all model testing standards established by various Tribes and States including California.

REASONS FOR GRANTING THE PETITION

This Court should grant a petition for writ of certiorari for three reasons:

First, the California court opinions conflict with relevant decisions of this Court and decisions of the Courts of Appeals which limit the constitutionally permissible scope of a state's specific personal jurisdiction. The California Court of Appeal refused to follow *Walden v. Fiore*, 571 U.S. 277 (2014) and *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773. The California court's sole explanation for refusing to follow this Court's binding precedent was its claim that the "stream of commerce" tort standard for personal jurisdiction is "a theory of personal jurisdiction neither addressed nor applied in *Walden* or *Bristol-Myers*." 249 Cal. Rptr. 3d at 453–54 (App. B, 12-16). The California court opinions also improperly conflate personal jurisdiction principles based on tort theories with this Court's precedent confirming that neither out of state business activities nor a third party's in state activity can constitutionally subject a foreign corporation to a state's specific personal jurisdiction in cases arising out of that corporation's out of state contractual obligations or performance. In doing so, the California court opinions improperly extend that state's regulatory jurisdiction beyond the state's geographic boundaries.

Second, the California court has decided an important question of federal law that has not been, but should be, decided by this Court: whether the Indian Commerce Clause protects Indian Tribes from state regulation of purely Indian commerce that occurs outside the state's geographic boundaries – specifically,

whether it allows a state to prohibit certain vendors from trading with Indians outside the state.

Third, the California court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and the Courts of Appeals which hold closely held corporations take on the constitutionally enshrined rights of their owners.

I. THE CALIFORNIA COURT 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 California Court of Appeal's Application of This Court's Tort Based "Stream of Commerce" Specific Jurisdiction Standard in a Contract Based Case Requiring "Purposeful Availment" Conflicts With This Court's Precedent and With Decisions of the Courts of Appeals.

Beginning in 1977, this Court decided a series of personal jurisdiction cases in which the Court clarified the standards to be applied to personal jurisdiction issues.[7] Prior to these cases, the general test applied to personal jurisdiction challenges required a determination of whether an out of state defendant had

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[7] *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 107 (1987).

"purposefully availed" itself of the laws and protections of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"). *Calder*, decided in 1984, adopted a less stringent analysis applicable to tort-based actions, only requiring that a foreign defendant purposefully "direct" its efforts towards residents of another state. 465 U.S. at 790. But one year later, the Court confirmed the continuing application of the *Hanson v. Denckla* "purposeful availment" analysis in contract-related claims. *Burger King*, 471 U.S. at 474-75.

More recently, this Court confirmed the application of the "purposeful availment" standard in non-tort actions:

> [A] corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there. See, *e.g., Asahi*, 480 U.S., at 112, 107 S.Ct. 1026 (opinion of O'Connor, J.) (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); *International Shoe*, 326 U.S., at 318, 66 S.Ct. 154 ("the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims).

Daimler AG v. Bauman, 571 U.S. 117, 135 n.13 (2014). *See also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017) ("Our precedent, however, explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere."). And the Court recently again confirmed that "[t]he bare fact that [a non-resident defendant] contracted with a [resident] distributor is not enough to establish personal jurisdiction in the State." *Bristol-Myers Squibb*, 137 S. Ct. at 1783. *See also Walden*, 571 U.S. 277.

In this contract related action, the California court refused to follow this Court's direction on personal jurisdiction, stating instead that this Court's recent opinions did not address the earlier "stream of commerce" standard adopted by the California court in this case.[8] The California court instead relied solely on *World-Wide Volkswagen* for the proposition that this Court "has gradually relaxed the limits placed on state jurisdiction by the Due Process Clause." 126 Cal. Rptr. 3d at 261 (App. C, 48-61). The fallacy in the California court's off-handed treatment of recent Supreme Court precedent is laid bare by the Oklahoma Supreme

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[8] *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) ("The rules and standards for determining state jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi*. The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the 'stream of commerce.' That concept, like other metaphors, has its deficiencies as well as its utilities. ... The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign").

Court's detailed analysis of these very same cases, and that court's resulting rejection of the "stream of commerce" test:

> In Bristol-Myers, supra, and Walden, supra, the [United States Supreme] Court, relying on its previous minimum contacts cases, clarified specific jurisdiction analysis and omitted from that analysis any previous "stream of commerce" analysis. [By omitted, we mean the Court neglected to mention it at all, presumptively, at least implicitly, rejecting such analysis.]
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> ….
>
> Perhaps equally persuasive, is the United States Supreme Court's action [in] two recent [Oklahoma cases where it] granted certiorari, vacated the judgment, and remanded the case back to the appellate courts for further consideration in light of Bristol-Myers.
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> ….
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> [T]he "totality of the contacts" or "stream of commerce" is no longer the analysis this Court will use to determine specific personal jurisdiction.

Montgomery v. Airbus Helicopters, Inc., 414 P.3d 824, 831, 834 (Okla. 2018). *See also Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 780 (3d Cir. 2018) ("A plurality of Supreme Court Justices has twice rejected the stream-of-commerce theory"). Simply placing a product in the "stream of commerce" is no longer sufficient in a tort action, let alone sufficient to allow state regulation of an out of state sale of goods in a contract related action.

The California court opinions also conflict with decisions of the Courts of Appeals which have applied this Court's contract related "purposeful availment" analysis in contract actions and the "purposeful direction" standard in tort actions. The Fifth,[9] Seventh,[10] Ninth,[11] Tenth,[12] and Eleventh[13] Circuit Courts of Appeals all have distinguished between the need to demonstrate an out of state defendant "purposefully availed" itself of the forum's laws and protections in a contract related case, while recognizing

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[9] *McFadin v. Gerber*, 587 F.3d 753 (5th Cir. 2009).

[10] *Felland v. Clifton*, 682 F.3d 665, 674 (7th Cir. 2012) ("The district court characterized Felland's decision to bring a fraud claim instead of a contract claim as a "tactical maneuver," but tactical or not, the tort-vs.-contract distinction is highly significant to the personal-jurisdiction analysis").

[11] *In re Boon Glob. Ltd.*, 923 F.3d 643, 651 (9th Cir. 2019) ("For claims sounding in contract, a purposeful availment test is used; for claims sounding in tort a purposeful direction test is used"); *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 605 (9th Cir. 2018) ("statements comparing within-forum-state versus out-of-forum-state conduct, and contract versus tort actions, suggest that a purposeful direction analysis naturally applies in suits sounding in tort where the tort was committed outside the forum state"); *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (less rigorous purposeful direction analysis only applies to "suits sounding in tort").

[12] *Niemi v. Lasshofer*, 770 F.3d 1331, 1348 (10th Cir. 2014) ("We agree with Plaintiffs that the correct measure of specific jurisdiction in this case is the 'purposeful direction' test applicable to tort actions, rather than the 'purposeful availment' test used in contract cases").

[13] *Licciardello v. Lovelady*, 544 F.3d 1280, 1285-88 (11th Cir. 2008).

the less stringent test applicable in tort actions. California's state courts must do the same.

There are no allegations or facts in the record demonstrating that the product purchased by Big Sandy from Native Wholesale was defective or misrepresented, nor any claim of fraud, deception or any personal injury that might implicate tort analysis. (App. J, 123-143, Compl. at 1-12). Instead, the State's claims are based entirely on contracts entered on an Indian reservation in New York by a federally recognized Indian Tribe and fully performed outside California. In holding that California has specific personal jurisdiction to regulate these out of state contracts, the California courts decided an important question of federal law in a way that conflicts with relevant decisions of this Court and the Courts of Appeals.

B. The California Court of Appeal's Holding That California has Specific Personal Jurisdiction to Regulate Out of State Contracts Decides an Important Question of Federal Law in a Way That Conflicts with Decisions of This Court and the Courts of Appeals Which Limit State Extra-Territorial Regulation.

This Court specifically addressed the limits of state regulatory jurisdiction in *Home Ins. Co. v. Dick*:

> A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts

> validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas.
> ....
> Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.

281 U.S. 397, 407-08 (1930). *Accord*, *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts"); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) ("There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction"). If a state regulates commerce that takes place wholly outside of the state's borders, "that regulation is automatically invalid, no matter how great the regulation's local benefit, no matter how small its out-of-state burden." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J. concurring).[14]

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[14] *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491 (4th Cir. 2007) ("If a state could leverage contacts within its borders to control a company's conduct elsewhere without being held to regulate extraterritorially, this

Finding that specific personal jurisdiction exists in the courts of California based solely on Native Wholesale's business operations on the Seneca Nation in New York and at a Foreign Trade Zone in Nevada not only offends due process protections but also conflicts with this Court's precedent regarding expansion of regulatory authority beyond state boundaries. As this Court noted in *Healy v. Beer Inst.*, 491 U.S. 324 (1989):

> 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.

Id. at 336 (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. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The California court recognized that the issue before it was "whether the state has a right to enforce Native Wholesale Supply's compliance with state law." 249 Cal. Rptr. 3d at 454-55 (App. B, 15, 19). Yet even

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would be the national market's undoing"); *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 831 (7th Cir. 2017) (recognizing the "general principle that a state may not impose its laws on commerce in . . . other states").

within its boundaries, California's power to regulate cigarettes is limited at best. California cannot 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) ("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)). Nor does California have tax jurisdiction over the sales at issue – an obvious concession that it has no jurisdiction over these out-of-state sales. *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).

C. The California Court Opinions Conflict with this Court's Precedent Confirming That Out of State Business Activities Cannot Subject a Foreign Corporation to a State's Specific Personal Jurisdiction in Contract Based Cases.

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"). As a result, activities of a non-resident defendant, legal where they occurred, and taking place outside a state

seeking to exercise specific personal jurisdiction, cannot form the basis for the state's exercise of jurisdictional authority over the non-resident. *Accord 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"); *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").

Native Wholesale's operations outside of California, both on the Seneca Nation and when warehousing and delivering products to purchasers at the Foreign Trade Zone in Nevada, were legal activities where they occurred. Therefore, those operations have no bearing on the question of specific personal jurisdiction in California. 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.

N.Y. 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 the Court rendered that opinion, and those rights preclude forcing Native Wholesale to defend itself in a jurisdiction where it does not have the

requisite minimum contacts.[15] *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 rules limiting personal jurisdiction").

All sales by Native Wholesale occurred either on the Seneca Nation when title passed to Big Sandy, or in Nevada at the place where Big Sandy took delivery of the products.[16] *Accord Lindgren v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131-32 (S.D. Iowa 2004) (no personal jurisdiction where state Uniform Commercial Codes confirmed title passed in California "when [defendant] delivered the items to FedEx for shipment"). Shipment was conducted by a third party not involved in this case and acting the entire time as the agent of Big Sandy. *Butler v. Beer Across Am.*, 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 California, and Native Wholesale has not otherwise purposefully

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[15] *Shaffer*, 433 U.S. at 212 ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny").

[16] Under California law, a "sale" is defined as the passing of title from the seller to the buyer for a price. Cal. Com. Code § 2106(1). California law also recognizes that title to the goods passes from the seller to the buyer at the time and place of shipment. Cal. Com. Code § 2401(2)(a).

availed itself of the privilege of doing business in California. As confirmed in *Hanson v. Denckla*:

> [a state] does not acquire [personal] 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.

357 U.S. at 254.

Constitutional due process protections do not permit California to exercise personal jurisdiction over this out of state vendor simply because Big Sandy has, of its own accord, brought the product it purchased back to its reservation. This Court consistently has confirmed that actions by a third party cannot expose an out of state defendant to personal jurisdiction. *Walden*, 571 U.S. at 291 ("[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State"); *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").

California wants to exercise its police powers to regulate an out of state sale made by an Indian to an Indian Tribe occurring on the Seneca Nation within the exterior boundaries of the State of New York. This Court's precedent confirms that Due Process protections prohibit it from doing so. The California Court of Appeal disagrees, and the California Supreme

Court has declined to correct that error, requiring this Court's review on writ of certiorari.

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

A. Unable to Stop Big Sandy From Buying Goods Directly, California Seeks to Regulate Indian Commerce by Suing the Indian Company From Which Big Sandy Buys Its Out of State Goods.

Regulating trade "with the Indian Tribes" is the most fundamental power granted to the United States Congress by the Indian Commerce Clause.[17] Allowing a state to usurp that exclusive congressional power through state regulation controlling a Tribe's purchase of goods from Indians out of state not only ignores the plain meaning of the Indian Commerce Clause, it undermines comprehensive federal statutory schemes adopted under Congress's Indian Commerce Clause

[17] "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).

powers,[18] and eviscerates centuries of this Court's jurisprudence on this very subject.[19]

California knows its courts cannot enjoin Big Sandy from purchasing goods from other Indians out of state.[20] 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*, 380 U.S. at 690 ("Congress has taken the business of Indian trading on

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[18] *E.g.*, Act of Aug. 15, 1876, ch. 289, §5, 19 Stat. 200 (codified at 25 U.S.C. § 261) (empowering the Commissioner of Indian Affairs to appoint and regulate traders to the Indian tribes including regulation of "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians"); Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified at 25 U.S.C. § 263) (empowering the President to forbid introduction of goods into the territory of a tribe); Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as amended at 25 U.S.C. § 264) (establishing penalties for trading without a license); 18 U.S.C. § 3113 (forbidding unlawful introduction of liquor into Indian country).

[19] "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); *United States v. Mazurie*, 419 U.S. 544, 554 (1975) (the Indian Commerce clause "affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians").

[20] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("[state] laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply"); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 987 (10th Cir. 1987). ("[T]he treaties with the Creek Nation as well as traditional presumptions favor the exclusion of state law from Creek Nation lands").

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").[21] As a result, 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.[22]

No doubt frustrated by its inability to regulate purchases of goods by a Tribe over which it has no police power, California asked its state courts to enjoin the Tribe's out of state seller from doing business with Big Sandy on an Indian reservation in New York. Whether a state can prohibit an Indian tribe located within its boundaries from leaving the state to purchase goods from Indians on a reservation outside the state is an important question of federal law that has not, but should be, addressed by this Court on writ

[21] 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 ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it").

[22] *E.g.*, 18 U.S.C. § 1161 (permitting application of state liquor law standards within an Indian reservation under certain conditions); 25 U.S.C. § 231 (permitting application of state health and education laws within a reservation under certain conditions); 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (respectively granting certain States criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations).

of certiorari to the California Court of Appeal. *Williams*, 358 U.S. at 218 ("Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari").

B. The Power to Regulate Indian Commerce Lies Exclusively in Congress.

California is jurisdictionally without authority to regulate commerce of any kind occurring completely outside of its boundaries. *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 California's attempt at extraterritorial regulation involves prohibiting purchases by an Indian tribe from an Indian vendor doing business in Indian country outside California. Yet the California Court of Appeal incorrectly held that "there is no constitutional or statutory right afforded to an Indian of one tribe (such as Montour) to conduct business free from state regulation with an Indian of a different tribe (such as a member of Big Sandy) under the Indian Commerce Clause." 249 Cal. Rptr. 3d at 459, n.9 (App. B, 27).[23]

The United States Constitution vests regulatory authority over intertribal trade and commerce exclusively in Congress. U.S. Const. art. I, § 8, cl. 3. In interpreting this Constitutional delegation of power exclusively to Congress, this Court has confirmed:

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[23] This Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983) was not decided on Indian Commerce Clause grounds.

> [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 of Fla. v. Florida, 517 U.S. 44, 62 (1996). The divestiture of state authority accomplished by the Indian Commerce Clause is confirmed in its historical underpinnings.[24]

Under the Indian Commerce Clause, intertribal trade and commerce between 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 California seeks here, just the opposite is true: Congress repeatedly has recognized and encouraged trade between Indians free of state regulation. *See, e.g.*, Native American Business Development Act, 25 U.S.C. § 4301(b)(5). In early statutes regulating interactions with Indians and

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[24] "The conduct of Indian affairs under the Articles of Confederation suffered because of conflicts between federal and state authority." Francis Paul Prucha, Documents of United States Indian Policy 10-11 (3d ed. 2000) p. 10. "[T]here was fundamental agreement that Indian affairs was one area that belonged to the central government." Francis Paul Prucha, American Indian Policy in the Formative Years (1962) p. 29. From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to disable the colonies or States from doing so. *(Ibid.)*

tribes, Congress recognized and encouraged trade between Indians, and specifically exempted Indians trading with other Indians from the scope of federal regulation. 25 U.S.C. §§ 261-264 (placing restrictions on "any person other than an Indian" attempting to engage in trade or commerce "with the Indians on any Indian reservation"). In addition, Congress recognized a tribe's authority to engage in tribal commerce when it passed the Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. §§ 4301-4307. Congress passed that Act not only to recognize, but also "to encourage intertribal . . . trade and business development." 25 U.S.C. § 4301(b)(5). Only Congress can regulate the right of tribes to engage in Indian commerce with other tribes. Here, the California court opinions sanctioning the State's lawsuit against Native Wholesale directly interferes with this congressional power, and unduly burdens Indian commerce, all in violation of the Indian Commerce Clause.

C. Federal Law Preempts the State Regulations at Issue.

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 tribal interests, including the federal trust responsibility and the tribal interest in promoting economic development, self-sufficiency and strong tribal government. As this Court has confirmed:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this

> sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. Relevant federal statutes and treaties must be examined in light of 'the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.' As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982) (citations omitted).

When on-reservation conduct involving only Indians 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 Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144; *McClanahan*, 411 U.S. at 171-72. In *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976) this Court held that vendor licensing fees the state sought to impose upon reservation Indians were preempted. *Id*. Here, similar to the vendor licensing fees this Court rejected in *Moe*, the burden falls on Indians conducting on reservation business, and the state regulation cannot be enforced because the state is regulating the Big Sandy Tribe (not non-Indian consumers), and is doing so by dictating those businesses from which the Tribe can purchase goods

outside California. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995); *Central Machinery Co. v. Ariz. State 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 from whom Big Sandy can purchase goods, is preempted. Indeed, because the cigarettes purchased by Big Sandy comply with federal regulatory requirements, California has no authority to regulate the brands of cigarettes the Tribe can purchase from out of state Indians. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-10 (1987) (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); *accord Milhelm Attea & Bros.*, 512 U.S. at 75 ("Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price").

California's decision not to prohibit cigarettes, but instead to regulate the kind and price, cannot be enforced to prohibit Big Sandy from trading with Native Wholesale. In holding to the contrary, the California court ignored this Court's controlling precedent, and instead opined that California has the authority to regulate *the product brand* of an otherwise legal product that can be purchased by Big Sandy from Indians in a transaction occurring entirely outside California. The California court incorrectly decided this important question of federal law that has not been, but should be, addressed instead by this Court.

III. CONSTITUTIONAL PROTECTIONS APPLY TO NATIVE WHOLESALE.

It was undisputed before the Superior court that: Native Wholesale is a corporation formed and organized under the laws of the Sac and Fox Nation; its sole shareholder is a Native American enrolled in the Seneca Nation; and its corporate headquarters is located on the Seneca Nation. 249 Cal. Rptr. 3d at 449 (App. B, 4). Yet the California Court of Appeal held that Native Wholesale is not an Indian and therefore not afforded protections under the Indian Commerce Clause and Equal Protection Clause. 249 Cal. Rptr. 3d at 458-60, 463 (App. B, 22-29, 33). This holding conflicts with opinions of this Court and the Courts of Appeals. This Court recently held:

> [T]he purpose of [the corporate personhood] fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. ... When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

Hobby Lobby Stores, *Inc.*, 573 U.S. at 706-07. Accordingly "extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company." *Id.* at 707. Following this Court's reasoning, the Second Circuit Court of Appeals recently held that an Indian owned corporation formed under tribal law and operating on an Indian Reservation was an "Indian" and therefore not subject to a federal statute which exempted "Indians in Indian country" from its

application. *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 548 (2d Cir. 2019).

A company wholly owned by a member of a federally recognized Indian Tribe is an Indian afforded protections under the Indian Commerce Clause and Equal Protection Clause. The California court's decision to the contrary conflicts with this Court's holding that closely held corporations take on the constitutionally enshrined rights of their owners.

CONCLUSION

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

Respectfully Submitted,

Randolph H. Barnhouse
Counsel of Record
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (Telephone)
(505) 842-6124 (Facsimile)
dbarnhouse@indiancountrylaw.com

Counsel for Petitioner