No. 19-985

In the Supreme Court of the United States

NATIVE WHOLESALE SUPPLY COMPANY,
Petitioner,

v.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
KAREN LEAF
Senior Assistant Attorney General

JOSHUA A. KLEIN*
Deputy Solicitor General
NICHOLAS M. WELLINGTON
Supervising Deputy Attorney General
NORA FLUM
Deputy Attorney General
KRISTIN A. LISKA
Associate Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1515 Clay Street
Oakland, CA 94612
(510) 879-0756
Joshua.Klein@doj.ca.gov
**Counsel of Record*

June 5, 2020

QUESTIONS PRESENTED

To preserve the ability to recover against tobacco manufacturers for the harms caused by their products, California requires manufacturers to pay about three cents per cigarette sold in the State into an escrow fund. Manufacturers who are already making payments for such claims under a legal settlement are exempt from that requirement. The sale or importation into California of cigarettes produced by manufacturers who have neither complied with the escrow requirements nor made equivalent payments under the settlement is prohibited. California law also prohibits the sale of cigarettes that do not comply with fire-safety requirements.

Petitioner Native Wholesale is a private corporation. It is tribally-chartered but is not owned or operated by any tribe. It steered over a billion non-compliant cigarettes to the California market, by selling the cigarettes to a California-based Indian tribe so that the tribe could sell them to the general public. The questions presented are:

1. Whether petitioner had minimum contacts with California sufficient for California's Attorney General to bring suit in state court to require petitioner to comply with California's laws.

2. Whether California is preempted by federal law from prohibiting petitioner from introducing into the California market cigarettes that do not comply with state law.

3. Whether California's regulation of cigarettes violates the Equal Protection Clause.

RELEVANT PRIOR PROCEEDINGS

United States Supreme Court:

Native Wholesale Supply Co. v. Superior Court of California, Sacramento County, No. 13-1117 (petition for certiorari denied June 23, 2014).

California Supreme Court:

People ex rel. Becerra v. Native Wholesale Supply Co., No. S257409 (petition for review denied Sept. 25, 2019).

Native Wholesale Supply Co. v. Superior Court, No. S213981 (petition for review denied Nov. 26, 2013).

People ex rel. Harris v. Native Wholesale Supply Co., No. S194878 (petition for review denied Sept. 21, 2011).

California Court of Appeal, Third District:

People ex rel. Becerra v. Native Wholesale Supply Co., Nos. C084031, C084961 (judgment entered July 2, 2019).

Native Wholesale Supply Co. v. Superior Court, No. C074756 (petition for writ of mandate denied Oct. 3, 2013).

People ex rel. Harris v. Native Wholesale Supply Co., No. C063624 (judgment entered June 8, 2011).

Superior Court of California, Sacramento County:

People ex rel. Harris v. Native Wholesale Supply Co., Case No. 34-2008-0014593 (judgment entered Jan. 24, 2017).

U.S. District Court, Eastern District of California:

California ex rel. Brown v. Native Wholesale Supply Co., No. 08-cv-1827 (remand order entered Oct. 8, 2008).

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INTRODUCTION

From 2004 to 2012, petitioner Native Wholesale Supply Company shipped over a billion cigarettes into California. The cigarettes did not comply with applicable state laws addressing the hazards that cigarettes pose to smokers, the general public, and the State. Although petitioner routed its transactions through the Big Sandy Rancheria, an Indian tribe, petitioner intended and expected that the vast majority of the cigarettes would be resold to California's general public. Petitioner maintains that because its provision of cigarettes to the public was channeled through Big Sandy, its business was immune from generally applicable state regulations addressing the health and fiscal harms created by cigarettes. The decision below rejecting that position is in accord with the decisions of two other courts. This Court has previously denied four petitions for certiorari, and one petition for rehearing, in which Native Wholesale sought review of the same personal jurisdiction and preemption issues it raises here. This petition should be denied as well.

STATEMENT

1. This case concerns California statutes that respond to two kinds of harms cigarettes cause to the individuals who use them and the community at large. First, cigarette smoking causes severe disease and hundreds of thousands of deaths each year. Because many smokers receive care for these conditions through state-financed programs, the costs to the State are immense. *See* Cal. Health & Safety Code § 104350(a)(7) (California was spending $5.6 billion annually on costs from smoking-related diseases as of 1995).

That situation led California and other States to seek compensation for public health expenditures traceable to tobacco products. *See generally In re Tobacco Cases II*, 41 Cal. 4th 1257, 1262-1263 (2007). Under a 1998 Master Settlement Agreement, many manufacturers agreed to alter their advertising practices and make annual payments based on their sales. *Id*. at 1263; *see also* Cal. Health & Safety Code § 104555(e). The States, in return, agreed to drop their claims against the manufacturers. *In re Tobacco Cases II*, 41 Cal. 4th at 1263.

Many tobacco manufacturers have elected not to join the settlement. *See* Cal. Health & Safety Code § 104555(f). But the cigarettes sold by those manufacturers still cause health harms and related costs, and if non-settling manufacturers do not reserve funds to pay for their liability for claims arising from those costs, the State would likely be unable to obtain reimbursement for such costs. Moreover, by exploiting their cost advantage over manufacturers who agreed to make regular payments under the settlement, non-settling manufacturers could expand their market share and increase the proportion of tobacco-caused costs that are unrecoverable by the State. California therefore enacted laws to ensure that non-settling manufacturers will have sufficient funds available for such future liabilities.

One such statute is the State's Escrow Statute. The statute applies to "[a]ny tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary." Cal. Health & Safety Code § 104557(a). Any manufacturer who has not joined and assumed the financial obligations of the Master

Settlement Agreement must deposit an inflation-adjusted amount (currently under three cents) per cigarette sold in the State into an escrow fund. *Id.* The manufacturer receives all interest or appreciation on its deposits. *Id.* § 104557(b).[1] The rest is safeguarded to pay "judgment[s] or settlement[s]" against the manufacturer. *Id.* § 104557(b)(1). Any money not paid for judgments or settlements reverts to the manufacturer after 25 years. *Id.* § 104557(b)(3).

A second statute, known as the Directory Statute, makes the escrow system functional. *See* Cal. Rev. & Tax Code § 30165.1. It requires tobacco manufacturers whose products are sold in California to certify to the California Attorney General that they comply with the Escrow Statute. *Id.* § 30165.1(b). Cigarette brands that are covered by such certifications are listed in a publicly accessible directory. *Id.* § 30165.1(c). "No person shall sell, offer, or possess for sale in [California], ship or otherwise distribute into or within [California] or import for personal consumption in [California]" cigarettes that are not listed on that directory. *Id.* § 30165.1(e)(2). Nor may any person "[a]cquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended to be distributed in violation" of the Directory Statute. *Id.* § 30165.1(e)(3)(B).

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[1] The manufacturer also receives a refund of any amount that exceeds what it would have paid the State had it joined the Master Settlement Agreement. Cal. Health & Safety Code § 104557(b)(2).

Second, cigarettes pose a significant risk of causing accidental fires in smokers' homes.[2] Those risks are addressed by the State's Fire Safety Act, which requires cigarettes to meet testing and performance standards designed to minimize the risk that they will ignite other materials. *See* Cal. Health & Safety Code § 14952(a), (b). Manufacturers must certify that their cigarettes conform to these requirements. *Id.* § 14953. They also must indicate that compliance on their packaging. *Id.* § 14954. No "person shall . . . sell, offer, or possess for sale in [California] cigarettes not in compliance with" the standards and packaging requirements of the Fire Safety Act. *Id.* § 14951.

2. Petitioner is a privately owned corporation. Pet. App. 4. Its corporate charter is from the Sac and Fox Nation of Oklahoma, *id.*, but the record does not disclose any relationship with that Tribe beyond the choice to incorporate there. Petitioner's headquarters are in New York, inside the Seneca Nation of Indians' reservation. *Id.* Through most of this litigation, petitioner's sole owner was Arthur Montour, an enrolled member of the Seneca tribe. *Id.* He has passed away, *see* Pet. 5, and the petition does not identify the current owner.

Petitioner distributes cigarettes to wholesale buyers. Pet. App. 4. The cigarettes are manufactured in Canada by Grand River Enterprises Six Nations Ltd. *Id.* During the period at issue in this case, Grand River did not pay into the escrow fund and did not cer-

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[2] For instance, data from 2003 showed that house fires started by cigarettes, typically ignited when a cigarette fell onto a mattress or piece of furniture, killed about 900 people annually and caused $6 billion in costs. *See* Gunja, Recent Development: Fire Safe Cigarettes, 40 Harv. J. Legis. 559, 559-560 (2003).

tify compliance with the Escrow Statute. Its cigarettes were not listed on the California Directory, *id.*, and they did not comply with the Fire Safety Act, *id.* at 82. Although Grand River's cigarettes were therefore not in compliance with California law, petitioner nevertheless arranged for an enormous quantity to be sold to California consumers.

One of petitioner's customers is the Big Sandy Rancheria Band of Mono Indians. Pet. App. 5. Big Sandy is a federally recognized Indian tribe; its reservation is in California, about 40 miles from Fresno. *Id.* at 5, 53. As of 2005, Big Sandy had about 435 members. *Id.* at 5 n.3. When Big Sandy ordered cigarettes, petitioner would release them from warehouses in New York and Nevada and arrange for their shipment into California. *Id.* at 53, 104. From 2004 to 2012, petitioner sold and shipped 98,540 cases of Grand River cigarettes—worth over $67 million—into California under this arrangement. *Id.* at 5. Petitioner used a customs broker in Woodland Hills, California, to assist with some of the transactions. *Id.*

No substantial portion of those cigarettes could plausibly have been intended for sale to Big Sandy's members. The sales to Big Sandy from 2004 to 2012 comprised more than 54 million cigarette packs—over a billion cigarettes. Pet. App. 5. That would have equated to roughly 125,000 packs for every member of the Tribe, including children. Petitioner arranged for some cigarettes purchased by Big Sandy to be shipped to smokeshops that were located on other Tribes' lands and that sold the cigarettes to the general public. *Id.* at 53-54. And petitioner shipped many of the cigarettes to Big Sandy itself, for sale to the general public in Big Sandy's on-reservation store. *Id.*

Petitioner supported these sales by "engag[ing] in promotional activities directed at a California market beyond Big Sandy." Pet. App. 83. At least fifteen of petitioner's employees conducted promotional activities in California—including giving away products, merchandise, and customer loyalty items at on-reservation retailers that sold to the general public. *Id.* at 81; *see also id.* at 53-54.

3. In response to these practices, California's Attorney General sued petitioner in the Superior Court for Sacramento County. *See* Pet. App. 123-141. As relevant here, the complaint alleged that petitioner had violated the Directory Statute and the Fire Safety Act, and sought injunctive relief and civil penalties. *Id.* at 133-135, 138-140.

a. The superior court initially granted petitioner's motion to quash for lack of personal jurisdiction. Pet. App. 63, 75. It concluded that the minimum-contacts requirement for personal jurisdiction was not met because the court was not convinced that petitioner had "purposefully availed itself of the privilege of conducting activities in California." Pet. App. 64. Although it may have been "foreseeable" to petitioner that the cigarettes it sold to Big Sandy would be resold to others, the court reasoned that "foreseeability alone is insufficient to support specific jurisdiction," *id.* at 73, and the court did not draw from the record the inference "that [petitioner] exercised any control over Big Sandy's downstream sales," *id.* at 72; *see also id.* at 76.

b. The court of appeal reversed. Pet. App. 48-61. The court agreed that "[p]urposeful availment does not arise where a nonresident manufacturer or distributor merely foresees that its product will enter the forum state." *Id.* at 52. But "purposeful availment is shown where the sale or distribution of a product

arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the [forum state's] market for its product." *Id.* (emphasis and internal quotation marks omitted).

Here, the court reasoned, petitioner had used Big Sandy to have "hundreds of millions" of cigarettes "sold to the general public." Pet. App. 56. That met the "'minimum contacts' legal standard," and established that petitioner "'purposefully derived benefit' from California activities," *id.*, through "not just a stream of commerce, but a torrent," *id.* at 50. In determining that those facts met the requirements for minimum contacts, the court considered the Oklahoma Supreme Court's reasoning in *State ex rel. Edmondson v. Native Wholesale Supply Co.*, 237 P.3d 199 (Okla. 2010), *cert. denied*, 563 U.S. 960 (2011). *See* Pet. App. 56-58. That case held that the requirements for personal jurisdiction over petitioner were satisfied in circumstances "involving a nearly identical distributive process." *Id.* at 56.

The California Supreme Court denied two petitions for review in which Native Wholesale challenged the jurisdictional ruling. *People ex rel. Harris v. Native Wholesale Supply Co.*, No. S194878 (Cal. Sept. 21, 2011); *Native Wholesale Supply Co. v. Superior Court*, No. S213981 (Cal. Nov. 26, 2013). This Court denied Native Wholesale's petition for certiorari. *Native Wholesale Supply Co. v. Superior Court*, 573 U.S. 931 (2014).

4. a. The superior court, on remand, granted the State's motion for summary judgment. Pet. App. 79-110. The court first rejected petitioner's argument that California's courts lacked personal jurisdiction. *Id.* at 84-85. The court also rejected the description of

petitioner's business practices contained in a declaration by Erlind Hill. *Id.* at 88. It ruled the Hill Declaration inadmissible, because Hill did not establish the personal knowledge and competence to testify required by California law. *Id.*; *see also id.* at 108.

On the merits, the court concluded that petitioner violated the Directory Statute because it "sold in and shipped or otherwise distributed into California cigarettes that were not listed on the Attorney General's directory." Pet. App. 84. The court also held that the cigarettes did not comply with the Fire Safety Act's standards. *Id.* at 89-90.

The court rejected petitioner's argument that the State's claims were preempted by federal law, after applying the balancing test established in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Pet. App. 101-106. That test requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 102 (quoting *Bracker*, 448 U.S. at 145). Petitioner, however, "fail[ed] to offer any evidence or even any argument regarding the balancing of the state, federal and tribal interests under the circumstances of the case." *Id.* The court also noted that *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), had upheld state regulation of a tribal member's sale of cigarettes on his own reservation to individuals who were not members of the tribe. Pet. App. 103. And the court invoked decisions by the Oklahoma and Idaho Supreme Courts rejecting petitioner's preemption challenge to those States' similar statutes. *Id.* at 102-103, 105 (discussing *Edmondson, supra,* and *State ex rel.*

Wasden v. Native Wholesale Supply Co., 155 Idaho 337 (2013), *cert. denied*, 573 U.S. 931 (2014)).

Finally, the court rejected petitioner's argument that the Directory Statute discriminates against Indians in violation of the Equal Protection Clause. Pet. App. 85-87. The court reasoned that the Directory Statute "does not single out Indian tribes and is equally applicable to all citizens of California." *Id.* at 85 (emphasis omitted). In any event, petitioner "d[id] not allege that it is a tribe, tribal member or native cigarette manufacturer." *Id.* at 86. Since "individuals who sell cigarettes to tribes are not a suspect class," the court applied rational basis review and concluded the statute passed that test. *Id.* at 86-87.

The court enjoined petitioner from further sales in California, and awarded civil penalties. Pet. App. 97.

b. The court of appeal affirmed. Pet. App. 2-47. With respect to personal jurisdiction, the court relied on its earlier decision. *Id.* at 13. Petitioner argued that the conclusions in the earlier decision were undercut by two intervening opinions of this Court—*Walden v. Fiore*, 571 U.S. 277 (2014), and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct 1773 (2017)—which petitioner characterized as prohibiting the earlier decision's use of a stream of commerce theory with respect to petitioner's actions. Pet. App. 13. The court of appeal noted, however, that neither *Walden* nor *Bristol-Myers* had addressed any stream of commerce theory. *Id.* "More importantly," the court continued, "the facts in those cases [were] highly distinguishable." *Id.*[3] As the court explained, the plaintiffs' claims in *Bristol-Myers* and *Walden* had far more

[3] Petitioner is thus incorrect when it asserts (Pet. 16) that the

tenuous connections to the forum states than the State's claims here. *See id.* at 13-14 (noting that *Bristol-Meyers* involved product liability claims by private nonresidents of California where the nonresidents "were not prescribed the drug in California, did not purchase or ingest the drug in California, and were not injured by the drug in California"); *id.* (noting that *Walden* involved a plaintiff's attempt to sue in Nevada over conduct that "'occurred entirely in Georgia'" and merely affected plaintiffs "'with connections'" to Nevada).

The court also held that the application of California's cigarette laws to petitioner was not preempted under the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. *See* Pet. App. 15-33. The court concluded that petitioner, as a corporate entity, was not itself an "Indian" for purposes of that Clause. *Id.* at 25. And even if such entities were embraced by the Clause, the court reasoned, petitioner's transactions with Big Sandy would not be automatically exempt from state regulations: petitioner had no membership connection *with Big Sandy*, and transactions between members of different tribes are treated like transactions with non-Indians under *Rice v. Rehner*, 463 U.S. 713, 720 n.7 (1983). Pet. App. 27 n.9.

As to the Directory Statute, the court concluded that the Attorney General's claim did not require balancing state and tribal interests under *Bracker* because petitioner's liability did not arise from conduct confined to a reservation. Pet. App. 31-32; *see id.* at 31 ("the legal incidence of the penalties and liability

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court of appeal's "sole explanation" was that *Walden* and *Bristol-Myers* did not discuss the stream of commerce theory of jurisdiction.

. . . attached before the contraband cigarettes reached Big Sandy's reservation" when they "breached the California border"). And the court held that the Fire Safety Act claim would survive any balancing test because of the need to prevent fires started by cigarettes sold to the general public. *Id.* at 32-33.

Finally, the court affirmed the superior court's rejection of petitioner's equal protection claim, reasoning that petitioner lacked standing because it was not a member of the class it alleged discrimination against. Pet. App. 34-35

The California Supreme Court denied Native Wholesale's petition for review. Pet. App. 1.

ARGUMENT

The petition raises three claims: first, that the California courts lacked jurisdiction to decide the State's allegation that petitioner violated California law; second, that California was preempted from applying its cigarette regulations to petitioner; and third, that the court of appeals erred in stating that petitioner was not itself an Indian. None of those claims merit this Court's review.

1. As to petitioner's arguments about personal jurisdiction (Pet. 17-29), petitioner has filed four previous petitions in this Court raising similar arguments. This Court has denied certiorari each time.[4] There is no reason for a different result here.

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[4] *See Native Wholesale Supply Co. v. Oklahoma ex rel. Pruitt*, 135 S. Ct. 1512 (No. 14-919), reh'g denied 135 S. Ct. 1888 (2015); *Native Wholesale Supply Co. v. Superior Court of California, Sacramento County*, 573 U.S. 931 (2014) (No. 13-1117); *Native Wholesale Supply Co. v. Idaho ex rel. Wasden*, 573 U.S. 931 (2014)

a. For a State's courts to "exercise personal jurisdiction over an out-of-state defendant," the defendant must have had "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantive justice." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (internal quotation marks omitted). The mere "foreseeability of causing injury in" a State does not suffice. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985) (emphasis omitted). Rather, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Id.* at 475 (internal quotation marks omitted). This requirement is met where the defendant "has 'purposefully directed' his activities at residents of the forum," *id.* at 472, including by making "efforts . . . to serve directly or indirectly[] the market" in a State, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This Court has also stated that purposeful availment may be shown where a defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 298.

Consistent with those principles, the court of appeal below recognized that a defendant's "merely foresee[ing] that its product will enter the forum state" does not establish purposeful availment, but that "purposeful availment is shown where the sale or distribution of a product" comes from the defendant's own

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(No. 13-838); *Native Wholesale Supply Co. v. Oklahoma ex rel. Edmondson*, 563 U.S. 960 (2011) (No. 10-754).

"'efforts to serve, directly or indirectly'" the forum state's market. Pet. App. 52 (emphasis omitted).

Those requirements were satisfied here. Petitioner made the arrangements for its cigarettes to be transported into California's borders. Pet. App. 53. Though it sold the cigarettes as a first step to Big Sandy, petitioner knew and intended that their ultimate destination would be the California general public—as evidenced by the fact that it sold over a billion cigarettes to a tribe of about 435 members. *Id.* at 5 & n.3. Petitioner took steps to further that result through "promotional activities directed at a California market beyond Big Sandy." *Id.* at 83.[5] These were sufficient contacts for personal jurisdiction, because petitioner's intentional efforts to direct its products to non-tribal Californians created the fire, health, and fiscal risks for California that California's statutes are designed to address.

Petitioner argues that the decision below conflicts with this Court's decisions in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct 1773 (2017), and *Walden v. Fiore*, 571 U.S. 277 (2014). *See* Pet. 19-20, 28. But those cases addressed different issues than the ones that petitioner presses here. *Bristol-Meyers* concerned the "arising under" element of personal jurisdiction,

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[5] Petitioner sent over a dozen employees to California to conduct promotional activities such as product- and merchandise-giveaways. Pet. App. 81. Indeed, even after petitioner claimed to have stopped selling cigarettes to Big Sandy, it continued to undertake actions to solicit and grow a market for its products within California's borders, including inviting Big Sandy's chairperson and affiliates of other tribal retailers selling to the California public to a $3 million customer-appreciation gala in Las Vegas. *Id.* at 93.

rather than the "purposeful availment" standard for minimum contacts that petitioner challenges here. *Bristol-Myers*, 137 S. Ct. at 1781 (even if a defendant has "extensive forum contacts" a court may not exercise jurisdiction without a "connection between the forum and the specific claims at issue"); *see* Pet. 17-18, 21, 28.[6] And while *Walden* did concern minimum contacts, its core holding is that personal jurisdiction must be based on the *defendant's* forum contacts rather than the plaintiff's. *See Walden*, 571 U.S. at 288-289. That does not bar jurisdiction here, given petitioner's own targeting of California.

In any event, as the court of appeal noted, the significant connections between petitioner's actions and California bear no resemblance to what this Court held insufficient to establish jurisdiction in *Walden* and *Bristol-Myers*. *See* Pet. App. 13; *see also supra* n.3. In *Walden*, all relevant conduct took place outside the forum State, and the only connection to that State was that the plaintiffs lived there. *See* 571 U.S. at 279-282, 288-289. And in *Bristol-Myers*, plaintiffs brought their drug-defect lawsuit in a state where they did not live; where they had not ingested, purchased, or been prescribed the drugs; and where they had suffered no harm. *See* 137 S. Ct. at 1781. Here, in contrast, the health, fire, and fiscal harms California seeks to prevent arise in California from the use of petitioner's products in California by the California public.

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[6] *See also* Br. for Petitioner at i, *Bristol-Myers*, *supra*, 2017 WL 908857 (presenting question whether plaintiffs' claims "arise out of or relate to [the] defendant's forum activities"); *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal. 5th 783, 801-802, 805 (2016) (defendant did not dispute that it "purposefully availed itself of the privilege of conducting activities in California," but argued that its conduct was insufficiently "related[]" to the claims).

Petitioner argues that the exercise of personal jurisdiction over petitioner violates this Court's precedents because it allows California to "regulate[] commerce that takes place wholly outside" its borders. Pet. 23; *see generally id.* at 22-29. But the sole cited support for the petition's assertions about how and where petitioner's sales and shipments occurred is the Hill Declaration. *See* Pet. 4, 5. The trial court ruled that declaration inadmissible. *See supra* p. 8; Pet. App. 88, 108, 110; *see generally* Cal. Code Civ. Proc. § 437c(d) (requiring declaration regarding summary judgment to be made "on personal knowledge" and to "show affirmatively that the [declarant] is competent to testify to the matters stated").[7] Although petitioner includes the declaration in the petition appendix (at 120-122), petitioner does not seek to challenge the state-law evidentiary ruling on federal grounds. Indeed, having not appealed the affidavit's exclusion to the court of appeal, *see* Pet. App. 31 n.10, petitioner has forfeited any such challenge. This case therefore does not present the question of whether personal jurisdiction would lie over a corporation that conducted

[7] The requirement that declarants show a basis for personal knowledge prevents them from making assertions "to the best of [their] knowledge and belief," Pet. App. 108, without undertaking steps to verify the assertions' accuracy. *Cf.* Plea Agreement, *United States v. Native Wholesale Supply*, No. 09-cr-214, Dkt. 456 ¶ 7(c) & (d) (W.D. Wash.) (plea agreement from petitioner's 2010 conviction for obstructing justice based on petitioner's preparation, and submission to federal court, of false declarations about its business); *id.* ¶ 7(f) & (g) (admitting that information contradicting the declarations could have been easily found in petitioner's records if a search had been conducted, but that "[n]o one from [petitioner] who was involved in the process of drafting the declarations either searched, or directed others to search, the transactional records").

its business in the manner that petitioner asserts. On the question that *is* presented, the state courts' exercise of jurisdiction was consistent with this Court's precedents.[8]

b. Review is not necessary to settle any conflict among the nation's lower courts. The most directly on-point cases from other courts accord with the California decision here. In *State ex rel. Wasden v. Native Wholesale Supply Co.*, 155 Idaho 337 (2013), the Idaho Supreme Court concluded that state courts had personal jurisdiction to adjudicate a state enforcement action concerning petitioner's similar practices in Idaho. *Id.* at 343-344. And the Oklahoma Supreme Court reached the same conclusion in *State ex rel. Edmondson v. Native Wholesale Supply Co.*, 237 P.3d 199 (Okla. 2010), regarding an enforcement action against petitioner's practices in Oklahoma. *Id.* at 205-209.

Notwithstanding *Edmondson*, Petitioner suggests (Pet. 19-20) that the decision below conflicts with a more recent Oklahoma decision, *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018). *Montgomery* concerned the crash of a helicopter that had been designed and built in France, sold and shipped to a Texas company, and sold and shipped again to a Kansas company. *Id.* at 826. The Kansas company used it in various states, including Oklahoma where it eventually crashed. *Id.* The Oklahoma Supreme

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[8] Nor is there any reason for the Court to delay action on this petition pending its forthcoming decisions in *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368, and *Ford Motor Co. v. Bandemer*, No. 19-369. Those cases involve whether a plaintiff's claims "arise out of" or "relate to" a defendant's commercial conduct toward the forum state, rather than whether the defendant has "purposefully avail[ed] itself of the forum." *See* Br. for Petitioner at 13, Nos. 19-368 & 19-369.

Court determined that neither the Texas company nor a Washington company that had supplied a replacement engine could be sued for the crash in Oklahoma's courts. *Id.* at 825-826. As part of its reasoning, *Montgomery* stated that, under *Bristol-Myers*, "any 'stream of commerce' test applied to [the products produced by the Texas and Washington companies] cannot establish Oklahoma jurisdiction." *Id.* at 833; *see id.* at 831 (stating that *Bristol-Myers* "neglected to mention" any stream-of-commerce analysis, "presumptively, at least implicitly, rejecting such analysis").

Nothing in *Montgomery* implies that the Oklahoma Supreme Court would find jurisdiction lacking if the facts in *Edmondson* or this case were presented to it now. In *Montgomery*, the Texas and Washington defendants may have foreseen that their products would reach Oklahoma, but nevertheless lacked minimum contacts because they "did not aim [their] products at Oklahoma markets . . . [n]or did they solicit business from Oklahoma markets and Oklahoma residents." 414 P.3d at 826, 834. The court of appeal in this case would likely have reached the same result as *Montgomery* if presented with those facts. It recognized that personal jurisdiction is not established "where a nonresident manufacturer or distributor merely foresees that its product will enter the forum state." Pet. App. 52; *see Bombardier Recreational Prod., Inc. v. Dow Chem. Canada ULC*, 216 Cal. App. 4th 591, 603-604 (2013) (*Native Wholesale* opinion does not allow personal jurisdiction based on "mere knowledge" that products would eventually be sold in California). But here, unlike in *Montgomery*, petitioner targeted its products at California markets and California consumers. The exercise of jurisdiction over those activities does not conflict with *Montgomery*. The cases reflect the same legal principles, and differ only in

their willingness to use the term "stream of commerce" to describe those principles. *See generally J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion) ("The stream of commerce . . . metaphor[] . . . refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact.").[9]

Petitioner also contends that this case could resolve whether the personal jurisdiction standard that applies to contract claims should be more restrictive than a purportedly weaker one that applies to tort claims. Pet. 21-22 (contrasting "purposeful availment" with "purposeful direction"). Petitioner did not raise that argument below, and this Court generally does not reach claims "not raised and passed upon in state court." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76 (1988). In any event, the court below applied the "purposeful availment" standard that petitioner seeks. *See supra* p. 6. And this case is neither a tort

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[9] Nor does *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760 (3d Cir. 2018), conflict with the lower court's decision here. In *Shuker*, Pennsylvania courts lacked jurisdiction because the defendants made no efforts to sell their goods "in Pennsylvania specifically." *Id.* at 780. Instead, the plaintiffs alleged only that "efforts to sell products in the United States generally" made it foreseeable that some would enter Pennsylvania. *Id.*; *compare id.* (rejecting "stream of commerce" theory that would allow jurisdiction whenever defendant has "'injected its goods into the forum state indirectly via the so-called stream of commerce, rendering it foreseeable that one of the defendant's goods could cause injury in the forum state'"), *with id.* ("purposeful availment" consists of "'deliberate targeting of the forum'"). The decision here agreed that mere foreseeability would not suffice and focused instead on petitioner's particular efforts to target California markets. *See supra* pp. 6-7, 13.

nor a contract suit, but rather a civil enforcement action by State authorities seeking to enforce state laws that a defendant is trying to circumvent.

Indeed, given the nature of that underlying claim, this case would be an exceptionally poor vehicle for addressing any aspect of petitioner's question. It is not clear that the jurisdictional analysis governing a state law enforcement authority's suit to prevent evasions of state law would match that for civil disputes about past harm between private parties. *See J. McIntyre Mach.*, 564 U.S. at 880 (plurality) (hypothesizing that "in some cases" a State may be able to exercise jurisdiction where purposeful availment is absent but defendant has "attempt[ed] to obstruct [the State's] laws"). So the more general issues that petitioner raises may not be implicated by this case.

2. Petitioner next argues that California's tobacco regulations cannot be applied to it because they are preempted by federal law. Pet. 29-36. That argument likewise does not warrant this Court's review.

The court of appeal's decision rejecting petitioner's preemption defense is consistent with decisions of other courts enforcing similar statutes against petitioner's practices. *See* Pet. App. 30 (agreeing with *Edmondson*, 237 P.3d at 215-216, and *Wasden*, 155 Idaho at 343). More broadly, the decision is consistent with numerous cases upholding the application of the same or similar state statutes to transactions that Indian-controlled entities conduct beyond the bounds of their own reservations.[10]

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[10] *See, e.g.*, *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 993-994 (9th Cir. 2014) (Washington's application of its escrow statute to tribal tobacco manufacturing activities conducted

Petitioner contends, however, that review is necessary because the court of appeal misapplied this Court's precedent. That is the same argument that petitioner raised in its petition for certiorari in *Wasden* and one of its petitions in *Edmondson*. It is incorrect, and this petition should be denied like the previous ones. *See supra* n.4.

Petitioner considerably understates the degree to which this Court's decisions allow appropriate state regulation of commerce occurring on a reservation. For instance, petitioner implies that "'there is no room for the States to legislate on the subject'" of trading that involves a reservation. Pet. 29 n.17. But this Court has rejected the argument that "no state regulation of Indian traders can be valid." *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71-72 (1994); *see also id.* at 78 (upholding state law regulating sales of cigarettes by Indian traders). And although Congress has not specifically "passed legislation authorizing" the regulation at issue here (Pet. 33), that does not automatically preclude the state regulation. Where "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Nevada v. Hicks*, 533 U.S. 353, 361-362 (2001); *see id.* ("[s]tate sovereignty does not end at a reservation's border," and "'[o]rdinarily,' . . . 'an Indian reservation is considered part of the territory of the State'").

The starting point for determining the validity of such regulations is *White Mountain Apache Tribe v.*

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partly outside reservation lands did not infringe federal law); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 173-174 (2d Cir. 2005) (federal law did not preempt States' application of escrow statutes to Canadian Indians' sale of tobacco products to United States tribes).

Bracker, 448 U.S. 136 (1980). Congress's authority under the Indian Commerce Clause to "regulate tribal affairs," and the "'semi-independent position' of Indian tribes," give rise to two limits on state authority. *Id.* at 142. First, a State's regulations "may be preempted by federal law." *Id.* Second, a State's regulations may be invalid when they "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). When analyzing whether those limits have been violated by a State's regulation of Indians' conduct on their own reservation, the Court conducts "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. That balancing test is inapplicable, however, to a State's regulation of Indians' conduct beyond their own reservation. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

The court of appeal correctly upheld California's regulation of petitioner's activities under these precedents. As the court noted, petitioner's activities targeting the California market did not take place exclusively on Indian reservations. *See* Pet. App. 30; *accord Wasden*, 155 Idaho at 343; *Edmondson*, 237 P.3d at 216. "[T]he legal incidence of the penalties and liability" attached "while the cigarettes were on their way to their final destination and after they breached the California border." Pet. App. 31. Many of the activities that took place on reservation land were not on

petitioner's own reservation.[11] And any transactions that purportedly occurred on petitioner's reservation involved other entities (such as Big Sandy) who were not members of petitioner's own tribe. *See, e.g., Washington v. Confederated Tribes of Colville Indians Reservation*, 447 U.S. 134, 143, 155-159 (1980) (holding that tribe's transactions on its reservation with non-Indians and with Indians who were not members of the tribe were subject to state laws). Finally, petitioner identifies no federal law that prevents States from regulating the sales of cigarettes by Indians under the circumstances here. As the lower court recognized, in this case it is therefore unnecessary to proceed to a balancing of interests under *Bracker* when determining the validity of the State's enforcement action.

If a balancing of interests were necessary, California would prevail. Although "state law is *generally* inapplicable" when "on-reservation conduct involving only Indians is at issue," *Bracker*, 448 U.S. at 144 (emphasis added), there is no blanket prohibition on such regulation, *see Hicks*, 533 U.S. at 362; *cf. Rice v. Rehner* 463 U.S. 713, 734 (1983) ("Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations."). And the Court has

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[11] If petitioner should be considered a member of a tribe for these purposes, it is not clear whether the relevant tribe would be the Sac and Fox Nation of Oklahoma (where petitioner is incorporated) or the Seneca Nation (on whose reservation its headquarters exists). Petitioner certainly was not a member of any of the California tribes to which it sent cigarettes.

upheld many State laws regulating the on-reservation sale of tobacco.[12]

California has a strong public safety interest in addressing the health and fire consequences of cigarettes. *See* Pet. App. 22, 33, 102-103; *Edmondson*, 237 P.3d at 216; *supra* pp. 1-4. In contrast, petitioner "fail[ed] to offer any evidence or even any argument regarding the balancing" of interests. Pet. App. 102; *cf. Colville*, 447 U.S. at 160 (accepting trial court's finding "that there was no evidence of record on this question" and concluding that tribe had thus failed to meet its "burden of showing that the . . . requirements which they are challenging are invalid"). That failure both establishes that the lower court's balancing was correct and constitutes a forfeiture of contrary arguments for any further proceedings in this Court.

In any event, the interests arguing against regulation are minimal. Petitioner and Big Sandy are neither the same tribe nor members of the same tribe. California's regulation of the transactions between the two entities therefore does not interfere in tribal self-governance. *Cf. Colville*, 447 U.S. at 161 (imposition of state tax on tribe's sales to Indians who are not

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[12] *See Milhelm*, 512 U.S. at 65-67 (upholding state law requiring pre-payment of sales taxes for sales of cigarettes by tribal members to non-members, imposing recordkeeping requirement and quantity limitations on tribal wholesalers, and requiring state approval of sales by wholesalers to tribes and resident retailers); *Colville*, 447 U.S. at 155-160 (upholding state law requiring sales tax collections and related recordkeeping for sales of cigarettes on tribal lands by tribal members to non-members); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-483 (1976) (upholding state law requiring tribal sellers to collect sales tax on cigarette sales to non-Indians).

members of that tribe would not "contravene the principle of tribal self-governance"). No interest cognizable under *Bracker* would be served by immunizing petitioner's activities here from state regulation.

3. Finally, petitioner argues that the court of appeal erred in stating that, as a corporation, petitioner was not itself an "Indian." Pet. i. That argument relates to the lower court's rejection of petitioner's equal protection challenge to the Directory Statute and, to a lesser extent, its rejection of petitioner's preemption defense. Pet. 37-38.[13] Petitioner's argument that this decision conflicts with other authority is not persuasive.[14] More importantly, whether a private corporation such as petitioner should be considered an Indian is immaterial to the claims in this case.

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[13] *See* Pet. App. 34 n.13 (noting that petitioner's equal protection arguments below concerned only the Directory Statute).

[14] Petitioner characterizes two cases as implying that corporations always take on the rights of their owners. Pet. 37-38. But those cases interpreted only the coverage of particular statutes—not the Equal Protection Clause or Indian Commerce Clause. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708-709 (2014) (interpreting the term "person" in the Religious Freedom Restoration Act of 1993); *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 547-548 (2d Cir. 2019) (interpreting the term "Indian" in 18 U.S.C. § 2346(b)(1)). They do not stand for the more general principle that petitioner now proposes. Indeed, petitioner itself argued that it should not be considered an Indian with respect to 28 U.S.C. § 1360, in circumstances where qualifying as an Indian was disadvantageous to petitioner's litigating position. *See* C.A. Resp. App'x at 52 n.22 (reproducing petitioner's trial-court pleading, which argued that "no Indians are parties to the instant litigation" because "[t]he only parties in this litigation are a State government, and an Indian-owned corporation").

As to the equal protection claim, California's statutes are neutral and generally applicable on their face. *See* Cal. Revenue & Tax Code § 30165.1(e)(2), (e)(3) (applying prohibitions to any "person"). The legislative findings reveal purposes that are neutral and nondiscriminatory.[15] Because petitioner pointed to no evidence of any discriminatory purpose, the court of appeal properly rejected the equal protection claim. *See generally Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Petitioner's proposed question about whether it is an "Indian" or has standing to assert the rights of its former owner could not change that result. Similarly, with respect to the preemption issue, the substantive shortcomings of petitioner's preemption arguments make the lower court's statement about the scope of the Indian Commerce Clause immaterial. *See supra* pp. 19-24.

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[15] *See* Cal. Health & Safety Code § 104555(f) (citing need to prevent manufacturers from "becoming judgment proof before liability may arise"); *Grand River Enter.*, 425 F.3d at 175 (recognizing health and fiscal interests served by California's and other States' cigarette escrow statutes).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
KAREN LEAF
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
NICHOLAS M. WELLINGTON
Supervising Deputy Attorney General
NORA FLUM
Deputy Attorney General
KRISTIN A. LISKA
Associate Deputy Solicitor General

June 5, 2020