No. 13-838

In The Supreme Court of the United States

NATIVE WHOLESALE SUPPLY COMPANY,

Petitioner,

vs.

STATE OF IDAHO by and through LAWRENCE G. WASDEN, Attorney General and the IDAHO STATE TAX COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED

1. Is Idaho's regulation of the sale and shipment of cigarettes to Idaho retailers in Idaho preempted by federal law because Petitioner, a corporation owned by a member of the Seneca Indian Nation and which sells and ships its cigarettes to Idaho, is located on the Seneca Indian Nation's reservation in New York?

2. Is Idaho's regulation of the sale and shipment of cigarettes to Idaho retailers in Idaho preempted by federal law because the recipient of Petitioner's cigarettes, an Idaho corporation owned by members of the Coeur d'Alene Tribe, is located on the Coeur d'Alene Reservation in Idaho?

3. May Petitioner argue that Idaho's actions in this case are preempted by the Indian Trader Statutes when that issue was not raised before the Idaho Supreme Court?

4. Is Idaho prohibited from exercising personal jurisdiction over Petitioner regarding the 100 million plus cigarettes it has purposefully shipped to Idaho because the recipient of Petitioner's cigarettes is located on the Coeur d'Alene Reservation in Idaho?

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STATEMENT OF THE CASE

A. Legal Background.

The Idaho Legislature has declared that smoking presents serious public health concerns to Idaho and its citizens. *See* Idaho Code § 39-7801(a). Noting that the Surgeon General also determined that smoking causes lung cancer and heart and other grave diseases, the Legislature found that smoking poses serious financial concerns for Idaho. Under certain health-care programs like Medicaid, Idaho may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with smoking, and those persons may have a legal entitlement to receive such assistance. *See* Idaho Code § 39-7801(a)-(b). While providing the programs' services, the Legislature found that the State pays millions of dollars each year to provide medical assistance to persons for health conditions associated with smoking. *See* Idaho Code § 39-7801(c). The Legislature further determined that the financial burdens imposed on the State by smoking should be borne by tobacco companies, rather than by the State, to the extent that such companies either enter into settlement agreements with the State or are found culpable by the courts. *See* Idaho Code § 39-7801(d).

In November 1998, leading United States tobacco companies entered into a settlement agreement, entitled the "Master Settlement Agreement" (MSA),

with Idaho and other States.[1] The MSA has been described by this Court as a "landmark" public health agreement, *Lorillard Tobacco Corp. v. Reilly*, 533 U.S. 525, 533 (2001), that addresses "one of the most troubling public health problems facing the Nation today." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). Under the MSA, tobacco companies that have joined the MSA pay billions of dollars a year to the States, based on the amount of cigarettes the respective tobacco companies sell.

Promptly after the MSA was executed, the Idaho Legislature declared that it would be contrary to the policy of the State if a tobacco company could decide not to enter into such a settlement agreement (called "nonparticipating manufacturers") and thereby use the resulting cost advantage to derive large profits in the years before liability may arise, without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. This legislative determination was driven, in part, by the fact that many diseases caused by tobacco use often do not appear until many years after the affected individual begins smoking. *See* Idaho Code § 39-7801(a) & (f).

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[1] The MSA is a lengthy public document. The Idaho Attorney General has made the MSA electronically available at: http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf.

The Idaho Legislature thus determined that it is in the interest of the State to require that nonparticipating manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. *See* Idaho Code § 39-7801(f). Accordingly, shortly after the MSA was signed, the Legislature passed the Idaho Tobacco Master Settlement Agreement Act (Idaho MSA Act), codified at title 39, chapter 78, Idaho Code. The Idaho MSA Act requires tobacco companies either (1) to join the MSA or (2) to place into a qualified escrow fund the payment amounts required by Idaho Code Section 39-7803(b)(1) of the Act.

In 2003, the Legislature determined that multitudinous violations of the Idaho MSA Act by various nonparticipating manufacturers threatened not only the integrity of the MSA, but also the fiscal soundness of the State and the public health. The Legislature responded with provisions to help prevent such violations through adoption of Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act), codified at title 39, chapter 84, Idaho Code. In *State v. Maybee*, 224 P.3d 1109, 1114 (Idaho), *cert. denied,* 131 S.Ct. 150 (2010), the Idaho Supreme Court described the reasons for and purposes of the Complementary Act as follows:

> [T]he goal of the Complementary Act was to prevent end-runs around the fee requirements of the MSA and the escrow

> requirement of the [Idaho MSA Act], through the sale of cigarettes produced by Non-Participating Manufacturers, who were not paying fees in accordance with the MSA, and were not making escrow payments in accordance with the [Idaho MSA Act]. The State was seeking to protect the scheduled fee payments under the MSA, and ensure that appropriate escrow funds are available to the State when needed to pay for medical expenses incurred due to tobacco-related health conditions, thereby protecting the public health.

The Complementary Act governs which cigarettes can be sold and which tobacco companies can have their cigarettes transported and shipped to and sold in Idaho. It requires, in part, that all tobacco companies whose cigarettes are sold in Idaho first certify themselves and their cigarette brands for sale with the Idaho Attorney General. The Act also provides for detailed reporting to the Attorney General regarding the cigarette sales in and shipments to the State. *See* Idaho Code §§ 39-8403(1)(b) & 39-8405(1).

The Complementary Act also establishes the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Directory) and requires the Idaho Attorney General to list on this Directory only those tobacco companies and their cigarette brand families that have been certified for

sale in Idaho. *See* Idaho Code § 39-8403.[2] Relevant to this case, Idaho Code Section 39-8403 of the Complementary Act and Subsections 39-8403(3)(b) and (c) make it unlawful for any person to sell, transport, import, or cause to be imported into Idaho cigarettes of a tobacco product manufacturer or cigarette brand which the person knows or should know are intended for sale or distribution in Idaho and which are not included on the Directory. This case focuses around application of the Complementary Act to Petitioner, which adopted a business model designed to avoid application of the Complementary Act through manipulation of Indian law preemption principles.

B. Factual Background.

The relevant facts of this case are straightforward. Petitioner is a business chartered by the Sac and Fox Tribe of Oklahoma. Its principal place of business is located on the Seneca Nation Reservation, located in the State of New York. While owned by a member of the Seneca Nation, Petitioner is itself not a member of the Tribe. Nor is it an instrumentality of

[2] The Idaho Directory is maintained and administered by the Idaho Attorney General, pursuant to Idaho Code Section 39-8403 of the Complementary Act. The Attorney General has made the Directory available at http://www2.state.id.us/ag/consumer/tobacco/directory_index.htm. Among other things, the Directory lists the various tobacco companies and their cigarette brands that may lawfully be shipped to and sold in Idaho.

either the Seneca Nation or the Sac and Fox Tribe. Pet. App. 11a, 60a-61a.

The conduct that brings the Complementary Act into play is that Petitioner has sold, collected money from, transported, imported and caused to be imported over 100 million cigarettes to an Idaho retailer, Warpath, Inc., an Idaho corporation owned by members of the Coeur d'Alene Tribe. All of these cigarettes are of cigarette brands that, at the relevant times, were illegal to be sold, transported and shipped into Idaho under the Complementary Act, because they had not been certified for sale in the State and thus were not listed on the Idaho Directory. Pet. App. 4a. Even after being advised of the Complementary Act's requirements, Petitioner continued to sell, transport, and ship millions of these cigarettes into Idaho in violation of the Act. Pet. App. 23a-24a; 67a-68a n.1.

Petitioner's cigarettes take a circuitous route getting to Idaho. They are first imported from a Canadian tobacco manufacturer, Grand River Six Nations Enterprises. Pet. App. 33a-34a, 53a. After importing these cigarettes from Canada, Petitioner ships and stores them in Nevada at the Las Vegas Foreign Trade Zone (FTZ). When Warpath, Inc., wants Petitioner's cigarettes, it orders them from Petitioner, which instructs the FTZ to release the ordered cigarettes to a trucking company with whom Petitioner has contracted and paid to transport the cigarettes from Nevada and deliver them to Warpath on the Coeur d'Alene Reservation in Idaho. Pet. App. 4a, 14a.

As noted, the Idaho Attorney General wrote Petitioner about the Complementary Act and requested cessation of its unlawful sales and shipments. Petitioner declined to comply. Accordingly, Idaho filed suit, seeking, *inter alia*, Complementary Act compliance. Idaho prevailed below. Pet. App. 2a-16a.

C. Proceedings Below.

1. The State of Idaho filed a civil action against Petitioner based on its repeated violations of the Complementary Act. The State's claim was straightforward, for the undisputed fact is that over a five-year period Petitioner sold, transported, imported, and caused to be imported into Idaho over 100 million cigarettes that were never certified for inclusion on the Idaho Directory. It thus flagrantly violated the Complementary Act. *Maybee*, 224 P.3d at 1124-25 (Idaho) (New York Native American Internet cigarette seller violated the Complementary Act by selling and offering for sale to Idaho consumers cigarettes not on the Idaho Directory).

The trial court ruled for the State and permanently enjoined Petitioner from selling and shipping non-Idaho Directory certified cigarettes to Idaho. Pet. App. 17a-74a. The court rejected Petitioner's contention that federal Indian law precludes Idaho from exercising personal or subject matter jurisdiction over it. And it rejected Petitioner's contention that federal Indian law allows it to violate Idaho law because it is owned by a tribal member and is headquartered on

the member's New York reservation, while the Idaho corporation that receives Petitioner's illegal cigarettes is owned by Coeur d'Alene tribal members and located on the Coeur d'Alene Reservation in Idaho. The trial court reasoned that Petitioner is not an enrolled member of the Seneca Nation and is "'not an "Indian" for purposes of immunity' from the application of state law." Pet. App. 37a, *quoting Baraga Products, Inc. v. Commissioner*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd per memo.*, 156 F.3d 1228 (6th Cir. 1998).

The trial court ruled further that in any event Petitioner's Complementary Act violations constitute off-reservation activity, relying upon the Idaho Supreme Court's decision in *Maybee*, 224 P.3d at 1123 (holding that the Complementary Act does not regulate a Native American cigarette seller's on-reservation activity of Internet cigarette sales, but rather his "introduction of Noncompliant Cigarettes into Idaho"). Thus, based upon this Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), that "'Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State,'" the trial court applied the Complementary Act to Petitioner. Pet. App. 38a.

2. The Idaho Supreme Court unanimously affirmed the trial court's decision regarding the Complementary Act. Pet. App. 2a-16a. The Court first analyzed whether federal Indian common law preempts application of the Complementary Act to Petitioner's

cigarette sales and shipments to Warpath, Inc. because Petitioner is owned by a member of the Seneca Indian Nation and is located on the Seneca Nation Reservation in New York. The Court explained that whether the Complementary Act is preempted depends upon (1) whether the party being regulated is a tribal member; (2) whether the conduct at issue occurs on or off reservation; and (3) if the regulated conduct occurs on reservation, whether State interests outside the reservation are implicated. Pet. App. 12a-13a. Analyzing these factors, the Court ruled that application of the Complementary Act here to Petitioner is not preempted.

The Idaho Supreme Court found that the Complementary Act does not regulate Petitioner's activities on the Seneca Reservation in New York. Instead, the Act applies to Petitioner's off-reservation activities of selling, transporting, and shipping to retailers in Idaho cigarettes that are not listed on the Idaho Directory in violation of the Complementary Act. Agreeing with the trial court that Petitioner's Complementary Act violations constitute off-reservation activity, and also relying on *Mescalero Apache* for the proposition that Native Americans going beyond their reservation boundaries are subject to nondiscriminatory state law otherwise applicable to all citizens of the State, the Idaho Supreme Court found Petitioner rightly accountable for its Complementary Act violations. Pet. App. 13a-14a.

Because the Idaho Supreme Court ruled that Petitioner's unlawful conduct does not occur on reservation

in New York, it ruled that it was not necessary to undertake the balancing test required by *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because that test only applies to certain on-reservation activities. Ultimately, the Court concluded that the Complementary Act is not preempted by operation of federal law. Pet. App. 13a-14a.

The Idaho Supreme Court also addressed the status to be accorded Petitioner, because while it is a corporation, it is owned by a member of the Seneca Nation. The Court ruled that Petitioner is not an Indian, noting that Petitioner is a corporation organized under the tribal laws of the Sac and Fox Tribe, located in Oklahoma. Pet. App. 11a. The Court rejected Petitioner's efforts to rely on Indian law preemption principles for that reason as well.

Finally, the Idaho Supreme Court ruled that Petitioner's sales and shipments of cigarettes to the Idaho retailer are contacts with Idaho that fall within the State's long-arm statute and are sufficient to conclude that the State's exercise of personal jurisdiction over Petitioner here fully complies with due process. Pet. App. 15a-16a. The Court rejected the argument that Idaho may not exercise personal jurisdiction over Petitioner solely because the retailer is located on the Coeur d'Alene Reservation in Idaho.

The Idaho Supreme Court did not rule on one issue that Petitioner raises here – whether the Indian Trader Statutes, 25 U.S.C. §§ 261 to 264, preempt

Idaho's action here, Pet. 17-20 – because Petitioner never raised it before that Court.

REASONS FOR DENYING THE PETITION

The petition presents no issues worthy of this Court's review. There is no conflict as to whether States may regulate Petitioner's cigarettes sales in and shipments to reservations in other States. Several States have enforced their Complementary Acts against Petitioner. Petitioner has challenged those States' actions on the same grounds as it raised here, and every court has rejected its arguments. *See, e.g., Oklahoma v. Native Wholesale Supply Company*, 237 P.3d 199 (Okla. 2010), *cert. denied*, 131 S. Ct. 2150 (2011); *People v. Native Wholesale Supply*, 126 Cal.Rptr.3d 257 (Cal. App. 2011), *petition for cert. filed,* No. 13-___ (Feb. 24, 2014). Nor to our knowledge has any court adopted Petitioner's theory in some other context.

The only conflict among the lower courts that Petitioner alleges regards whether an Indian-owned corporation should be treated like an Indian for purposes of certain Indian-law doctrines. But Petitioner cannot prevail here regardless of how that issue is resolved. And in any event, the Idaho Supreme Court ruled correctly on the issue.

In the end, as every court to address the issue has held, States may regulate Petitioner's cigarette sales and shipments because well-established

Indian-law doctrine provides that a State may regulate an Indian's off-reservation activities, and Petitioner (even if treated as an Indian) is doing just that, selling and shipping millions of cigarettes off of the reservation where it is located to Idaho in violation of Idaho law. The Idaho Supreme Court's rejection of Petitioner's arguments do not conflict with any decisions of this Court or any other court, and does not warrant this Court's review. In sum, no substantial federal question demanding this Court's review exists.

I. Idaho's Regulation Of The Sale And Shipment Of Cigarettes To Retailers And Consumers In Idaho Is Not Preempted By Federal Law Merely Because Petitioner Is Owned By A Member Of A Tribe And Is Located On An Indian Reservation

A. Well-established Indian-law doctrine provides that a State may regulate an Indian's off-reservation activities, which is what Petitioner is doing here with its sales and shipments of millions of non-compliant cigarettes to Idaho. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court was asked to prohibit New Mexico from imposing a gross receipts tax on revenue generated from a tribal ski resort and a use tax on materials employed in constructing the resort's lifts. The resort was located just outside the tribe's reservation on land leased from the United States Forest Service. *Id.* at 146. The resort's location was critical because "in the special area of state taxation, absent cession of jurisdiction

or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on *within* the boundaries of the reservation." *Id.* at 148 (emphasis supplied). "[T]ribal activities conducted *outside* the reservation present different considerations[,]" however, and in that situation "[a]bsent express federal law to the contrary, Indians going *beyond reservation boundaries* have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49 (emphasis supplied).

This Court applied *Mescalero Apache* in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), where it upheld imposition of a state fuel tax on an off-reservation distributor with respect to purchases by a tribal retailer for on-reservation sale. This Court rejected the proposition that the tax's validity must be assessed under the interest-balancing test governing on-reservation transactions prescribed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because "[w]e have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian country." 546 U.S. at 112. That "altogether different course" was the principle set out in *Mescalero Apache*, which controlled because the Kansas fuel tax accrued upon receipt of the fuel by the distributor at its *off-reservation* place of business. This Court reasoned that "the 'use, sale or delivery' that *triggers* tax

liability is the sale or delivery of the fuel to the distributor." *Id.* at 107 (emphasis supplied).

Mescalero Apache and *Wagnon* establish the fundamental framework against which Petitioner's Indian law-based preemption claim must be measured. Here, the requirements of the Complementary Act are "trigger[ed]" by Petitioner's *introduction* of cigarettes into Idaho and are not tied to where the cigarettes are sold from. This point is driven home by the Idaho Supreme Court's *Maybee* decision.

In *Maybee*, the Idaho Supreme Court applied the Complementary Act to a tribal member Internet cigarette seller (Maybee) who situated a cigarette-retail business on his reservation in New York, indeed the same one where Petitioner is located. Maybee argued that federal law preempted application of the Complementary Act to his cigarette sales activities. The Court rejected that argument, holding that the Act does not regulate his on-reservation activity of Internet cigarette sales, but rather his "*introduction* of Noncompliant Cigarettes into Idaho." *Maybee*, 224 P.3d at 1123 (emphasis supplied). Because this embodies off-reservation conduct, Maybee was properly subject to the Complementary Act's provisions. *Id., citing Mescalero Apache*, 411 U.S. at 148-49.[3]

[3] It bears noting that in arriving at its decision in *Maybee*, the Idaho Supreme Court also relied upon *Nevada v. Hicks*, 533 U.S. 353 (2001). The *Hicks* Court's ruling is instructive here:

(Continued on following page)

Thus, the critical "where" of the transactions at issue is Idaho, where the purchaser of the cigarettes is located and where the cigarettes were transported and shipped to, not Petitioner's New York place of business. In short, *Mescalero Apache* and its progeny stand for the rule that Idaho can regulate Petitioner's off-reservation cigarette sales and shipments. And under the Complementary Act, that is precisely what Idaho law is addressing – Petitioner's cigarettes sales and shipments to Idaho, its "introduction" of tens of millions of cigarettes into the State in violation of the Complementary Act. This activity constitutes off-reservation conduct for which there is no federal Indian common law principle that preempts the State

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> 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. *When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land*, as exemplified by our decision in [*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)]. In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could 'impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax[.]'

Id. at 362 (emphasis supplied; some citations omitted).

and immunizes Petitioner from compliance with the law.

B. Faced with the precedent squarely arrayed against it, Petitioner throws up the legal equivalent of diversionary flack: Because Petitioner is located on one reservation and the recipient of its cigarettes is located on a separate reservation in Idaho, this "reservation-to-reservation" shipment immunizes Petitioner from Idaho law. Like its other arguments, this one does not warrant this Court's review.

First, Petitioner's cigarettes do not actually go directly from one reservation to another. They first go to and are stored in Nevada at the Las Vegas Foreign Trade Zone, a creature of state and federal law, where they stay pending shipment to Idaho. The fact of the matter is that Petitioner's cigarettes are not (and were not) shipped directly from the Seneca Reservation in New York to the Coeur d'Alene Reservation in Idaho without there being an intermediate and indeterminate stop along the way. As the Idaho Supreme Court explained,

> The activity at issue here extends beyond the borders of the reservation. Looking at [Petitioner's] activity as a whole, it cannot be characterized as an on-reservation activity. [Petitioner] is operated on the Seneca reservation in New York, but is organized under the laws of a separate tribe. It purchases cigarettes that are manufactured in Canada. It stores those cigarettes in a foreign trade zone in Nevada. It then ships

> those cigarettes from Nevada into Idaho. [Petitioner's] activities in this case are not limited to a single reservation, or even several reservations.

Pet. App. 14a.[4]

Second, the Complementary Act's requirements do not turn on where within Idaho cigarettes are specifically received. As explained above, the regulatory

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[4] One of the principal reasons Petitioner alleges that *Mescalero* does not apply here is that its cigarettes are sold "F.O.B. Seneca Nation," with title to the product thus allegedly transferring in New York, meaning whatever action Petitioner took, it occurred, in its view, on the Seneca Nation's Reservation. Pet. 13. This argument was raised in the *Maybee* case and rejected. The Idaho Supreme Court there noted that Section one of the Official Comments to Idaho Code Section 28-2-401 (Idaho's version of the Uniform Commercial Code) states that its provisions governing the passing of title in sales transactions " 'in no way . . . indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition.' " *Maybee*, 224 P.3d at 1120. The Court went on to state:

> The goal of the legislature in enacting I.C. § 39-8403(3) of the Complementary Act was to prevent the cigarettes of Noncompliant Manufacturers from being sold to Idaho consumers. Idaho Code § 39-8403(3) is concerned with the introduction of Noncompliant Cigarettes into Idaho, not where the legal title to those cigarettes passes. Therefore, we hold that the Uniform Commercial Code is irrelevant to the determination of where Maybee's cigarette sales took place, and that those cigarette sales did, in fact, take place in Idaho for purposes of the Complementary Act.

Id.

incidence of Idaho Code Section 39-8403(3)(c) of the Complementary Act applies, as relevant here, to the act of *introducing* cigarettes into Idaho for the purpose of distribution or sale. The triggering event is thus not the actual *receipt* of the non-compliant cigarettes by a purchaser, but rather is the requisite intent coupled with the act of *introduction* of the cigarettes into Idaho. Accordingly, under the Complementary Act, who actually receives the cigarettes and where specifically in the State they are actually received is of no legal import.

Third, Petitioner's argument that state law cannot apply to sales that originate on one reservation and ultimately terminate on another reservation has not been accepted by the courts. In fact, it has been rejected. This Court has ruled that Native American tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right to tax" activities within its borders. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also 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"). Thus, a State can require a tribal retailer on its reservation "to purchase cigarettes and other tobacco from a[ ] [state-licensed] wholesaler." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1177 (10th Cir. 2012). By analogy here, Idaho can foreclose the purchase of cigarettes by a reservation retailer (Warpath, Inc.)

from a non-member wholesaler (Petitioner) who imports non-compliant product into the State.

No court has ever adopted the theory Petitioner proposes here. Any claim to, in effect, "reservation-to-reservation" or "super-sovereignty" preemption immunity from regulation under the Complementary Act thus falls far short of presenting a substantial federal question for both factual and legal reasons. *Rice*, 463 U.S. at 720 & n.7 (Indian law focuses on commerce *within* a tribe, not *between* two different tribes and its members).

C. For these reasons, Petitioner errs in contending that the Idaho Supreme Court should have applied the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Pet. 17. The *Bracker* balancing test does not apply when a State attempts to regulate or tax an Indian's off-reservation conduct. *Bracker* involved the question whether Arizona could impose motor carrier license and use fuel taxes on a nontribal firm with respect to on-reservation hauling of tribal timber pursuant to a contract with the resident tribe. The Court concluded that whether a State may regulate commercial transactions between tribes and nonmembers that occur on reservation depends on the outcome of a test that balances applicable federal, state and tribal interests. 448 U.S. at 144-45.

Bracker simply does not apply here because Petitioner's unlawful sales and shipments of cigarettes to Warpath, Inc. in Idaho constitute activity

that is beyond the boundaries of the Seneca Reservation where Petitioner is located. Petitioner's liability for its Complementary Act violations arose by virtue of its introduction of non-compliant cigarettes into Idaho, action that brings this matter (as the Idaho Supreme Court held) squarely within *Mescalero Apache*. Furthermore, even were *Bracker* applicable, Idaho's effort to apply its Complementary Act to Petitioner's cigarette sales and shipments would readily satisfy it.

Concerning the federal interest, "the federal government has been generally supportive of state regulation of cigarette sales." *Ward v. New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003). For example, federal law supports States in obtaining information regarding cigarette shipments and sales, mandating that out-of-state wholesalers report monthly to a State's taxing authority all sales and shipments made into that State. 15 U.S.C. § 376. In short, federal law sustains, not undercuts, state regulation of cigarette sales and shipments.

Concerning Idaho, its interest in regulating tobacco is self-evident. As noted above, the Idaho Legislature has found that smoking presents serious public health concerns to Idaho and its citizens. Idaho Code § 39-7801(a)-(c). The State's interest in thus comprehensively regulating the sale of this dangerous product cannot be gainsaid. Idaho cannot effectively undertake such regulation, however, if wholesalers, with impunity, can ignore the requirement that only cigarettes of tobacco companies known to and

approved and tracked by the Idaho Attorney General can be sold and shipped into this State. In short, Idaho's interests are significant and Petitioner says nothing to undercut them.

The final consideration – the relevant tribal interest – is not helpful to Petitioner. The burden upon the Seneca Nation's tribal interests in Petitioner (a business entity that is not even incorporated there) complying with Idaho law is not apparent. It is no more intrusive on Petitioner's time and resources than the record-keeping and tax collection duties approved in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).[5] In short, even if *Bracker*'s test were to be employed here, it would support, not undercut, Idaho's application of its laws to Petitioner.

[5] The Idaho Supreme Court noted further that "[a]lthough [Petitioner] devoted a great deal of space in its briefing and time at oral argument arguing state infringement of tribal sovereignty on behalf of Warpath and the Coeur d'Alene tribe, those entities have not asserted any interest in this case." Pet. App. 14a n.2.

II. The Idaho Supreme Court's Holding That The Two Corporations Involved In This Case Are Not "Indians" For Purposes Of Applying *Mescalero Apache* Does Not Warrant This Court's Review Because It Does Not Affect The Outcome Of This Case

Before this Court, Petitioner focuses on the Idaho Supreme Court's conclusion that Petitioner is not an Indian. Petitioner's argument is that because this conclusion is at odds with decisions by the Montana and South Dakota Supreme Courts, *see Pourier v. South Dakota Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *cert. denied*, 541 U.S. 1064 (2004); and *Flat Center Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578 (Mont.), *cert. denied*, 537 U.S. 1046 (2002), this Court should resolve this shallow split and address the issue. Pet. 11-12. Petitioner's argument fails here, though, because, at the end of the day, it makes no difference. And in any event the Idaho Supreme Court ruled correctly on the issue.

A. Petitioner tellingly does not show, or attempt to show, how a conclusion that Petitioner is an Indian or should be treated as such would have changed the result of this case. The fact is that it would not have altered the case's outcome. As noted above, Petitioner violated the Complementary Act as a result of its *off-reservation activity* and, as stated by this Court, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."

Mescalero Apache, 411 U.S. at 148-49. Thus, whether Petitioner is an Indian (or should be treated as an Indian) does not affect its liability here because the violations of the Complementary Act at issue are for its off-reservation actions of selling and shipping to Idaho cigarettes unlawful to be sold in or shipped to the State, and this is true whether Petitioner is an Indian or not. Thus, whatever conflict there is between the Idaho Supreme Court's decision regarding the Indian status of Petitioner and other state court decisions regarding corporations owned by Indians, it is immaterial here. In either event, Petitioner is liable for its unlawful off-reservation activity.

B. Further, the Idaho Supreme Court did not err in determining that Petitioner is not an Indian. Neither Petitioner (nor Warpath, Inc. for that matter) are members of an Indian tribe. They are instead corporations, created pursuant to Idaho law (Warpath) and the law of the Oklahoma-based Sac and Fox Tribe (Petitioner). This is important because it is hornbook law that corporations have identities separate from their owners. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003) (corporations have identities separate from that of their owners); *accord Moline Properties v. Comm'r,* 319 U.S. 436, 438-39 (1943). Because of this rule, the court in *Baraga Products, Inc. v. Commissioner*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd per memo.*, 156 F.3d 1228 (6th Cir. 1998), ruled that an incorporated business entity is not an enrolled member of an Indian tribe simply because its sole shareholder is. *Id.* at 298

("a corporation is not an 'Indian' for purposes of immunity" from the application of state law). So, for example, no one contends that Petitioner's and Warpath's shareholders could be held liable personally for the corporation's debts or obligations (including, as to Petitioner, the civil penalties assessed against it for Complementary Act violations). These principles make sense and are, as noted, hornbook corporation law. The Idaho Supreme Court's determination concerning the lack of "Indian" status for Petitioner is thus perfectly reasonable. Review by this Court of this issue is thus doubly unwarranted.

III. Petitioner Did Not Raise Before The Idaho Supreme Court Any Argument That The Complementary Act Conflicts With The Indian Trader Statutes

Petitioner did not raise before the Idaho Supreme Court, and the Court did not pass on, the issue of whether the Complementary Act conflicts with the Indian Trader Statutes. As such, this Court should not address the issues. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("[o]ur normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals").

Even were the claim not procedurally defective, the Trader Statutes' application would not present a significant federal question. This Court's reasoning in *Department of Taxation and Finance v. Milhelm Attea*

& Bros., Inc., 512 U.S. 61 (1994), has particular force here:

> Just as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose. A regulation designed to prevent non-Indians from evading taxes may well burden Indian traders in the sense that it reduces the competitive advantage offered by trading unlimited quantities of tax-free goods; but that consideration is no more weighty in the case of Indian traders engaged in wholesale transactions than it was in the case of reservation retailers.

Id. at 74. No legitimate dispute exists that the Complementary Act furthers a core state interest in the health and safety of Idaho's residents and that Petitioner's proposed evasion here places it in no different position than the wholesaler whose position the Court rejected in *Milhelm Attea*. Petitioner is, as well, situated no differently than the off-reservation distributor in *Wagnon*. The Trader Statutes, in short, add nothing to the preemption analysis that would apply otherwise even were Warpath, Inc. deemed to be an "Indian" within their protective ambit. *See Muscogee (Creek) Nation*, 669 F.3d at 1173 (recognizing that *Milhelm Attea* "appl[ied] the 'particularized inquiry'

from *Bracker* and balance[ed] state, tribal, and federal interests").[6]

IV. Idaho May Properly Exercise Personal Jurisdiction Over Petitioner

Petitioner argues that exercising personal jurisdiction over it would violate due process. The Idaho Supreme Court's exercise of such jurisdiction over Petitioner does not conflict with any decision of this Court, does not conflict with any decision of a lower court, and was perfectly proper. This Court has set forth a two-part due process analysis regarding personal jurisdiction. The court must first determine whether the defendant "purposefully" directed activities toward the forum state or intends to derive benefits from its markets. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2854 (2011). Second, the court must decide whether exercise of such jurisdiction is supported by traditional notions of fair play and substantial justice. *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). Both prongs of the analysis were readily met here.

A. Due process is not intended to act as a "territorial shield" whereby defendants can escape

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[6] Petitioner also argues at the end of its petition in a paragraph that the exercise of personal jurisdiction over it would "implicate" the Commerce Clause. Pet. 23. This argument was also not raised before the Idaho Supreme Court and this Court should not address the issue here either.

jurisdiction through artful structuring of commercial relations. *Id.* at 473-74. "[W]here individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for *consequences that arise proximately* from such activities." *Id.* (emphasis supplied; citations omitted). Where "a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State," this is sufficient to establish personal jurisdiction "even if it has no physical presence in the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992).

In answering the second prong of due process – "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice,'" *Burger King,* 471 U.S. at 476 (citation omitted) – factors to consider include (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Id*. at 477.

It cannot be gainsaid but that Petitioner has purposefully directed its activities toward Idaho – its 100 million-plus cigarettes sold and shipped to Idaho

over a five-year time period attest to that.[7] Nor can it be reasonably disputed that applying these factors here supports the exercise of personal jurisdiction over Petitioner by Idaho courts.[8]

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[7] It is equally clear that Petitioner's cigarette sales have significant off-reservation effects. The 100 million plus cigarettes Petitioner sold and shipped to Warpath, Inc., constitute a staggering volume for one retailer and plainly serve a market far larger than the members of the Coeur d'Alene Tribe. According to the 2010 Census, there are 1,247 Indians living on the Coeur d'Alene Reservation. U.S. Census Bureau; 2010 Census American Indian and Alaska Native Summary File, Summary File 1 (American FactFinder), *available at* http://factfinder.census.gov (last visited Feb. 12, 2014). Petitioner's sale and shipment of these millions of cigarettes defies any suggestion that such a volume would be purchased exclusively by adult Coeur d'Alene Indians (who constitute a subset of the 1,247 Indians living on the Coeur d'Alene Reservation) and Petitioner cannot contend to the contrary. Clearly, large volumes of the cigarettes being sold to Warpath ultimately are being purchased by nonmembers of the Coeur d'Alene Tribe, resulting in large off-reservation effects.

[8] *First*, it is reasonable for Petitioner to defend this litigation in Idaho. It is not unfair to subject a person to the burdens of litigating in a forum where the person derives economic benefits from the conduct at issue. *Burger King*, 471 U.S. at 474. Indeed, "it may well be unfair to allow [an out-of-state defendant] to escape having to account in other States for consequences that arise proximately from such [interstate] activities." *Id. Second*, Idaho has a strong interest in adjudicating this dispute in Idaho. It is, after all, Idaho law that Petitioner violated. Denying personal jurisdiction here defeats that interest and would preclude Idaho from seeking relief provided for by the relevant laws. *Third*, Idaho has an important interest in furthering important substantive social policies – the protection of the public health and the effective regulation of tobacco, a most dangerous product. The Legislature has, as noted, emphasized that the

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Where the plaintiff has made a prima facie showing of purposeful availment, the burden shifts to the defendant to make a "compelling case" that jurisdiction would be unreasonable. *Id*. Petitioner has not done this. And it is hard to imagine such a statement forthcoming, because if something were to be unfair in this case or that would offend justice and fair play, it would be if Idaho could not hold Petitioner accountable for its sales of over 100 million cigarettes into Idaho, all of them contraband and illegal under Idaho law.

B. Petitioner's only real argument is that because the recipient of its cigarettes, Warpath, Inc. is located on an Indian Reservation (albeit in Idaho), Petitioner does not have adequate contacts with Idaho such to justify an Idaho court in exercising personal jurisdiction over Petitioner. Presence on an Indian reservation, however, is not akin to presence in a foreign country or even in a sister State. "The attributes of sovereignty possessed by [a] Tribe do not negate the fact that [a] Reservation is a part of the State of California." *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986). When an individual is on an Indian reservation in Idaho, she is in the State of Idaho: "State sovereignty does not end at a reservation's border. . . . Ordinarily, it is now clear, an Indian

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Complementary Act's provisions will "safeguard . . . the fiscal soundness of the state and the public health." Idaho Code § 39-8401.

reservation is considered part of the territory of the State." *Hicks*, 533 U.S. at 361-62 (citations omitted); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989). As such, there is nothing in this Court's precedent to preclude the consideration of cigarettes flowing to a location on a reservation within Idaho as contacts with the State.

One recent state court case, finally, explicitly rejected Petitioner's "reservation location" argument as it relates to personal jurisdiction. In *Oklahoma v. Native Wholesale Supply Company*, 237 P.3d 199 (Okla. 2010), *cert. denied*, 131 S. Ct. 2150 (2011), Petitioner asserted, like here, that its sale of millions of cigarettes into Oklahoma were to tribal wholesalers with the intent that they only be sold to reservation Indians and thus Oklahoma may not exercise personal jurisdiction over it. The Oklahoma Supreme Court rejected this argument: "While the entity with which [Petitioner] directly deals may operate on tribal land*, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma*." 237 P.3d at 208 (emphasis supplied). No substantial question exists over whether Idaho courts possessed personal jurisdiction over Petitioner.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted this 6th day of March, 2014.

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