No. 13-838

In The
Supreme Court of the United States

NATIVE WHOLESALE SUPPLY COMPANY,
Petitioner,

v.

STATE OF IDAHO BY AND THROUGH LAWRENCE G. WASDEN, ATTORNEY GENERAL and THE IDAHO STATE TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari
To the Idaho Supreme Court

REPLY BRIEF

ROBERT J. LUDDY
GREGORY J. KERR
WINDELS MARX LANE & MITTENDORF LLP
156 West 56th St.
New York, NY 10019
(212) 237-1000

JEREMY A. COLBY
(Counsel of Record)
WEBSTER SZANYI LLP
1400 Liberty Bldg.
Buffalo, NY 14202
(716) 842-2800
jcolby@websterszanyi.com

(For Continuation of Appearances See Inside Cover)

LEONARD VIOLI
LAW OFFICE OF
LEONARD VIOLI, LLC
910 East Boston Post Road
Mamaroneck, NY 10543
(914) 698-6200

Counsel for Petitioner

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INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioner Native Wholesale Supply Company ("NWS") files this reply brief to address new points raised in the State of Idaho's brief in opposition.

The State of Idaho ("Idaho") recognizes that it cannot regulate the sale of tobacco products to Warpath Inc. ("Warpath"), a Native-American entity located on the Coeur d'Alene reservation. Consequently, it attempts do so indirectly by regulating NWS instead. In an effort to avoid review by this Court, Idaho mischaracterizes (1) the transaction as occurring off reservation, (2) Warpath as an Idaho retailer in Idaho, and (3) NWS as a non-Indian. Idaho is wrong on all points.

The sales transaction between NWS and Warpath is not off reservation because it concludes on the Coeur d'Alene reservation. The tobacco products are imported to Indian Country, not Idaho. Each case cited by Idaho concerns activity that was off reservation, but within the regulating state.

Idaho acknowledges the split of authority concerning the legal status of Native American-owned corporations. Idaho attempts to avoid the split by calling it irrelevant, thus disavowing the Idaho Supreme Court's decision. The issue must be addressed because it impacts the level of scrutiny to be applied by this Court.

This Court should review this case to clarify federal law concerning what constitutes off reservation activity and whether a corporation owned by Native Americans should be deemed an Indian for purposes of a state's regulatory authority.

Idaho also seeks to exercise personal jurisdiction based solely upon contacts with Indian Country and based upon the unilateral conduct of third parties after NWS concludes its sale to Warpath.

REASONS FOR GRANTING THE PETITION

I. Idaho Cannot Regulate The Tobacco Trade With Indians In Indian Country.

Idaho recognizes, as it must, that the importation of cigarettes to Warpath is the sole basis for its enforcement action.[1] The relevant issue, therefore, concerns Idaho's ability to regulate transactions with Warpath that occur on the Coeur d'Alene reservation. Yet Idaho does not address its ability to regulate the tobacco trade with Native Americans in Indian Country.[2] Rather, Idaho poses its own straw-man question: whether its ability to regulate the sale and shipment of cigarettes to "retailers and consumers in Idaho" is preempted because NWS is owned by a tribal member

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[1] Idaho Br., at 6 ("The conduct that brings the Complementary Act into play is that [NWS] has sold, collected money from, transported, imported or 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.").

[2] 18 U.S.C. § 1151 (defining "Indian Country").

and is located on the Seneca Nation. NWS, however, does not sell to Idaho retailers or consumers – its sales are limited to Warpath. Idaho mischaracterizes the transaction at issue in an effort to avoid review by this Court.

Idaho also overlooks the fact that NWS is not required to maintain a wholesaler permit because sales to Warpath are tax exempt.[3] If Idaho cannot tax sales to Warpath, then it likewise cannot prohibit sales to Warpath. Idaho seeks to avoid this obstacle by describing Warpath as an Idaho retailer in Idaho – as opposed to a Native American-owned business in Indian Country.[4] Idaho implicitly concedes its inability to regulate sales to Warpath.

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[3] State ex rel. Wasden v. Native Wholesale Supply Co., 312 P.3d 1257, 1261 (Idaho 2013).

[4] Idaho Br., at 12. *But see* Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

Idaho argues that NWS's conduct occurs off reservation.[5] Idaho relies heavily on Mescalero Apache Tribe v. Jones, which involved a Tribe operating a ski resort off-reservation.[6] Idaho also cites Wagnon v. Prairie Band Potawatomi Nation, which upheld a fuel tax on a distributor located off reservation (but within the State) because the tax accrued upon the distributor's receipt of the fuel off reservation.[7]

Unlike Mescalero or Wagnon, NWS does not engage in any off reservation activities within the borders of Idaho. Even assuming that NWS shipped cigarettes to Warpath, the endpoint of that sales transaction is the Coeur d'Alene reservation.[8]

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[5] Idaho Br., at 12-15.

[6] 411 U.S. 145, 152 (1973).

[7] Idaho Br., at 13 (citing 546 U.S. 95, 112 (2005)).

[8] Webster's On-Line Dictionary defines "transaction" as "a business deal: an occurrence in which goods, services, or money are passed from one person, account, etc., to another." Consequently, the sale transaction occurs on the Coeur d'Alene reservation (where the goods are received). Idaho lacks jurisdiction over any other possible location where any part of the transaction

Idaho argues that it may regulate NWS because it "introduces" cigarettes into Idaho, relying heavily on the decision of the Idaho Supreme Court in State ex rel. Wasden v. Maybee.[9] The problem with this reliance, however, is that, unlike the cigarette retailer in Maybee, NWS does not sell to Idaho residents. NWS's sales are limited to Warpath in Indian Country. Indeed, Maybee acknowledged that the Complementary Act does not regulate on reservation activities.[10] The shipment to Warpath, therefore, is not off reservation conduct and is not subject to Idaho's regulatory reach for the same reason that Idaho may not tax such sales.[11]

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occurs, i.e. the Seneca Nation (where the order is accepted and payment received), and, perhaps, either Nevada or Seneca Nation (where the product is shipped FOB to Warpath).

[9] 224 P.3d 1109, 1123 (Idaho 2010).

[10] Id.

[11] Idaho's own tax code provides that cigarette wholesalers such as NWS "may deliver cigarettes which do not have Idaho stamps affixed to Idaho Indian reservations when . . . [t]he purchaser is a business enterprise wholly owned and operated by an enrolled

The critical "where" of the transaction that Idaho seeks to regulate is the endpoint of the cigarette shipment, i.e., the Coeur d'Alene reservation. NWS requires no wholesalers' permit from Idaho because the sale does not occur in Idaho and is beyond Idaho's reach. Accordingly, by engaging in this sale transaction, NWS is not importing cigarettes into Idaho, but rather, into Indian Country.

Although Idaho argues that the destination of the cigarettes is irrelevant, the Complementary Act says otherwise because it qualifies "transport, import" by also requiring awareness that the cigarettes "are intended for distribution or sale in the state."[12] In other words, the identity of the recipient is required to ascertain whether distribution is intended – and if so, whether it is distribution "in the state," which excludes Indian Country. If cigarettes are subsequently imported into Idaho by

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member . . . of an Idaho Indian tribe." IDAPA 35.01.10.014 ¶ 1(b).

[12] Idaho Code §§ 39-8403(3)(c).

consumers, then it is that point at which Idaho may prohibit importation. For the sake of expedience, however, Idaho exceeds its regulatory authority by seeking to prohibit the tobacco from reaching Indian Country.

NWS does not assert a "reservation to reservation" exception. Rather, Idaho lacks authority to regulate because no part of the transaction occurs in Idaho. Simply passing through Idaho en route to the Coeur d'Alene reservation is not enough. In Central Mach. Co. v. Arizona State Tax Comm'n, Arizona lacked authority to impose a "transaction privilege tax" on an Arizona corporation that sold and delivered tractors to a tribal entity on a reservation.[13] Idaho's connection to the sale is more tenuous than the one in Central Mach., a case which Idaho ignores because it has nothing to say.

[13] 448 U.S. 160, 161-65 (1980).

A. A Tribally-Chartered Corporation Is An Indian For Purposes Of State Regulation.

Idaho hopes to avoid what it describes as a "shallow conflict" between several state supreme courts on the issue of whether or not a Native American-owned corporation is deemed an Indian for purposes of state regulation. For its main argument, Idaho asserts that, because the transaction occurs off reservation, it does not matter whether Warpath or NWS are "Indians" for purposes of applying Mescalero.[14] This argument must be rejected.

First, the identity of the participants (i.e. the "who"), is required to ascertain what degree of deference, if any, will be accorded to the state regulation at issue.

Second, Idaho's argument assumes that the conduct is off reservation -- based on the unwarranted assumption that the cigarettes at issue are imported to Idaho as opposed to Indian Country.

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[14] Idaho also defends the Idaho Supreme Court's conclusion that a Native American-owned corporation is not an Indian.

Third, Idaho overlooks that NWS is chartered under tribal law of the Sac and Fox Tribe. Consequently, NWS is an "Indian" because it is a citizen of the jurisdiction under which it is incorporated.[15]

Fourth, the Idaho Supreme Court erred in parting ways with Montana and South Dakota on the issue of whether a corporation may be deemed an Indian. No court has held that a tribally chartered corporation is not an Indian for purposes of state regulation. This Court should provide nationwide uniformity on this important issue.

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[15] *Cf.* Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (noting that Marshall v. Baltimore & Ohio R. Co., 16 How. 314 (1854) "held that the reason a corporation was a citizen of its State of incorporation was that, for the limited purpose of determining corporate citizenship, courts could conclusively (and artificially) presume that a corporation's *shareholders* were citizens of the State of incorporation."). In other words, courts have adopted the legal fiction of assuming that the citizenship of a corporation is the citizenship of its shareholders. This construct is even more appropriate in the context of Native American-owned corporations.

B. Bracker Analysis Is Required If NWS Is Deemed A Non-Indian.

In addition to its argument that this case concerns off reservation activity, Idaho also proffers its Bracker[16] analysis, which is best addressed on remand. If considered, however, the Jenkins Act[17] does not "support" prohibiting the tobacco trade in Indian Country. Rather, it requires wholesalers to provide certain information to state taxing authorities regarding in-state shipments. As noted above, Idaho cannot tax NWS sales to Warpath, which are not in-state sales, and the Jenkins Act is therefore inapplicable. Idaho has no legitimate interest in prohibiting tobacco shipments to Indian Country.[18]

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[16] White Mt. Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[17] 15 U.S.C. § 376.

[18] Despite Idaho's assertion to the contrary, both the Seneca Nation and the Coeur d'Alene Tribe have an interest in the economic self-sufficiency of tribal members. Both tribes also have an interest in protecting Indian sovereignty from state encroachment.

II. Idaho's Complementary Act Is Preempted To The Extent That Idaho Seeks To Enforce It In Indian Country Or Against An Indian Trader.

Desperate to avoid an argument that it cannot refute, Idaho argues that NWS failed to raise preemption based on the Indian Trader Statutes.[19] First, Idaho ignores the fact that NWS also argues preemption based upon the Indian Commerce Clause.[20] Second, the parties did brief preemption under the Indian Trader Statutes.[21] The Idaho Supreme Court

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[19] Idaho Br., at 24-25.

[20] NWS Br., at 20. By failing to respond to the Indian Commerce Clause, Idaho appears to concede the point.

[21] Idaho argued below that Milhelm Attea & Bros., 512 U.S. 61 (1994) held that "the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose." (Record, at 523). Likewise, NWS argued to the Idaho Supreme Court that the Complementary Act is preempted "by the Indian Commerce Clause and other federal law." NWS Reply Br., at 9. Idaho stated that its Supreme "Court concluded that the Complimentary Act is not preempted by operation of federal law." Idaho Br., at 10. This body of federal law includes the Indian Trader Statutes.

discussed Wagnon, which cited Central Mach. for the proposition that the Indian Trader Statutes preempted Arizona's tax on a non-Indian seller's on-reservation sales.[22]

In Maybee, the Idaho Supreme Court held that the Complementary Act was not preempted by the Indian Trader Statutes, which regulates sales "*to* Native Americans, not sales *from* Native Americans."[23] Here, on the other hand, the sales are to a Native American-owned entity, and preemption therefore applies.

In sum, Idaho cannot refute that its Complementary Act is preempted by the Indian Trader Statutes under Central Mach.

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[22] State ex rel. Wasden v. Native Wholesale Supply Co., 312 P.3d 1257, 1263 (Idaho 2013) (citing Wagnon); Wagnon, 546 U.S. at 102 (citing Cent. Mach., 448 U.S. 160).

[23] Maybee, 224 P.3d at 1115 (construing tobacco sales by a Native American to non-Indians in Idaho).

III. Idaho Cannot Exercise Personal Jurisdiction Over NWS Where Its Sole Contact Is With Warpath On The Coeur d'Alene Reservation.

Idaho argues that NWS "purposely avails itself of the benefits of Idaho's economic market."[24] The problem with this argument is that NWS avails itself of the market in Indian Country, not Idaho. Contacts with Indian Country should not be deemed contacts with Idaho for purposes of establishing minimum contacts.

Idaho argues that Indian Country is not sovereign and is part of Idaho for purposes of personal jurisdiction. Idaho cites Cotton Petroleum Corp. v. New Mexico, which held that New Mexico could tax oil production on a reservation even though the tribe also taxed the oil production.[25] This Court held that "concurrent taxing jurisdiction" existed because federal statutes permitted it. Here, on the other hand, Idaho does not have concurrent jurisdiction to tax –

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[24] Idaho Br., at 27.

[25] 490 U.S. 163, 188 (1989).

and certainly not to regulate -- the sale of tobacco to Native Americans in Indian Country. In fact, the opposite is true.

Idaho also cites Nevada v. Hicks, for the proposition that "[O]rdinarily … an Indian reservation is considered part of the territory of the State."[26] The very next sentence, however, states, "[t]hat is not to say that States may exert the same degree of regulatory authority within a reservation as they do without."[27] Hicks further noted that the "States' inherent jurisdiction on reservations can of course be stripped by Congress."[28] Unlike Hicks, Congress has stripped Idaho of the ability to regulate Warpath's receipt of tobacco by enacting, *inter alia*, the Indian Commerce Clause and Indian Trader Statutes. Hicks noted that state court "process . . . may run into an Indian reservation . . . where the subject-matter or controversy is otherwise within

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[26] Idaho Br., at 29-30 citing (533 U.S. 353, 362 (2001)).

[27] Hicks, 533 U.S. at 362.

[28] Id. at 365.

[the state's] cognizance."[29] Here, Idaho lacks jurisdiction over the subject matter of the tobacco trade with Native Americans.

For these reasons and those discussed in the *certiorari* petition filed by NWS in People v. Native Wholesale Supply Co.,[30] Idaho may not exercise personal jurisdiction over NWS. Idaho seeks to exercise jurisdiction over NWS for the unilateral downstream acts of Warpath. In Walden v. Fiore, this Court recently noted that it has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State."[31]

Simply put, NWS designed its distribution system to restrict its business to Indian Country -- it does not purposefully avail itself of the privilege of conducting business in any forum other than a tribal forum. Idaho may not exercise personal

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[29] Id. at 363 (citation omitted).

[30] *Cert.* Pet. No. 13 – 1117.

[31] 134 S. Ct. 1115, 1122 (2014) (citing Hanson v. Denckla, 357 U.S. 235, 251-52 (1958).

jurisdiction based solely upon NWS's contacts with the Coeur d'Alene reservation.

CONCLUSION

For all these reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

ROBERT J. LUDDY
GREGORY J. KERR
WINDELS MARX LANE & MITTENDORF LLP
156 West 56th Street
New York, NY 10019
(212) 237-1000

JEREMY A. COLBY
(Counsel of Record)
WEBSTER SZANYI LLP
1400 Liberty Bldg.
Buffalo, NY 14202
(716) 842-2800
jcolby@websterszanyi.com

LEONARD VIOLI
LAW OFFICE OF LEONARD VIOLI, LLC
910 East Boston Post Road
Mamaroneck, NY 10543
(914) 698-6200

Counsel for Petitioner

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