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 A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case concerns the validity of Idaho's efforts to prevent businesses owned by Indians and licensed by their respective Tribe and Nation from trading, among each other and entirely within Indian Country, tobacco products that are made by Indians. This is not a case of Indians marketing nothing more than a State tax exemption for Marlboro cigarettes that are sold to non-Indian consumers. The questions presented are:

1. Whether under circumstances in which a State is admittedly precluded from regulating an Indian it is also precluded from regulating a corporation wholly owned by an Indian and organized under the laws of a federally recognized tribe.

2. Whether, under a State law that purports to give the Attorney General power to "approve" all cigarettes before they may be imported into Idaho, the State of Idaho can prohibit an Indian-owned business on the Coeur d'Alene reservation from importing into that reservation cigarettes that are sold "FOB Seneca Nation" by a company wholly owned by a member of the Seneca Nation and licensed by the Seneca Nation to carry on such trade.

3. Whether the State of Idaho's cigarette-sale statutes are preempted to the extent that they are enforced in a manner that prohibits Native Wholesale Supply Company ("NWS") from trading with Warpath Inc. ("Warpath").

4. Whether the State of Idaho can constitutionally exercise personal jurisdiction over NWS, an Indian-chartered entity located on Seneca Nation of Indians

Land, situated within the geographic boundaries of the State of New York, where NWS sells the tobacco products "FOB Seneca Nation" to Warpath, and the products are then transported to Warpath's place of business on the Coeur d'Alene reservation.

## LIST OF PARTIES

Petitioner Native Wholesale Supply Company ("NWS") is a corporation wholly owned by a member of the Seneca Nation of Indians ("Seneca Nation") - a federally recognized Indian Tribe - and is licensed by the Seneca Nation to engage in *inter alia* wholesale distribution of tobacco products. NWS maintains its offices on Seneca Nation land. At the times relevant to this case, NWS distributed tobacco products (including Seneca® brand cigarettes made for NWS) to Indian Tribes, Nations, and distributors located in Indian Country. NWS was a defendant in the District Court of the Fourth Judicial District of the State of Idaho.

Respondents were plaintiffs in the District Court of the Fourth Judicial District of the State of Idaho.

## CORPORATE DISCLOSURE STATEMENT

Petitioner NWS has no parent corporation and no publicly held company owns 10% or more of its stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner NWS seeks a writ of certiorari to review the Substitute Opinion of the Supreme Court of Idaho dated October 15, 2013.

## OPINIONS BELOW

The Supreme Court of Idaho affirmed in part and reversed in part the lower court's decisions and orders: (A) denying NWS's motion to dismiss; (B) granting Respondents' motions for summary judgment and a permanent injunction. This Opinion is attached as Appendix B, and is also reported at 155 Idaho 337 (2013).

The Judgment of the Idaho District Court is attached as Appendix C.

The Decision and Order of the Idaho District Court imposing a civil penalty is attached as Appendix D.

The Permanent Injunction Order of the Idaho District Court is attached as Appendix E.

The Decision and Order of the Idaho District Court granting Respondents' motion for summary judgment and a permanent injunction is attached as Appendix G.

The Decision and Order of the Idaho District Court denying NWS's motion to dismiss and granting Respondents' motion for a preliminary injunction is attached as Appendix F.

## JURISDICTION

The Idaho Supreme Court filed a Substitute Opinion on October 15, 2013 replacing an Opinion dated August 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the validity of Idaho's efforts to enforce various state statutes governing tobacco sales infringes upon Indian sovereignty and violates federal law, including the Indian Trader Statutes, and the Indian Commerce, Commerce, and Due Process Clauses.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. art. I, § 8, cl. 3**

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

**U.S. Const. art. VI, cl. 2**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**25 U.S.C. §§ 261-264**
**(Indian Trader Statutes)**

Any person other than an Indian . . . who shall attempt to reside in the Indian country, or on any Indian

reservation, as a trader, or to introduce goods, or to trade therein, without such license. . .

**Idaho Master Settlement Agreement Complementary Act, Idaho Code §§ 39-8403**

(2) . . . the attorney general shall develop and publish on his website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (1) of this section, and all brand families that are listed in such certifications, except as noted below.

> (a) The attorney general shall not include or retain in such directory the name or brand families of any nonparticipating manufacturer that fails to provide the required certification or whose certification the attorney general determines is not in compliance with subsections (1)(b) and (c) of this section, unless the attorney general has determined that such violation has been cured to the satisfaction of the attorney general.

* * *

(3) It shall be unlawful for any person:

* * *

> (b) To sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory;

(c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3).

## STATEMENT OF THE CASE

At the times relevant to this case, Petitioner NWS distributed Seneca® brand tobacco products to tribally-affiliated or licensed entities located in Indian Country (18 U.S.C. § 1151). These cigarettes were manufactured for NWS by a company owned by members of the Iroquois Confederacy (Six Nation) on Six Nations land located just north of the U.S. border in Canada. The cigarettes were shipped to either Seneca Nation land, which is located within the geographic boundaries of the State of New York, or to a Foreign Trade Zone in Nevada. NWS sold these cigarettes to Warpath on terms that were "F.O.B. Seneca Nation" and were marked "for reservation sales only." Title, risk of loss, and control over the tobacco transferred from NWS, to Warpath once the order and sale was accepted by NWS at its office on Seneca Nation land, and the goods were placed into the hands of a common carrier on Warpath's behalf. Warpath is a corporation owned by members of the Coeur d'Alene Tribe and located on that Tribe's land.

The State of Idaho seeks to prevent shipments of Seneca® products from reaching Warpath on the Coeur d'Alene reservation based on Idaho's stated intention of enforcing a state statute (the Complementary Act) making it unlawful to "sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand

family not included in the directory" or to "acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3)."[1] This statute is part of a complex constellation of state statutes designed to regulate the tobacco trade in Idaho separate and apart from Idaho's tax laws (which exempt cigarettes sold in Indian Country from taxation).

Idaho is a party to the Master Settlement Agreement ("MSA") entered into between the major tobacco manufacturers and 46 states and other jurisdictions. As a result, Idaho enacted the Master Settlement Agreement Act ("MSAA"),[2] the Idaho Master Settlement Agreement Complementary Act ("Complementary Act"),[3] and the Idaho Consumer Protection Act.[4] Under this statutory regime, Idaho requires tobacco manufacturers whose cigarettes are sold in Idaho, to either become a signatory to the MSA or to meet certain other obligations as a Non-Participating Manufacturer ("NPM").

If a tobacco manufacturer fails to comply with the MSAA scheme, its products are placed on a list of non-compliant products that are deemed contraband by

1. Idaho Code § 39-8403(3).
2. Idaho Code §§ 39-7801 *et seq.*
3. Idaho Code §§ 39-8401 *et seq.*
4. Idaho Code §§ 48-601 *et seq.*

Idaho.[5] Cigarettes listed on Idaho's directory of compliant products are permitted to be sold in Idaho.[6]

In June of 2008, the Idaho Attorney General provided NWS with a Notice of Violation indicating Idaho's belief that NWS was violating the Complementary Act because its tobacco was being transported to Warpath on the Coeur d'Alene reservation.

On May 20, 2010, the Idaho District Court denied NWS's motion to dismiss and granted Idaho's motion for a preliminary injunction. (App. 31a–44a.)

On November 26, 2010, the Idaho District Court granted summary judgment and a permanent injunction to Idaho. (App. 45a-74a.) An Order memorializing the Permanent Injunction was signed on December 13, 2010. (App. 28a-30a.)

On March 8, 2011, the Idaho District Court assessed a civil penalty against NWS of $214,200 for "continuing to sell non-compliant cigarettes in Idaho" after having received a Notice of Violation from the Idaho Attorney General. (App. 23a, 27a.)

On August 15, 2013, the Idaho Supreme Court issued an Opinion affirming in part and reversing in part the lower court's rulings.[7] This decision, however, was replaced

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5. Idaho Code §§ 39-8403(2).

6. Idaho Code §§ 39-8403(3)(b).

7. State ex rel Wasden v. Native Wholesale Supply Co., No. 38780, 2013 WL 4107633 (Idaho Aug. 15, 2013).

by the Substituted Order dated October 15, 2013. (App. 2a-16a.) In that Order, the Idaho Supreme Court held that, despite Respondents' contentions to the contrary, NWS was not required to obtain a wholesaler permit from the State of Idaho. (App. 16a.) NWS is statutorily prohibited from obtaining a wholesaler permit because it does not sell cigarettes "that are subject to Idaho taxes" because "NWS's only wholesale sales within the state of Idaho were to Warpath," which is "owned and operated by a member of the Coeur d'Alene tribe." (App. 7a–9a.) Such sales are "not subject to tax." (App. 8a.) As a result, Wasden held that "any cigarette sales made to a business owned by a tribal member are exempt from tax, and thus exempt from the requirement to obtain a wholesaler permit." (App. 8a.)

The Idaho Supreme Court also held that the State of Idaho "can regulate the importation of cigarettes onto reservations located in Idaho." (App. 9a, 14a.) Wasden cited this Court's decision in McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170-71 (1973) for the proposition that Congress "has plenary power over affairs arising within Indian country, unless it has provided otherwise and unless the state has correspondingly assumed such jurisdiction." (App. 9a.)

Wasden also cited this Court's decision in Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) for the proposition that "[w]hen a state is attempting to regulate a tribe or a member of that tribe inside Indian Country, express congressional authorization is required." (App. 9a.) Wasden, however, noted that "express authorization is not required when the regulated party is not a tribe or a tribal member." (App. 9a.)

Wasden held that, since it is a corporation, NWS is not an Indian and that, "[b]ecause NWS is not an Indian, the State's attempt to regulate NWS is not categorically barred." (App. 11a.)

Wasden also held that the regulated activity occurred off-reservation, and thus declined to apply this Court's interest-balancing test set forth in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980), which applies when a state seeks to regulate non-Indians' on reservation conduct. (App. 12a–14a.)

Wasden held that NWS's conduct "is not occurring strictly on the reservation" and its "activity as a whole . . . cannot be characterized as an on-reservation activity" because "NWS is operated on the Seneca reservation in New York, but is organized under the laws of a separate tribe," and it imports cigarettes from Canada and stores them in a foreign trade zone in Nevada. (App. 14a.) Wasden found that "NWS's activities in this case are not limited to a single reservation, or even several reservations." (App. 14a.) Wasden thus held that "NWS's importation of non-compliant cigarettes into Idaho is an off-reservation activity and is therefore not subject to a Bracker analysis." (App. 14a.)

This case raises important federal questions regarding Indian sovereignty, State regulation of interstate commerce, and personal jurisdiction. This Court has never held that a state may prohibit Indians from selling tobacco to other Indians in Indian Country. That, however, is the end-result of the court's decision below, which overlooked the impact on members of the Coeur d'Alene tribe. Indians are entitled to sell tobacco

to Indians in Indian Country free from state regulation. Wasden, however, effectively permits Idaho to ban any such commerce by depriving tribal members in Idaho the right to obtain "non-compliant" tobacco unless it is grown, manufactured, and sold on the Coeur d'Alene reservation. This is a substantial departure from this Court's prior decisions in Moe and Colville.

Idaho's attempt to enforce its cigarette-sale statutes are preempted to the extent that Idaho seeks to enforce them in a manner that bans the Indian tobacco trade in Indian Country.

Idaho lacks personal jurisdiction over NWS because it does not have sufficient minimum contacts with Idaho. Since NWS ships cigarettes "FOB Seneca Nation," it has no contact with Idaho. Rather, Warpath accepts delivery outside Idaho and imports the cigarettes to its reservation. In an effort to avoid the obstacles to regulating Warpath, however, Idaho instead seeks to indirectly regulate Warpath by preventing it from doing business with NWS.

## REASONS FOR GRANTING THE PETITION

### I. The Petition Should Be Granted Because Idaho Cannot Regulate the Tobacco Trade by Indians in Indian Country.

The State of Idaho seeks to regulate NWS, an Indian-chartered business owned by a member of the Seneca Nation that conducts operations in Indian Country.[8] By doing so, Idaho also seeks to prohibit Warpath, an

8. *See* 18 U.S.C. § 1151 (defining "Indian Country").

Indian-owned business located on the Coeur d'Alene reservation, from engaging in the tobacco trade on reservation with tribes and tribal entities. Idaho's action, however, is unlawful because "States are categorically barred from placing the legal incidence of an excise tax [or other regulation] '*on a tribe or on tribal members* for sales made *inside Indian country*.'" Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-02 (2005) (underlining added, italics in the original).

The Supreme Court of Idaho acknowledged that "any cigarette sales made to a business owned by a tribal member [i.e., Warpath] are exempt from tax, and thus exempt from the requirement to obtain a wholesaler permit." State ex rel. Wasden v. Native Wholesale Supply Co., 312 P.3d 1257, 1261 (Idaho 2013). Wasden thus held that "NWS's sales to Warpath were not subject to tax" and that "not only was NWS not required to obtain a wholesaler permit, it was statutorily prohibited from doing so." Id. If Idaho cannot tax NWS's cigarette sales to Warpath, then it cannot prohibit such sales outright as it attempts to do here. The Supreme Court of Idaho erred in holding otherwise.

In Wagnon, this Court held that it must examine the "who" (Indian or non-Indian) and "where" (on or off reservation) when construing State efforts to tax or regulate Indians. 546 U.S. at 101-02.

### A. Tribal Members Do Not Shed Their Indian Status By Choosing To Do Business Through a Tribally-Chartered Corporation.

Several states disagree whether an Indian owned corporation should be deemed an Indian for purposes of regulatory authority. The issue was discussed in Baraga Products, Inc. v. Comm'r of Revenue, which held that an Indian-owned corporation is not an Indian for purposes of regulatory authority.[9] Three state supreme courts – Idaho, South Dakota, and Montana – have considered the issue and disagree on the answer.[10] Accordingly, this Court should resolve the split and address this important federal issue -- i.e., whether a corporation chartered under tribal law, that is Indian owned, and which operates solely in Indian Country, should be deemed an Indian for purposes of regulatory authority. The scope and breadth of State regulatory authority over Indians should be uniform nationwide and should not be subject to a patchwork of state law.

In Wasden, the Idaho Supreme Court considered the "who" of Wagnon's analysis. Wasden followed Baraga and held that NWS is not an Indian because it is a corporation.

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9. 971 F. Supp. 294, 298 (W.D. Mich. 1997), *aff'd sub nom.* Baraga Products, Inc. v. Michigan Comm'r of Revenue, 156 F.3d 1228 (6th Cir. 1998).

10. *Compare* Wasden, 312 P.3d at 1262 *with* Pourier v. South Dakota Dep't of Revenue, 658 N.W.2d 395 (S.D. 2003) (holding that an Indian-owned corporation doing business on reservation is an Indian for purposes of tax immunity), *vacated in part on other grounds*, 674 N.W.2d 314 (S.D. 2004); Flat Center Farms, Inc. v. State Dep't of Revenue, 310 Mont. 206, 212 (2002) (declining to follow Baraga).

Reliance on Baraga, however, is misplaced because, unlike NWS, "Baraga was not organized under tribal laws . . . [but] was instead organized under the laws of the State of Michigan." Baraga, 156 F.3d at 1228. NWS is chartered under tribal law (the tribal code of the Sac & Fox Tribe).

Moreover, Wasden and Baraga ignore this Court's holding in Cent. Mach. Co. v. Arizona State Tax Comm'n, which held that, for purposes of ascertaining whether a non-Indian could be taxed for on reservation sales, it was "irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself." 448 U.S. 160, 164 n.3 (1980).

Limitations on State regulation over Indians extend to tribal members, as this Court noted in McClanahan v. Arizona State Tax Comm'n, which held that Arizona could not impose income tax on tribal members with respect to on reservation income. 411 U.S. 164, 173 (1973). NWS is owned by a member of the Seneca Nation, and is therefore an Indian.

Wasden acknowledged that, "[w]hen a state is attempting to regulate a tribe or a member of that tribe inside Indian Country, express Congressional authorization is required." 312 P.3d at 1261 (citing Chickasaw, 515 U.S. at 458). Nonetheless, Wasden held that Congressional authorization was not required and that, "[b]ecause NWS is not an Indian, the State's attempt to regulate NWS is not categorically barred." Id. at 1261-62. Wasden should be reversed because NWS is an Indian and the State of Idaho has prohibited it from selling cigarettes to an Indian-owned business on the Coeur d'Alene reservation despite Idaho's own tax code, which

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 member . . . of an Idaho Indian tribe." IDAPA 35.01.10.014 ¶ 1(b). NWS is thus permitted to "deliver" untaxed cigarettes to Indian businesses such as Warpath. Nonetheless, Idaho seeks to stop NWS and Warpath from trading with each other by seeking to enforce the Complementary Act in Indian Country.

### B. NWS Sells Tobacco On Reservation – and a Bracker Analysis is Required If the Conduct is Deemed Off Reservation.

In Wasden, the Idaho Supreme Court also considered the "where" of Wagnon's analysis, and held that NWS engages in conduct off reservation. This conclusion is wrong. NWS is located on the Seneca Nation, which is located within the geographic boundaries of the State of New York. NWS ships cigarettes "FOB Seneca Nation"[11] that are marked "for reservation sales only." NWS only sells cigarettes to tribes or tribally-affiliated or licensed entities located in Indian Country. This activity by NWS is therefore conducted on reservation in the Seneca Nation. After leaving NWS's possession and control, the cigarettes are shipped from either the Seneca Nation or a foreign trade zone in Nevada. From there, the product is shipped by common courier to Warpath at the Coeur d'Alene reservation. To regulate this sale, Idaho must either (i) reach outside of Idaho and into the Seneca Nation

11. As a result, title and risk of loss passes to the buyer on the Seneca Nation.

to regulate NWS; or (ii) reach into the Coeur d'Alene reservation to regulate Warpath.

If Idaho is permitted to prevent NWS's sales to Warpath, it will mean that States may regulate on reservation commerce by Indians unless all materials involved in such commerce are grown, manufactured, and distributed on reservation. This would be a substantial degradation of Indian rights under the Indian Commerce Clause and this Court's prior decisions, such as Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 480 (1976).

It would also undermine the Indian Rehabilitation Act, which is designed to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (citing Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*).

As this Court held in Bracker, "[w]hen 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." 448 U.S. 136, 144 (1980). As a result, this Court has repeatedly held that states may not tax or regulate tribal members for commercial transactions occurring on reservation. In McClanahan, this Court held that states cannot impose income tax on tribal members with respect to on reservation income. 411 U.S. at 173.

In Oklahoma Tax Comm'n v. Sac & Fox Nation, this Court held that Oklahoma could not impose a personal property tax on property held by tribal members who lived in Indian Country. 508 U.S. 114, 127-28 (1993).

In Oklahoma Tax Comm'n v. Chickasaw Nation, this Court held that Oklahoma could not tax the retail sale of gas on a reservation to non-Indians because the legal incidence of the tax fell on tribal members. 515 U.S. at 453-55 ("Indian tribes and individuals generally are exempt from state taxation within their own territory") (emphasis added and citation omitted). Consequently, Wasden should be reversed.

Even if NWS is deemed a "non-Indian," Wasden nonetheless erred in failing to apply the interest-balancing test set forth by this Court in Bracker, 448 U.S. at 145 because the conduct occurred on reservation. As this Court noted in Bracker, "[m]ore difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." Id. at 144. As discussed above, NWS ships its product "FOB Seneca Nation" and then takes no further action. NWS does not engage in any conduct in the State of Idaho. Likewise, Warpath's conduct occurs on the Coeur d'Alene reservation, from which it places an order and arranges to take delivery and transport its cigarettes back to the reservation.

Wasden held that the regulated conduct occurred off reservation, and thus declined to apply Bracker. 312 P.3d at 1262-63. This, however, overlooks that (i) NWS ships tobacco "FOB Seneca Nation" from the Seneca reservation and takes no further action; (ii) NWS does not enter Idaho;

and (iii) Warpath receives the product in New York or Nevada and transports it to its own reservation.

Although the cigarettes acquired by Warpath from NWS may travel through Idaho on the way to the reservation,[12] it is not conduct by NWS. Accordingly, the only possible contact with Idaho is the transportation across Idaho roads, which has no bearing on the interest that Idaho seeks to foster by prohibiting "non-compliant" cigarettes from entering Indian Country.[13] Rather, Idaho seeks to prevent the cigarettes from entering the state at all because they do not bear a tax-stamp – even though Idaho's own regulations confirm that Coeur d'Alene members may receive untaxed cigarettes on reservation.

The two cases cited by the Idaho Supreme Court do not support its conclusion that the regulated activity in this case occurred off reservation. In Wagnon, this Court held that a non-Indian fuel distributor could be taxed upon receiving fuel, which occurred off reservation. 546 U.S. at 101-02. In Mescalero Apache Tribe, this Court held that an off reservation tribal ski resort could be taxed. 411 U.S. at 157-58. Unlike Wagnon or Mescalero Apache Tribe, however, NWS does not engage in any off reservation conduct that is within the State of Idaho. NWS's conduct started and ended within the Seneca Nation, which is more than 2,000 miles from Idaho.

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12. No evidence to this effect was introduced; the reservation borders the State of Washington.

13. Idaho is of course free to proscribe its citizens from purchasing non-compliant cigarettes.

Rather, the relationship between Warpath and NWS is more akin to the relationship between the tribe and the non-Indian logging company in Bracker, where this Court held that a tax on the non-Indian would alter the Indians' rights to engage in their logging operation as provided for under federal law. 448 U.S. at 148-49. Likewise, Idaho's ban prevents NWS from selling cigarettes to Warpath and prevents Warpath from selling to tribes and tribal entities. Accordingly, at the very least, this action should be reversed and remanded with instruction to apply Bracker.

## II. The Petition Should Be Granted Because Idaho's Complementary Act is Preempted To The Extent That Idaho Seeks To Enforce It In Indian Country or Against An Indian Trader.

Congressional power to regulate Indians is plenary and absolute. Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976) (citing McClanahan). As a result, States cannot regulate on reservation tobacco sales to tribal members. In Moe, this Court held that states cannot tax or regulate the tobacco trade on reservations by Indians to other Indians. 425 U.S. at 480-81 (citing McClanahan).

Implicit in Moe is the right to receive the tobacco necessary to engage in such commerce. Indians cannot trade if states may stop the flow of goods into Indian Country. By enacting the Indian Commerce Clause, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." Bracker, 448 U.S. at 152; Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965) (invalidating state law

that "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized" by Congress).

The Supreme Court of Idaho has acknowledged that the Complementary Act does not regulate on reservation activities. State ex rel. Wasden v. Maybee, 224 P.3d 1109, 1123 (Idaho 2010).[14] Idaho seeks to indirectly do what it cannot do directly – prohibit Indians from selling cigarettes to other Indians on reservation. Although Idaho may prevent the importation of unstamped cigarettes bound for destinations outside of Indian Country, it cannot stop importation to Indian Country – which is an overly broad attempt to enforce the Complementary Act. Under Moe, Idaho cannot prohibit Warpath from purchasing cigarettes from NWS, and its attempt to do so is preempted by federal law, including the Indian Commerce Clause.[15]

Idaho's conduct is also preempted under the Indian Trader statutes, which reflect "a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange." Washington v.

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14. Unlike Maybee, NWS does not sell cigarettes to non-Indians located off reservation in the State of Idaho. The Complementary Act is therefore inapplicable to NWS.

15. Maybee held that the Indian Commerce Clause "regulated only sales *to* Native Americans, not sales *from* Native Americans." 224 P.3d at 1115-16 (emphasis in original). Here, NWS's sales are to an Indian business and Idaho's attempt to regulate the sales are thus preempted by the Indian Commerce Clause.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).[16]

In Cent. Mach., this Court held that Arizona could not impose a "transaction privilege tax" on an Arizona corporation that sold tractors to a tribal enterprise on a reservation. 448 U.S. 160, 161-65 (1980). Arizona lacked jurisdiction over the sale despite the fact that the seller: (i) was not a licensed Indian trader; (ii) was not located on the reservation; (iii) solicited the sale on reservation; and (iv) the contract was made on reservation. Id. at 161, 164-65. This Court held that it "is the existence of the Indian trader statutes, . . . not their administration, that preempts the field of transactions with Indians occurring on reservations." Id. at 165.

Under Cent. Mach., Idaho's Complementary Act is preempted to the extent that it is being applied to regulate a sale between an Indian and an Indian trader. Indeed, Idaho's attempt to regulate cigarettes being transported to a reservation is similar to the motor fuel tax that was struck down by the New York Court of Appeals in Herzog Bros. Trucking, Inc. v. State Tax Comm'n.[17] In Herzog, New York imposed a tax on motor fuel on importation from Pennsylvania to the Seneca reservation. 72 N.Y.2d at 723. Like Herzog, Warpath constituted NWS's only sales in Idaho. Id. The court adhered to its previous decision

16. There is also a "firm federal policy of promoting tribal self-sufficiency and economic development" (Bracker, 448 U.S. at 143), and "of leaving Indians free from state jurisdiction and control [that] is deeply rooted in the Nation's history." McClanahan, 411 U.S. at 168.

17. 72 N.Y.2d 720, 724-25 (1988), *adhering to* 69 N.Y.2d 536 (1987), *vacated and remanded by* 487 U.S. 1212 (1988).

holding that the Indian Trader statutes preempted the field and left "no room" for state regulation to impose "additional burdens . . . no matter how minimal the burden imposed. . ." 69 N.Y.2d at 545-46. As a result, New York could not tax an out-of-state distributor for sales to Indians on reservation. Idaho's application of the Complementary Act is even more burdensome because it eliminates Warpath's ability to obtain Seneca brand tobacco from NWS.

Finally, Idaho's attempt to prevent NWS's products from reaching the Coeur d'Alene reservation is different than the seizure in Colville of "unstamped cigarettes en route to the reservations from wholesalers outside the State." 447 U.S. at 152. In Colville, the seizure of cigarettes in-transit was permitted because the Indian retailers had "refused to fulfill collection and remittance obligations" for taxes upon sales to non-Indians. Id. at 161-62. Here, there is no blanket refusal by Warpath to comply with a similar obligation. Indeed, Idaho is not even attempting to collect a tax because the sale to an Indian-owned business is tax exempt.

For all of these reasons, Idaho's attempt to regulate the tobacco trade in Indian Country is preempted by the Indian Commerce Clause, the Indian Trader Statutes, and this Court's decisions.

## III. The Petition Should Be Granted Because Idaho Cannot Exercise Personal Jurisdiction Over NWS Where Its Sole Contact Is With Warpath on the Coeur d'Alene Reservation.

Idaho cannot constitutionally exercise personal jurisdiction over NWS because its sole contact is with an Indian-owned business located on reservation. NWS has been unable to locate a single decision that upheld personal jurisdiction based solely on contacts with Indians on reservation. One decision from Oregon, however, found personal jurisdiction lacking where a defendant out-of-state resident "arguably passed through Oregon to reach the reservation." North Pac. Ins. v. Switzler, 143 Or. App. 223, 235 (Or. App. 1996). NWS's "contact" with Idaho is even more tenuous because it was not even "passing through" since the product was shipped "FBO Seneca Nation." Consequently, NWS lacks sufficient minimum contacts with Idaho to be subject to suit in that state.

In Cent. Mach., this Court held that a sale transaction was beyond Arizona's reach even though the seller was an Arizona corporation located in Arizona that entered a contract on reservation. 448 U.S. 161, 164-65. NWS has even less connection to Idaho because it is not an Idaho corporation, is not located in Idaho, and does not consummate any sale on the Coeur d'Alene reservation; rather, the sale occurs on the Seneca reservation in New York. Unlike the seller in Cent. Mach., NWS did not deliver product to the reservation.

Wasden erroneously found that NWS imported cigarettes; the record shows that Warpath, not NWS, imported cigarettes into Idaho. As a result, personal

jurisdiction over NWS may not be based on actions taken by Warpath after the sale is consummated. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954). In Miller, this Court held that a sale in Delaware does not give rise to any liability for a Maryland use tax, which arises after the sale is consummated, because such "liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandize carried away by the buyer." Id.

To establish personal jurisdiction, a plaintiff must prove that a defendant's purposeful conduct and connection to the forum state are such that a defendant avails itself of the benefits and protections of the state's laws and, should, therefore reasonably anticipate being haled into the forum. J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780 (2011); Asahi Metal Indus. Co. v. Sup. Court of Cal., 480 U.S. 102 (1987); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

Under these decisions, the mere presence of NWS's product in Idaho, by itself, is insufficient to establish personal jurisdiction over NWS. The due process interest is heightened in this case because it involves a State's efforts to exercise authority over an Indian that operates from a reservation in another State.[18] Accordingly, Idaho lacked personal jurisdiction over NWS.

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18. Tennessee v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726 (Tenn. 2013) (presence of defendant's cigarettes in Tennessee insufficient, by itself, to support personal jurisdiction over defendant); South Dakota v. Grand River Enterprises, Inc., 757 N.W.2d 305 (S.D. 2008) (presence of defendant's tobacco products in South Dakota insufficient to establish personal jurisdiction over defendant).

Finally, even if Idaho could obtain personal jurisdiction, its actions would implicate Commerce Clause concerns because NWS has no substantial nexus with Idaho where it lacks a physical presence and, like the seller in Quill, NWS's only connection is the shipment of goods in interstate commerce. Quill Corp., 504 U.S. 298.

## CONCLUSION

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

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