

# Nos. 17-3198

17-3222 (cross-appeal)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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STATE OF NEW YORK,

Plaintiff-Appellee-Cross-Appellant,

v.

MOUNTAIN TOBACCO COMPANY, DBA KING MOUNTAIN TOBACCO  
COMPANY INC.,

Defendant-Appellant-Cross-Appellee,

MOUNTAIN TOBACCO DISTRIBUTING COMPANY INC., DELBERT  
WHEELER, SR.,

Defendants.

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On Appeal from the United States District Court  
for the Eastern District of New York

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF NEW YORK STATE**

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## INTRODUCTION AND INTEREST OF THE UNITED STATES

New York State seeks to enforce the Prevent All Cigarette Trafficking Act (PACT Act), Pub. L. No. 111-154, 124 Stat. 1087 (2010), against the Mountain Tobacco Company, known as King Mountain, a corporation located on the Yakama Reservation in Washington State. Because the PACT Act is one of the federal government's primary tools for combatting the serious problem of interstate cigarette trafficking, the United States has a substantial interest in this Court's interpretation of the statute, which will apply to States and the federal government alike.

Among other things, the PACT Act imposes reporting requirements on persons who sell cigarettes through "interstate commerce." *See* 15 U.S.C. § 376(a). The district court incorrectly held that sales from an Indian reservation in one State into an Indian reservation in a different State do not constitute "interstate commerce" under the PACT Act. To the contrary, the PACT Act's text, purpose, and historical context all support the commonsense conclusion that sales between reservations in different States qualify as interstate commerce. The district court's contrary holding would create a sizeable loophole in the PACT Act by exempting reservation-to-reservation cigarette sales from the statute's reporting requirement. Such reservation-to-reservation sales have become commonplace, and they now represent a substantial proportion of interstate cigarette sales throughout the United States. Deeming such transactions exempt from the PACT Act's definition of interstate commerce would facilitate

cigarette trafficking and make it more difficult for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)—the federal agency tasked with enforcing the PACT Act—to ensure that cigarette sellers comply with federal law.<sup>1</sup>

## BACKGROUND

### A. The Prevent All Cigarette Trafficking Act

Since 1949, a federal law known as the Jenkins Act has required all “out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents.” *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 5 (2010). This reporting requirement was designed to facilitate the collection of excise taxes from the in-state cigarette buyers who ultimately owed the taxes to the State. Half a century after the Jenkins Act took effect, however, noncompliance with the statute’s reporting requirement was rampant, resulting in billions of dollars of lost state and local tax revenue. In 2010, therefore, Congress amended the Jenkins Act with the PACT Act, which imposed new requirements to ensure that out-of-state cigarette sellers comply with their state tax

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<sup>1</sup> New York State also brought a claim against King Mountain under a second federal statute, the Contraband Cigarette Trafficking Act (CCTA). The district court rejected that claim, concluding that King Mountain qualifies as “an Indian in Indian country” and is therefore exempt from State-initiated suits under the CCTA. *See* 18 U.S.C. § 2346(b)(1). Because the CCTA’s bar on suits against “an Indian tribe or an Indian in Indian country” does not apply to the federal government, *see id.*, this Court’s resolution of that question does not directly affect the interests of the United States. The United States therefore does not address that question in this brief. Nor does the United States address New York State’s state law claims.

obligations. Congress enacted the PACT Act to “provide government officials with more effective tools to combat tobacco smuggling”; to make it more difficult for cigarette traffickers “to engage in and profit from illegal activities”; and to “prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal internet or contraband sales.” PACT Act, Pub. L. No. 111-154 § 1(c) (Findings and Purposes).

As relevant here, the PACT Act imposed additional reporting requirements on persons who sell cigarettes in interstate commerce. The PACT Act’s reporting provision requires cigarette sellers to register with the U.S. Attorney General and with “the tobacco tax administrators” of the States and places into which they sell cigarettes. 15 U.S.C. § 376(a)(1). The provision further requires cigarette sellers to file monthly reports documenting their cigarette sales with the relevant state authorities, *id.* § 376(a)(2), and with the authorities of local governments and Indian tribes that apply their own taxes on cigarettes, *id.* § 376(a)(3). The statute imposes these reporting requirements on “[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco *in interstate commerce.*” *Id.* § 376(a) (emphasis added).

This case concerns the PACT Act’s interstate commerce requirement. The statute defines “interstate commerce” to mean (1) “commerce between a State and any place outside the State,” (2) “commerce between a State and any Indian country in the State,” or (3) “commerce between points in the same State but through any place outside the State or through any Indian country.” 15 U.S.C. § 375(9)(A). The statute in

turn defines “State” to mean “each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.” *Id.* § 375(11). And the statute defines “Indian country” by cross-referencing the criminal definition of that term, which provides that Indian country includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,” “all dependent Indian communities within the borders of the United States . . . whether within or without the limits of a state,” and “all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151 (cross-referenced in 15 U.S.C. § 375(7)(A)). The PACT Act then sets out a distinct definition of “Indian country” for Indian lands located “within the State of Alaska.” 15 U.S.C. § 375(7)(A).

Congress authorized the Attorney General to seek criminal and civil penalties against persons who violate the PACT Act. *See* 15 U.S.C. § 377; *id.* § 378(b). Congress additionally tasked the Attorney General with maintaining a “[l]ist of unregistered or noncompliant delivery sellers” that “have not registered with the Attorney General of the United States pursuant to [the reporting requirement], or that are otherwise not in compliance with this chapter.” *Id.* § 376a(e)(1). This list, known as the “non-compliant list,” must be updated periodically and distributed to States, localities, and Indian tribes, who may nominate for inclusion on the list entities that fail to register or fail to file their requisite monthly reports. *Id.* The statute then bars any “person who delivers cigarettes

or smokeless tobacco to consumers” from knowingly delivering any package on behalf of entities included on the non-compliant list. *Id.* § 376a(e)(2).

To complement federal enforcement of the PACT Act, Congress authorized States and other entities that impose cigarette taxes—including Indian tribes—to bring suit to enforce its civil provisions. The statute provides that States, localities, and Indian tribes may bring suit “to prevent and restrain violations of this chapter by any person or to obtain any other appropriate relief from any person for violations of this chapter, including civil penalties, money damages, and injunctive or other equitable relief.” 15 U.S.C. § 378(c)(1)(A).

#### **B. Prior Proceedings**

In 2012, New York State filed suit against King Mountain, a company “organized under the laws of the Yakama Nation; wholly owned by . . . a member of the Yakama Nation; and located on the Yakama Indian Reservation.” SPA12. King Mountain manufactures cigarettes on the Yakama Reservation and then sells them for profit throughout the United States. SPA2-3. As relevant here, the State alleged that King Mountain failed to file monthly reports with the New York State tobacco tax administrator as required by the PACT Act. The State additionally alleged violations of the Contraband Cigarette Trafficking Act and New York State law that this brief does not address.

The district court granted summary judgment in favor of King Mountain on New York State’s PACT Act claim. The court held that sales from a reservation located in

one State to reservations located in another State did not qualify as “interstate commerce.” SPA20. The court rejected New York’s argument that Indian reservations are generally considered part of the State in which they are located, and that sales between reservations in two different States therefore constitute interstate commerce. The court believed that because the PACT Act provides distinct definitions of the term “State” and “Indian country,” “[t]he notion that a qualified Indian reservation—which falls squarely within the definition of ‘Indian Country’—is somehow subsumed within the definition of ‘state’ is belied by a plain reading of the statute.” SPA20-21. Thus, with the exception of one shipment to a company in New York State located outside of Indian country, *see* SPA25-27, the district court granted summary judgment for King Mountain on the State’s PACT Act claim. SPA27-28.

## **ARGUMENT**

### **TRANSACTIONS BETWEEN INDIAN RESERVATIONS IN DIFFERENT STATES QUALIFY AS “INTERSTATE COMMERCE” UNDER THE PACT ACT.**

Transactions between Indian reservations in two different States plainly constitute “interstate commerce” under the PACT Act. The Bureau of Alcohol, Tobacco, Firearms and Explosives—the federal agency charged with administering the PACT Act—has always applied the PACT Act’s reporting requirement to entities that sell cigarettes from one Indian reservation to another. Indeed, ATF has previously enforced the PACT Act against King Mountain itself for failing properly to report reservation-to-reservation sales. *See* JA520-29. This Court should reverse the grant of

summary judgment for King Mountain on New York State's PACT Act claim and remand for further proceedings.

**A.** The PACT Act imposes reporting requirements on persons who sell cigarettes through “interstate commerce.” 15 U.S.C. § 376(a). The statute defines interstate commerce to mean (1) “commerce between a State and any place outside the State,” (2) “commerce between a State and any Indian country in the State,” or (3) “commerce between points in the same State but through any place outside the State or through any Indian country.” *Id.* § 375(9)(A). The transactions at issue in this case involve cigarette sales from the Yakama Reservation in Washington State into Indian reservations in New York State. These transactions do not satisfy the second or third prongs of the Act's definition of interstate commerce. They therefore only constitute interstate commerce if they satisfy the first prong—“commerce between a State and any place outside the State.” *Id.*

Interstate reservation-to-reservation transactions constitute commerce “between a State and any place outside of the State.” Whether references to a “State” in a federal statute encompass Indian reservations turns on congressional intent, and ordinarily an “Indian reservation is considered part of the territory of the State” in which it is located. *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (quotation marks omitted). Under a straightforward application of this ordinary rule, transactions between Indian reservations located within different States qualify as transactions between States. Context indicates that Congress intended to adhere to this ordinary rule here.

*First*, the PACT Act’s text demonstrates that Congress intended the term “State” to encompass Indian country within the State. The PACT Act defines “interstate commerce” in part to encompass “commerce between points in the same State but through any place outside the State *or* through any Indian country.” 15 U.S.C. § 375(9)(A) (emphasis added). Congress’s use of the disjunctive “or” to distinguish “any place outside of the State” from “Indian country” demonstrates Congress’s understanding that Indian country may exist within a State. Under the district court’s contrary interpretation, the latter clause of this definition—“or through any Indian country”—would be superfluous, because Indian country would already be encompassed by the former clause—“any place outside the State.” Moreover, the statute’s definition of interstate commerce also includes “commerce between a State and *any Indian country in the State*,” *id.* (emphasis added), further reflecting Congress’s understanding that Indian country is located with the territory of a State.

Numerous other provisions of the PACT Act underscore that understanding. The definition of “Indian country” cross-referenced in the PACT Act, for instance, recognizes that Indian country includes (among other things) “all dependent Indian communities within the borders of the United States . . . whether *within or without the limits of a state*.” 18 U.S.C. § 1151 (cross-referenced in 15 U.S.C. § 375(7)(A)) (emphasis added). The PACT Act then provides a different definition of Indian country applicable to Indian land “*within the State of Alaska*.” 15 U.S.C. § 375(7)(A) (emphasis added). And the PACT Act’s reporting provision requires cigarette sellers to provide reports to

States as well as “Indian tribes operating *within the borders of the State.*” *Id.* § 376(a)(3) (emphasis added). These provisions reflect Congress’s understanding that Indian country is located within a State.

The text of the PACT Act’s reporting requirement further confirms that Congress intended the requirement to apply to reservation-to-reservation sales. Congress intended the reporting requirement to apply to transactions that *begin* in Indian country. *See* 15 U.S.C. § 376(a) (reporting requirement applies to transactions commenced by “[a]ny person”); *id.* § 375(10) (the term “person” in the PACT Act includes an “Indian tribal government”). Congress similarly intended the reporting requirement to apply to transactions that *end* in Indian country. *See id.* § 376(a) (reporting requirement applies to transactions that terminate in “a State, locality, *or Indian country*”) (emphasis added). There is no textual basis to conclude that Congress intended the reporting requirement to apply to interstate transactions that begin *or* end in Indian country, but not to interstate transactions that begin *and* end in Indian country.

*Second*, the statutory context supports the understanding that Indian country exists within the jurisdiction of a State. The PACT Act was enacted against the backdrop of Supreme Court precedent recognizing that Indian tribes are subject to state taxation with respect to cigarette sales to nonmembers. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154-156 (1980) (affirming a State’s “power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops”). It was therefore settled when the PACT Act was enacted that Indian

reservations were located within state jurisdiction for purposes of cigarette sales—including, as relevant here, sales by Indian tribes to members of a different tribe. *See id.* at 161 (explaining that “[f]or most practical purposes [non-tribal member] Indians stand on the same footing as non-Indians” for purposes of state taxation). Thus, while there are contexts in which Congress may not intend statutory references to a “State” to include Indian reservations in the State, Congress in the PACT Act was legislating in an area where Indian reservations had long been understood to be located within state jurisdiction.

*Third*, the purposes of the PACT Act provide powerful evidence that Congress intended reservation-to-reservation sales to qualify as interstate commerce subject to the reporting requirement. The statute was enacted to prevent persons from delivering no-tax or low-tax cigarettes into high-tax jurisdictions without paying the applicable taxes, and Congress recognized that a large proportion of such sales originated in Indian reservations, where businesses have access to untaxed cigarettes by virtue of their exemption from state taxation in sales to tribal members. *See* U.S. Government Accountability Office, *Internet Cigarette Sales: Limited Compliance and Enforcement of the Jenkins Act Result in Loss of State Tax Revenue*, at 13 n.14 (May 1, 2003) (more than half of the internet vendors reviewed were Native American), *available at* <https://www.gao.gov/products/GAO-03-714T>; *Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 7 (May 1,

2008) (House sponsor’s testimony that the problem of cigarette smuggling is “the most extreme case in places that have no tax, meaning Indian reservations”). Congress thus enacted the PACT Act in part “to curtail what Congress believed to be improper assertions of sovereignty by Native American retailers” in interstate transactions. *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 256 (W.D.N.Y. 2010), *vacated*, June 6, 2013. It would be wholly incompatible with that goal to leave interstate cigarette sales between reservations unregulated.

The district court’s ruling would additionally create a “crazy-quilt” of coverage at odds with the PACT Act’s purposes. *See Torres v. Lynch*, 136 S. Ct. 1619, 1628 (2016). Under the district court’s interpretation, a transaction would qualify as interstate commerce if it began in a State and ended in a reservation within the same State; or if it began and ended in non-Indian territory within the same State but passed through a reservation in the interim; but not if it began in a reservation in one State and ended in a reservation in a different State. It is difficult to imagine why Congress would have intended its definition of “interstate commerce” to apply to transactions that begin and end in the same State but not to transactions that begin and end in different States.

**B.** The district court reached a contrary conclusion by focusing on the PACT Act’s “separate definitions for ‘State’ and ‘Indian country.’” SPA20. In the court’s view, “[t]he notion that a qualified Indian reservation—which falls squarely within the definition of ‘Indian Country’—is somehow subsumed within the definition of ‘state’ is belied by a plain reading of the statute.” SPA20-21. But that conclusion does not

follow. Congress may define two terms separately even though the terms have overlapping content. Nothing about the statute's separate definitions of "State" and "Indian country" indicates that the two terms are mutually exclusive. *Cf. Ho-Chunk, Inc. v. Sessions*, 253 F. Supp. 3d 303, 307-08 (D.D.C. 2017) (rejecting the argument that the term "State" excludes "Indian country" under the CCTA, which defines both terms similarly), *appeal pending*, No. 17-5140 (D.C. Cir.) (oral argument held March 15, 2018).

Indeed, just as the PACT Act refers to "States" and "Indian country" separately, the PACT Act also refers to "States" and "localities" separately, and requires cigarette sellers to comply with the reporting requirement for cigarettes "shipped into a State, locality, *or* Indian country" that imposes cigarette taxes. 15 U.S.C. § 376(a) (emphasis added). Cigarette sellers therefore must file the requisite reports and prepay the applicable taxes both in a locality that imposes cigarette taxes and in the State where the locality is located. A cigarette business that delivers cigarettes into New York City, for example, must file reports both with New York City and with New York State. *See* Admin. Code of City of New York § 11-1302(a) (imposing cigarette tax on cigarettes sold to New York City residents). That the statute imposes distinct obligations on cigarette sellers regarding sales to States and sales to localities, however, does not mean that the terms are mutually exclusive, nor does it mean that sales from a locality in one State to a locality in a different State are not "interstate commerce." The same reasoning applies to interstate reservation-to-reservation sales.

Congress’s decision to define “State” and “Indian country” separately in the PACT Act, and to include distinct references to “States” and “Indian country” in the statute’s definition of “interstate commerce,” reflects Congress’s intent to expand the traditional understanding of interstate commerce rather than to narrow it. The references to Indian country in the definition of “interstate commerce” are intended to distinguish between a State and Indian country within the same State, and to specify that transactions between a State and Indian country *within its own borders* qualify as interstate commerce. *See* 15 U.S.C. § 375(9). Congress had no need to specify that transactions between Indian country in different States similarly qualify as interstate commerce, however, because such transactions constitute interstate commerce under the plain meaning of that term.

**C.** In part due to the theory accepted by the district court here, reservation-to-reservation sales by Indian-owned tobacco businesses have become commonplace.<sup>2</sup> If

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<sup>2</sup> *See, e.g., Ho-Chunk, Inc. v. Sessions*, 253 F. Supp. 3d 303, 309 (D.D.C. 2017) (sales between Nebraska and New York reservations); *United States v. Tarbell*, 242 F. Supp. 3d 200, 202 (W.D.N.Y. 2017) (sales between two reservations within New York); *New York v. Grand River Enterprises Six Nations, Ltd.*, No. 14-cv-910, 2015 WL 686819, at \*1 (W.D.N.Y. Feb. 18, 2015) (defendant was “an Indian corporate entity selling to Indian resellers located in Indian territories within New York State”); *United States v. Parry*, No. 4:13-cr-00291, 2015 WL 542566, at \*4 (W.D. Mo. Feb. 10, 2015) (sales between Nebraska and New York reservations); *State v. Native Wholesale Supply Co.*, 312 P.3d 1257, 1259 (Idaho 2013) (sales between Idaho and New York reservations); *United States v. Montour*, No. 09-cr-214, 2010 WL 2293143, at \*1-2 (W.D. Wash. May 3, 2010) (sales between New York, Oklahoma, and Washington reservations); *United States v. Baker*, 63 F.3d 1478, 1483-84 (9th Cir. 1995) (sales between Montana and Washington reservations).

such transactions were deemed not to constitute “interstate commerce,” a large proportion of the national cigarette trade would be exempt from the PACT Act’s reporting provision—a loophole that Congress is unlikely to have intended when it passed a statute entitled the Prevent *All* Cigarette Trafficking Act.

If affirmed, the district court’s ruling would impair federal, state, and local efforts to track the flow of cigarettes in interstate commerce, and would undermine the PACT Act’s goals of curbing cigarette excise tax evasion and preventing the sale of cigarettes to minors. *See* PACT Act, Pub. L. No. 111-154 § 1(c) (Findings and Purposes). It would also prevent ATF from placing reservation-to-reservation sellers who do not comply with the reporting provision on the PACT Act’s non-compliant list. *See* 15 U.S.C. § 376a(e)(1)(A). Because carriers may not complete deliveries for entities on the non-compliant list, *see id.* § 376a(e)(2)(A), the list is a powerful federal tool for achieving PACT Act compliance. Indeed, in 2015, ATF notified King Mountain that it intended to place King Mountain on the non-compliant list for failing properly to report reservation-to-reservation sales into California. *See* SPA22-23; JA520-29. ATF emphasized that King Mountain’s sales into California constituted interstate commerce even if “the final destination in California may be located in Indian Country.” JA527. King Mountain began to file the necessary reports in California soon thereafter. Under the district court’s interpretation, however, the non-compliant list would not be an available tool for businesses like King Mountain that fail to comply with the reporting provision in reservation-to-reservation sales.

In addition to undermining enforcement of the PACT Act generally, the district court's interpretation of the statute would undermine tribal interests that Congress sought to protect when it enacted the PACT Act. Many Indian tribes impose their own cigarette taxes, *see, e.g., Colville Indian Reservation*, 447 U.S. at 158, and Congress designed the PACT Act in part to prevent the evasion of these taxes. The PACT Act requires delivery sellers to comply with all relevant "tribal . . . laws generally applicable to sales of cigarettes," 15 U.S.C. § 376a(a), and additionally requires sellers to file monthly reports with the "tobacco tax administrators and chief law enforcement officers of the . . . Indian tribes operating within the borders of the State that apply their own . . . tribal taxes on cigarettes," *id.* § 376(a)(3). The PACT Act further authorizes any "Indian tribe that levies a tax" to bring an action in federal court to enforce the PACT Act. *Id.* § 378(c)(1)(A). Thus, Congress sought to "benefit . . . tribal governments by expanding their authority to collect cigarette taxes" and by "enhanc[ing] the existing reporting requirements" that enable tribes to track tobacco shipments into their territory. *See* H.R. Rep. No. 111-117, at 23-25 (2009). If affirmed, the district court's decision would deprive tribes of these benefits in reservation-to-reservation sales.

## CONCLUSION

For the foregoing reasons, the grant of summary judgment for King Mountain on New York State's PACT Act claim should be reversed.

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MAY 2018

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## CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 29(a)(5) and Fed. Rule App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. According to the word count of Microsoft Word, the brief contains 3,896 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

s/ William E. Havemann  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 29, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ William E. Havemann*  
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