UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, Governor of the State of New York, JAMIE WOODWARD, Acting Commissioner, New York State Department of Taxation and Finance, WILLIAM COMISKEY, Deputy Commissioner, Office of Tax Enforcement, New York State Department of Taxation and Finance, JOHN MELVILLE, Acting Superintendent, New York State Police, each in his or her official capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff the Seneca Nation of Indians (the "Seneca Nation" or "Nation") moves this Court for preliminary injunctive relief (or a temporary restraining order) to prevent irreparable harm to its federally-protected sovereign rights and interests, and to the federally-protected rights of its members and licensed businesses, pending a final decision on the merits in this action. In June 2010, the New York State Legislature amended Article 20 of the New York Tax Law and the New York State Department of Taxation and Finance promulgated an emergency rule that radically restructures the Tax Law as it applies to cigarette sales occurring on Indian lands,

including sales to tax-exempt members of the Indian nations found within New York's borders. The amendments and the emergency rule impose an absolute embargo on the distribution of non-New York stamped cigarettes to the Nation's sovereign territories, and impose a strict quota on the distribution of tax-exempt, albeit stamped, cigarettes. As applied to the Nation, its members, and its licensed businesses, the amendments and the Emergency Rule violate the well-established legal standards (and fail to heed the warnings) set forth by the United States Supreme Court, the New York Court of Appeals, and the Department itself over the past 35 years.

It is a bedrock principle of federal Indian law that states lack jurisdiction to regulate Indian nations and their members in Indian country. While the Supreme Court has held that a state may impose *minimal* burdens on Indian retailers to collect cigarette taxes from non-Indians purchasing cigarettes on Indian lands, the Legislature and the Department have proceeded from the erroneous premise that they may impose *any level of burdens* on the Seneca Nation and its members, licensed-businesses, and economy. In an effort to balance its budget, the State seeks to compel the Nation to implement, administer, and enforce an entirely new regulatory program in the service of the State's own taxation scheme. This the State cannot do, as its efforts to commandeer the Nation's government for its own fiscal ends run directly counter to the Nation's own right of self-government, which right is deeply enshrined in federal law, and to the rights of its members and licensed businesses to engage in tax-exempt commerce free of State interference.

The Nation has been forced to come to this Court to seek preliminary injunctive relief, and to seek it on an expedited basis. When the Nation filed its Complaint in this action, its President, Barry E. Snyder, Sr., sent a letter to Governor Paterson and Attorney General Cuomo in which he stated that if the State could assure the Nation that it would not seek to enforce the

new legislative and regulatory provisions until this Court had enjoyed the opportunity to address the Nation's challenges to those provisions in an orderly fashion, the Nation would not need to move for a preliminary injunction on an expedited basis. The Governor and the Attorney General declined to provide those assurances. Declaration of Robert Odawi Porter ("Porter Decl.") at ¶ 19 & Ex. D.

FACTUAL BACKGROUND

I. THE SENECA NATION'S WELL-REGULATED FREE MARKET TOBACCO ECONOMY

The federally recognized Seneca Nation of Indians exercises the right of self-government over its treaty-protected Cattaraugus, Allegany, Oil Spring, Niagara Falls, and Buffalo Creek territories (collectively, "Territories") in Western New York. *See generally Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 671-72 (1974) (discussing *The New York Indians*, 72 U.S. (5 Wall.) 761, 766-71 (1867)); Porter Decl. at ¶¶ 1-2. The Nation's treaty-protected rights include the authority "to make [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). In the exercise of that authority, the Nation's government has fostered a "vigorous, private, and Native-owned economy" in its Territories. Declaration of Jonathan Taylor ("Taylor Decl.") at ¶ 14. "By deliberate self-determined choice, Seneca Nation policies encourage private business activity, generally eschewing Seneca taxes on private business and adopting a judicious approach to regulation." *Id.*

The Nation's tobacco economy hews closely to this model. "[T]he Nation's government plays an active role in regulating the Nation's tobacco economy," Porter Decl. at ¶ 13, but "the government has never sought to interfere with the basic free market character of [that] economy." *Id.* In order to safeguard the integrity of the tobacco economy, in 2006 the Nation enacted a comprehensive regulatory and law enforcement program—the Seneca Nation of

Indians Import-Export Law and Import-Export Regulations (collectively, the "IEL"). Porter Decl. Ex. A. The IEL, which is implemented and enforced by the Nation's Import-Export Commission ("Commission"), strictly governs the importation, exportation, and sale of all cigarettes on the Nation's Territories and all businesses participating in the Nation's tobacco economy. *See Id.* at ¶ 6.

Pursuant to the IEL, cigarettes may only be imported into the Nation's Territories by stamping agents licensed by the Commission, which must affix a unique, traceable Seneca Nation stamp to each package of cigarettes. *See* Porter Decl. ¶ 6 & Ex. A at 7. The six separate security features of the Seneca stamp (watermark, chemical reagent, variable image, variable color, microprint, and an embedded magnetic symbol) are amongst the most sophisticated in the United States and exceed those of the State of New York stamp. Porter Decl. ¶ 6. Through the affixation of the Seneca stamp, the Nation imposes an administrative fee of seventy-five cents on each carton of cigarettes, which fees are dedicated to health and education programs for Nation members on the Territories. *See* Porter Decl. ¶ 6 & Ex. A at 6, 17. The IEL provides that, with limited exceptions, non-Seneca stamped cigarettes found on the Territories are contraband subject to seizure by the Commission and subject to forfeiture. Porter Decl. ¶ 7 & Ex. A at 9.

Only after cigarettes have been affixed with a Seneca stamp may they be distributed to retailers on the Nation's Territories. Porter Decl. ¶ 6-7 & Ex. A at 7-8. Retailers must possess a Seneca Nation license to operate lawfully. Porter Decl.¶ 7. Each month, Nation-licensed stamping agents must report to the Commission (1) the quantity and brand of cigarettes stamped, (2) the name of the Nation-licensed retailer who purchased the cigarettes, (3) the date on which those cigarettes were stamped and the retail location to which they were delivered, and (4) the lot numbers of the stamps affixed to those cigarettes. Porter Decl. ¶ 6. The IEL prohibits Nation-

licensed retailers from, *inter alia*, selling cigarettes to minors, selling cigarettes below the Nation's minimum pricing structure, and selling cigarettes in wholesale quantities to any person, Indian or non-Indian, for purposes of off-reservation resale. Porter Decl. ¶ 7 & Ex. A. at 13, 16.

The Seneca Nation has a powerful ally in its implementation and enforcement of the IEL—the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), which is charged by Congress and by the Attorney General with implementing and enforcing the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341-2346. *See* 18 U.S.C. § 2346(a); 27 C.F.R. Part 646. Upon the adoption of the IEL, the Seneca Nation met on a government-to-government basis with the ATF and the United States Attorney for the Western District of New York to discuss the Nation's regulatory and law enforcement plans with respect to all cigarette trafficking and sales activities on the Nation's Territories, and to request the United States' support for its plans. *See* Porter Decl. ¶¶ 8-9. Since that initial meeting, the ATF and the Seneca Nation have met on several occasions and have routinely shared confidential law enforcement information to facilitate their respective enforcement of the CCTA and the IEL. *Id.*

In 2007, soon after the Nation seized over 60,000 cartons of non-Seneca stamped cigarettes with an estimated value of approximately $1.5 million, the ATF invited the Nation to participate in an international Contraband Tobacco Information Sharing Summit of federal, Canadian, state, provincial, and local law enforcement agencies. *Id.* at ¶ 10. The Nation's cooperative relationship with the ATF has proved fruitful to both the ATF and the Nation, leading to numerous investigations, contraband cigarette seizures, and related prosecutions. *Id.* at ¶¶ 11-12; *see also, e.g.*, *United States v. Lloyd Long,* 1:08-cr-00174-RJA (W.D.N.Y. filed July 10, 2008).

The Nation has also worked cooperatively and coordinated law enforcement activities with other federal and state agencies, including the United States Postal Service, local law enforcement, and the New York State Department of Taxation and Finance (the "Department" or "DTF") to combat unlawful cigarette trafficking on the Nation's Territories and throughout New York State. Porter Decl. ¶ 9. For example, in April 2008, a joint investigation of the ATF, the Seneca Nation, and the DTF led to the seizure of massive quantities of non-State stamped, non-Seneca stamped cigarettes being diverted by a state-licensed stamping agent through the Nation's Territories to the Peace Pipe Smoke Shop on the Poospatuck Reservation on Long Island. *See id.* at ¶ 11; *Gutlove & Shirvint, Inc.*, Nos. 822533 & 822921, FOF 11 (N.Y. Div. Tax App. June 2, 2009) (Amended Determination), *available at* http://www.nysdta.org/Determinations/822533.det.amd.htm (last visited Aug. 18, 2010). The Nation thereafter barred that agent from conducting business on the Territories or with any Nation-licensed business, and imposed substantial civil penalties upon it. Porter Decl. ¶ 11.

The ATF has since shared with the Nation its view that contraband cigarette trafficking is not an issue in the Territories as a result of the Nation's implementation and enforcement of the IEL and the Nation's work with the ATF. Porter Decl. ¶ 12. On May 12, 2009, the ATF, through Special Agent in Charge Ronald B. Turk, presented the Nation with a letter of commendation documenting the cooperative government-to-government relationship between the Nation and the United States as well as the Nation's valuable role in combating contraband cigarette trafficking in the State of New York. The letter states in part:

> On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), New York Field Division, please accept my gratitude for the assistance and support recently provided by the Seneca Nation of Indians to help curtail illegal cigarette trafficking.

> As a result of the Seneca Nation's cooperative efforts with ATF, several investigations into illicit cigarette trafficking have been initiated and are now being prosecuted. The assistance provided thus far has been invaluable, and we recognize the efforts made by the Seneca Nation to curtail illegal cigarette distribution.

Id. & Porter Decl. Ex. B.

While the Nation is hence an active and responsible regulator of the tobacco economy that exists in its Territories, that economy is decidedly grounded in free market principles. *Id.* at ¶ 13. At present, approximately 172 Nation-licensed retailers compete vigorously for market share in that economy. *Id.* at ¶ 4. The Seneca government does not attempt to run the economy in command fashion, and any attempt to do so would run directly counter to the will of the Seneca people. *Id.* at ¶ 13.

The Seneca tobacco economy is vitally important to the Nation and its peoples. Following two centuries in which the Nation was deprived of the vast majority of its lands through coercion and fraud, Indians living in the Seneca Territories in 2000 earned an average income of just $12,300, compared with $23,400 for all New Yorkers. Porter Decl. at ¶ 3. Yet the Nation has developed its tobacco economy to include 28 Nation-licensed wholesalers (including 15 Nation-licensed cigarette stamping agents) and the approximately 172 Nation-licensed cigarette retailers mentioned above, which between them employ approximately 3,000 people including Seneca members and non-members. Porter Decl. at ¶ 4 ; Taylor Decl. at ¶ 18.

II. THE APPLICATION OF THE NEW YORK CIGARETTE TAX TO ON-RESERVATION RETAIL SALES TO NON-INDIANS

The Seneca Nation's tobacco economy has developed based upon the rights of the Nation and its members under federal law and treaties, and in good faith reliance on the actions over the course of more than two decades by the legislative, executive, and judicial branches of New

York State regarding the application of state tax to retail cigarettes sales on the Nation's Territories.

Although New York first imposed an excise tax on cigarettes in 1939, it did not seek to impose that tax on cigarettes sold to non-Indians in Indian country because it was well-settled law at that time that New York lacked jurisdiction to do so. *See Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 622-23 (N.Y. Ct. App. 2010). In 1976, the Supreme Court held for the first time that states may impose an excise tax on non-Native manufactured cigarettes sold to non-Indians in Indian country. *See id.* at 623 (citing *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976) (discussed *infra*)).[1] New York did not respond to this decision until 1988, when the Department promulgated regulations to implement the cigarette tax as applied to on-reservation sales to non-Indians. *See id.* at 623. As a result of a facial legal challenge to the regulations by non-Indian cigarette wholesalers, however, *see Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), the Department did not implement or enforce those regulations. *Cayuga Indian Nation*, 14 N.Y.3d at 623-24. Although it ultimately prevailed before the United States Supreme Court on that particular challenge, in 1998 the Department formally repealed the 1988 regulations. *See id.* at 623-25. The New York courts subsequently upheld the Department's decision not to implement the regulations against an equal protection challenge by a convenience store association. *See id.*

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[1] The Seneca Nation firmly believes that decisions of the United States Supreme Court holding that, as a general matter, states may tax sales of non-Native manufactured cigarettes to non-Indians even when the sales occur within Indian country do not apply to the Nation, given the solemn treaty promises made by the United States to the Nation and other fundamental features of the Nation's history and control over its Territories. The Nation, indeed, has never been party to any litigation concluding that New York State possesses such a right. However, it is not necessary in this action for the Nation to challenge New York's purported right to tax transactions taking place within its Territories. Even under the terms of the Supreme Court decisions, New York in its most recent legislation and regulations has far exceeded the constraints placed by the Court on the authority of the states to tax such transactions.

at 626 (discussing *Matter of New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204 (1998)).

In 2003, the Legislature enacted N.Y. Tax Law § 471-e and directed the Department to "promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on . . . cigarettes or other tobacco products" purchased on Indian lands by any "non-native American . . . for such person's own consumption." *See Cayuga*, 14 N.Y.3d at 627 & n.3. Although the Department proposed such regulations, it did not adopt them. *See id.* In 2005, the Legislature amended § 471-e and effectively codified the Department's proposed regulations, including an Indian tax exemption coupon system. *See id.* at 627. Thereafter, however, the Department did not promulgate the regulations or take other administrative actions necessary to implement the amended § 471-e, and enforcement of the statute, which was held to not be in effect, was preliminarily enjoined. *See id.* at 628-29 (discussing *Day Wholesale, Inc. v. State of New York*, 51 A.D.3d 383 (N.Y. App. Div. 2008)).

Accordingly, in May 2010, the New York Court of Appeals confirmed the right of Indian reservation retailers to sell non-New York stamped cigarettes, explaining that "at present, there is no enforceable statutory or regulatory scheme specifically addressing the calculation or collection of taxes arising from the on-reservation retail sale of cigarettes." *Id.* at 629. The Court held that Indian retailers cannot "be criminally prosecuted for failing to collect the sales taxes from consumers and forward them to the Department . . . *[i]n the absence of a methodology developed by the State that respects the federally protected right to sell untaxed cigarettes to members of the Nation while at the same time providing for the calculation and*

collection of the tax relating to retail sales to non-Indian consumers." *Id.* at 648 (emphasis added).[2]

III. THE LEGISLATURE'S JUNE 2010 TAX LAW AMENDMENTS AND THE DEPARTMENT'S EMERGENCY RULE

On June 21, 2010, the New York Legislature amended N.Y. Tax Law § 471 and § 471-e regarding the distribution and sale of cigarettes to Indian territory and raised the cigarette tax from $2.75 to $4.35 per pack. N.Y. Tax Law § 471(1). The amendments clarify that the cigarette tax set forth in § 471 shall not be imposed on sales to qualified Indians for their own use and consumption on their nations' qualified reservations, but that the tax is imposed on all cigarettes sold to non-members of the nation and to non-Indians and that evidence of such tax shall be by means of an affixed New York State cigarette tax stamp. *See* N.Y. Tax Law § 471(1); N.Y. Tax § 471-e(1)(a). Notwithstanding the conceded tax immunity of qualified Indians, the amendments further provide that effective September 1, 2010 *all* cigarettes sold by state-licensed stamping agents and wholesale dealers to Indian nations or tribes or reservation cigarette sellers must bear a New York State tax stamp, and thus, stamping agents must prepay the State tax on all such cigarettes. *See* N.Y. Tax Law § 471(2), (5)(b); N.Y. Tax § 471-e(1)(b),

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[2] Notwithstanding this history with respect to the *prepayment* and *precollection* of tax on cigarettes sold to non-Indians in Indian country, the Legislature and the Department *have always required payment and collection* of tax on such sales under N.Y. Tax Law § 471-a (imposing an equivalent "tax on all cigarettes used in the state by any person, except that no tax shall be imposed . . . if the tax provided in [N.Y. Tax Law § 471] is paid"), pursuant to which non-exempt individuals purchasing and using non-State stamped cigarettes must remit the tax directly to the Department. *See Cayuga*, 14 N.Y.3d at 647 & n.17, 648; *see also City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 619 (N.Y. Ct. App. 2009) (explaining that non-exempt purchasers of non-State stamped cigarettes must remit use tax); *Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F. Supp. 2d 439, 450 (E.D.N.Y. 2007) (discussing the cigarette use tax as applied to on-reservation sales to non-Indians); *People v. Tracy*, 1 Misc. 3d 308, 312 (N.Y. City Ct. 2003) (same). Indeed, § 471-a is a "complement" or a "supplement" to § 471, 20 N.Y.C.R.R. § 74.5(a), and together those statutes comprise "the cigarette tax imposed [on individual consumers] pursuant to article 20" of the Tax Law. *See* 20 N.Y.C.R.R. § 70.1(a).

N.Y. Tax Law § 471-e(3)(d), N.Y. Tax Law § 471-e(6). The amendments identify two alternative statutory mechanisms by which Indian nations and their members may obtain tax-exempt, albeit stamped, cigarettes. *See* N.Y. Tax Law § 471(1).

The first mechanism is the § 471-e Indian tax exemption coupon system, in which an Indian nation must affirmatively elect to participate. N.Y. Tax Law §§ 471(1), 471-e(1)(b). Under this system, the Department would distribute a quota of Indian tax exemption coupons to a participating Indian nation based upon the probable demand for tax-exempt cigarettes by members of the nation for their own personal use and consumption as calculated by the Department. N.Y. Tax Law § 471-e(2). The coupon system does not allocate or otherwise regulate access to the quota among reservation cigarette sellers or Indian nation members. Instead, it contemplates that the Indian nation would implement, administer, and enforce the coupon system on the State's behalf by allocating the coupons among reservation cigarette sellers and the nation itself, presumably based upon a determination by the nation as to the demand for tax-exempt cigarettes by nation members at each retail location. *See id.* Reservation cigarette sellers in turn would provide these coupons to state-licensed stamping agents and wholesale dealers and would thereby purchase tax-exempt, albeit stamped, cigarettes for purposes of resale to nation members. N.Y. Tax Law § 471-e(3). Agents and dealers in turn would submit these coupons to the Department in conjunction and request a refund for taxes prepaid on stamped cigarettes not in fact subject to the State tax. N.Y. Tax Law § 471-e(4).

The second mechanism is the § 471(5) prior approval system, which controls in the absence of a nation's election to participate in the Indian tax exemption coupon system. N.Y. Tax Law § 471(5)(a). Under the prior approval system, the Department calculates a quota for each Indian nation based upon the same probable demand formula noted above. N.Y. Tax Law §

471(5)(b). State-licensed stamping agents and wholesale dealers may not sell any portion of the tax-exempt quota to the Indian nation or to reservation cigarette sellers on the nation's qualified reservation without receiving prior approval from the Department. *See id.* If an agent or dealer receives such approval, it may in turn request a refund from the Department for taxes prepaid on stamped cigarettes sold as tax-exempt to reservation cigarette sellers. *Id.* There exists no provision in the prior approval system to provide tax-exempt cigarettes to the nation and to reservation cigarette sellers on its territories if the quota is exhausted.

On June 22, 2010, just one day after the Legislature's amendments, the Department adopted an emergency rule to implement the Indian tax exemption coupon and prior approval systems. 20 N.Y.C.R.R. § 74.6 (the "Emergency Rule").[3] The Emergency Rule reiterates that all cigarettes sold by state-licensed stamping agents or wholesale dealers to reservation cigarette sellers must bear a New York tax stamp. *See* 20 N.Y.C.R.R. § 74.6(a)(3). The Emergency Rule calculates the probable demand for tax-exempt cigarettes by members of each Indian nation for their own personal use and consumption under both the Indian tax exemption coupon and prior approval systems by reference to United States per capita average cigarette consumption and

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[3] Only three months earlier, on March 10, 2010, the Department had filed a Notice of Proposed Rule Making regarding the imposition of a quota on the distribution of tax-free cigarettes to Indian reservation retailers. *See* TAF-10-10-00004-P (NYS Register Mar. 10, 2010), *available at* http://www.dos.state.ny.us/info/register/2010/mar10/pdfs/rules.pdf, (last visited Aug. 18, 2010). On April 23, 2010, the Seneca Nation of Indians submitted timely comments on the proposed rule to the Department (as well as to the Commissioner of Labor, the Commissioner of Economic Development, the Governor's Office of Regulatory Reform, and the Administrative Regulations Review Commission) regarding the havoc a quota system would wreak on its well-regulated tobacco economy and its interference with the federally protected rights of the Nation and its members. Porter Decl. ¶ 17 & Declaration of James Driscoll MacEachron ("Driscoll-MacEachron Decl.") at Ex. C. Notwithstanding these comments, to which the Department did not respond, the Department promulgated the Emergency Rule without making any attempt to confer with the Nation regarding the rule's potential conflict with Nation law or with the rights and interests of the Nation and its members. *See* Porter Decl. ¶ 17.

federal census data for each nation's population in New York State. *Id.* at § 74.6(e). Based upon this calculation, the Emergency Rule sets the quarterly cigarette quota for the Seneca Nation of Indians at 168,600 packs. *Id.* This quota is for all five of the Nation's Territories collectively—it is not allocated among each territory. *See id.*

With respect to the Indian tax exemption coupon system, the Emergency Rule provides that an Indian nation must affirmatively elect to participate in the system by the August 15 prior to the twelve-month period beginning September 1. *Id.* at § 74.6(b)(3). The Emergency Rule reiterates that the implementation, administration, and enforcement of the system on an Indian nation's qualified reservation are the obligation of the nation to which the Department will distribute Indian tax exemption coupons. *Id.* at § 74.6(c). With respect to the prior approval system, the Emergency Rule reiterates that effective September 1, 2010, state-licensed stamping agents and wholesale dealers must receive prior approval from the Department prior to selling any tax-exempt cigarettes to Indian reservation cigarette sellers, and that such sales may not exceed the quota set by the Department. *Id.* at § 74.6(d). The Emergency Rule further provides that the manner and form of prior approval may include the use of an interactive web application. *Id.* at § 74.6(d)(3).

Taken together, the Tax Law amendments and the Emergency Rule (sometimes collectively referred to as the "State's new tax scheme") utterly fail to regulate or to address the following questions:

- the allocation of the quota among state-licensed stamping agents and wholesale dealers
- the allocation of the quota among reservation cigarette sellers on each Indian nation's qualified reservation or reservations
- the allocation of the quota among qualified Indians
- the allocation of the quota among various brands of cigarettes
- a qualified Indian's ability to purchase, and a reservation cigarette seller's ability to sell, tax-exempt cigarettes where the seller lacks access to the quota

- state-licensed stamping agents' and wholesale dealers' sale of the quota to reservation cigarette sellers operating in violation of applicable Indian nation law
- the sale of tax-exempt cigarettes by reservation cigarette sellers to non-tax-exempt individuals
- the sale of inventories of non-New York stamped cigarettes acquired by reservation cigarette sellers prior to September 1, 2010
- a means by which reservation cigarette sellers may acquire tax-free cigarettes for purposes of sales to out-of-state residents, which New York lacks authority to tax

On July 29, 2010, the Department's Office of Tax Policy Analysis, Taxpayer Guidance Division issued TSB-M-10(6)M, Cigarette Tax, TSB-M-10(8)S, Sales Tax, ("Guidance Notice"), *available at* http://www.tax.state.ny.us/pdf/memos/multitax/m10_6m_8s.pdf (last visited Aug. 18, 2010), regarding the Department's implementation of the State's new tax scheme. The Guidance Notice, however, answers none of these outstanding questions. Instead, the Guidance Notice reiterates that on or after September 1, 2010, all cigarettes sold by state-licensed stamping agents and wholesale dealers to Indian nations or reservation cigarette sellers must be affixed with a New York tax stamp, and provides that state-licensed stamping agents and wholesale dealers must have an online services account in order to request prior approval for the sale of a portion of the tax-exempt cigarette quota to Indian reservation cigarette sellers.[4] *Id.* at 1, 5. The Guidance Notice likewise confirms that the Department will not allocate each Indian nation's quota among agents and dealers, but that an agent or dealer must dispose within forty-eight hours of any cigarettes with respect to which it receives prior approval. *Id.* at 5-6. The Guidance Notice unequivocally states that the Department will not accept Form DTF-801 ("Certificate of Individual Indian Exemption for Certain Property or Services Delivered on a Reservation") as a basis for a refund of cigarette tax prepaid on cigarettes sold to tax-exempt qualified Indians. *Id.* at 7.

[4] An interactive web application will display each Indian nation's quota and will immediately reduce that quota upon each approval granted by the Department. Guidance Notice, at 5-6.

Defendant Woodward sent a letter accompanying the Guidance Notice under her signature to the President of the Seneca Nation of Indians, Barry E. Snyder, Sr., Porter Decl., Ex. C. In that letter, Defendant Woodward stated that "[a]s you are aware, current judicial injunctions that prevent the Department from enforcing the Tax law as it related to sales by stamping agents to reservation sellers and to reservation sales at retail to non-Indians remain in place at this time." *Id.* at 3. In support of the State's motion to lift those injunctions (issued by the New York Supreme Court in *Day Wholesale, Inc. v. State*, No. 07668 (N.Y. Sup. Ct. Erie Cty. Filed Aug. 10, 2006)), Defendant Woodward affirmed under penalty of perjury on August 5, 2010 that the injunctions "enjoin the defendants from enforcing the provisions of Tax Law section 471-e or otherwise restricting sales of unstamped cigarettes to or by reservation cigarettes sellers[.]" Declaration of James Driscoll-MacEachron ("Driscoll-MacEachron Decl."), Ex. A at 1. Nevertheless, on August 9, 2010, the Department seized a truck carrying a shipment of Seneca-stamped cigarettes from a Nation-licensed stamping agent on the Nation's Allegany Territory to Nation-licensed retailers on the Nation's Cattaraugus Territory. Porter Decl. at ¶18. While the State returned the truck two days later, it has never publicly apologized for its actions or admitted that they were taken without due legal authority. *Id.*

IV. THE RELATIONSHIP BETWEEN THIS MATTER AND THE *DAY WHOLESALE* PROCEEDINGS

As this Court may be aware, in 2006, Day Wholesale, Inc. and Scott Maybee commenced an action in New York Supreme Court, Erie County, seeking a declaration that § 471-e of the New York State Law was unenforceable because DTF had not, at that time, adopted the necessary rules and regulations to implement the Indian tax exemption coupon system. On January 27, 2007, Justice Sconiers issued a preliminary injunction preventing defendants from enforcing the amended provisions of § 471-e. This decision was affirmed by the Appellate

Division, Fourth Department, on May 2, 2008. *Day Wholesale, Inc. v. State*, 51 A.D. 3d 383 (4th Dept. May 2, 2008). On December 15, 2008, plaintiff filed an amended complaint in that case challenging New York State's enactment of a new certification provision as subdivision 4 to Tax Law § 471. On January 27, 2009, Justice Sconiers granted plaintiff's motion and granted a second preliminary injunction enjoining "Defendants' and anyone charged with the enforcement of Article 20 of the New York Tax Law . . . from restricting New York stamping agents from selling at wholesale unstamped cigarettes to reservation cigarette sellers or restricting reservation cigarette sellers from selling at retail unstamped cigarettes to tribal and non-tribal members," until DTF "has taken the necessary action," including "distributing Indian tax exemption coupons" to the governing bodies of recognized Indian nations and tribes and "adopt[ing] the necessary rules and regulations to implement the Indian tax exemption coupon system." Both of these injunctions remain in place.

The defendants in the *Day Wholesale* action recently filed a motion in that action to vacate these two previously entered injunctions, claiming that the recent statutory and regulatory developments, including the Emergency Rule, justify their request. The case is now assigned to Justice Siwek. In their motion papers, the defendants in *Day* Wholesale have directly raised the validity of the Emergency rule and seek to rely upon it as a basis for lifting the prior injunctions. At the same time, however, the State has repeatedly stated in that proceeding and elsewhere that it intends to enforce the new statute and regulations as of September 1. Justice Siwek has set a return date on the motion to lift the injunctions for August 30, 2010.

The Nation has a separate challenge to the Emergency Rule, not covered in the claims in this case, based on the failure to follow the State Administrative Procedure Act ("SAPA") in promulgating the Emergency Rule. According to our research, this challenge *must* be brought in

State Court. Accordingly, on August 18 2010, the Seneca Nation moved to intervene in the *Day Wholesale* case for the sole purpose of asserting the procedural challenge under SAPA. Justice Siwek has scheduled the motion to intervene for August 25, 2010. In the event that motion is granted, the Nation will be a party to the proceedings in *Day Wholesale* regarding the validity of the previously issued injunctions, and will assert its procedural objection to the Emergency Rule in that forum. The Nation will not be asserting any of the claims at issue in this case in that forum, nor does it assert any claims here regarding SAPA.

The Nation has carefully coordinated these two actions so that there is no overlap of substantive claims and will certainly keep this Court apprised of any developments in the *Day Wholesale* case. Proceeding in this Court is appropriate, despite the pendency of the proceedings before Justice Siwek, for the following reasons: (1) the claims in this complaint assert compelling federal claims that should be adjudicated in federal court; (2) federal court is the appropriate forum to resolve these claims because of the conflict between two sovereign governments, the Nation and the State of New York; (3) any order from this Court will have a far greater jurisdictional scope than an order of the State Supreme Court, which is a concern given the previous enforcement efforts by the State (including the enforcement efforts in the *Cayuga* case, *infra,* and the unauthorized seizure by the DTF on August 9, 2010); (4) the Nation has not yet been allowed to intervene in that case and its motion may not be granted; and (5) any relief granted to the Nation in that case would necessarily be temporary in nature given the procedural challenge under SAPA, which can readily be corrected by the State. Furthermore, and perhaps most important, the State has asserted that the new tax scheme *will* be implemented on September 1, despite the *Day Wholesale* case injunctions. If the State does not feel constrained

by the existing injunctions in state court, there is every reason to pursue injunctive relief in federal court.

ARGUMENT

I. STANDARD FOR ISSUANCE OF INJUNCTIVE RELIEF

This Court has very recently had occasion to reiterate the familiar standard for the granting of a preliminary injunction. As the Court stated in *Red Earth, LLC v. United States*, Nos. 10-CV-530A, 10-CV-550A, 2010 WL 3061103 (W.D.N.Y. July 30, 2010), "where a party seeking a preliminary injunction attempts to enjoin application of a governmental statute or regulation, it . . . must demonstrate irreparable harm and a clear likelihood of success on the merits. Additionally, the movant must show that granting a preliminary injunction is in the public interest." *Id.* at *2 (citing *Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007), *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir. 2006), and *Winter v. Natural Res. Defense Council, Inc.*, 129 S.Ct. 365 (2008)). The standard for granting a temporary restraining order is the same. *See* Temporary Restraining Order, Docket No. 10, Nos. 10-CV-530A, 10-CV-550A, *Red Earth*, 2010 WL 306 1103; *Jackson v. Johnson*, 962 F. Supp. 391, 392 (S.D.N.Y. 1997) ("In the Second Circuit, the standard for a temporary restraining order is the same as for a preliminary injunction.").

While "[i]njunctive relief 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion,'" *Red Earth*, 2010 WL 3061103, at *2 (quoting *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005)), for the reasons discussed below the Nation's motion amply satisfies the criteria for the issuance of such relief.

II. THE SENECA NATION WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF

The Seneca Nation, its citizens and its licensed businesses will unquestionably suffer irreparable harm if this Court does not issue a preliminary injunction during the pendency of this matter. As this Court recently stated in *Red Earth*, "[a]n irreparable harm is a harm for which 'a monetary award cannot be adequate.'" 2010 WL 3061103, at *3 (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)). Moreover, a "[p]laintiff[] must also show that the injury [it] will suffer is 'actual and imminent' and not 'remote or speculative.'" *Id.* (quoting *Grand River*, 481 F.3d at 66); *see also Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005).

If the Tax Law amendments and Emergency Regulation are allowed to go into effect on September 1, the Nation and its citizens will suffer immediate and concrete harm to their core governmental and economic interests, harm which could not be remedied by an award of monetary damages even if the State did not enjoy Eleventh Amendment immunity from such awards. As discussed above, while the Nation's government plays an active role in regulating the tobacco economy that exists on its Territories in order to safeguard the integrity of that economy, *see* Porter Decl. at ¶¶ 5-12, "it is the will of the Seneca people that the economy operate pursuant to basic free market principles, and the government has never sought to interfere with the basic free market character of the economy." Porter Decl. at ¶ 13; *see also* Taylor Decl. at ¶ 14 ("By deliberate self-determined choice, Seneca Nation policies encourage private business activity . . . ."). This fundamental policy choice has created a climate conducive to economic development in the Nation's Territories. Taylor Decl. at ¶ 18 ("The pro-business stance of Seneca Nation policy fosters competition and business opportunity.").

The regulation of economic activity inside a sovereign's territory is a traditional governmental function. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (noting "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction"), and, as elaborated upon below, the decision of the Seneca Nation to regulate its tobacco economy in such a way as to foster vigorous free market competition represents an important aspect of the exercise of its right of self-government. This right of Indian nations to govern themselves free of state interference is a core attribute of their sovereignty, and it is one which the Seneca Nation guards jealously.

The Tax Law amendments and Emergency Rule would, however, trample that right. The tax exemption coupon system would require the Nation's government to play a far more intrusive role in the tobacco economy than it has ever chosen for itself – the government would have to allocate the State's pre-determined quota among the Nation's numerous licensed stamping agents and retailers. Porter Decl. at ¶ 15. Not only would this be a nigh-impossible task that would open up the government to potentially destabilizing charges of favoritism, incompetence, or worse, *see* Taylor Decl. at ¶ 30c ("Quota allocations tend to be politically challenging to design and difficult to implement well . . . . Seneca legislators, policymakers, and regulators would face numerous challenges in grafting a system for allocating New York's tax-exempt coupons for 'probable demand' on top of their existing systems, institutions, and policies"), but it would require the radical transformation of the government's role from one of responsible regulator to that of the principal operator in a centralized command economy. *Id.* at ¶ 30d ("[T]he 'Indian tax exemption coupon system' is an . . . override of Seneca self-determined policymaking."). The prior approval system would likewise require the Seneca government to undergo this radical transformation of its role in the tobacco economy in a likely futile attempt

"[t]o guard against the severe market distortions that the system would engender." Porter Decl. at ¶ 16.

When a State threatens a significant infringement upon an Indian nation's right of self-government, the federal courts have held that this constitutes precisely the type of harm with respect to which a preliminary injunction can issue. *See, e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) ("prospect of significant [State] interference with tribal self-government," coupled with State's Eleventh Amendment immunity from damages claims, constitutes threat of irreparable harm warranting issuance of preliminary injunction); *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (same); *Winnebago Tribe of Nebraska v. Stovall,* 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002) (finding irreparable injury where "scope of tribal sovereignty" is threatened because such "can not be measured in dollars"). This is just such a case.

A grave threat of irreparable harm exists here in a second sense as well. As explained in the Declaration of economist Jonathan Taylor, the "rudimentary construction of the Department's prior approval system makes it vulnerable in ways that can reasonably be expected to work to the significant economic detriment of Seneca individuals, firms, and government, be it through fraud, market friction, or market manipulation." Taylor Decl. at ¶ 31. The Declaration details the various ways in which the State's ill-conceived scheme threatens to wreak havoc in the presently well-functioning Seneca tobacco economy. *Id.*; *see also* Porter Decl. at ¶ 16.

The Second Circuit has repeatedly held that the loss of commercial opportunities or market share for *individual businesses* can constitute irreparable harm. *See, e.g.*, *Grand River*, 481 F.3d at 67 ("It is well-established that a movant's loss of current or future market share may constitute irreparable harm"); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)

(holding that "district court did not abuse its discretion in finding that, unless specific relief were granted, Verio's actions would cause Register irreparable harm through loss of reputation, good will, and business opportunities"). Here, it is not just a few businesses, but the entire Seneca tobacco economy, which consists of approximately two hundred companies that together employ roughly 3,000 workers, Porter Decl. at ¶ 4, that stands to suffer as the result of the State's rushed and poorly conceived taxation scheme. Taylor Decl. at ¶¶ 29, 31. The threatened harm is not only imminent, but could persist well into the future. "Because the aforementioned dynamics of predation, monopolization, and the like can have lasting and/or self-reinforcing effects . . . [w]hat happens at the opening bell could lock in place for years." *Id.* at ¶ 31h. And again, because of the State's Eleventh Amendment immunity, damages would not be available to any of the constituent parts of the Seneca tobacco economy for the evisceration of what is presently a thriving free market.

The State's new taxation scheme, then, poses a concrete threat of irreparable harm to the Nation's government and economy that warrants the issuance of injunctive relief.

III. THE NATION HAS A CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS

In its Complaint, the Nation has pled a number of claims which it believes to possess strong merit. For purposes of the present Motion, the Nation will focus its attention on three arguments, each of which has a clear likelihood of success on the merits, and each of which independently warrants the issuance of injunctive relief. In sum, the State's new taxation scheme should be enjoined because: (1) it infringes unduly on the Nation's right of self-government; (2) it interferes unduly with the rights of Seneca members and businesses to engage in tax-exempt commerce and hence places impermissible burdens on the Seneca tobacco economy; and (3) it unlawfully demands the prepayment of taxes to which the State concedes it is not entitled.

A. Indian Nations, Their Members and Their Economies Enjoy a Fundamental Immunity from State Regulation and Interference

As the Supreme Court has oft declared, "'the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965) ("[F]rom the very first days of our Government, the Federal Government has been permitting the Indians largely to govern themselves, free from state interference[.]"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force[.]"); *Cohen's Handbook of Federal Indian Law* § 6.03[1][a], at 520 (2005 ed.) ("A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country."). This policy applies with full force to the Seneca Nation, which is party to a series of treaties with the United States that remain in effect today. Principal among these is the 1794 Treaty of Canandaigua, which set forth the boundaries of the Nation's territories and solemnly guaranteed that "the United States will never claim the [Nation's lands], nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in *the free use and enjoyment thereof*." Treaty of Canandaigua, art. 3, 7 Stat. 44, 45 (emphasis added); *see also Bowen v. Doyle*, 880 F. Supp. 99, 112 (W.D.N.Y. 1995) (Arcara, J.) (discussing the Seneca Nation's right to self-government under the Treaty of 1794).

The rights at issue in this case rest firmly on this bedrock principle that the State may not assert jurisdiction over Indian nations or their members residing in Indian country. Two fundamental aspects of this principle are of central relevance here.

First, Indian nations enjoy the right to govern themselves free of State interference, which right of self-government is "deeply engrained in our jurisprudence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Indian Nations possess the sovereign right "to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), and "the power of regulating their internal and social relations," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quotation marks and citation omitted); *Bowen*, 880 F. Supp. at 112 ("Under the treaty of 1794 and well-settled case law, the [Seneca] Nation holds the right to self-government."). This right of self-government is an "independent . . . barrier[] to the assertion of state regulatory authority over tribal reservations and members," and the assertion of such authority accordingly is prohibited where it "unlawfully infringe[s]" on that right. *White Mountain Apache Tribe*, 448 U.S. at 142; *Bowen,* 880 F. Supp. at 113 ("A necessary corollary to the rights of Indian tribes to self-government and to exclusive jurisdiction over their internal affairs is the principle that state law does not apply on reservations."). In *Mescalero Apache Tribe*, the Supreme Court outlined the powerful federal policies that preclude state interference with this right of self-government:

> [B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. *We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging tribal self-sufficiency and economic development.* In part as a necessary implication of this broad federal commitment, *we have held that tribes have the power to manage the use of [their] territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes. Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.*

462 U.S. at 334-36 (footnotes, quotation marks, and citations omitted) (emphasis added).

Congress has underscored the right of self-government through numerous statutes, beginning with the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 (1975) (codified as amended at 25 U.S.C. § 450 et seq.), which provides that "the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities," 25 U.S.C. § 450a(b), and which seeks to maximize effective and meaningful Indian participation in the direction, planning, conduct, and administration of federal services to Indian communities, *id.* § 450a(a)-(b).

Congress has indeed articulated these policies specifically as applied to Indian nations' regulation of the tobacco economies in their territories. For example, when Congress amended the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341-2346 in 2006, it made clear that "the rule of law of enforcement in Indian country will fall to tribal governments." 151 Cong. Rec. H6273-04, 6284 (2005) (Representative Conyers). Although Congress at that time authorized state and local governments to sue for violations of the CCTA, 18 U.S.C. § 2346(b)(1), it stressed that such governments could not target tribal sovereignty or activities in Indian country. *See* 151 Cong. Rec. at H6284 (Representative Kildee) ("Indian tribal governments that are legally involved in the retailing of tobacco products are clearly not the types of entities we are targeting with this provision."); *id.* (Representative Conyers) (section 2346(b) should not be used to "target[] [a] tribal government[] who [is] legitimately involved in the retailing of tobacco products."); *id.* (Representative Cantor) ("[T]he modifications make sure that there is no impact on tribal sovereignty.").[5]

[5] Congress was well aware when it enacted the CCTA in 1978 that state taxation of cigarette sales in Indian country implicated tribal sovereignty. *See Joint Explanatory Statement of the Committee of Conference*, H.R. Conf. Rep. No. 95-1778, 13 n.17 (1978), *as reprinted in* 1978

In the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010), which this Court recently had occasion to address, *Red Earth, LLC. V. United States*, Nos. 10-CV-530A, 10-CV-550A, 2010 WL 3061103 (W.D.N.Y. July 30, 2010), Congress again recognized the sovereign authority of Indian nations to regulate their tobacco economies and affirmed that the laws of Indian nations stand on an equal footing with those of state and local governments. *See, e.g.*, 15 U.S.C. § 376a(a)(3) (requiring compliance with state, local, and tribal laws applicable to sales of cigarettes); *id.* § 376a(c)(3) (authorizing access to records by state, local, and tribal governments that apply taxes on cigarettes or smokeless tobacco); *id.* § 376a(e)(1)(D) (requiring that Attorney General include information received by state, local, and tribal governments in list of unregistered or noncompliant delivery sellers); *id.* § 376a(e)(4)(B) (requiring that common carrier and other delivery services provide records upon request to law enforcement officials and tax administrators of state, local, and tribal governments); *id.* § 378(c)(1)(A) (authorizing state, local, and tribal governments that levy taxes on cigarettes or smokeless tobacco to bring an action in federal court to prevent and restrain violations of the Jenkins Act); 15 U.S.C. § 378(c)(4) (preserving remedies available under state, local, and tribal law and preserving tribal court jurisdiction over violations of tribal law).

Second, Nation members on Indian territory enjoy absolute immunity from state taxation, and Nation-licensed businesses enjoy the corresponding right to engage in tax-free commerce with Nation members on Indian territory. "As a corollary of [exclusive federal] authority [over relations with Indian tribes], and in recognition of the sovereignty retained by Indian tribes even

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U.S.C.C.A.N. 5535, 5542 n.17 ("Some concern was expressed in the course of the Conference that the definition of 'contraband cigarettes' inadvertently extinguished rights of certain Indians and Indian Tribes under current law to engage in the commercial sale of cigarettes within Indian country free of state taxation. . . . The Conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian Reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian Tribe.").

after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Thus, "[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *Red Earth*, 2010 WL 3061103, at *11 & n.10. Nation-licensed businesses possess the complementary "federally protected right to sell untaxed cigarettes to members of the Nation." *Cayuga*, 14 N.Y.3d at 648.

In the PACT Act, Congress again confirmed that these strict limitations on state authority over Indian nations and their members apply to the taxation, distribution, and sale of cigarettes in Indian country by devoting an entire section of the Act to "Exclusions Regarding Indian Tribes and Tribal Matters":

> Nothing in this Act . . . shall be construed to amend, modify, or otherwise affect . . . any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country . . . [or] any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes; or . . . any State or local government authority to bring enforcement actions against persons located in Indian country.

15 U.S.C. § 375, historical and statutory notes (PACT Act, Pub. L. No. 111-154, § 5, 124 Stat. 1087).

B. The Supreme Court's Smoke Shop Cases Carve Out a Very Limited Role For State Taxation of Tobacco Transactions Involving Non-Indians

The United States Supreme Court held for the first time in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) that a state may impose its

cigarette excise tax on non-Indians who purchase non-Native manufactured cigarettes from Indian reservation retailers, and that it may impose on the Indian retailer "minimal burdens" associated with the collection of the tax. The Court emphasized that the "legal obligation to pay the tax" rested firmly on the non-Indian purchaser but that requiring the Indian retailer to collect the tax was a "simple expedient" to prevent "wholesale violations of the law" by non-Indians. *Id.* at 482. The Court thus forged a narrow exception to the general prohibition against state regulation of Indians in Indian country:

> The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a *minimal burden* designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. . . . [T]o the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor *simply to add the tax to the sales price* and thereby aid the State's collection and enforcement thereof.

Id. at 483 (emphases added).

Four years later, in *Colville*, the Supreme Court reaffirmed this conclusion—"[t]he *simple collection burden* imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in *Moe*, and we therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe."[6] 447 U.S. at 159 (emphasis added). The Court also upheld recordkeeping requirements imposed by the state on Indian retailers, including "record[ing] the number and dollar volume of taxable

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[6] The Court subsequently restated this holding in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 513 (1991) ("[T]he doctrine of tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe."), and in *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) ("[A] State may require a tribe to collect cigarette taxes from non-Indian purchasers and remit the amounts of such tax to the State.").

sales to nonmembers," and "record[ing] and retain[ing] for state inspection the names of all Indian purchasers . . . and the dollar amount and dates of sales." *Id.* at 159. The Court reiterated shortly thereafter, though, that "a State may assert jurisdiction over the on-reservation activities of tribal members" only in "exceptional circumstances." *Mescalero Apache Tribe*, 462 U.S. at 331-32.

In *Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 67-69, 74 & n.10 (1994), the Court reviewed a narrow facial challenge brought by off-reservation non-Indian wholesalers to cigarette tax regulations promulgated by the New York State Department of Taxation and Finance in 1988. Under the 1988 regulations, wholesalers would not have prepaid, and the Department would not have precollected, taxes on cigarettes destined for purchase by tax-exempt Indian purchasers. *See* Driscoll-MacEachron Decl., Ex. B at 5-6, 8, 10-11 (20 N.Y.C.R.R. §§ 335.4(c)(1), (d)(1), (e)(3), 335.5(a)(1), (b)(3) (1988)). To facilitate the distribution of tax-free cigarettes, the Department would have sent each Indian retailer on the territories of each Indian nation (which retailers would be required to demonstrate compliance with "any applicable tribal regulations and/or licensing procedures," *id.*, Ex. B at 7-8 (§ 335.4(e)(1)(iii)(A) (1988)), tax exemption coupons "entitling them to their monthly allotment of tax-exempt cigarettes." *Milhelm*, 512 U.S. at 66. The Department would have made this allotment based upon its determination of the probable demand for tax-free cigarettes by nation members at each retail location, considering, for example, evidence of the number of members living within a reasonable distance of the retailer's place of business or historical sales data. *See* Driscoll-MacEachron Decl., Ex. B at 13-14 (20 N.Y.C.R.R. § 335.5(d)(2)-(3) (1988)). The Department would also have distributed "certificate[s] of individual Indian exemption" to

individual nation members. *Milhelm*, 512 U.S. at 67; *see also* Driscoll-MacEachron Decl., Ex. B at 6-7 (20 N.Y.C.R.R. § 335.4(c)(2), (d)(2) (1988)).[7]

The Supreme Court did not review these allocation provisions or their impacts on Indian nations, reservation retailers, and nation members. *See Milhelm*, 512 U.S. at 77-78 (noting that "problems involving the allocation of cigarettes among reservation retailers would not necessarily threaten any harm to [non-Indian] wholesalers, whose main interest lies in selling the maximum number of cigarettes, however ultimately allocated"). Instead, the Court "confront[ed] the narrower question whether the New York scheme is inconsistent with the Indian Trader Statutes." *Id.* at 69-70. The Court thus held only that "the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders [i.e. the non-Indian wholesalers doing business in the Indian territories] . . . to assist enforcement of valid state taxes." *Id.* at 74; *see also id.* at 75 ("Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes."). The Court stated unequivocally that it did not "assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs." 512 U.S. at 69; *see also Cayuga*, 14 N.Y.3d at 650 n.19 ("In *Milhelm*, non-Indian wholesalers challenged the 1988 regulations as preempted by federal Indian trader statutes. The Court made clear that its decision did not address other concerns, such as how New York's scheme 'might affect tribal self- government or federal authority over Indian affairs'[].").

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[7] In *Cayuga,* the New York Court of Appeals summarized the allocation provisions of the 1988 regulations as follows: "Tax exemption coupons would be issued to Indian retailers representing their monthly allotment under the probable demand formulation and the retailers could then exchange those coupons with wholesalers for unstamped cigarettes. Retailers were to sell unstamped cigarettes only to 'qualified Indians,' who would be provided with individual exemption certificates to present to retailers when purchasing cigarettes." 14 N.Y.3d at 623.

C. The State's New Taxation Scheme Violates the Nation's Right of Self-Government

As a matter of federal law, the State's new taxation scheme unlawfully infringes upon the Seneca Nation of Indians' right "to make [its] own laws and be ruled by them," *Williams*, 358 U.S. at 220, and are therefore invalid and unenforceable as applied to the Nation, its members, and its licensed businesses. "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156. "[C]ases applying the *Williams* test have dealt principally with situations involving non-Indians . . . [where] both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest *up to the point where tribal self-government would be affected*." *McClanahan*, 411 U.S. at 179 (emphasis added). Here, the Indian tax exemption coupon system, the prior approval system, and the Emergency Rule fail to make any "accommodation" for the powerful federal and tribal interests in the Nation's comprehensive self-regulation of the tobacco economy on its Territories, and instead would undermine the Nation's exercise of self-government over that economy, including commerce between Nation members and Nation-licensed businesses that the State possesses no authority to tax or to otherwise regulate.

As discussed above, the Nation has invested substantial resources to develop, implement, and enforce the IEL and to support the activities of the Import-Export Commission. *See* Porter Decl. at ¶¶ 6-7. For example, all retail businesses engaged in tobacco commerce on the Nation's Territories must be licensed by the Nation. *Id.* at ¶ 7. Those businesses may only sell cigarettes imported by Nation-licensed stamping agents and affixed with a unique, traceable Seneca Nation

stamp. *Id.* at ¶¶ 6-7. Through the affixation of the Seneca stamp, the IEL generates substantial administrative fees to support health and education programs for Nation members. *Id.* at ¶ 6. As a result of these regulatory measures, the Nation has successfully prevented the trafficking of contraband cigarettes on its Territories, and in doing so, has forged a cooperative and productive law enforcement relationship with the ATF. *Id.* at ¶¶ 8-12 & Ex. B.

While the Nation has engaged in the active and responsible regulation of its tobacco economy, however, it has deliberately chosen to allow the economy to operate pursuant to free market principles, and has resisted any notion that it should introduce command and control dictates into that economy. *See* Porter Decl. at ¶13; Taylor Decl. at ¶ 14. Accordingly, within the framework of the IEL, approximately 15 Nation-licensed stamping agents and 172 Nation-licensed retailers compete each day for the business of cigarette consumers in a vigorous free market. Porter Decl. at ¶ 4; Taylor Decl. at ¶ 18.

The Indian tax exemption coupon system would compel the Nation to abandon the IEL and these free-market principles and instead to nationalize its tobacco economy. At a minimum, the Nation's government would be required to develop new laws and regulations compelling: (1) the gathering and submission of data by the Nation or by Nation-licensed retailers regarding the quantities of cigarettes purchased by Nation members at each of approximately 172 retail locations on the Nation's five different territories, (2) the processing of that data for the purpose of allocating exemption coupons among retailers, (3) the resolution of discrepancies between the data gathered and the quota of exemption coupons made available by the Department, (4) the distribution of exemption coupons to Nation-licensed retailers, (5) the resolution of disputes by Nation-licensed retailers regarding their allotment of exemption coupons, (6) the gathering of data regarding fluctuations in market conditions, including, for example, the purchasing habits of

Nation members, cigarette prices, and the entry of additional retailers to the market, (7) and the quarterly modification of the allocation among Nation-licensed retailers based upon that data. "[T]he putative 'Indian tax exemption coupon system' is not a reasonably tailored *system* in any sense of being, say, a minimally burdensome tax-free tobacco allocation mechanism robust to economic incentives. Rather, the [system] is an abdication of quota allocation design and an override of Seneca self-determined policymaking." Taylor Decl. at ¶ 30d (emphasis in original).

New York State, however, may not foist the administrative burdens and costs associated with its own regulatory program on a sovereign Indian nation, and may not commandeer the Nation's government to exercise its powers on the State's behalf. Just as the Tenth Amendment prohibits Congress from "compel[ling] the States to implement, by legislation or executive action, federal regulatory programs" and from "requir[ing] the States to enforce federal law," *Printz v. United States*, 521 U.S. 898, 925 (1997); *see also New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'") (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)), federal common law prohibits a State commandeering the government of the Seneca Nation to administer a state regulatory program. The State's attempt to engage in such commandeering here directly contravenes the Nation's federally protected right of self-government.

The prior approval system would likewise force the Nation to radically revise the role of its government in its tobacco economy in service of the State scheme. The government would have to take drastic, and likely futile action, to address the severe market distortions that would result from the implementation of the system and that are described in detail above. Porter Decl. ¶ 16; Taylor Decl. ¶ 31. Such action would be necessary in an attempt to defend the rights of its

members to purchase tax-free cigarettes and the rights of its licensed businesses to engage in tax-free commerce, and to prevent its tobacco economy from plunging into chaos.

To the Nation's knowledge, no court has ever upheld a state regulatory program that purported to compel a sovereign Indian nation to allocate tax-free goods among its members or businesses on the state's behalf. Indeed, the Supreme Court has *never* upheld burdens imposed on Indian nations in their *sovereign governmental capacity* with respect to the collection of cigarette taxes on non-Indians. Rather, the "minimal burdens" upheld by the Supreme Court in the smokeshop cases have been burdens imposed on individual retailers or on Indian nations *acting as market participants*. *See Citizen Band Potawatomi*, 498 U.S. at 507 (tribe as retailer); *Chemehuevi*, 474 U.S. at 10 (tribe as retailer); *Colville*, 447 U.S. at 144-45 (tribes as retailers and distributors to tribal member retailers); *Moe*, 425 U.S. at 467-68 (tribal member retailers); *see also Milhelm*, 512 U.S. at 76 ("By requiring [off-reservation non-Indian] wholesalers to precollect taxes on, and affix stamps to, cigarettes destined for nonexempt consumers, New York has simply imposed on the wholesaler the same precollection obligation that, under *Moe* and *Colville*, may be imposed on *reservation retailers*.") (emphasis added). The attempt by the Legislature and the Department to impose such burdens on the Seneca Nation through the new taxation scheme plainly violates the Supreme Court's admonition that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U.S. at 154.[8]

The State's new taxation scheme conflicts with the Nation's decision to operate a well-regulated but free market tobacco economy in other fundamental ways. In contrast to the 1988

[8] Under the State's approach, it could compel Indian nations to administer such programs with respect to any taxable commodity, including fuel, beer, and other retail items. *See Red Earth,* 2010 WL 3061103, at *18 (explaining how the rationale underlying the PACT Act's novel taxing scheme could also be applied to other commercial products).

regulations, the prior approval system and the Emergency Rule permit state-licensed stamping agents and wholesale dealers to sell the Nation's tax-free cigarettes quota to businesses operating without a Nation license in violation of Nation law, thus circumventing the IEL altogether.

No federal statute sanctions this interference with tribal self-government. To the contrary, through the CCTA and the PACT Act Congress has recognized the authority of Indian nations to regulate tobacco commerce within their territories and has unequivocally expressed its intent that Indian nation laws stand on an equal footing with those of the several States. *See supra* Argument Section III.A. Accordingly, "this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes." *Mescalero Apache Tribe*, 462 U.S. at 337-38. The United States has further sanctioned the Nation's comprehensive self-regulation of its tobacco economy and licensed businesses through the ATF's cooperative law enforcement relationship with the Nation, and the ATF's formal acknowledgment of the Nation's role in advancing federal law enforcement objectives. *See* Porter Decl. at ¶¶ 8-12 & Ex. B. The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule contravene both the strong federal and the strong Seneca interest in the Nation's maintenance of its powers of self-government and in its exercise of those powers to foster and protect its free market tobacco economy.

In short, the State's new taxation scheme unlawfully interferes with the Nation's "ability to exercise its sovereign functions," *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982), and "would completely 'disturb and disarrange' . . . the comprehensive scheme" adopted by the Nation to regulate the tobacco economy within its Territories, *Mescalero Apache Tribe*, 462 U.S. at 338. The State scheme is not "carefully tailored" to the State's purported interest in collecting tax from non-Indians, *Crow Tribe of*

Indians v. Montana, 819 F.2d 895, 896, 901 (9th Cir. 1987), but instead "would effectively nullify the [Nation's] authority" over this commerce and would allow New York "wholly to supplant [the Nation's] regulations" and "to dictate the terms" of transactions among Nation-licensed businesses and Nation members. *Mescalero Apache Tribe*, 462 U.S. at 338. The Nation's treaty-protected sovereignty and right to self-government "would have a rather hollow ring" if it could only exercise its authority over the tobacco economy on its Territories "at the sufferance of the State." *Id.* at 338. Accordingly, the Nation has a clear likelihood of success on the merits of its claim that the State's new taxation scheme unlawfully interferes with the Nation's right of self-government.

D. The State Scheme Unlawfully Interferes with the Rights and Immunities of Nation Members and Nation-Licensed Businesses and Imposes Undue Burdens on the Nation's Tobacco Economy

The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule, also unlawfully interfere with Nation members' well-established immunity from state taxation and with the federally protected right of Nation-licensed businesses to engage in tax-free commerce. As discussed above, "[i]n the special area of state taxation of Indian tribes and tribal members, [the Supreme Court] ha[s] adopted a *per se* rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absence clear congressional authorization." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). Nation-licensed businesses possess the complementary "federally protected right to make tax-free sales to tribal members," *Cayuga*, 14 N.Y.3d at 647, and a state's methodology to collect cigarette taxes in Indian country must "respect" that right, *id.* at 648.

The Legislature and the Department have chosen to summarily impose, at the top of the chain of cigarette distribution, a quota on the number of tax-exempt cigarettes that state-licensed stamping agents and wholesale dealers may distribute to the territories of each Indian nation. As applied to the Seneca Nation, the fundamental challenge inherent to such a methodology is the allocation of that quota among 28 Nation-licensed wholesalers (including 15 stamping agents), approximately 172 Nation-licensed retailers, and thousands of Nation members.[9] "Seneca legislators, policymakers, and regulators would face numerous challenges in grafting a system for allocating New York's tax-exempt coupons for 'probable demand' on top of their existing systems, institutions and policies." Taylor Decl. ¶ 30c. Under the 1988 regulations, the Department at least acknowledged these challenges and undertook, albeit in inadequate fashion, to allocate Indian tax exemption coupons to each reservation cigarette seller (on the basis of the probable demand for tax-free cigarettes by qualified Indians at that location) and to provide certificates of individual exemption to Nation members.[10]

Notwithstanding the Department's efforts, the Supreme Court recognized the potential for "significant problems" with respect to "allocating each reservation's overall quota among its retail outlets." *Milhelm*, 512 U.S. at 77. Less than one year after the Court's decision, then-Department Commissioner Michael Urbach outlined similar concerns to members of the State Senate in a letter dated March 27, 1995:

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[9] Moreover, according to the Department's July 21, 2010 Regulatory Impact Statement, up to 73 state-licensed stamping agents and 265 wholesale dealers may compete for access to each Indian nation's quota. N.Y.S. Register, TAF-27-10-00013-E, Sales of Cigarettes on Indian Reservations, at 18 (July 21, 2010), http://www.dos.state.ny.us/info/register/2010/jul21/pdfs/rules.pdf, *available at* (last visited Aug. 19, 2010).

[10] The 1988 regulations also required "[w]holesalers who wish to sell tax-free cigarettes to Indian tribes or reservation retailers [to] ensure that the buyer intends to distribute the cigarettes to tax-exempt consumers." *Milhelm*, 512 U.S. at 67. The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule include no such requirement.

> [T]he Attea Court reviewed the regulatory system with a view towards its impact on the rights of Indian traders/wholesale suppliers – not those of reservation retailers or of the Indian nations. Potentially, a retailer or Nation could challenge the Department's implementation of the regulations because the implementation could take place in a manner that is allegedly arbitrary, or that allegedly fails to sufficiently protect the rights of reservation retailers and/or the Nation, itself, to engage in tax-free commerce with reservation Indian consumers. *For example, the amount that the Department allocates to a particular reservation, or to a particular retailer, could be the subject of such a challenge.*

Driscoll-MacEachron Decl., Ex. D (Letter from Michael Urbach, Commissioner of the New York State Department of Taxation and Finance, to the Honorable William R. Sears and Jess J. Present, New York State Senators (Mar. 27, 1995)) (emphasis added). Fifteen years later, in crafting a new regulatory scheme, the Legislature and the Department have not addressed these concerns—in fact, they have done far worse.

In amnesic fashion, the Legislature and the Department have throw all caution to the wind and ignored the question of allocation altogether. The plain language of the Emergency Rule reveals that the purpose of the prior approval system is not to ensure access by Nation members and Nation-licensed businesses to tax-exempt cigarettes, but merely to convey a quota of stamped but purportedly tax-exempt cigarettes to the Nation's borders and to foist upon it the problems of allocation. *See* 20 N.Y.C.R.R. § 74.6(d)(1) (the purpose of the prior approval system is to "ensure an adequate quantity of tax-exempt cigarettes *on such Indian nation's or tribe's qualified reservation* for the use or consumption of the nation or tribe or by its members") (emphasis added). The Indian tax exemption coupon system likewise fails to address this question of allocation. *See supra* Fact Section III.

By abandoning any pretense of ensuring access to tax-exempt cigarettes by Nation-licensed businesses and Nation members, the Legislature and the Department have exacerbated, exponentially, the "significant problems" of which the Supreme Court warned. The prior

approval system will result in severe market distortions throughout the Nation's tobacco economy. As described by economist Jonathan Taylor in his Declaration, the "rudimentary construction of the Department's prior approval system makes it vulnerable in ways that can reasonably be expected to work to the significant economic detriment of Seneca individuals, firms, and government, be it through fraud, market friction, or market manipulation." Tayor Decl. ¶ 31; *see also id.* at ¶¶ 31a-31h (elaborating on the severe market distortions that the prior approval system might well engender).

As a result, Nation members may only exercise their federally protected right to purchase tax-free cigarettes if the Nation administers the tax exemption coupon quota in a manner that permits them to do so, or if they are fortunate enough to access a portion of the prior approval quota. The Nation, however, will not abdicate its sovereign power over its members and territories in order to administer a tax-exempt cigarette quota on the State's behalf. Moreover, the systems include no backstop mechanism by which tax-exempt transactions may occur when a Nation member seeks to purchase tax-free cigarettes from a Nation-licensed retailer that possesses no share of the tax exemption coupon or prior approval quota.[11] The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule similarly interfere with the right of Nation-licensed businesses to engage in tax-free commerce with Nation members. The systems do not assure "retailers who are already engaged in the business of selling cigarettes" or "new reservation retailers" access to any portion of the tax-free cigarette

[11] In *Day Wholesale, Inc. v. State of New York*, 51 A.D.3d 383, 389 (N.Y.A.D. 4th Dep't 2008), the New York State Supreme Court, Appellate Division held that "[n]either [the general tax refund provision of N.Y. Tax L. § 476] nor the implementing regulation . . . provides a means for documenting or otherwise demonstrating that taxes on cigarettes sold on an Indian reservation were paid in error." Further, in its Guidance Notice, the Department expressly provided that it will not accept Form DTF-801 ("Certificate of Individual Indian Exemption for Certain Property or Services Delivered on a Reservation") as a basis for a refund of cigarette tax prepaid on cigarettes sold to tax-exempt Indians. Guidance Notice at 7.

quota. *Milhelm*, 512 U.S. at 77. Accordingly, they "stultify tribal economies" in the very manner the Supreme Court has warned would be impermissible. *Id.*

The Western District has previously considered the validity of a New York statute that denied Seneca retailers the ability to engage in cigarette commerce with Nation members on the Territories. In *Ward v. New York*, 291 F. Supp. 2d 188, 207 (W.D.N.Y. 2003) (Skretny, J.), the court concluded that the retailers were "likely to succeed on the merits of their claim that the Statute is unconstitutional insofar as it restricts the shipment or transportation of cigarettes from a tribe member on the reservation to another tribe member on the reservation." *Ward*, 291 F. Supp. 2d at 207.[12] The court also found that the retailers were "likely to succeed on the merits of their claim that the Statute unconstitutionally restricts the shipment and transportation of cigarettes from [wholesalers] located off of the reservation to trib[al] [retailers] located on the reservation." *Id.* Although the statute at issue in *Ward* (N.Y. Pub. Health Law § 1399-*ll*, prohibiting the direct shipment of cigarettes to New York consumers or to unauthorized "receivers") and the new State taxation scheme differ in form, their unlawful interference with the ability of Nation-licensed businesses to engage in tax-exempt commerce with Nation members is identical.

The burdens imposed on Nation-licensed businesses and Nation members by the new State scheme far exceed the "minimal burdens" previously upheld by the United States Supreme Court. *See Moe*, 425 U.S. at 483 (upholding the requirement that Indian retailers "simply . . . add the tax to the sales price" on sales to non-Indians). The only burden on *Indian-to-Indian* commerce upheld by the Supreme Court has been a recordkeeping requirement—namely, that Indian retailers maintain records of tax-exempt sales to individual Indians and confirm the

[12] The State "concede[d] that the regulation of on-reservation activities between tribe members is subject to heightened scrutiny." *Ward*, 291 F. Supp. 2d at 206.

membership status of any Indian unknown to the retailer. *See Colville*, 447 U.S. at 159. The Supreme Court has never upheld state regulations that did not guarantee the right of *all* individual Indians and *all* reservation retailers to engage in tax-free commerce.

The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule, however, impose the burden on Nation-licensed stamping agents, Nation-licensed retailers, and Nation members of *not being able to engage in tax-free commerce at all, or of engaging in such commerce in a severely distorted market*. Taylor Decl. at ¶¶ 28-31. These burdens are excessive, unreasonable, and far exceed the State's authority under federal law. Accordingly, the Nation has a clear likelihood success on the merits of its claims that the new State taxation scheme violates the federally protected rights of the Nation, its members, and its licensed businesses to engage in tax-exempt commerce.

E. The State Scheme Unlawfully Requires Prepayment of Taxes to which New York Concededly Is Not Entitled

Finally, the Indian tax exemption coupon system, the prior approval system, and the Emergency Rule suffer from yet another fundamental flaw dispositive of their invalidity—they require the prepayment of cigarette tax to which New York has no lawful entitlement. Sections 471 and 471-e mandate the affixation of a New York stamp (and thus mandate the prepayment and precollection of tax) to *all* cigarettes distributed by state-licensed stamping agents and wholesale dealers to Indian reservations, including cigarettes destined for purchase by *tax-exempt* qualified Indians. *See* N.Y. Tax Law § 471(2), (5)(b); N.Y. Tax Law § 471-e(1)(b), (3)(d), (6). The Emergency Rule reiterates this requirement, *see* 20 N.Y.C.R.R. § 74.6(a)(3) ("All cigarettes sold by agents and wholesale dealers to Indian nations or tribes or reservation cigarette sellers located on Indian reservations must bear a tax stamp.").

The Supreme Court, however, has never approved the prepayment of tax on cigarettes bound for purchase by tax-exempt Indians. To the contrary, in *Milhelm*, the Court emphasized that the Department's "precollection regime [should] not require prepayment of any tax to which New York is not entitled," 512 U.S. at 76, and that under the 1988 regulations, tribal members could purchase "cigarettes upon which the seller has not prepaid and precollected the cigarette tax," *id.* at 65. *See also id.* at 75 ("If the Department's 'probable demand' calculations are adequate, tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption."). In *Cayuga*, the New York Court of Appeals stressed that the Supreme Court had "specifically approved one feature of the 1988 regulations – *that the state was not permitted to precollect taxes on cigarettes that were ultimately the subject of tax-exempt sales*," 14 N.Y.3d at 650 (emphasis added), and that this feature was an "important consideration" to the Court, *id.* at 624 n.2.

The Indian tax exemption coupon system, the prior approval system, and the Emergency Rule fail to respect this basic rule. As the Court of Appeals explained in *Cayuga*: with respect to § 471-e:

> In this significant respect, the tax collection methodology codified in 2005 in Tax Law § 471-e differed from the system adopted in the 1988 regulations. The statute requires prepayment of taxes on cigarettes ultimately involved in tax-exempt sales, in contrast to the 1988 regulations which, as emphasized in *Milhelm*, did not require wholesalers to prepay taxes on cigarettes destined for consumption by tax-exempt Indian purchasers.

14 N.Y.3d at 628 n.4.

In short, the Legislature and the Department have crafted a tax collection mechanism already disapproved by the Supreme Court and the New York Court of Appeals, and have done so without articulating any purported justification. This is no small matter. The recent

amendments to the Tax Law increase the State tax to $4.35 per pack of cigarettes. N.Y. Tax Law § 471(1). And by the State's own calculations, Seneca members are entitled to 168,600 tax-exempt packs of cigarettes per quarter. 20 N.Y.C.R.R. § 74.6(e)(1). The State, then, is demanding roughly three-quarters of a million dollars in money per quarter to which it is not entitled, with no set timeline as to when it will return that money. While State officials may view the opportunity to capture the "float" on these funds (and on funds that it is likewise demanding from the other Indian nations in New York) as an attractive financial option, it is decidedly one to which they are not entitled under federal law.

IV. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF AN INJUNCTION

Issuance of a preliminary injunction here would plainly serve the public interest. As the above discussion demonstrates, the State's new taxation scheme promises to work a severe infringement on the Nation's right of self-government, on the proper functioning of its tobacco economy and on the rights of its members and licensed businesses to engage in tax-exempt commerce free from intrusion by the State. An injunction would guard against these harms while this Court considers the important questions raised by this litigation. And it would do so while simply maintaining what has been the status quo ever since the State first enacted its cigarette tax in 1939. The State has never pre-collected that tax with respect to sales taking place in Indian country, and no inequity will result if it has to wait for a brief period as this Court considers the State's rushed and ill-considered efforts to impose such a tax now.

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that this Court issue a temporary restraining order and preliminary injunction enjoining the enforcement of N.Y. Tax Law §§ 471, (2), (5), N.Y. Tax Law §471-e, and 20 N.Y.C.R.R. § 74.6.

Respectfully submitted,

KANJI & KATZEN, PLLC

By: s/ Riyaz A. Kanji

Riyaz A. Kanji
Cory J. Albright
James Driscoll-MacEachron
Kanji & Katzen, PLLC
101 N. Main Street, Suite 555
Ann Arbor, MI 48104
Telephone: (734) 769-5400
rkanji@kanjikatzen.com

HARTER SECREST & EMERY LLP
Carol E. Heckman, Esq.
David T. Archer, Esq.
Harter Secrest & Emery LLP
Twelve Fountain Plaza, Suite 400
Buffalo, NY 14202-2293
Telephone: (716) 853-1616

Christopher Karns
General Counsel
Seneca Nation of Indians
Post Office Box 231, Seneca Nation
Salamanca, NY 14779
Telephone: (716) 945-1790
Fax: (716) 945-6869

Attorneys for the Seneca Nation of Indians