10-4265(L)

10-4598(XAP)

United States Court of Appeals for the Second Circuit

UNKECHAUGE INDIAN NATION and
ST. REGIS MOHAWK TRIBE,
Plaintiffs

vs.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* AKWESASNE CONVENIENCE STORE ASSOCIATION IN SUPPORT OF APPELLEE ST. REGIS MOHAWK TRIBE

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January 26, 2011

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CORPORATE DISCLOSURE STATEMENT

The Akwesasne Convenience Store Association does not have a parent corporation, and no publicly-held corporation has a 10% or more ownership interest in it.[1]

[1] No party's counsel authored this brief in whole or in part. The points raised in this brief were discussed orally with counsel for the St. Regis Mohawk Tribe. The St. Regis Mohawk Tribe contributes financial support to the Akwesasne Convenience Store Association as a recognized Tribal organization, and that support is used for various Association needs, including legal expenses.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal and State Statutes:

STATEMENT OF INTEREST

The Akwesasne Convenience Store Association ("ACSA") is an unincorporated association whose members are St. Regis Mohawk Tribe tobacco retailers. The ACSA was formed in 2008, and its purpose is to promote and protect the business interests of its members. Its membership is comprised of 30 Tribal-member owned convenience stores that employ 417 local residents. The ACSA is authorized by its Articles of Organization and By-Laws to engage in advocacy efforts to protect and defend the inherent and sovereign rights of its members.

The livelihood of the ACSA members comes from the operation of their cigarette retail businesses. They make their living and pay their employees by exercising their federally-protected right to sell tax-exempt cigarettes to other members of the St. Regis Mohawk Tribe.[1]

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[1] The St. Regis Mohawk Tribe is a federally recognized Indian tribe (Dkt. 7-1 at 2). Although the St. Regis Mohawk Tribe refers to itself as a "tribe," many federally-recognized tribes refer to themselves as "nation." The legislation and regulations at issue uses both terms and also "reservation" to refer the lands of federally-recognized Indian tribes as defined under 18 U.S.C. § 1151. Throughout this brief, these lands are referred to as "reservations," or in the singular "reservation." Additionally, federally-recognized Indian tribes are referred to in this brief as "tribes" or, in the singular, as "tribe."

The St. Regis Mohawk Tribe has a regulatory system designed to control cigarette prices on its Territory. It also collects tobacco fees from the retailers to fund public services for members of the St. Regis Mohawk Tribe. Beyond that, the retail relationship between the ACSA members and cigarette wholesalers and between the ACSA members and their customers is not regulated by the St. Regis Mohawk Tribe. The internal retail cigarette market that exists on the territory of the St. Regis Mohawk Tribe was created and is maintained by Native American cigarette retailers, including the ACSA members.

New York State and its Department of Taxation and Finance (the "Department") recently enacted new laws and regulations, respectively, concerning the distribution, allocation, and taxation of cigarettes on Indian Reservations.[2] Pursuant to the revised New York State Tax Law § 471, New York's cigarette tax initially must be imposed on all cigarettes sold in the State. N.Y. Tax Law § 471(1) (McKinney's 2010). Section 471e(1) provides a limited exception so that qualified Indians may purchase State tax-exempt cigarettes for their own use on their own reservations. N.Y. Tax Law § 471-e(1) (McKinney's 2010). Since,

[2] The definition of Indian reservation and/or Indian country is set forth at 18 U.S.C. § 1151.

pursuant to New York State Tax Law § 471, all cigarettes sold by wholesalers or licensed stamping agents must now bear a New York State tax stamp, the Department adopted Emergency Regulations consisting of two mechanisms by which qualified Indians may obtain State tax-exempt cigarettes. *See* 20 N.Y.C.R.R. § 74.6 (2010). Under the first system, if a tribe so elects, on a quarterly basis, the Department will provide that tribe with a quota of coupons the tribe then must distribute itself, if it is the sole Reservation cigarette retailer, and, if not, between and among all the cigarette sellers operating within the Tribe's borders, both private and tribe-operated, if the tribe also is a retailer. *See* 20 N.Y.C.R.R. § 74.6(c) (2010). Prior to the sale of cigarettes to fellow tribal members, the cigarette retailer must provide the wholesaler from which it buys cigarettes with coupons representing the anticipated total sales to tribal members. *Id.* The wholesaler then applies to the Department for a refund of the taxes it previously paid. *Id.* The wholesaler evidently is required to bear the cost of funding the tax payment to the State before the refund. There also is no indication as to how Native American cigarette retailers are supposed to sell State tax-exempt cigarettes to members of their own tribe once the quota is exhausted for a given quarter. Any sale by a wholesaler of stamped, untaxed

cigarettes without having first received coupons is considered a violation of Article 20 of the Tax Law. *See* 20 N.Y.C.R.R. § 74.6(c)(5) (2010).

In the alternative, if the Tribe does not elect to participate in the coupon system, it and cigarette retailers located on Reservation lands may only sell State tax-exempt cigarettes from wholesalers in the quantity of cartons for which the Department has given its prior approval. *See* 20 N.Y.C.R.R. § 74.6(d) (2010). The quantity of cartons allocated to each Tribe is set forth in the Emergency Regulations. Pursuant to the Emergency Regulations, if the Department does not grant its prior approval, Native Americans on reservations have no means by which to purchase State tax-exempt cigarettes.

The State's tax scheme violates the federally-protected rights of the ACSA members to engage in State tax-free commerce with fellow members of their Tribe. Without the Department's approval or a coupon, the ACSA members no longer can obtain State tax-exempt cigarettes. The ACSA members will be deprived of their rights, will suffer harm to their business, and will be unable to shoulder the heavy burden the State's tax scheme places on them. The ACSA members will lose customers and good

will, as there will be only a finite number of State tax-exempt cigarettes that each retailer is able to sell to members of the Tribe.

Judge Arcara denied the St. Regis Mohawk Tribe's motion for a preliminary injunction seeking to enjoin enforcement of this tax scheme. *See Unkechauge Indian Nation v. Patterson*, No. 10-CV-811, 2010 U.S. Dist. LEXIS 119724 (W.D.N.Y. Nov. 9, 2010). The ACSA respectfully requests that this Court find in favor of the St. Regis Mohawk Tribe on its cross-appeal from Judge Arcara's November 9, 2010 decision and order due to the irreparable harm that the State's tax scheme causes to the ACSA members.

SUMMARY OF ARGUMENT

The St. Regis Mohawk Tribe is likely to succeed on the merits of its challenges to New York State's new tax scheme. The new regulations impose an unwieldy burden on Tribes and their members. That burden infringes on the federally-protected rights of Native Americans to engage in State tax-free commerce among themselves and infringes on the sovereign rights of Native Americans to self-government.

After years of non-enforcement of its tax laws related to the sale of cigarettes on Reservations, now, burdened with a failing economy, New York is desperate to fill its coffers by collecting taxes on the sale of cigarettes to non-Native Americans. The ACSA members recognize the right of a State to tax its citizens, but submit respectfully that such a right does not extend to infringing on the federally-protected rights of reservation retailers and their customers who are members of their Tribe.

The District Court erred in holding that the St. Regis Mohawk Tribe failed to establish a likelihood of success on the merits of its claims. Both the coupon system and the prior approval system place an unconstitutional burden on tribal members. Together with the irreparable

harm that will befall reservation retailers in the absence of an injunction and with the balancing of the equities and public interest weighing in favor of injunctive relief, it is submitted respectfully that the motion of the St. Regis Mohawk Tribe for a preliminary injunction should have been granted. If the State tax scheme is allowed to stand, the ACSA members, and other reservation retailers similarly situated, will suffer irreparable harm, as their businesses will fail as a result of the State's unconstitutional taxing system.

ARGUMENT

POINT I

THE ST. REGIS MOHAWK TRIBE HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CASE.

New York State's tax scheme, in effect, permits the State to regulate reservation cigarette retail businesses. The State contends that it merely is implementing an unobtrusive plan to collect the taxes to which it is entitled from its citizens. *See generally* Defendant's MOL in Support of Motion for Transfer, *St. Regis Mohawk Tribe v. Paterson*, 10-CV-1026 (E.D.N.Y. Sept. 27, 2010) (Dkt. 35-1 at 4). This contention ignores the drastic effect that the State's tax scheme has on the economy of the St. Regis Mohawk Tribe. It also ignores settled Supreme Court precedent stating that members of a Tribe have a federally protected right to sell tax-exempt cigarettes to one another. *See Washington v. Confederated Tribes of the Coleville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069 (1980) (upholding a State cigarette tax when the legal incidence of the tax falls on the non-Native American purchaser); *see also Dep't of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64, 114 S. Ct. 2028, 2031 (1994) ("New York lacks authority to tax cigarettes sold to tribal members for their own consumption. . . .").

Moreover, the Commerce Clause of the Constitution provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes." Const., Art. I, § 8, cl. 3. Thus, the Indian Commerce Clause is a "shield to protect Indian tribes from state and local interference. . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54, 102 S. Ct. 894, 910 (1982). It gives "the federal government the sole power over Indian affairs. . . ." *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 482 (W.D.N.Y. 2002).

The ACSA acknowledges that the Supreme Court permits States to impose a "minimal burden" in collecting and remitting to the State taxes from the sale of cigarettes to non-Native Americans. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). New York's tax scheme, however, imposes a far greater constraint than the minimal burden to which the Supreme Court referred. Contrary to the State's contention, the New York tax scheme can and does deprive reservation retailers of their right to sell tax-exempt cigarettes to other members of their Tribe.

In *Moe*, the Court upheld a State tax that imposed on reservation retailers the minimal burden of collecting and remitting to the State a tax on cigarettes ***sold to non-Native American customers***. The Court held that 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." *Id.* at 483 (emphasis added). The Supreme Court agreed with the District Court's holding that 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.*

New York's convoluted taxing scheme does far more than merely require the ACSA members to add the State tax to the price of the cigarettes sold to non-St. Regis Tribe members. Rather, it requires the ACSA members to purchase already-taxed cigarettes from wholesalers either through coupons or through the prior approval system.

Under the coupon system, each Tribe purportedly is allocated a certain amount of coupons. It then must allocate the coupons among its

retailers so that the retailers can use the coupons to obtain tax-exempt cigarettes to sell to Native American customers. There is no guidance as to how that allocation will be determined or distributed, or whether the ACSA members will be able to receive coupons at all. If the ACSA members receive coupons, at least one or more the ACSA members will exhaust this supply and then no longer be able to sell tax-exempt cigarettes to other tribal members. Indeed, the State admits that its tax scheme makes coupons a "scarce resource" that the Tribes must allocate among their retailers and themselves. Defendant's MOL in Support of Motion for Transfer, *St. Regis Mohawk Tribe v. Paterson*, 10-CV-1026 (E.D.N.Y. Sept. 27, 2010) (Dkt. 35-1 at 21).

The Tax Law amendments and Emergency Rule threaten the commercial viability of the ACSA members in that they limit the retailers' right to sell as many tax-exempt cigarettes to St. Regis Mohawk Tribe members as the market may demand at any given time. When an ACSA member exhausts its supply of coupons for tax-exempt cigarettes, it becomes unable to engage in State tax-exempt commerce with other members of the St. Regis Mohawk Tribe in contravention of well-established sovereignty

rights. As explained in more detail below, the District Court did not issue a decision on the constitutionality of this system.

The prior approval system is similarly infirm. Under that system, the State has determined how many tax-exempt cigarettes each Tribe may sell, and then left no method to determine which wholesaler and/or retailer can purchase the entire quota. When a competing entity or entities obtain prior approval for the entire St. Regis Mohawk Tribe quarterly quota, other the ACSA members will be unable to engage in State tax-exempt commerce with other members of the St. Regis Mohawk Tribe, again, in contravention of well-established sovereignty rights. The ACSA member's rights unlawfully will be infringed upon, and that member's St. Regis Mohawk Tribe customers will need to deal with other retailers to purchase cigarettes.

This outcome is certain, not speculative. If the prior approval is allowed to go into effect, the President of Day Wholesale has stated that his company will purchase the entire quota of tax-exempt cigarettes for each reservation. Aff. of Peter Day, *St. Regis Mohawk Tribe v. Paterson*, 10-CV-1026 (E.D.N.Y., Sept. 21, 2010) (Dkt. 23-1 at ¶ 35). Those

cigarettes will then be sold only to Day Wholesale customers. *Id.* Stated another way, this tax-scheme will deprive certain Native American retailers of their federally-recognized right to engage in tax-exempt commerce with other members of their Tribe.

The District Court held that the prior approval system did not require Tribes to become involved in the allocation of tax-exempt cigarettes. "Tribes have the option of doing nothing and permitting the allocation of tax-exempt cigarettes to be governed by free-market forces." *Unkechauge Indian Nation*, at *12. The District Court erred in this respect. The Tribes undoubtedly must become involved in regulating the prior approval system. Otherwise, the cigarette retail business on Reservations will collapse, and the Reservation economies will fail. The "free market force" noted by the District Court is not a free market at all, but rather State control over Tribal economies that will result in their downfall.

The District Court rejected the State's contention that the Tribes need not involve themselves with the allocation of coupons, and it rightfully noted that the Tribes must become involved in the allocation of coupons for the coupon system to work. *See Seneca Nation of Indians v. Paterson*,

No. 10-CV-687, U.S. Dist. LEXIS109525 at *42, (W.D.N.Y. Oct. 14, 2010). The Court declined to consider whether the task of allocating coupons imposed an impermissible burden on the Tribes because the prior approval system was available. *Id.* at 28.

In *Dep't of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 114 S. Ct. 2028 (1994), the Supreme Court recognized that the application of New York's probable demand method of calculating how many cigarettes each Tribe would sell to other members of the Tribe would provide the basis for subsequent legal challenges. *Id.* at 75-76, 114 S. Ct. at 2037. In that case, however, the respondents had not made a showing that the quota was inadequate, and the Court did not decide that issue. *Id.* Here, there was sworn evidence before the District Court that one wholesaler ***will*** monopolize the entire quota of tax-exempt cigarettes allocated to the St. Regis Mohawk Tribe. *See* Aff. of Peter Day, *St. Regis Mohawk Tribe v. Paterson*, 10-CV-1026 (E.D.N.Y., Sept. 21, 2010) (Dkt. 23-1 at ¶ 35).

The State suggested that, in order to avoid this, there is no reason why "the participants in the market (including Indian tribes themselves) could not or would not privately negotiate with wholesalers to

ensure that reservation sellers obtain their fair share of tax-exempt cigarettes." Defendant's MOL in Support of Motion for Transfer, *St. Regis Mohawk Tribe v. Paterson*, 10-CV-1026 (E.D.N.Y. Sept. 27, 2010) (Dkt. 35-1 at 28). By the State's own logic, the burden imposed on retailers is more than simply adding the tax to cigarettes, as approved by *Moe*, or collecting and remitting the tax to the State, as approved in *Colville*. The prior approval aspect of the State tax scheme would necessarily require that the ACSA members negotiate, trade, and bargain with one another and the St. Regis Mohawk Tribe to make private deals with wholesalers to ensure that each can obtain tax-exempt cigarettes. The State cannot require Native Americans to negotiate for a "scare resource" that they are entitled to acquire and sell. This State-imposed control over the St. Regis Mohawk Tribe's economy violates Native American rights to self-government.

POINT II

ABSENT INJUNCTIVE RELIEF, ACSA MEMBERS WILL SUFFER IRREPARABLE HARM.

"Irreparable harm is the ***single most important*** prerequisite for the issuance of a preliminary injunction." *Grand River Enter. Six Nations, Ltd. v. Pryor,* 481 F.3d 60, 67 (2d Cir. 2007) (internal citations and quotations omitted) (emphasis added). Indeed, courts long have recognized that as a condition precedent to the consideration of the likelihood of success on the merits the movant must ***first*** demonstrate that absent a preliminary injunction he will suffer irreparable harm. *See id.* at 66.

In denying the motion for a preliminary injunction, Judge Arcara did not discuss the irreparable harm that the State tax scheme causes to St. Regis Mohawk Tribe cigarette retailers, although he found that the St. Regis Mohawk Tribe would suffer irreparable harm absent a stay of the court's preliminary injunction decision and order. *See Unkechauge Indian Nation*, at *19-20. Since the St. Regis Mohawk Tribe has shown that it has a likelihood of success on the merits of its claims, the District Court should have considered the irreparable harm to the St. Regis Mohawk Tribe and its members when it decided the Tribe's preliminary injunction motion. The ACSA members also will suffer

irreparable harm if the State is allowed to enforce its unconstitutional taxation regulations against them. *See Standard & Poor's Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (a "significant risk of irreparable harm to the public supports [a] preliminary injunction."); *see also Green v. Crew*, No. CV-96-3367, 1996 U.S. Dist. LEXIS 20227 at *18 (E.D.N.Y. Sept. 10, 1996) (the "Court may consider both harm to the parties as well as harm to the public") (citing *Long Island Railroad Co. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989)).

A. The Loss of the ACSA Members' Businesses Constitutes Irreparable Harm as a Matter of Law.

"In this circuit it is firmly settled that the loss or destruction of a going business constitutes irreparable harm, whether viewed as an injury not compensable in monetary terms, or as one which cannot be reduced to monetary value with sufficient accuracy to make damages an adequate substitute for injunctive relief." *Janmort Leasing, Inc. v. Econo-Car Int'l, Inc.*, 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979) (internal quotations and citations omitted). Thus, the loss of a business or even a line of business – whether it has been in existence for two or twenty years – constitutes irreparable harm. *See Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (11 years);

Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970) (20 years); *Travellers Int'l AG v. Trans World Airlines, Inc.*, 684 F. Supp. 1206 (S.D.N.Y. 1988) (three years); *Janmort Leasing*, 475 F. Supp. 1282 (two years).

If the State's tax scheme is enforced against the ACSA members, they no longer will be able to operate their businesses because of the impermissible and unwieldy burden that the State's coupon and prior approval system foists on them. Far from the "minimal burden" discussed and approved by the Supreme Court in *Moe*, the State regulations herein infringe on the ACSA members' rights to conduct business with other members of the St. Regis Mohawk Tribe and, therefore, interfere with the Tribe members' sovereignty and right to self government.

Moreover, the ACSA members will lose collateral business as well as business from cigarette sales. If St. Regis Mohawk Tribe members cannot patronize the ACSA convenience stores for cigarettes, the ACSA members will lose customers and, therefore, profits from the sale of other items such as milk and bread. Even assuming that each convenience store has a limited quantity of tax-exempt cigarettes to sell, the State's tax scheme

will cause customers to doubt the credibility of convenience store retailers, because the price for a pack of cigarettes will rise from approximately $5 to $10 the moment that the retailer exhausts its supply of tax-exempt cigarettes, whether under the coupon or prior approval system. Thus, one St. Regis Mohawk Tribe member patronizing a convenience store may be charged $5 for a pack of cigarettes, and the next St. Regis Mohawk Tribe member in line will be charged $10 for the exact same product. Given the tax stamp requirement, there will be no way to distinguish between these products. Such a practice, which is a virtual certainty, will undermine the credibility of cigarette retailers within the St. Regis Mohawk Tribe economy and sow customer doubt and confusion. As a consequence, long-time customers of the ACSA members frequently will be forced to other suppliers for their cigarette and convenience store retailing needs and also will become circumspect as to the propriety and veracity of the ACSA members as retailers. Moreover, no consideration whatsoever is given to the inconvenience of the tribal customer forced to undertake a scavenger hunt in search of the cigarettes he or she is entitled without limit to purchase from the ACSA members.

Simply put, if the State's tax-scheme is allowed to be enforced, the ACSA members will be prevented from engaging in free commerce with St. Regis Mohawk Tribe members and will suffer irreparable harm as a result.

B. The Deprivation of a Constitutional Right Constitutes Irreparable Harm.

Deprivation of a constitutional right is presumptively recognized as irreparable harm. *See Johnson v. Miles*, 355 Fed. Appx. 188, 196 (2d Cir. 2009) ("because an alleged violation of a constitutional right 'triggers a finding of irreparable harm,' [plaintiff] necessarily satisfied the requirement that a party applying for a preliminary injunction show irreparable harm.") (*citing Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)); *Ward v. State*, 291 F. Supp.2d 188, 207 (W.D.N.Y. 2003). This principle of law does not apply exclusively to violations of a movant's First Amendment rights. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2000) (Fourteenth Amendment); *Jolly*, 76 F.3d at 482 (Eighth Amendment); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment); *Ward*, 291 F. Supp.2d at 196 (rights granted to Native Americans under the Constitution).

Under the new tax scheme, the ACSA members can only purchase from wholesalers and then sell to other St. Regis Mohawk Tribe members State tax-exempt cigarettes ***if*** they have a coupon or ***if*** they have been selected by the Department to receive prior approval to obtain State tax-exempt cigarettes. As set forth above, this violates the federally-protected rights of the ACSA members. *See Moe*, 425 U.S. at 480, 96 S. Ct. at 1644.

Fundamentally the Constitution does not give the States power to regulate and interfere with commerce between and among Native Americans. *See Moe,* 425 U.S. at 480, 96 S. Ct. at 1644 (holding that the State could not tax cigarette sales from on-reservation sales by tribe members to tribe members); *see also Ward,* 291 F. Supp.2d at 207 (holding that plaintiffs showed a likelihood of success on the merits of their claim that N.Y. Pub. Health Law § 1399-II was "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").

As set forth above, if the State tax scheme is enforced, the ACSA members would be deprived of the federally-protected rights that

they enjoy as members of a Tribe. Unlike the minimal burden explained in *Moe* and *Colville*, New York's tax scheme impermissibly burdens commerce ***between and among members of the St. Regis Mohawk Tribe***. Here, the taxes under consideration ***do in fact*** "burden commerce that would exist on the reservations without respect to the tax exemption." *Colville*, 447 U.S. at 157, 100 S. Ct. at 2083. Consequently, absent relief enjoining enforcement of the State tax scheme, the ACSA members will be deprived of their constitutional rights and the rights afforded to them as members of a sovereign, federally-recognized tribe. As a direct result, they will suffer irreparable harm.

CONCLUSION

The Akwesasne Convenience Store Association respectfully requests that this Court reverse Judge Arcara's November 9, 2010 decision and order and remand this case to the District Court for a determination on the issue of irreparable harm.

Dated: January 26, 2011

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)(7)(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to the Federal Rules of Appellate Procedure Rules 29(d) and 32(a)(7)(c) that, according to the count of Microsoft Office Word 2003, the foregoing brief satisfies the type-volume limitations set forth in the Federal Rules of Appellate Procedure Rule 29(d) because the brief contains 4,060 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(i). This brief satisfies the type-face requirements of the Federal Rules of Appellate Procedure Rule 32(a)(5) and the type-style requirements of the Federal Rules of Appellate Procedure Rule 32(a)(6), because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

s/ Michael T. Feeley
Michael T. Feeley

CERTIFICATE OF SERVICE

Docket Numbers 10-4265 (L), 10-4598 (XA)

I, Michael T. Feeley, Esq., hereby certify under penalty of perjury that on January 26, 2011, I served a copy of Akwesasne Convenience Store Association's Amicus Brief via the CM/ECF Case Filing System. All counsel of record are registered CM/ECF users. I also served six copies of Akewsasne Convenience Store Association's Amicus Brief on the Court via Federal Express.

s/ Michael T. Feeley
Michael T. Feeley, Esq.