10-4265(L)

10-4272(CON), 10-4598(CON), 10-4758(CON)
10-4477(XAP), 10-4976(XAP), 10-4981(XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ONEIDA NATION OF NEW YORK,
Plaintiff-Appellee,

SENECA NATION OF INDIANS, ST. REGIS MOHAWK TRIBE,
UNKECHAUGE INDIAN NATION,
Plaintiffs-Appellees-Cross-Appellants,

v.

DAVID A. PATERSON, in his official capacity as Governor of New York, JAMIE WOODWARD, in his official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, WILLIAM J. COMISKEY, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,
Defendants-Appellants,

JOHN MELVILLE,
Defendant-Appellant-Cross-Appellee,

CAYUGA INDIAN NATION OF NEW YORK,
Intervenor-Appellant.

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

BRIEF FOR APPELLEE ONEIDA NATION OF NEW YORK

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INTRODUCTION

The United States District Court for the Northern District of New York (Hurd, J.), preliminarily enjoined the State of New York from enforcing against the Oneida Nation new statutes and regulations designed to collect taxes on the sale of cigarettes by tribes to non-members. The State appeals. The District Court enjoined the tax collection scheme because it impermissibly requires the Oneida Nation to pay wholesalers millions of dollars in state taxes without receipt of any interest from the State for the substantial period between when the Nation acquires the cigarettes and when it sells them to non-member customers. Moreover, the District Court found that the tax scheme impermissibly compromises the Oneida Nation's federally protected right to obtain untaxed cigarettes for use by the Nation and its members.

It was well within the District Court's discretion to preserve the decades-long status quo and to prevent irreparable harm to the Oneida Nation pending final resolution of the merits. The District Court's findings of fact are based on an unrebutted factual record, and the District Court's legal analysis correctly applies federal law. That law indisputably prohibits states from taxing Indian tribes and permits states to impose only minimal and reasonably necessary burdens on tribes when a state seeks to collect taxes from non-Indians. *Dep't of Taxation & Finance v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994). This Court should affirm.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) to review the District Court's October 14, 2010 grant of a preliminary injunction. Appellants timely noticed this appeal on October 15, 2010.

ISSUE PRESENTED

Whether the District Court abused its discretion in granting a preliminary injunction that maintains the status quo where it was undisputed that (1) the new tax scheme would require the Nation at all times to be out of pocket $3.5 million to the State and to lose over $200,000 annually in foregone interest and (2) the tax scheme lacks safeguards to protect the Oneida Nation's federally protected right to obtain untaxed cigarettes for use by the Nation and its members?

STATEMENT OF THE CASE

A. The State's Long History of Not Collecting Taxes on Cigarette Sales by Indian Tribes to Non-Members

1. Historical Background

Since 1939, the State of New York has imposed an excise tax on cigarettes sold within the State. N.Y. Tax Law § 471; SPA104-06. Section 471 requires wholesalers licensed as stamping agents to purchase New York tax stamps and affix them to packages of cigarettes. The tax is then passed on to each successive

purchaser in the distribution chain and ultimately collected from the consumer as part of the retail price of cigarettes. N.Y. Tax Law § 471(2); SPA105.

New York never has collected excise or other taxes on cigarette sales made to non-members by tribes or tribal retailers. One reason is that until relatively recently it was thought that collecting tax on sales by an Indian tribe, whether to members or non-members, would violate federal law as a tax on an Indian tribe and as an interference with tribal sovereignty. *Cayuga Indian Nation v. Gould*, 930 N.E.2d 233, 236 (N.Y. 2010); N.Y. Tax Law § 471(1) (no cigarette tax shall be imposed if the State "is without power to impose such tax"); SPA104.

In the 1970s, however, the United States Supreme Court held that states may collect taxes on tribal sales to non-members and require tribes to assist in such collection. This holding came with important caveats: (1) a state cannot impose taxes on Indian tribes; (2) any state collection mechanisms may impose only minimal and reasonably necessary burdens on tribes; and (3) the schemes must safeguard a tribe's federally protected right to acquire untaxed cigarettes for tribal and member use. *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

2. The Supreme Court's *Attea* Decision

In 1988, the New York Department of Taxation & Finance (the "Department") took the first steps toward state taxation of tribal cigarette sales to

non-members by issuing new regulations designed to collect those taxes. Non-Indian wholesalers challenged the regulations, contending that the federal Indian Trader Statutes preempted them. 25 U.S.C. § 261 *et seq*. The case ultimately reached the United States Supreme Court. *Dep't of Taxation & Finance v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994). The regulations required prepayment, through a stamping mechanism, of a 56 cents per pack tax ($5.60 per carton) on cigarettes destined for tribal sale to non-members. The regulations also allowed wholesalers, after obtaining the Department's prior approval, to sell a certain quota of untaxed cigarettes to tribal retailers for tribal or member use. *Id.* at 64-67. To receive prior approval, wholesalers had to present the Department with "evidence of valid purchase orders" from a tribal retailer; upon receiving approval, the wholesaler could then claim a portion of the tribe's allocation of untaxed cigarettes and sell them to a tribal retailer. *Id.* at 66.

The Court held that the federal Indian Trader Statutes did not preempt the regulations. *Id*. at 78. The Court stressed that its analysis was limited to the particular challenge before it, which was "essentially a facial one," and that its ruling 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." *Id.* at 69-70. Moreover, the Court reaffirmed that Indian tribes have a federally protected right to sell cigarettes to tribal members free of state taxes, *id.*

at 64 & 73, and that state cigarette taxing schemes may impose on tribes only "minimal burdens," *id.* at 73, that are both "reasonably tailored" and "reasonably necessary" to the collection of the tax. *Id.* at 73, 75.

3. The State's Forbearance Policy

The State recognized that the *Attea* decision did not bless New York's taxing scheme in its entirety and for all purposes. Accordingly, in the wake of *Attea* the State announced a delay in the enforcement of the regulations. The State acknowledged "the need to assess the regulations against the 'several potential legal obstacles to enforcement' that had been highlighted by the Supreme Court's opinion and . . . the pendency of 'serious discussions with several Indian Nations regarding [the State's and Nations'] respective sovereign concerns.'" *N.Y. Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904, 906-07 (N.Y. 1998) (citation omitted).

New York ultimately withdrew the regulations to strengthen the governmental relationships between Indian tribes and the State. *See Urbach*, 699 N.E.2d at 909. The State, therefore, never enforced the tax scheme at issue in *Attea*, and whether those regulations infringed tribal rights never was adjudicated. Instead, the State left tribes free to make tax-free cigarette sales to non-member purchasers, who in turn are required by State law to pay the cigarette tax to the State. N.Y. Tax Law § 471-a.

The State's forbearance policy and refusal to issue regulations persisted even though the Legislature amended the Tax Law in 2003 and 2005 to provide for a tax on tribal sales. *See Gould*, 930 N.E.2d at 238-39; JA204-05 (Advisory Opinion TSB-A-06(2)(M) stating forbearance policy). In the absence of regulations, tribal retailers could lawfully sell cigarettes to non-members without collecting taxes. *See Gould*, 930 N.E.2d at 239-40; *Day Wholesale, Inc. v. State*, 856 N.Y.S.2d 808 (N.Y. App. Div. 2008).

B. The State's Recent Effort to Tax Cigarette Sales by Indian Tribes

In February 2010, the Department announced the end of the State's forbearance policy. JA206 (administrative revocation of Advisory Opinion TSB-A-06(2)(M)); JA771 (Smirlock Decl. ¶ 6). At that time, however, the Department did not issue necessary regulations or otherwise seek to implement taxation of tribal cigarette sales. *Gould*, 930 N.E.2d at 239-40 & 240 n.6.

1. The June 2010 Amendments to the Tax Law

On June 21, 2010, the Legislature again amended the cigarette Tax Law (the "June 2010 Amendments"). SPA87, SPA94-102. The June 2010 Amendments provide that, effective September 1, 2010, all cigarettes that non-Indian wholesalers supply to tribes or tribal retailers must bear a state tax stamp. The State also significantly increased the excise tax to $4.35 per pack ($43.50 per carton). N.Y. Tax Law § 471(1); SPA104. The tax is thus 7.75 times higher than

the tax at issue in *Attea*; indeed, the tax on a single pack is now close to the tax on an *entire carton* of cigarettes ($5.60) at the time of *Attea*.

The June 2010 Amendments impose on tribes either of two different systems ostensibly designed to provide a quantity (or quota) of untaxed cigarettes to Indian tribes for their own or their members' use. N.Y. Tax Law §§ 471(5)(b), 471-e(1)(b); SPA106 & 107. Under both systems the State calculates the tribe's "probable demand" for tribal or member use and imposes that calculation as a quota on the tribe. *Id.* §§ 471(5)(b), 471-e(2)(b); SPA106 & 108. The first system, which only applies if a tribe elects it (and the Oneida Nation did not so elect) utilizes a coupon mechanism to facilitate tax-free sales to tribes and members. *Id.* § 471-e(1)(b); SPA107. The second, default system is the "prior approval system." The new statute directed the Department to specify procedures that would allow wholesalers to get the Department's prior approval to make tax-free sales to the tribe or its retailers up to the available "probable demand" quota and then to petition the State for a refund of the tax previously paid. *Id.* § 471(5)(b); SPA106.

2. The Emergency Rule Implementing the June 2010 Amendments

On June 22, 2010 (the day after the June 2010 Amendments passed), the Department adopted an "emergency" rule to implement the Amendments, avoiding notice and comment and any meaningful consideration of regulatory impacts and problems. JA207-16 (emergency rule); JA738 (N.Y.S Register publication

regarding issuance of emergency rule). On November 10, 2010, the emergency rule was codified verbatim at 20 N.Y.C.R.R. § 74.6 as the final regulation implementing the June 2010 Amendments. SPA120-26.

The Department promulgated the "emergency" and now-final regulation in such a rush that it did not address even such a basic issue as how the Department will grant prior approval to non-Indian wholesalers for sales to tribes within their quotas. Thus, the Department had to issue an "informal guidance" to wholesalers on July 29, 2010, SPA139-46, which directs wholesalers to the Department's website to establish an online services account. SPA143. On the site, the Department expects to list each Indian tribe's quarterly probable demand quota of untaxed cigarettes. SPA143. The guidance permits any wholesaler to use the website to unilaterally claim some or all of a tribe's quota, which amount is then subtracted from the tribe's available quota. SPA143-44. There is no requirement that wholesalers have (or even intend to seek) a purchase request from a tribe to claim a tribe's entire probable demand quota.

The informal guidance gives the wholesaler 48 hours to complete a sale to the tribe or tribal retailer and report back to the Department about the sale. SPA144. Any amount that was claimed but then not sold within 48 hours is restored to the available quota. SPA144. Under the informal guidance, however, the same wholesaler who initially claimed a tribe's quota may return to the website

at the moment of the 48-hour deadline and then assert a new claim over the tribe's quota (and continue doing so *ad infinitum*). SPA144. Thus, under the guidance, a wholesaler can lay perpetual claim to the quota of the Oneida Nation or any other tribe, choosing either to withhold the cigarettes from the Nation, or to demand a monopoly price for them.

C. Proceedings Below

1. The Oneida Nation's Complaint and Motion for Preliminary Injunctive Relief

The Oneida Nation attempted for many years (long before the June 2010 Amendments became law) to negotiate a mutually acceptable agreement with the State concerning cigarette (and other) taxes. JA722 (Complaint ¶ 25). There were many meetings in 2009 and 2010, and despite a national trend of state-tribe tax compacts, New York did not conclude an agreement with the Oneida Nation, or with any other tribe. JA722 (¶ 25).

On September 7, 2010, after exhausting efforts to reach the negotiated bilateral resolution contemplated by Tax Law § 471(6), the Oneida Nation filed its complaint, challenging specific defects in New York's new statutory and regulatory scheme as applied to the Oneida Nation. JA712-33. The complaint asserts two claims: (1) that the new cigarette tax scheme imposes an impermissible tax and an undue, non-minimal burden on the Nation by requiring it to prepay millions of dollars without interest, JA722-26 (Complaint ¶¶ 26-36); and (2) that

the prior approval system fails to protect the Nation's and its members' right to obtain cigarettes for their own use free of state taxes. JA727-31 (¶¶ 37-51). The complaint alleges that the defects in the tax collection scheme are not reasonably necessary for the collection of taxes. JA713-14 (¶ 5). The complaint seeks an injunction against enforcement of the new tax scheme. JA732 (¶ 52). Appellants did not seek dismissal of the complaint for failure to state a claim or on any other ground. Instead, Appellants sought and received an extension of time to respond, DE28; Sept. 20, 2010 Text Order, and then just answered. DE64. Appellants still have neither filed a dispositive motion nor sought a merits determination.

The Oneida Nation did not seek injunctive relief when it filed its complaint because a state court injunction against enforcement already was in place. Memorandum of Law (DE11), at 1-2. On the same day a state court issued an order effectively lifting the injunction, the Nation sought a temporary restraining order, DE10, which the District Court granted on September 17, 2010. DE25, DE27. On October 1, 2010, at the preliminary injunction hearing, the District Court (without objection from Appellants) extended the TRO through October 15, 2010. Oct. 3, 2010 Minute Entry.

2. Unrebutted Evidence Before the District Court

The Oneida Nation demonstrated that it would be out-of-pocket to the State $3.5 million at all times to maintain its inventory of cigarettes for sale to non-

members and that the State would not even pay the Nation interest. The factual record on these points was undisputed. JA740-41 (Rebich Decl. ¶¶ 10-11). That undisputed record also showed a further $200,000 annual cost to the Nation from the prepayment scheme based upon its loss of use of $3.5 million dollars and its borrowing costs. JA741 (Rebich Decl. ¶ 12).

The Nation's evidence about the prior approval system likewise was uncontradicted: (1) the website identified in the informal guidance never has been operational, JA768 (Day Aff. ¶ 34); (2) nothing requires a wholesaler to have an order from the Oneida Nation before claiming its quota of untaxed cigarettes, JA759-60 (Bartlett Testimony at 88:1-89:2); (3) a wholesaler who draws down the Oneida Nation's quota can perpetually control it by returning to the website every 48 hours, JA744 (Saffire Decl. ¶¶ 9-11); and (4) a wholesaler will therefore be able to command a monopoly price, effectively making the Nation pay virtually the same amount as if it paid the state tax, but to the wholesalers. JA744-46 (Saffire Decl. ¶¶ 13-18); JA753-54 (Vanderlinden Testimony at 105:15-106:21); JA766-69 (Day Aff. ¶¶ 25-30, 33-36). State officials not only failed to contradict this evidence but admitted that the State's prior approval system was susceptible to abuse. JA756-61 (Bartlett Testimony at 47:17-48:1, 88:1-89:2, 89:15-90:13); JA753-54 (Vanderlinden Testimony at 105:15-106:21). Affidavits from wholesalers confirmed the financial incentives to wholesalers to take advantage of

the defects in the system—*e.g.*, to claim a tribe's entire quota even without having a purchase order—and the intention of one wholesaler to do so, thereby inflicting injury on the Oneida Nation and other tribes. JA744-46 (Saffire Decl. ¶¶ 13-18); JA768 (Day Aff. ¶ 35).

3. The District Court's Preliminary Injunction Ruling

The District Court's ruling rests on factual findings pursuant to Fed. R. Civ. P. 52(a)(2). Given the undisputed record, it is hardly surprising that on October 14, 2010 the District Court entered a preliminary injunction maintaining the status quo by prohibiting enforcement of the challenged statutes and regulations against the Oneida Nation. *Oneida Nation of New York v. Paterson*, No. 10-1071, 2010 WL 4053080 (N.D.N.Y. Oct. 14, 2010); SPA46-70. The District Court found a likelihood of success on the merits, SPA61-65, and that enforcement of the scheme would irreparably harm the Nation by infringing the Nation's tribal sovereignty and right to self-government. SPA59-61. The District Court found that the harm cannot be measured in dollars, and, even if it could, the Eleventh Amendment would bar monetary relief to the Nation. SPA60-61.

4. Court-Ordered Mediation

In addition to seeking injunctive relief, on September 22, 2010 the Oneida Nation moved the District Court to refer the action to mediation. DE30, DE31. Although Appellants opposed negotiating, DE46, the District Court ordered the

parties to mediate before the Magistrate Judge assigned to the case until December 17, 2010, noting that the amended Tax Law specifically contemplated that a tribal-state agreement regarding cigarette taxation could be reached and approved by a federal judge. SPA66-68, SPA70. Under Tax Law § 471(6), such an agreement would supplant the otherwise applicable provisions of the Tax Law. SPA106.

Appellants then asked the District Court to stay the mediation order pending appeal, DE65, contending that, notwithstanding the Tax Law's express contemplation of such tribal-state agreements, *see* § 471(6), mediation was "unlikely to be productive." Memorandum of Law (DE65-1), at 9. The District Court denied Appellants' motion, DE68, but, given the State's hostility to mediation, the mediation proved to be unsuccessful. DE70.

5. Western District of New York Litigation

On the day the District Court granted a preliminary injunction in this case, the United States District Court for the Western District of New York (Arcara, J.) denied the Seneca and Cayuga Nations' request for an injunction against the new taxing scheme. *Seneca Nation of Indians v. Paterson*, No. 10-0687, 2010 WL 4027796 (W.D.N.Y. Oct. 14, 2010); SPA3-37. Judge Arcara thereafter denied similar motions filed by the St. Regis Mohawk Tribe and Unkechauge Indian Nation. *Unkechauge Indian Nation v. Paterson*, No. 10-0711, 2010 WL 4486565 (W.D.N.Y. Nov. 9, 2010); SPA74-86. Pursuant to Fed. R. Civ. P. 62(c), however,

Judge Arcara enjoined enforcement of the disputed statutes and regulations pending appeal to this Court, finding that challenges to the new cigarette tax collection scheme present substantial questions, that enforcement would irreparably harm the tribes, that a stay serves the public interest, and that the status quo should be maintained. *Seneca Nation of Indians v. Paterson*, No. 10-0687, 2010 WL 4027795 (W.D.N.Y. Oct. 14, 2010); SPA38-45; *Unkechauge Indian Nation v. Paterson*, No. 10-0711, 2010 WL 4486565, at *6 (W.D.N.Y. Nov. 9, 2010); SPA85.

6. Appellants' Unsuccessful Efforts to Obtain Emergency Relief

On October 22, 2010, Appellants asked the District Court to stay the preliminary injunction pending appeal. DE65. The District Court denied the motion on October 28, 2010. DE68. Appellants then sought the same stay in this Court and also filed in this Court (in Nos. 10-4272 & 10-4598) motions challenging Judge Arcara's stay of enforcement of the tax scheme pending appeal of the Western District cases. On December 9, 2010, this Court denied Appellants' motions and consolidated the appeals.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion. The preliminary injunction rests on factual findings that are based on an undisputed factual record. The District Court correctly found that the Oneida Nation is likely to succeed in

demonstrating that the new tax scheme places burdens on the Nation that are neither minimal nor reasonably necessary and tailored to collection of tax on sales to non-members. The District Court also correctly held that the Nation is likely to show that the "prior approval" system is ill-conceived and will not safeguard the Nation's and its members' right to purchase, for their own use, cigarettes free from state taxes. Finally, the District Court correctly determined that the status quo should be preserved pending a merits resolution. After many years of delay and forbearance, the State can hardly claim a sudden emergency requiring enforcement before a final merits determination. This is especially true where, as here, the tax scheme at issue needlessly compromises the Oneida Nation's sovereignty and, therefore, irreparably harms the Nation. Appellants have been free for months to seek a merits determination in the District Court but have chosen not to do so.

STANDARD OF REVIEW

"The district court has wide discretion in determining whether to grant a preliminary injunction, and this Court reviews [its] determination only for abuse of discretion." *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008); *see especially Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 167-69 (2d Cir. 2001) (explaining in detail the nature of abuse of discretion review regarding issuance or denial of preliminary injunctions); *see Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004); *Arthur Guinness & Sons, PLC v. Sterling Publ'g*

Co., 732 F.2d 1095, 1099 (2d Cir. 1984) (party appealing from preliminary injunction ruling "bears [a] heavy burden").

A district court abuses its discretion only "when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Vincenty v. Bloomberg*, 558 F.3d 204, 209 (2d Cir. 2009) (internal quotation marks omitted); *see Zervos*, 252 F.3d at 168-69; *Columbia Pictures Indus., Inc. v. Am. Broad. Cos.*, 501 F.2d 894, 897 (2d Cir. 1974) ("[W]hile another judge might have arrived at a different result, we cannot say that this result constitutes an abuse of the wide discretion normally accorded a district court on the issue of preliminary relief.").

This Court respects the District Court's factual findings unless they are clearly erroneous. Fed. R. Civ. P. 52(a)(6); *Zervos*, 252 F.3d at 168. Questions of law are reviewed de novo. *Lusk v. Village of Cold Spring*, 475 F.3d 480, 484 (2d Cir. 2007).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion.

A. The Preliminary Injunction Preserves the Status Quo that Has Been in Place for Decades.

The State never has enforced cigarette tax laws against Indian tribes. Indeed, in recognition of the legal obstacles to enforcement that the Supreme Court described in *Attea* and out of respect for tribal sovereignty, the State for decades intentionally has foregone such taxes. *See Urbach*, 699 N.E.2d at 906-07, 909; *Gould*, 930 N.E.2d at 238-39. The District Court's decision thus preserves the longstanding status quo and promotes the orderly administration of justice through final resolution of the Oneida Nation's claims.

The District Court pointed to "the State's policy of forbearance" and correctly concluded that an injunction would maintain the status quo: "Although New York may have an interest in obtaining revenue, injunctive relief will maintain the status quo, not reduce the State's revenue." SPA65. In the Western District cases, the court also relied on the "State's lengthy prior history of forbearance" and ruled that a stay of enforcement would maintain the status quo. SPA43-44.

Appellants' interlocutory appeal seeks a fundamental change in the status quo—an abrupt shift to immediate cigarette tax enforcement—with the spectre of dismantling the new regime when the Oneida Nation's claims are sustained on the

merits. Appellants did not and cannot argue that the harm to the Nation's tribal sovereignty and right to self-government can later be undone or recompensed. Moreover, since the District Court entered the injunction, Appellants have done nothing to litigate the merits. That inaction further supports preservation of the status quo until a final determination of the merits.

B. The Oneida Nation Demonstrated a Likelihood of Success on the Merits on Both of Its Claims.

As discussed above, *Attea* supports the District Court's finding that the Oneida Nation is likely to succeed on the merits: (i) that the State cannot impose a tax on a tribe; (ii) that, in enlisting the tribe's assistance in collecting taxes from non-members, the State may impose only minimal and reasonably necessary burdens on the tribe; and (iii) that the State scheme must safeguard the tribe's and its members' federally protected right to cigarettes for their own use that are free of state taxes. *Attea*, 512 U.S. at 64, 73, 75.[1]

[1] Even when "the balance of federal, state and tribal interests favors the State," and thus "the State may impose its levy" [on non-members], it only "may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (quoting *Attea*, 512 U.S. at 73); *see Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 159-60 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976).

1. The Prepayment Requirement Is More than a Minimal Burden and Is, in Effect, a Tax on the Oneida Nation.

The State did not dispute that with an excise tax of $43.50 a carton, N.Y. Tax Law § 471(1), for the Nation to maintain its current cigarette inventory the new tax law's prepayment provision would require the Nation perpetually to have outstanding $3.5 million in state tax prepayments. No one would describe a permanent multi-million dollar burden as "minimal." Losing $200,000 annually from not having use of the funds (foregone interest), or from the cost of borrowing, is also far from a minimal burden.

Instead of challenging the Nation's proof about the current tax pre-collection scheme, Appellants chose to argue that, because *Attea* and other Supreme Court precedent had approved other pre-collection laws, any upstream pre-collection scheme is permitted, without regard to details or impact or necessity. Memorandum of Law (DE46), at 18-25. The District Court correctly rejected the State's sweeping argument, which ignored the factual record developed below.

For example, *Attea* involved a tax of 56 cents per pack—$5.60 per carton. *Id.* at 64. Here the tax is 7.75 times as high. Differences in degree so extreme become differences in kind. The State's taxing scheme may ultimately require non-member purchasers to pay a tax, but collecting it first in such a large amount from the Oneida Nation also imposes a tax on the Nation.

Even if the huge pre-payment obligation is somehow not technically a tax, it is a non-minimal burden and impermissible for that reason alone. Moreover, the State's uncompensated appropriation and use of the Nation's money, particularly when there is no payment of compensating interest, imposes costs and lost opportunities on the Nation that are themselves forbidden taxes.

Attea did not consider the State's failure to provide for a fair payment for its use of tribal funds to implement its taxing scheme, as the issue was not before the Court. As the District Court found and Appellants do not dispute, the cost to the Nation is $200,000 a year. SPA61. This is value the State takes from the Nation that is *never* recouped. It is value that the State benefits from that is never disgorged. And it is significant value, not de minimis, as in *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007) (state's failure to pay interest to tribal members on cigarette tax refunds not impermissible where small amount of money (about $450 annually) was involved).

The law routinely recognizes that the cost of funds, or the time value of money, makes payment of interest essential, to fully compensate for a loss. *See, e.g.*, *Clarke v. Frank*, 960 F.2d 1146, 1154 (2d Cir. 1992) (holding that award of prejudgment interest in Title VII actions "discourages an employer from attempting to enjoy an interest-free loan for as long as [it can] delay paying out back wages") (internal quotation marks omitted); *Love v. State*, 78 N.Y.2d 540,

544 (N.Y. 1991) (State of New York required to pay interest, not as a penalty, but as "simply the cost of having the use of another person's money") (citing Siegel, N.Y. Prac. § 411, at 623 (2d ed.)); *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009) ("inflation and the power of money to earn an economic return" often require addition of interest to achieve "complete compensation"); N.Y.C.P.L.R. § 5001(a) (requiring prejudgment interest to compensate for any act "depriving or otherwise interfering with" "possession or enjoyment" of property).

Many New York statutes require payment of interest to the State, to make it whole, when someone fails to remit taxes at the required time. *See, e.g.*, N.Y. Tax Law § 289-a (motor fuel); *id.* § 433 (alcoholic beverages); *id.* § 481 (cigarettes and tobacco products); *id.* § 684 (personal income); *id.* § 1145 (sales and compensating use). Likewise, the new law would have to provide for the payment of interest on huge tax pre-payments, in order to make the Oneida Nation whole, and thereby to avoid taxing the Nation or imposing an undue and unnecessary burden on the Nation. But it does not.

The absence of an interest payment is not necessary to the prepayment scheme. Governments—including the State of New York—often pay interest when they return excess tax payments, in recognition that the taxpayer has been deprived of both the underlying tax payment and also the time value of the money. *See* 26 U.S.C. § 6611 (interest on overpayment of any internal revenue tax); N.Y.

Tax Law § 688 (interest on overpayment of personal income tax); *id.* § 1088 (interest on overpayment of corporate tax); *Doolin v. United States*, 982 F.2d 15, 15 (2d Cir. 1990) (characterizing government's failure to pay interest on estate tax overpayment as "windfall" to the United States). It is just as necessary for New York to compensate the Nation for the cost of tax pre-payments as it is for New York to pay interest on tax overpayments. *See Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453 (7th Cir. 2010) (Posner, J.) ("Every day that a sum of money is wrongfully withheld, its rightful owner loses the time value of the money.").

The multi-million dollar, perpetual prepayment burden and the loss of interest on that money are both non-minimal burdens, are both taxes, and neither is reasonably necessary. The rules reaffirmed in *Attea* do not permit the State to proceed with a taxing scheme that has these defects.

2. The Prior Approval System Fails to Assure the Oneida Nation an Adequate Allocation of Tax-Exempt Cigarettes.

"'[T]he 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, 68 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). This principle animates longstanding Supreme Court precedent, fully embraced in *Attea*, that Indian tribes have a federally protected right to obtain, without payment of tax, cigarettes for their use and the use of their members.

Attea, 541 U.S. at 64 & 73. Any state taxing scheme, to be valid, must adhere to this principle.

The District Court correctly concluded that the Nation is likely to succeed on the merits of its challenge to the prior approval system because the "scheme does not assure adequate availability of untaxed cigarettes for consumption by members and the Oneida Nation." SPA62. Its conclusion rests on specific factual findings that the prior approval system "is ripe for manipulation by wholesalers," "incentivizes wholesalers . . . to leverage for a higher sales price" to the Nation, and "allow[s] a wholesaler . . . to monopolize the Oneida Nation's allotment [of untaxed cigarettes] to prevent tax-free sales forcing members to purchase taxed cigarettes at non-Indian retailers for their own consumption." SPA62. These are not speculative problems with the prior approval system, as the District Court's factual findings make clear. They rest on unrebutted record evidence.

The State *admitted* that nothing requires a wholesaler to have a legitimate purchase order from the Oneida Nation before drawing down the Nation's quota of untaxed cigarettes. JA759-60 (Bartlett Testimony at 88:1-89:2). It *admitted* that a wholesaler who draws down an Indian tribe's quota of untaxed cigarettes can perpetually control it, without selling any cigarettes to the tribe, by returning to the website every 48 hours. JA760-61 (Bartlett Testimony at 89:15-90:1); JA753-54 (Vanderlinden Testimony at 105:15-106:21). And testimony from State officials

and unchallenged affidavits from wholesalers establish that, under the prior approval system, a wholesaler can demand a monopoly price from the Oneida Nation for "tax-free" cigarettes. The wholesaler can also deny the Nation access to such cigarettes to protect the ability of non-Indian retailers to sell taxed cigarettes to Oneida Nation members. JA744-46 (Saffire Decl. ¶¶ 13-18); JA753-54 (Vanderlinden Testimony at 105:15-106:21); JA766-69 (Day Aff. ¶¶ 25-30, 33-36). A declaration from one wholesaler identified the financial incentives to wholesalers to abuse the system's defects—including the incentive to claim a tribe's entire quota even without having a purchase order. JA744-46 (Saffire Decl.¶¶ 13-18). An affidavit from another wholesaler did more than identify the system's weaknesses; it established the wholesaler's intention immediately to claim the entire quota for every tribe in the state as soon as the system becomes operational. JA768 (Day Aff. ¶ 35).

Attea did not approve a substantially similar system. The system there required, as a condition of obtaining approval, that a wholesaler provide "evidence of valid purchase orders." *Attea*, 512 U.S. at 66. Appellants do not deny the absence of any similar purchase order requirement here. Indeed, they do not deny that a wholesaler may claim all of the Oneida Nation's quota of untaxed cigarettes without any intention to sell a single pack of cigarettes to the Nation. JA759-61 (Bartlett Testimony at 88:1-89:2, 89:15-90:10); JA753-54 (Vanderlinden

Testimony at 105:15-106:21). The inadequacies of the prior approval system are not speculative. They are real, admitted, and concrete.

C. Enforcement of the State's New Tax Scheme Will Cause Irreparable Harm to the Oneida Nation.

The District Court correctly concluded that "the harm from permitting the State to enforce its new tax law will be irreparable to the Oneida Nation." SPA61. Irreparable harm to an Indian tribe occurs when a state threatens to infringe the tribe's federally protected sovereign interests and right to self-government. *See, e.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) (holding that "prospect of significant interference with [tribal] self government" posed by state motor vehicle registration and titling laws, coupled with State's Eleventh Amendment immunity from damages claims, constitutes threat of irreparable harm warranting issuance of preliminary injunction); *Kiowa v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998) (affirming injunction issued to protect tribal sovereign immunity from state court suit); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994) (holding that tribe had demonstrated a threat of irreparable harm because it would be unable to recover monetary damages on account of the State's Eleventh Amendment immunity); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming grant of injunctive relief where tribe faced "the prospect of significant interference with [tribal] self government" from state's efforts to enjoin bingo

operations on tribal land); *Winnebago Tribe v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002) (finding irreparable injury where "scope of tribal sovereignty" is threatened because such "cannot be measured in dollars"); *United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (granting injunctive relief where regulations promulgated by fishery management authority threatened tribal fishing rights).

A state scheme that taxes an Indian tribe, deprives it of tribal funds used for governmental services, frustrates its sales to members, or imposes non-minimal and unnecessary burdens interferes with tribal sovereignty. Moreover, courts are particularly sensitive to that type of harm where the Eleventh Amendment bars monetary compensation. *E.g.*, *Pierce*, 253 F.3d at 1250-51; *Baker Elec. Co-op., Inc.*, 28 F.3d at 1472-73. Finally, irreparable harm flows from the loss of market share, which will inevitably result when the Nation's access to tax-free cigarettes is thwarted. *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007) ("[A] movant's loss of current or future market share may constitute irreparable harm.").

D. The Preliminary Injunction Promotes the Public Interest.

Federal law controls in assessing conflicting tribal and state interests in the area of state taxation. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Accordingly, federal law frames the public interest inquiry. *Cf. Indep.*

Living Ctr. of S. Calif., Inc. v. Maxwell-Jolley, 572 F.3d 644, 658 (9th Cir. 2009) ("Federal courts . . . have the power to enjoin state actions, in part, because those actions sometimes offend *federal* law provisions, which, like state statutes, are themselves 'enactment[s] of its people or their representatives.'") (emphasis in original). A state taxing scheme that violates federal law is inconsistent with the public interest. Federal courts often enjoin such unlawful state taxing schemes, *e.g.*, *Winnebago Tribe v. Stovall*, 341 F.3d 1202 (10th Cir. 2004), and the District Court did not abuse its discretion in doing so here.

Appellants argued below that the State's revenue and public health concerns established a public interest in immediate enforcement of the challenged tax collection scheme. Memorandum of Law (DE46), at 35. But after years of intentional forbearance, Appellants cannot credibly claim a compelling public need for immediate enforcement pending resolution of the Oneida Nation's claims on the merits. The District Court correctly concluded: "The State has been depriving itself of these revenues for many years and cannot now use revenues as a 'public interest weapon' to prevent injunctive relief where it is otherwise deserved." SPA65-66.

Appellants' public health claim is also unavailing. The adverse health effects of smoking have been known for quite some time, but the State took no action to collect taxes on cigarette sales by tribes to non-members. Appellants

introduced no evidence at the hearing to suggest that the new enforcement scheme is directed at public health concerns. The District Court specifically found that "the stated purpose of the legislation is to raise revenue. Public health is not mentioned." SPA66 (note 6).

In the Western District cases, the court similarly concluded that the public interest is served by staying implementation of the new taxing scheme pending final resolution of tribal challenges on the merits. SPA44 ("Given the passionate sentiments involved, the Court finds that granting a stay pending appeal is in the public interest because it will simply preserve the status quo while a higher court considers the merits of the plaintiffs' claims."). Judge Arcara found "it prudent to delay implementation" to give the tribes "the opportunity to have all of their arguments fully considered before they are required to engage in activity that they view as an affront to their tribal sovereignty." SPA44. The same reasoning applies here with equal force.

Finally, the public interest favors maintenance of the status quo to encourage voluntary settlement, particularly in view of Tax Law § 471(6), which authorizes tribal-state agreements that, when approved by a federal court, supersede the cigarette tax provisions of the Tax Law. SPA106. The Oneida Nation continues to believe that good faith negotiations would result in a section 471(6) agreement. Provisions allowing for agreements between states and Indian tribes are commonly

included in tax collection statutes.[2] The record before the District Court, *see* Memorandum in Support of Motion for Mediation (DE31), at 2-4, demonstrated that states recognize the mutual benefit derived from agreements negotiated in good faith,[3] that the public interest of both Indians and non-Indians is served by resolving disputes through agreement,[4] and that agreements negotiated in good faith improve government-to-government relations.[5] More generally, strong

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[2] *See*, *e.g.*, Idaho Code Ann. § 67-4002 (fuel tax); Minn. Stat. § 270C.19 (sales, use and excise taxes); Miss. Code Ann. § S. 27-65-217 (gross receipts tax with Choctaw Tribe); N.M. Stat. § 67-3-8.1 (fuel tax); Okla. Stat. tit. 68, § 346 (tobacco tax); S.D. Codified Laws § 10-12A-4 (cigarette taxes, among others); Wash. Rev. Code § 82.36.450 (fuel tax); Wash. Rev. Code § 43.06.450 (sales tax on cigarettes); Wash. Rev. Code § 43.06.465 (cigarette tax agreement with the Puyallup Tribe); Wis. Stat. § 139.805 (tobacco tax).

[3] *See* Okla. Stat. tit. 68, § 500.63 ("It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts . . . for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts. . . .").

[4] *See* S.D. Codified Laws § 10-12A-2 ("The Legislature finds that the public interest of both Indians and non-Indians is best served by close cooperation between the state government and the Indian tribes. The Legislature finds this cooperation to be especially important in the area of taxation. Accordingly, the department is hereby authorized to enter into tax collection agreements with Indian tribes."); Miss. Code Ann. § S. 27-65-213 (substantially same).

[5] *See* Wash. Rev. Code § 43.06.450 ("The legislature intends to further the government-to-government relationship between the state of Washington and Indians in the state of Washington by authorizing the governor to enter into contracts concerning the sale of cigarettes. The legislature finds that these cigarette tax contracts will provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance

policies favoring the avoidance of unnecessary litigation and the reduction of conflicts between sovereigns support efforts to facilitate the agreement authorized by the Tax Law.[6] States and tribes around the country have compiled an impressive record of negotiating in good faith and reaching productive agreements.[7] The District Court correctly concluded that an injunction maintaining the status quo would facilitate an agreed resolution between the State and Oneida Nation in this historically contentious arena. SPA67-68. The Oneida Nation is committed to resolving its disagreements with the State pursuant to an agreement under Tax Law § 471(6) that is approved by a federal court.

CONCLUSION

The District Court's preliminary injunction order should be affirmed.

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enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict."); *id.* § 43.06.465 ("The legislature finds that [entering into agreements with Indian tribes] has been effective, as measured by the success of the existing agreements. The legislature further finds the agreements resolved decades of conflict between the state and tribes over the sale of contraband cigarettes to non-Indians.") (Historical and Statutory Notes).

[6] *See Nevada v. Hicks*, 533 U.S. 353, 392 (2001) (O'Connor, J., concurring in part and concurring in the judgment) (reviewing tribal agreements); *Okla. Tax Comm'n v. Citizens Band Potawatomi Tribe*, 498 U.S. 505, 514 (1991) (state may enter into "mutually satisfactory" cigarette tax collection agreements with tribes).

[7] By 2001, there were at least 200 agreements between states and tribes covering a range of tax matters. *See* Lorie Graham, Securing Sovereignty Through Agreement, 37 New Eng. L. Rev. 523, 535 (2003).

Dated: January 21, 2010

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Dated: January 21, 2011

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CERTIFICATE OF SERVICE

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