10-4265-cv(L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ONEIDA NATION OF NEW YORK,
Plaintiff-Appellee,

SENECA NATION OF INDIANS,
Plaintiff-Appellee – Cross-Appellant,

ST. REGIS MOHAWK TRIBE
Plaintiff-Appellee – Cross-Appellant,

UNKECHAUGE INDIAN NATION
Plaintiff-Appellee – Cross-Appellant,

v.

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

JOHN MELVILLE, in his official capacity as Acting Superintendent, New York State Police,
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 OF PLAINTIFF-APPELLEE – CROSS-APPELLANT
THE SENECA NATION OF INDIANS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SENECA NATION OF INDIANS, Plaintiff-Appellee – Cross-Appellant, v. DAVID A. PATERSON, *et al.*, Defendants-Appellants – Cross-Appellees.	No. 10-4265-cv(L) 10-4272-cv (CON) 10-4598-cv (CON) 10-4758-cv (CON) 10-4477-cv (XAP) 10-4976-cv (XAP) 10-4981-cv (XAP) FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned co-counsel for Plaintiff-Appellee – Cross-Appellant the Seneca Nation of Indians certifies that, on information supplied by the Seneca Nation of Indians, the Seneca Nation of Indians has no parent corporation(s) and no publicly-held corporation owns stock in the Seneca Nation of Indians.

Dated this 21st day of January, 2011.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee – Cross-Appellant the Seneca Nation of Indians requests the full allotment of oral argument time that it would receive absent consolidation of its appeal with other related appeals in light of the significant distinctions between its tobacco economy and legal arguments and those of other Indian nations challenging the State's new tax scheme.

GLOSSARY

In discussing factual and historical matters, litigation positions, and arguments in this brief, the terms "Nation" and "Seneca Nation" refer to Plaintiff-Appellee – Cross-Appellant the Seneca Nation of Indians. In discussing litigation positions and arguments, the term "State" refers to Defendants-Appellants – Cross-Appellees David Paterson, Jamie Woodward, William Comiskey, and John Melville. In discussing factual and historical matters, the term "State" refers to the New York State Legislature ("Legislature") and to the New York State Department of Taxation and Finance ("Department"), unless otherwise indicated. The term "the State's new tax scheme" refers to the Legislature's June 2010 amendments to N.Y. Tax Law §§ 471 and 471-e regarding the imposition and collection of cigarette taxes on qualified Indian reservations and to the Department's June 2010 rule implementing those amendments, 20 N.Y.C.R.R. § 74.6.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Seneca Nation's claims under 28 U.S.C. §§ 1331 and 1362 because this action arises under the Constitution and laws of the United States, including the federal common law right of Indian nations to make their own laws and to be ruled by them, and the federal common law right of reservation Indians to be free from state taxation.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the Nation appeals from the district court's denial of its motion for a preliminary injunction on October 14, 2010. *Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027796 (W.D.N.Y. Oct. 14, 2010) (SPA-3—37); *see also Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027795 (W.D.N.Y. Oct. 14, 2010) (granting the Nation's request for injunctive relief pending appeal) (SPA-38—45). The Nation timely filed a notice of appeal on October 29, 2010.

STATEMENT OF THE ISSUES

The United States Supreme Court has repeatedly held that in seeking to tax on-reservation cigarette sales to non-Indians, States may only impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from the non-Indians. It has further consistently held that States may not tax Indian nations or their members and may not infringe on Indian nations' federally-protected right of self-government. This case raises the following issues with

respect to the "prior approval" and "Indian tax exemption coupon" systems that are contained in the State of New York's new cigarette tax scheme.

1. Where the district court found the prior approval system to be plagued by "numerous problems" that would eviscerate the right of Seneca Nation members and businesses to engage in tax-exempt commerce with one another, does the Nation have a likelihood of success on its claim that the system impermissibly burdens the rights of its members and businesses?

2. Where both the Indian tax exemption coupon and prior approval systems would require the Seneca Nation government to radically recast its role in the Nation's tobacco economy, does the Nation have a likelihood of success on its claim that the systems impermissibly burden its right of self-government?

3. Did the district court correctly conclude that the prior approval and Indian tax exemption coupon systems would visit irreparable harm on the Nation and its members and that the public interest warrants the grant of injunctive relief?

STATEMENT OF THE CASE

The Seneca Nation commenced this action for declaratory and injunctive relief on August 17, 2010, challenging the validity under federal law of the State's new tax scheme as it applies to the Nation. JA-17. On August 20, 2010, the Nation moved for a temporary restraining order and preliminary injunction to halt the implementation and enforcement of the scheme, which was scheduled to go

into effect on September 1, 2010. JA-40. On August 25, 2010, the Cayuga Indian Nation moved to intervene and for preliminary injunctive relief. JA-7. On August 31, 2010, the district court (Arcara, J.) temporarily enjoined the State "from implementing, administering, and enforcing" the new tax scheme as applied to the Seneca and Cayuga Nations. SPA-2. The district court then held a two-day evidentiary hearing on September 14 and 15, 2010, and with the State's consent, extended its temporary restraining order until October 15, 2010. JA-10—11.

On October 14, 2010, the district court denied the Nations' motions for a preliminary injunction, SPA-36, but, finding that the Nations had raised "serious legal questions going to the merits of their claims," SPA-44, granted the Nations' requests for injunctive relief pending appeal, SPA-45. The State appealed the latter order on October 21, 2010, JA-694, and the Nation appealed the former order on October 29, 2010, JA-696. On October 25, 2010, the State moved this Court on an emergency basis to vacate or to modify the district court's injunction pending appeal, and on November 5, 2010, moved to consolidate various related appeals and to expedite briefing. On December 9, 2010, after hearing oral argument, the Court denied the State's motion to vacate or to modify the injunction pending appeal, granted the State's motion to consolidate, and entered the briefing schedule agreed to by the parties.

STATEMENT OF THE FACTS

I. The Application of the New York Cigarette Tax to Sales by Indian Retailers

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 then well-settled law that New York lacked authority to do so. *See Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 622-23 (2010). In 1976, the Supreme Court held for the first time that states may impose an excise tax on cigarettes sold to non-Indians in Indian country, but reaffirmed the long-established principle that States may not levy taxes directly on Indian nations or their members. *See id.* at 623 (citing *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976)). New York did not respond to this decision until 1988, when the New York State Department of Taxation and Finance ("Department") promulgated regulations to implement the cigarette tax as applied to on-reservation sales to non-Indians. *See Cayuga*, 14 N.Y.3d at 623.

Under those regulations, the Department would not have precollected taxes on cigarettes destined for purchase by tax-exempt Indians. JA-141—142, 144, 146—147 (20 N.Y.C.R.R. §§ 335.4(c)(1), (d)(1), (e)(3), 335.5(a)(1), (b)(3) (1988)). Rather, the Department would have provided each Indian retailer tax exemption coupons representing its monthly allotment of unstamped, tax-exempt

cigarettes, and would have provided individual Indian nation members exemption certificates to ensure their ability to purchase such cigarettes. JA-142—143 (*Id.* §§ 335.4(c)(2), (d)(2)); *see also Cayuga*, 14 N.Y.3d at 623. The Department would have made this allotment based upon its determination of the probable demand for tax-exempt cigarettes at each retail location, considering, for example, evidence of the number of nation members living within a reasonable distance of the retailer's place of business or historical sales data. JA-149—150 (*Id.* § 335.5(d)(2)-(3)).

As a result of a facial challenge to the regulations brought by non-Indian wholesalers, however, the Department did not immediately implement them. *See Cayuga*, 14 N.Y.3d at 623-24. And while it ultimately prevailed before the United States Supreme Court on that particular challenge, *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), the Department chose not to implement the regulations (a decision upheld by the New York courts) and formally repealed them in 1998. *See Cayuga*, 14 N.Y.3d at 623-26. The Department likewise chose not to promulgate regulations or to take other administrative actions necessary to effectuate statutory changes in 2003 and 2005 that would have led to the precollection of excise taxes on cigarettes sold in Indian country. *See id.* at 627-29 & n.4.

Accordingly, the New York Court of Appeals confirmed in May 2010 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, and that Indian reservation retailers possess the right under State law to sell unstamped cigarettes to all consumers "[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.

Notwithstanding this history with respect to the *prepayment* and *precollection* of taxes at the wholesale level under N.Y. Tax Law § 471 on cigarettes sold to non-Indians in Indian country, the State has for decades required the payment and collection of those taxes from consumers under N.Y. Tax Law § 471-a, pursuant to which non-exempt individuals purchasing unstamped cigarettes must remit the tax directly to the Department. *See, e.g.*, *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 619 (2009). Section 471-a is a "complement" or "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, 20 N.Y.C.R.R. § 70.1(a). The *Cayuga* court therefore explained that "non-Indian consumers remain[] obligated to pay [cigarette] taxes" in the absence of "an authorized method for calculating and collecting that tax from Indian retailers." 14 N.Y.3d at 647-48 & n.17.

II. The Seneca Nation's Well-Regulated Private Sector Tobacco Economy

The Seneca Nation is a federally-recognized Indian nation with 7,800 enrolled members that exercises the treaty-protected right of self-government over its Cattaraugus, Allegany, Oil Spring, Niagara Falls, and Buffalo Creek territories in Western New York. JA-42—43 (Declaration of Robert Odawi Porter) ¶¶ 1-2; JA-264 (Testimony of Robert Odawi Porter) 17:21; JA-423 (map of Seneca territories). The Nation reserved the right to "the free use and enjoyment" of its territories under the 1794 Treaty of Canandaigua, Article 3, 7 Stat. 44, 45, and likewise possesses the right "to make [its] own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959). The Nation's tobacco economy, comprised of approximately 200 Seneca businesses spread across its five non-contiguous territories, JA-44 (Porter Decl.) ¶ 4, JA-419—423 (maps of Seneca territories and businesses), has developed based upon these rights and in good faith reliance on the actions of the New York State government regarding the scope and application of the New York cigarette tax. Because the Nation challenges the State's new tax scheme specifically as applied to the Nation and its members, the unique features of that economy are critical here.

The Nation exercises comprehensive regulatory and law enforcement jurisdiction over its tobacco economy pursuant to the Seneca Nation of Indians Import-Export Law and Import-Export Regulations (collectively, the "IEL"), JA-

347. *See* JA-44 (Porter Decl.) ¶ 6. As Robert Odawi Porter, who as the Nation's Senior Policy Advisor and Counsel was the principal architect of the IEL and who is now the Nation's President, testified, the IEL requires a Nation-licensed stamping agent to affix a unique, traceable Seneca stamp to all cigarettes entering the territories prior to distributing those cigarettes to Nation-licensed retailers. *Id.*; JA-265—266, 268 (Porter Testimony) 22:17—23:8, 27:4-24, 33:6—36:18. The IEL, which is implemented and enforced by the Nation's Import-Export Commission, prohibits Nation-licensed retailers from, *inter alia*, selling cigarettes to minors and selling cigarettes in wholesale quantities to non-Indians for purposes of off-reservation resale. JA-45 (Porter Decl.) ¶ 7. The IEL further provides, with limited exceptions, that non-Seneca stamped cigarettes found on the territories are contraband subject to seizure by the Commission and to forfeiture. *Id.*

The Nation enacted the IEL to advance three principal policy goals, and it has proven highly successful in achieving them. JA-267, 274 (Porter Testimony) 29:6—30:17, 57:25—58:19. First, the Nation has eliminated contraband cigarette trafficking on its territories through its enforcement of the IEL in cooperation with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). JA-45—47 (Porter Decl.) ¶¶ 8-12; JA-270, 272—273 (Porter Testimony) 41:22—42:25, 52:23—54:24; JA-294—295 (Testimony of Gary Sanden) 140:4—141:23.

In May 2009, the ATF, through Special Agent in Charge Ronald B. Turk, publicly commended the Nation for its efforts in this regard:

> 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.

JA-92 (Letter from Ronald B. Turk, May 12, 2009). Second, through the seventy-five cents per carton stamping fee that accompanies the affixation of Seneca stamps, the Nation has generated substantial revenues that benefit all Nation members by funding health and education programs. JA-45 (Porter Decl.) ¶ 6; JA-418 (detailing stamping fees totaling over $37 million for fiscal years 2008, 2009, and part of 2010).

Third, the IEL has advanced the Nation's private sector philosophy, pursuant to which the Nation's government eschews an expansive role as a cigarette retailer or command regulator. JA-47 (Porter Decl.) ¶ 13; JA-107—108 (Declaration of Jonathan Taylor) ¶¶ 14, 17-18; JA-265 (Porter Testimony) 21:6-16; JA-306 (Testimony of Jonathan Taylor) 185:12—186:19. "[T]he Seneca Nation has always had a very decentralized entrepreneurial economy," JA-264 (Porter Testimony) 19:9-10, and does not restrict the entry and exit or the market shares of

Nation-licensed retailers in the marketplace, JA-266 (*Id.*) 26:15—27:2. Hence, while the Nation's government is an active and responsible regulator of the tobacco economy in its Territories, it "has never sought to interfere with the basic free market character of [that] economy." JA-47 (Porter Decl.) ¶ 13. Accordingly, the private sector has flourished, and approximately 172 Nation-licensed cigarette retailers and 28 Nation-licensed wholesalers (including 15 Nation-licensed cigarette stamping agents), which together employ 3,000 people, JA-44 (*Id.*) ¶ 4, engage in commerce each day with Nation members and businesses, non-Indians, and out-of-state residents, *see, e.g.*, JA-302 (Testimony of Jason Franco) 171:3—172:17.

III. The State's New Tax Scheme

In June 2010, less than six weeks after the New York Court of Appeals' decision in *Cayuga*, the State enacted the new tax scheme, which radically restructures the cigarette tax as it applies to sales on Indian lands. Notwithstanding the well-established state tax immunity of Indian nations and their members, the new scheme provides that *all* cigarettes sold by state-licensed wholesalers to Indian nations or reservation retailers must bear a New York State tax stamp reflecting the prepayment of tax to the Department. SPA-105—106 (N.Y. Tax Law § 471(2), (5)(b)); SPA-107, 109—110 (N.Y. Tax Law § 471-e(1)(b), (3)(d), (6)); SPA-120 (20 N.Y.C.R.R. § 74.6(a)(3)). In contrast to the 1988 regulations, tax-exempt

cigarettes would thus be indistinguishable from taxable cigarettes, thereby making it impossible to verify that tax-exempt product reaches the intended recipients.

The new scheme purports to protect the right of Nation members and businesses to engage in tax-exempt commerce with one another via two alternative, but highly flawed, mechanisms. The first is the Indian tax exemption coupon system, under which the Department would distribute a quarterly quota of tax exemption coupons to a participating Indian nation based upon the Department's calculation of the probable demand for tax-exempt cigarettes by nation member consumers. SPA-104 (N.Y. Tax Law § 471(1)); SPA-107—108 (N.Y. Tax Law § 471-e(1)(b), (2)); SPA-120—122 (20 N.Y.C.R.R. § 74.6(b)). The Indian nation's government would then have to devise its own regulatory program to allocate and distribute the coupons among reservation retailers in service of the State scheme, SPA-108 (N.Y. Tax Law § 471-e(2)(a)); SPA-122 (20 N.Y.C.R.R. § 74.6(c)(2)), an obligation previously assumed by the Department under the 1988 regulations, *see supra* at 4-5. Reservation retailers would use these coupons to purchase stamped cigarettes from state-licensed wholesalers without payment of the tax, and the wholesalers in turn would submit the coupons to the Department for a refund of the taxes previously paid on those cigarettes. SPA-109—110 (N.Y. Tax Law § 471-e(3), (4)). President Porter and other Nation witnesses testified without contradiction that allocating the coupons among the

Nation's several hundred tobacco businesses would require a dramatic restructuring of the government's role in the economy, one that would expose the government to destabilizing charges of graft and favoritism. *See infra* at 44-46. The district court agreed that in the context of the Seneca Nation's economy the burdens imposed by the coupon system on the Nation's government might well be significant. SPA-29—30.

The second mechanism is the prior approval system, which controls in the absence of a nation's election to participate in the tax exemption coupon system, and which also hinges upon the probable-demand quota calculated by the Department. SPA-106 (N.Y. Tax Law § 471(5)(a)-(b)). This system would impose an absolute prohibition on the sale of any tax-exempt cigarettes by state-licensed wholesalers to an Indian nation or to reservation retailers in the absence of prior approval from the Department. SPA-106 (N.Y. Tax Law § 471(5)(b)); SPA-124 (20 N.Y.C.R.R. § 74.6(d)). To make such a sale, a wholesaler would have to employ a Department web application (to which the wholesalers would have exclusive access) that displays each nation's available quota and that immediately reduces that quota upon each electronic approval granted. SPA-124 (20 N.Y.C.R.R. § 74.6(d)(3)); SPA-143—144 (Taxpayer Guidance Division Technical Memorandum); JA-336 (Testimony of Joseph Vanderlinden) 97:14—98:5. After a wholesaler receives approval and completes the sale to a nation or reservation

retailer within 48 hours, it would then apply to the Department for a refund of the taxes previously paid on those cigarettes. SPA-106 (N.Y. Tax Law § 471(5)(b)); SPA-144—145 (Taxpayer Guidance Division Technical Memorandum); JA-320 (Testimony of John Ward Bartlett) 35:7-20. The Department's web application provides approval on a first-come, first-served basis, with no limit on the share of the quota that may be claimed by any one wholesaler, and once an Indian nation's quarterly quota is exhausted, no tax-exempt cigarettes may be sold to retailers on that nation's territories. SPA-124 (20 N.Y.C.R.R. § 74.6(d)); SPA-143—144 (Taxpayer Guidance Division Technical Memorandum); JA-336—337 (Vanderlinden Testimony) 100:20—102:5. The district court agreed that the prior approval system is plagued by "numerous problems," SPA-32—33, detailed below, that taken together would lead to the monopolization of tax-exempt cigarettes by wholesalers and their preferred retailers and the consequent erosion of Nation members' federally-protected tax immunity.

SUMMARY OF THE ARGUMENT

It is a bedrock principle of federal law that states lack jurisdiction to regulate Indian nations and their members in Indian country. And while the Supreme Court has carved out a narrow exception to this principle in holding that a state may impose *minimal* burdens on Indian *retailers* that are *reasonably tailored* to the collection of cigarette taxes from non-Indians, the Court has unequivocally

provided that states may not interfere with Indian nations' congressionally-sanctioned right of self-government or with their members' immunity from state taxation. As applied to the Seneca Nation's well-regulated, private sector tobacco economy, the State's new tax scheme violates these well-established legal standards.

After hearing two days of largely uncontroverted testimony, the district court found that the prior approval system would result in the monopolization of the Nation's tax-exempt cigarette quota by state-licensed wholesalers and their preferred retailers, the exclusion from the marketplace of Seneca businesses unable to gain access to the quota, the extraction of inflated prices (in effect, a private tax) by those attaining a monopoly over the quota, and the unavailability of tax-exempt cigarettes for purchase by Nation members. SPA-32—34. The district court further suggested that the coupon system would violate the Nation's right of self-government by requiring that the Nation fundamentally recast its role in its economy in service of the State scheme. SPA-28—30. And it determined that implementation and enforcement of the new scheme would visit irreparable harm upon the Nation and its members and that injunctive relief pending appeal would be in the public interest. SPA-41—44.

Nevertheless, the district court denied the Nation's motion for a preliminary injunction. The court reasoned that the Nation had not demonstrated a likelihood

of success on the merits because (1) the severe market distortions fostered by the prior approval system would be consummated through the conduct of third-party actors, and (2) while that system (in contrast to the coupon system) would not directly compel the Nation to regulate the allocation of tax-exempt cigarettes among Seneca businesses, the Nation could seek to address its flaws through its own governmental actions. SPA-33—35. The district court cited no legal authority in support of these arguments, and none exists. Federal law does not allow the State to impose a tax scheme that is bound to interfere with Seneca members' and businesses' right to engage in tax-exempt commerce with one another, and the notion that the State may be excused for the entirely foreseeable consequences of its scheme simply because private actors will be involved in effecting those consequences is at odds not only with fundamental tenets of federal Indian law but with federal law more generally. Nor may the State escape responsibility by foisting on the Nation's government the choice between drastic and likely futile steps to cure the flaws in the State's own system or watching its tobacco economy descend into chaos. The Seneca Nation has accordingly demonstrated a strong likelihood of success on the merits of its claims and is entitled to a preliminary injunction.

STANDARD OF REVIEW

Although the denial of a preliminary injunction is reviewed for an abuse of discretion, the district court's determination that the Nation does not have a likelihood of success on the merits was grounded in conclusions of law and is subject to *de novo* review. *American Express Fin. Advisors Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998) ("Questions of law decided in connection with requests for preliminary injunctions . . . receive the same *de novo* review that is appropriate for issues of law generally."); *see also City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 120 (2d Cir. 2010) ("'The abuse of discretion standard is used to evaluate the . . . court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de novo* standards, respectively.'") (citation omitted).

ARGUMENT

I. The Seneca Nation's Congressionally-Sanctioned Right of Self-Government and Its Members' Immunity from State Taxation Preclude the State from Imposing More than Minimal Burdens on the Nation's Tobacco Economy

A. Indian Nations and Their Members Enjoy a Fundamental Immunity from State Taxation and Regulation on Their Territories

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 Ariz., 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *see also Warren Trading Post Co. v. Ariz. 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[.]"). Indian nations accordingly enjoy the right to govern themselves free of State interference. The Supreme Court has described this right of self-government as "deeply engrained in our jurisprudence," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980), and this right operates as an "independent . . . barrier[] to the assertion of state regulatory authority over tribal reservations and members," *id.* at 142. The right of self-government includes an Indian nation's "power of regulating [its] internal and social relations," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quotation marks and citation omitted), and the power "to control economic activity within its jurisdiction," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

As a federally-recognized Indian nation with a long history of relations with the United States, the Seneca Nation fully enjoys the right of self-government. *See Bowen v. Doyle*, 880 F. Supp. 99, 112 (W.D.N.Y. 1995) (Arcara, J.) ("Under the treaty of 1794 and well-settled case law, the [Seneca] Nation holds the right to self-government."), *aff'd*, 230 F.3d 525 (2d Cir. 2000). Moreover, Congress has

expressly sanctioned the Seneca Nation's self-regulation of its tobacco economy. In the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010), Congress confirmed this sovereign authority and placed Indian nations' laws and governments on an equal footing with those of the States. *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(e)(1)(D) (requiring the United States Attorney General to include information received by state, local, and tribal governments in his list of unregistered or noncompliant delivery sellers). Similarly, 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) (Rep. Conyers).

A critical component of the right of self-government is that Indian nations and their members enjoy absolute immunity from state taxation and regulation on Indian territory. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("As a corollary of [exclusive federal] authority [over relations with Indian tribes], and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory."). As explained by the foremost commentator:

> A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.
> . . .
> Indian conduct was left exclusively [in the Constitution] to tribal governments in the absence of congressional legislation specifically limiting tribal authority or extending state authority. *Consequently, Indian activities and property in Indian country are ordinarily immune from state taxes and regulations.*

Cohen's Handbook of Federal Indian Law § 6.03[1][a], at 520-21 (2005 ed.) (emphasis added).

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." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). Indian nation businesses enjoy the corresponding "federally protected right to sell untaxed cigarettes to members of the Nation." *Cayuga*, 14 N.Y.3d at 648; *see also* SPA-16 ("The Supreme Court also has recognized that individual members possess a corresponding right to engage in tax-free commerce with one another."). In the PACT Act, Congress expressly preserved these strict limitations "on State . . . 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" and on "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." 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 and Regulation of Tobacco Transactions Involving Non-Indians

The Supreme Court has stated, however, that "[m]ore difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144. The 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 taxes on non-Indians who purchase cigarettes from Indian reservation retailers, and that it may impose on Indian retailers "minimal burden[s]" associated with the collection of the tax. *Id.* at 483. The Court emphasized that the "legal obligation to pay the tax" rested firmly on the non-Indian purchaser and that requiring the Indian retailer "simply to add the tax to the sales price," *id.* at 483, was a "simple expedient" to prevent "wholesale violations of the law" by non-Indians, *id.* at 482.

Four years later, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), 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." *Id.* at 159 (emphasis added).[1] The Court also upheld recordkeeping requirements imposed by the state on Indian retailers, including "record[ing] the number and dollar volume of taxable sales to nonmembers," and "record[ing] . . . the names of all Indian purchasers . . . and the dollar amount and dates of sales." *Id.* at 159.

In *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), the most recent of its smoke shop cases, the Court reviewed a facial challenge brought by off-reservation, non-Indian wholesalers to the Department's 1988 cigarette tax regulations. In direct contradiction of the State's efforts below to characterize the decision as dispositive of the issues presented here, the *Milhelm Attea* Court stated unequivocally that "this case does not require us to 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. Instead, the Court "confront[ed] the narrower question whether the New York scheme is inconsistent with the Indian Trader Statutes," *id.* at 69-70, and held that those statutes "do not bar the States from imposing reasonable regulatory burdens upon Indian traders [i.e. the non-Indian wholesalers doing business with Indian retailers]

[1] The Court subsequently restated this holding in *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 513 (1991), and in *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985).

. . . to assist enforcement of valid state taxes," *id.* at 74. The Court reiterated the general rule that "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians," *id*. at 73, but did not review the regulations' allocation provisions or their impact on Indian nations and their members, explaining that "problems involving the allocation of cigarettes among reservation retailers would not necessarily threaten any harm to [the plaintiff] wholesalers, whose main interest lies in selling the maximum number of cigarettes, however ultimately allocated," *id.* at 77-78. The instant case accordingly presents new issues not previously adjudicated by the Court.

C. The Nation's Challenge to the State's New Tax Scheme is a Narrow As-Applied Challenge that is Ripe for Adjudication

The State has sought in this litigation to cast the Nation's challenge to the new tax scheme as one that it emphatically is not—a sweeping challenge to the general rule of the smoke shop cases that the States possess authority to tax cigarette sales to non-Indians in Indian country.[2] However, as the district court

[2] To be clear, in light of the specific treaty promises made by the United States to the Nation and the unique sovereign authority of the Nation acknowledged therein, the Nation firmly believes that the Court's smoke shop cases do not apply to it. The Nation, indeed, has never been party to any litigation concluding that New York State possesses the right to tax transactions taking place within its territories. It is not necessary in this action, however, for the Nation to frame a treaty-based challenge to New York's purported right to do so because the State's new tax scheme, as applied to the Nation, so far exceeds the constraints recognized by the Supreme Court on the general taxing authority of states in Indian country.

recognized, "the Nations are not challenging [in this case] the *authority* of New York [to] require them to collect cigarette taxes on sales to nonmembers. What they challenge, rather, is the *manner* in which those taxes are to be collected." SPA-19.[3] The Nation's action is an as-applied challenge predicated on substantial witness testimony and documentary evidence demonstrating that *as it pertains to* the Seneca Nation and its well-regulated, private sector tobacco economy, the new scheme unlawfully interferes with the right of Nation members and businesses to engage in tax-exempt commerce and with the Nation's right of self-government.[4] The Nation's challenge is not facial, and the district court's discussion of the facial

[3] As was undisputed before the district court, the State's new tax scheme and the Nation's claims implicate only non-Native manufactured cigarettes produced outside of Indian country and distributed by state-licensed agents. They do not concern cigarettes manufactured by members of the Seneca and other Iroquois Nations on their territories, which represent "value generated on the reservation by activities involving" the Iroquois nations and their members, *Colville*, 447 U.S. at 156-57, and which New York may not tax or otherwise regulate regardless of the Indian status of the purchaser, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994); Neb. Atty. Gen. Op. 98005 (Jan. 22, 1998).

[4] While the State would blur them together, the legal claims raised by each Indian nation challenging the State's tax scheme differ, just as the facts giving rise to those claims differ because of important variations in each nation's tobacco economy.

validity of the new scheme, SPA-20—22, hence has no applicability to the Nation's claims.[5]

Further, the Nation's claims are ripe for adjudication. As Joseph Vanderlinden, a senior official in the Department, has confirmed, "a ruling of [the district court] permitting, the department intends to enforce the prior approval system with respect to cigarette sales into the [Seneca] nation's territories and . . . immediate compliance will be expected." JA-337—338 (Vanderlinden Testimony) 104:24—105:3. Because "[t]he regulations are clear-cut . . . [and] immediate compliance with their terms [is] expected," the Nation's challenge is therefore ripe. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). It is immaterial in this regard that the Nation's challenge is pre-enforcement in nature. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate *a realistic danger* of sustaining a direct injury as a result of the statute's operation or enforcement. *But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'*") (citations

[5] The distinction is critical: "A 'facial challenge' to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual. An 'as-applied challenge,' on the other hand, requires an analysis of the facts of a particular case to determine whether the application of a statute, even one [valid] on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (citation omitted).

omitted; emphases added); *see also Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 227 (2d Cir. 2006). As discussed in detail below, the district court found on an uncontroverted factual record that there is "a very realistic possibility," SPA-33, that the Nation and its members will suffer irreparable harm upon the implementation of the State's new tax scheme, and as *Babbitt* makes clear, the Nation does not have to wait until that harm is consummated in order to challenge the scheme.

II. The Nation Has Demonstrated a Likelihood of Success on the Merits of Its Claims, and the District Court Committed Critical Errors of Law in Concluding Otherwise

A. The District Court Correctly Found that the Prior Approval System Will Interfere with the Ability of Seneca Members and Businesses to Engage in Tax-Exempt Commerce with One Another

Although the district court expressed serious doubts about the Indian tax exemption coupon system as applied to the Seneca Nation, SPA-28—30, the court concluded that the Nation had not established a likelihood of success because the alternative prior approval system, while significantly flawed, was valid. Accordingly, the Nation will address that system first.

Under the prior approval system the State would establish a website posting the Nation's tax-exempt cigarette quota each quarter. *See supra* at 12. State-licensed wholesalers could draw down on that quota on a first-come, first-served basis until it is exhausted, the only limit on their actions being a requirement that

they resell any claimed cigarettes to reservation sellers within 48 hours. *See supra* at 12-13. The district court agreed that this system is plagued by "numerous problems," SPA-32—33, which, as explained below, the State's own witnesses openly conceded.

In particular, the district court found there to exist a "very realistic possibility," SPA-33, that: (1) state-licensed wholesalers will monopolize the Nation's quota and will direct that tax-exempt product only to their favored retailers; (2) the monopolists will then charge a higher price for the product, in effect extracting a private tax and depriving Nation members of the full economic value of their federally protected tax immunity; and (3) a significant number of the Nation-licensed businesses (which, as noted above, presently number 172 retailers, 28 wholesalers, and 15 stamping agents spread across the Nation's five Territories) will be shut out of the tax-exempt trade with Nation members. As the district court explained:

> As applied to the Seneca Nation, . . . [p]erhaps most obvious is that the system creates [an] incentive for a single wholesaler to acquire as much of the quota [of tax-exempt cigarettes] as possible so that s/he can then resell the tax-exempt cigarettes to reservation retailers at a premium. In fact, the Seneca Nation has cited to an affidavit of a state-licensed wholesaler who affirmatively states that if the prior approval system is implemented, he intends to acquire "the entire tax-exempt allocation" for the Seneca Nation and that he also intends to sell that entire quota only to his existing customers. Day further states that "given the high demand" for tax-exempt cigarettes, "tribal members can expect to pay higher prices" for those cigarettes.

> The State's own witness, John Bartlett, admitted that there is nothing in the tax law amendments that would prohibit a single wholesaler from acquiring a Nation's entire probable demand quota. Nor is there anything in the regulations that would prohibit that wholesaler from selling that entire quota to only one cigarette retailer-at a premium. Thus, there is a very realistic possibility that the scenario presaged by Day will occur.
>
> In addition to the Day affidavit, an economist who testified on behalf of the Seneca Nation, Jonathon Taylor, opined that under the prior approval system, there will be a disruption in cigarette supplies because some of the Nation's retailers will be unable to acquire *any* of the tax-exempt cigarettes, putting them at a competitive disadvantage to retailers who are fortunate enough to acquire a portion of the tax-exempt quota. Taylor testified that the prior approval system encourages a "first come, first serve, all you can eat" system of competition.

SPA-32—33 (citations to record omitted); *see also* SPA-34 ("[T]here may be occasions when a 'premium' charged by a monopolistic retailer eviscerates any tax savings to the individual member.").

The district court's findings enjoy full support in the record and are not subject to serious challenge. Nation witnesses testified, without contradiction, that the State system can "reasonably be expected," JA-111 (Taylor Decl.) ¶ 31, to plunge the Nation's tobacco economy into chaos by fostering the monopolization of tax-exempt cigarettes, the charging of inflated prices, and the corresponding exclusion from the marketplace of Seneca retailers unable to gain access to that product. JA-111—112 (Taylor Decl.) ¶ 31c-h; JA-48 (Porter Decl.) ¶ 16; JA-310, 312—314 (Taylor Testimony) 202:12-22, 4:7—6:2, 8:2—9:10; JA-279 (Porter Testimony) 78:14-25; JA-303 (Franco Testimony) 173:6—174:17.

Moreover, State officials conceded the existence of these severe flaws in the system. Thus, John Ward Bartlett, who has long served as the Director of Regulations for the Department, agreed that "[o]ne state-licensed wholesaler could obtain the entire quarterly quota for the Seneca Nation under the . . . [new] scheme" and could subsequently sell the entire quota "to just one reservation cigarette seller." JA-323 (Bartlett Testimony) 47:17—48:1. Joseph Vanderlinden, who served for nine years as head of the Department's Cigarette Tax Unit, likewise agreed that "under the prior approval system a single state-licensed wholesaler can claim the entire probable demand quota for the Seneca Nation for that particular quarter," that "[t]here's nothing to prevent that wholesaler from selling the quota cigarettes only to one or two retailers on one of the nation's territories to the exclusion of the other territories," and that "there's nothing to prevent them from raising th[e] price to reflect the fact that they have the quota." JA-338 (Vanderlinden Testimony) 105:15—106:16.

Indeed, as the district court found, corporate actors have expressed their clear intent to engage in precisely these activities under the prior approval system. *See* JA-640 (Affidavit of Peter Day) ¶¶ 33, 35 (affirming that State-licensed stamping agent Day Wholesale will seek to acquire the Nation's "entire tax-exempt allocation," that it will sell the quota only to its existing customers, and that "tribal members can expect to pay higher prices" due to the demand for those cigarettes);

JA-588 (Day Wholesale Reply Memorandum, Sept. 8, 2010) ("Day Wholesale and Maybee [a Seneca-licensed business] raise the issue of hoarding for one simple reason – they will, like other agents and reservation cigarette sellers, attempt to acquire all of the limited quantity of tax-exempt cigarettes . . . .").

B. As Applied to the Seneca Tobacco Economy, the Prior Approval System Unlawfully Interferes with the Rights of Seneca Members and Businesses

Given the district court's findings and the uncontroverted factual record, the court erred only in failing to draw the legal conclusion that inexorably follows from them—that the prior approval system may not legally be applied to the Nation and its members. The Supreme Court, as discussed above, has very clearly circumscribed the burdens that a State may place on an Indian nation's tobacco economy in seeking to collect taxes from non-Indians. As the Court put it in *Milhelm Attea*, "New York lacks authority to tax cigarettes sold to tribal members for their own consumption," 512 U.S. at 64, but "may impose on reservation retailers *minimal burdens reasonably tailored to the collection of valid taxes from non-Indians*," *id.* at 73 (emphasis added). The New York Court of Appeals has likewise explained that any State tax scheme must "respect[] the federally protected right to sell untaxed cigarettes to members of the Nation." *Cayuga*, 14 N.Y.3d at 648.

As applied to the Seneca tobacco economy, the widespread flaws in the prior approval system in no way satisfy these descriptions. The scheme goes far beyond the "simple expedient" the Court approved in *Moe* of "requir[ing] the Indian proprietor simply to add the tax to the sales price," 425 U.S. at 482-83, or the recordkeeping requirements that the Court approved in *Colville*, 447 U.S. at 159-60. Instead, the system would deprive Nation members and businesses of the ability to engage in tax-exempt commerce with one another by allowing non-Indian actors to monopolize the tax-exempt trade and to exact their own private tax in derogation of the members' and businesses' fundamental tax immunity. This is far more than a minimal burden reasonably tailored to the collection of valid taxes, and the Supreme Court has never approved of such a scheme.

In *Milhelm Attea*, the Court anticipated the potential for "significant problems" with respect to "allocating each reservation's overall quota among its retail outlets" under the Department's 1988 regulations. 512 U.S. at 77. Now, by abandoning any pretense of ensuring access to tax-exempt cigarettes for approximately 200 Nation-licensed businesses and thousands of Nation members, the State has exacerbated, exponentially, the "significant problems" of which the Supreme Court warned. The State's new tax scheme does not assure "retailers who are already engaged in the business of selling cigarettes," let alone "new reservation retailers," access to any portion of the tax-free cigarette quota. *Id*.

Seneca retailers unable to gain access to tax-exempt cigarettes to sell to their member customers, particularly small businesses without capital to make large-scale purchases of the quota, would be squeezed out of the marketplace to their substantial economic detriment as those customers, no matter how loyal, will be forced to go elsewhere in search of tax-exempt cigarettes. JA-309 (Taylor Testimony) 199:22—200:14; JA-302—303 (Franco Testimony) 170:13-25, 173:6—174:21. This market contraction would not only injure many Nation-licensed businesses, but would run contrary to the strong federal interest in Indian economic self-sufficiency, *see Mescalero Apache Tribe*, 462 U.S. 334-36; *Bracker*, 448 U.S. at 143 & n.10, and to the strong Seneca interest in private sector business development, *see supra* at 9-10. Accordingly, the scheme would "stultify tribal economies" in the very manner the Supreme Court has warned would be impermissible. *Milhelm Attea*, 512 U.S. at 77. [6]

[6] These market distortions would be exacerbated by the new scheme's failure to address the vast tax-exempt interstate market served by Seneca retailers. *See* JA-324—325 (Bartlett Testimony) 51:16—54:8. "Evidence presented at the hearing suggested that as many as half of the 10 million cartons of cigarettes purchased from Seneca Nation retailers last year were purchased by non-Indians located outside of New York State," SPA-26, and "New York lacks authority to collect excise taxes for out-of-state sales." SPA-25. By employing a "precollection regime [that] . . . require[s] prepayment of . . . tax to which New York is not entitled" and that "does not "leave ample room for legitimately tax-exempt sales," *Milhelm Attea*, 512 U.S. at 76, the new scheme thus fails to accommodate a significant portion of the Seneca tobacco economy.

As a result of this interference, Nation members' ability to exercise their federally-protected right to purchase tax-free cigarettes would be substantially burdened if not denied altogether. Members purchasing so-called tax-exempt cigarettes would be subject to inflated prices demanded by state-licensed wholesalers and reservation retailers who succeed in obtaining a stranglehold over this "scarce commodity." SPA-34. Nation members would thus be deprived of the full economic value of their immunity from State taxation and would also be required to travel significant distances to purchase those cigarettes. JA-111—112 (Taylor Decl.) ¶ 31c, e; JA-309, 312—313 (Taylor Testimony) 199:22—200:9, 4:16—5:2; JA-227 (Porter Testimony) 71:13—72:10. Although the district court downplayed the concern that "members wanting to purchase tax-free cigarettes would have to seek out the cigarette retailer with the tax-exempt quantity, which may require the member to travel up to 30 miles to do so," SPA-34, it cited no authority for the proposition that a State may require individual Indians to "seek out," at significant time and expense, the tax exemption to which they are entitled under federal law with respect to *any* transaction that they enter on their Nation's territories.[7]

[7] It is approximately 29.5 miles between the Nation's two residential Territories, and within those Territories the east-west spreads are 23.3 and 13.7 miles, respectively, which are far from trivial distances. JA-422 (map showing proximity of Cattaraugus and Allegany territories); JA-265—266 (Porter Testimony) 23:9—25:19. The record reflects that some Nation member consumers currently purchase

The State may not engage in this profound interference with the commercial relationships between Seneca businesses and members. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144 (citing *Moe*, 425 U.S. at 480-81 and *McClanahan*, 411 U.S. at 175). 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 membership status of any Indian unknown to the retailer. *See Colville*, 447 U.S. at 159. The Supreme Court has never upheld a state scheme that failed to protect the right of *all* individual Indians and reservation retailers to engage in tax-exempt commerce with one another. The State's new tax scheme, by contrast, impermissibly "burden[s] commerce that would exist on the reservations without respect to the tax exemption," *Colville*, 447 U.S. at 157, and thus is not reasonably tailored and cannot be sustained.

The district court did not disagree with any of this. However, it absolved the State of responsibility for the severe legal defects in the prior approval system on the basis that the impact on the Nation and its members from the system would not

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cigarettes from smoke shops within walking distance of their homes. JA-302 (Franco Testimony) 172:6-25.

derive solely from the State's actions in setting up that system but from private actors taking advantage of the system's flaws:

> [T]here may be occasions when a "premium" charged by a monopolistic retailer eviscerates any tax savings to the individual member. *However, it would not be by virtue of conduct by the State*. Instead, it would simply be the natural consequence of putting a scarce commodity out on a highly competitive free market. Those charging the "premium" for the scarce commodity would be private individuals looking to capitalize on the scarcity - not the State itself. The only thing the State is doing is limiting the quantity of tax-free cigarettes that are currently available for sale by reservation retailers.

SPA-34 (emphasis added). This causation analysis, which the court supported with no legal authority, runs directly counter to time-honored principles of federal constitutional and federal Indian law.

Pursuant to those principles, a State may not establish a regulatory system pursuant to which private actors are likely to act in ways infringing on federally-protected rights and yet escape responsibility for that system. For example, in the venerable case of *NAACP v. Alabama*, 357 U.S. 449 (1958), the NAACP challenged a state production order compelling the disclosure of its membership lists as violating its right to freedom of association. The Court found that "[t]he fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely [] does not end inquiry into the effect of the production order" where the NAACP had demonstrated that the order would facilitate such actions by private individuals. *Id*. at 461-63. The Court explained:

> It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. *The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold*.

Id. at 463 (emphasis added). So too is the interplay between governmental and private action the crucial factor here. It is only by virtue of the State's actions in establishing the severely-flawed prior approval system that corporate actors will be able to violate the right of Seneca members and businesses to engage in tax-exempt commerce with one another, and the district court committed legal error in absolving the State of all responsibility for a system that the court itself found "creates [the] incentive," SPA-32, for this conduct.

Similarly, in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), the Court held that a statute compelling the disclosure of the Socialist Workers Party's contributors and recipients violated the First Amendment where there was "*a reasonable probability* that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals" by private parties. *Id*. at 100 (emphasis added). Here, the district court indeed found there to be "a very realistic possibility," SPA-33, that the actions of private parties under the prior approval system would eviscerate the right of Seneca

members and businesses to engage in tax-exempt commerce, and the State is accordingly responsible for those actions.

The Supreme Court has also rejected the district court's causation analysis in the voting rights context. In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court held that the State of Texas could not dilute Fifteenth Amendment rights by "casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." *Id.* at 664; *see also Terry v. Adams*, 345 U.S. 461, 469 (1953) (recognizing a Fifteenth Amendment violation where state law permitted a private political organization to deny African-Americans the right to vote in a pre-primary election because this mechanism "produce[d] an equivalent" of a racially-discriminatory state election). As in *Allwright* and *Terry*, under the prior approval system the State "prescribes [a] . . . process that gives a special role to" third-parties, namely wholesalers and reservation retailers that possess control over the Nation's tax-exempt cigarette quota, and in doing so, "endorses, adopts and enforces" the interference with the tax immunity of Nation members "that the parties . . . bring into the process." *California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000) (quotation marks and citation omitted). The district court thus erred by failing to hold the State accountable for this interference.

In the specific context of federal Indian law, the Supreme Court has likewise held that States may not sanction third-party action that interferes with the rights of Indian nations and their members. Hence, in the seminal treaty fishing rights litigation, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the federal courts rejected the State of Washington's position that it possessed no obligation to regulate private, non-Indian fishermen so that they would not interfere with the tribes' access to their treaty-protected allocation of fish. In a series of post-trial orders, the district court explained that the state agencies must "manage the allocated nontreaty share in such manner as to . . . not interfere with the treaty fishermen's opportunity to catch their allocated share of the harvestable resource," *United States v. Washington*, 459 F. Supp. 1020, 1105 (W.D. Wash. 1978); *see also id.* at 1033, 1047, 1106, 1114, 1127 (same), and granted the tribes injunctive relief because "the State of Washington remains unwilling or unable to control the nontreaty fishermen so as to be in compliance with the orders of this court by providing treaty Indians with the opportunity to catch their share of the returning salmon," *id.* at 1116.

In reviewing these orders, the Supreme Court rejected the very same reasoning adopted by the district court here—that a State acts lawfully when it provides an Indian nation and its members nothing more than the *opportunity* to

compete for access to goods that as a matter of federal law (be it treaty or common law) they have the *right* to access:

> The State characterizes its interpretation of the treaty language as assuring Indians and non-Indians an "equal opportunity" to take fish from the State's waters. . . . [I]n light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' "equal opportunity" to take advantage of a scarce resource is likely in practice to mean that the Indians' "right of taking fish" will net them virtually no catch at all.

Fishing Vessel Ass'n, 443 U.S. at 676 n.22. If, as the district court concluded here, the State's only obligation is to ensure that a quota of tax-exempt cigarettes enters the marketplace, then Seneca businesses' and members' "opportunity" to acquire that "scarce resource is likely in practice to mean" that their tax immunity "will net them virtually no [tax-exempt goods] at all," as a result of upstream parties that seek to capture the economic value of that immunity. *Id.* This result cannot stand, and the district court erred in concluding that the State is not legally responsible for establishing a scheme that denies Seneca Indians access to the tax-exempt goods to which they are entitled.

The district court's conclusion contravenes additional, well-established principles of federal Indian law providing that the courts must consider indirect burdens imposed on Indian nations and their members, including economic burdens, when reviewing the validity of state taxes imposed on non-Indians in

Indian country.[8] In *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M*, 458 U.S. 832 (1982), for example, the Supreme Court explained that in *Bracker*, 448 U.S. at 151, "we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company," *Ramah*, 458 U.S. at 844 n.8. The Court proceeded to invalidate a tax whose "ultimate burden f[ell] on the tribal organization," *id.* at 844, notwithstanding that the burden was "imposed indirectly," *id.* at 844 n.8. Similarly, in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988), the Ninth Circuit rejected the State of Montana's argument that its coal tax did not unlawfully "burden Crow's economic interests because the Tribe itself does not pay the tax" but "the taxes were imposed on the [non-Indian] lessee." 819 F.2d at 899.

In *Crow Tribe*, the Ninth Circuit discussed the burdens fostered by the Montana tax scheme, including the increased price of coal, the loss of market share by Crow coal producers, and the resulting economic injury to the Crow Tribe. *Id.* at 899-900. These are very similar to the burdens—the increased cost and

[8] The courts consider these burdens in the course of conducting "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. In the context of State taxation of non-Indians purchasing cigarettes in Indian country, the Supreme Court has distilled this "particularized inquiry" to the "minimal burdens" test set forth in *Milhelm Attea*. *See* 512 U.S. at 73.

decreased availability of tax-exempt cigarettes, the loss of market share by Seneca businesses, and the resulting economic injury to those businesses and to Seneca members—that the district court found will result from the State's new scheme. The economic burdens to which the Nation objects here thus bear no resemblance to those addressed by the Supreme Court in *Colville*, where the tribes argued that their loss of revenues from the inability to market a cigarette tax exemption to *non-Indians* was an unreasonable economic burden. 447 U.S. at 154-57. Here, the substantial burdens of the prior approval system fall upon commerce between Seneca members and businesses *that the State concedes is tax-exempt*. *Cf. Crow Tribe*, 819 F.2d at 899 (distinguishing the economic burdens at issue in *Colville* from burdens that fall on activities in which an Indian nation has a strong interest).

Moreover, in sharp contrast to the district court's assertions, nowhere in its smoke shop cases has the Supreme Court ever held that a "State has the right" to make goods destined for purchase by Indian nation members "a scarce commodity" such that "private individuals looking to capitalize on the scarcity" may monopolize those goods and charge a premium far above the prevailing market price that effectively eviscerates members' tax immunity. SPA-34. To the contrary, "[t]he Indian Trader Statutes [25 U.S.C. §§ 261-264] were enacted to protect the Indians from unethical traders' exploitation of an essentially captive consumer market." *Ashcroft v. United States Dep't of Interior*, 679 F.2d 196, 198

(9th Cir. 1982). Accordingly, in *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965), the Court struck down a state tax on non-Indians because it "would put financial burdens on . . . the Indians . . . in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to *protect Indians against prices deemed unfair or unreasonable* . . . ." *Id.* at 691 (emphasis added).

The only right that the State may fairly claim based on the smoke shop cases is the right to collect cigarette taxes from non-Indians and to impose on Indian retailers minimal burdens reasonably tailored to the collection of that tax. To the extent the State may possess the right to limit the quantity of tax-exempt cigarettes available for purchase on the Nation's territories, it must do so in a manner that respects the right of all Nation members and businesses to engage in tax-exempt commerce with one another, as explained by the Court in *Milhelm Attea*. The State's new tax scheme, however, *converts the federally-protected tax immunity of Seneca Indians into a commodity itself*, the value of which may be captured by third-parties, by placing that immunity on the open market instead of upholding that immunity at the point of retail sale.

In sum, the Supreme Court has repeatedly held, both in the Indian law context and more generally, that States bear legal responsibility for their regulatory programs that will likely result in private parties interfering with federally-

protected rights. The district court accordingly erred as a matter of law in applying a causation analysis that stripped the substantial burdens imposed by the State's new tax scheme on Seneca members and businesses of all legal significance. Had the district court applied the proper legal standard, its own findings of fact would have compelled the conclusion that the Nation has a substantial likelihood of success on the merits of its claims.

The district court also suggested, with little elaboration, that the Nation could take its own governmental actions in an effort to cure the flaws in the State's system. "It also must be remembered that if the Seneca Nation wishes to ensure that this monopoly does not occur, it has the right, but not the obligation, to act to ensure that one retailer does not acquire all of the tax-exempt cigarettes." SPA-35; *see also* SPA-33 ("the Nation may find it *prudent* to act under the prior approval system in order to protect the rights of its members and ensure that every member can acquire some portion of the quota"). As explained below, the district court's suggestion, if accepted, would impermissibly infringe on the Nation's right of self-government. But the important point here is that the court nowhere explained how its suggestion would lessen the burdens of the State scheme on the Nation and its members. While the court speculated that the Nation might undertake "to create a tax-exempt cigarette allocation scheme," SPA-45, it did not address how the Nation would go about seeking to control the monopolistic actions and pricing

decisions of non-Indian, state-licensed wholesalers operating outside the boundaries of the Nation's territories, especially where those wholesalers would undoubtedly raise their compliance with the new state law in defense of their actions. As the Nation's expert economist testified without contradiction, "the Seneca Nation government is at a very significant disadvantage [under the prior approval system] in being able to prevent these harms," and "is really in a position of only dealing with the consequences." JA-315 (Taylor Testimony) 14:21—15:4. Enforcement actions against the State wholesalers and their cooperating retailers can hardly be described as a minimal burden (let alone as an effective option) in the context of the prior approval system, and the district court's offhand suggestion cannot save that system from invalidity.

C. Both the Prior Approval and Coupon Systems Would Violate the Nation's Right of Self-Government By Compelling Governmental Action in Service of the State Scheme

The State argued extensively below that any deficiencies in the prior approval system are of no moment because the Nation can opt into the coupon system and thereby take on the task of allocating tax-exempt cigarettes itself. Under that system, the State would distribute exemption coupons to the Nation, which the Nation would then distribute to Seneca retailers—those retailers would in turn redeem the coupons with the state-licensed wholesalers, who would supply tax-exempt cigarettes to the retailers. *See supra* at 11. The district court explained

that the system "do[es] not provide for allocation of the coupons among reservation cigarette sellers or tribal members . . . , leaving the tribe with the obligation to determine how those coupons should be redeemed, allocated and distributed," SPA-11, and further found that "[i]n order for the coupon system to work, the Nation must distribute the coupons" and that "[i]f the Nation were to refuse to distribute the coupons, it would be interfering with the corresponding right of its members to purchase tax-exempt cigarettes from reservation retailers," SPA-29.

While it did not reach a definitive conclusion as to the coupon system because it found the prior approval system to be a permissible alternative, the district court squarely rejected the State's argument "that the coupon system imposes no burden at all on the right of tribal self-government," *id.*, and correctly recognized that the "[t]he task of allocating coupons among the Nation's retailers may be somewhat more onerous than the 'minimal burden' approved of by the Supreme Court," SPA-30. The district court erred as a matter of law in not arriving at the same view with respect to the prior approval system's interference with the Nation's right of self-government.

In order to implement the coupon system in the context of its vigorous private-sector economy, the Seneca government would have to enmesh itself in allocating a valuable economic resource—exemption coupons—among the several

hundred Seneca stamping agents, wholesalers, and retailers. As the district court recognized, this would require the Seneca government to radically revise its role in the Seneca economy. SPA-30 ("Requiring the Nation to distribute the coupons may require it to become involved in matters that it claims to have consciously avoided delving into, namely, decisions concerning which of the Nation's 172 tobacco retailers should be given coupons and, if so, how many coupons to give that retailer."). As President Porter testified, "the foundation of the Nation's tobacco economy is entrepreneurial activity and the Nation's government has never been involved in directing the supply and demand of products to individuals." JA-277 (Porter Testimony) 70:18-21. Hence, while "the Nation's government plays an active role in regulating the Nation's tobacco economy," JA-47 (Porter Decl.) ¶ 13, it "has never sought to interfere with the basic free market character of [that] economy," *id*. The coupon system, by contrast, would require the Nation's government to transform its role from that of a responsible regulator to that of the central player in a command and control economy, and thus would require "the Nation's government to interfere in the workings of the Seneca tobacco economy to an extent that it never has before, and in a manner that would be directly contrary to the way in which the Seneca people have chosen to govern themselves and their economic dealings." JA-47—48 (Porter Decl.) ¶ 14; *see also*

JA-313 (Taylor Testimony) 5:10—6:19 (discussing how the State's new tax scheme would undermine Seneca public policies).

The Nation's objection to this transformation in its role is not simply theoretical. As President Porter stated, "[n]either the Nation's Import-Export Commission nor any other arm of the Nation's government is equipped or willing to engage in this process of quota allocation." JA-48 (Porter Decl.) ¶ 15; *see also* JA-275 (Porter Testimony) 61:14-17 ("I'm not familiar with how those coupons would have been distributed within the Nation. We have no mechanism under our laws for such a scheme to operate."). By requiring the Nation's government to "make decisions that would inevitably favor certain agents and retailers over others," JA-48 (Porter Decl.) ¶ 15, the coupon system would open the government up to significant and destabilizing charges of favoritism, incompetence, and graft. "The Seneca government is not willing to undertake this radical transformation in its role in the Seneca economy," JA-48—49 (*Id.*) ¶ 16, and thereby "to jeopardize its standing among the Seneca people . . . all in the service of New York State," JA-48 (*Id.*) ¶ 15.

Moreover, the Nation's expert economist testified without contradiction (the State presented no economist at the hearing) that there exists no readily apparent way in which the Nation could implement the coupon system. JA-315—316 (Taylor Testimony) 14:18—17:19 (explaining the significant problems that the

Nation would face in seeking to address the deficiencies in the State scheme and in administering the Indian tax exemption coupon system by any of the three primary available mechanisms—market-share based allocation, an auction, or a trading system—and concluding that it is "absolutely not possible" to "graft some sort of system on the Import Export Law" to allocate tax-exempt cigarettes "because that law is set up to do something completely different"); *see also* JA-111 (Taylor Decl.) ¶ 30c ("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.").

No court has ever held that a State may impose a tax scheme requiring an Indian nation, either as a matter of direct requirement (as in the coupon system) or as a matter of necessity (in order to respond, however futilely, to the flaws in the prior approval system), to so radically alter the role it has chosen to play in its economy. Indeed, the Supreme Court has *never* upheld significant burdens imposed on Indian nations in their *sovereign governmental capacity* with respect to the collection of cigarette taxes from non-Indians. Rather, the "minimal burdens" upheld by the Supreme Court in the smoke shop cases have been burdens imposed on individual wholesalers or retailers or on Indian nations *acting in a proprietary capacity as market participants*. *See Milhelm Attea*, 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*.") (emphases added); *id.* at 74 ("tribal sovereignty does not completely preclude States from enlisting tribal *retailers* to assist enforcement of valid state taxes") (emphasis added); *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 as distributors to tribal member retailers); *Moe*, 425 U.S. at 467-68 (tribal member retailers).

The Indian tax exemption coupon system would directly commandeer the Seneca Nation to exercise its sovereign governmental authority in the service of the State by "compelling [the Nation] to make coupon-allocation decisions." SPA-30. But 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.") (internal quotation marks omitted), the Nation's federally protected right of self-government prohibits the State from commandeering the

government of the Seneca Nation to administer a state regulatory program. The coupon system "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. Far from being reasonably tailored to the State's purported interest in collecting tax from non-Indians, it "would effectively nullify the [Nation's] authority" over Seneca tobacco commerce and would allow New York "wholly to supplant [the Nation's] regulations" and "to dictate the terms" of transactions among Seneca businesses and members that the State concedes are not subject to tax. *Id*.

If the coupon system were permissible, which it is not, a state's interest in collecting taxes from non-Indians would *always* trump the federally-protected rights of Indian nations and their members. That is, if under the guise of collecting tax from non-Indians a state may compel an Indian nation to regulate lawful Indian-to-Indian commerce under a regime other than the one the nation has chosen for itself, then the State's "power to tax" is truly "the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). Bedrock principles of federal Indian law simply do not allow for such a result. *Mescalero Apache Tribe*, 462 U.S. at 338 (an Indian nation's right to self-government "would have a rather hollow ring" if it could "exercise its authority over the reservation only at the sufferance of the State"); *Colville*, 447 U.S. at 154 ("[T]ribal sovereignty is

dependent on, and subordinate to, only the Federal Government, not the States."); *Williams*, 358 U.S. at 223 ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.")[9]

The prior approval system likewise unlawfully interferes with the Nation's right of self-government, and the district court committed legal error in concluding otherwise. (Of course, regardless of whether the prior approval system violates the Nation's right of self-government, that system is still invalid because of the significant burdens it places, as discussed in detail above, on the rights of Seneca members and businesses to engage in tax-exempt commerce with one another.) It was utterly unrealistic for the district court to suggest that "[w]hile the Nation may find it *prudent* to act under the prior approval system in order to protect the rights of its members . . . the Nation is not actually *compelled* to do so." SPA-33. No responsible government could sit idly by and watch a significant component of its economy descend into chaos accompanied by the evisceration of its citizens' legal rights, without making efforts, however futile, to stem the disruption. Contrary to the district court's assertion, in other words, that "the Nation can simply refrain

[9] No federal statute sanctions this interference with the Nation's exercise of self-government over its tobacco economy. To the contrary, "this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes," *Mescalero Apache Tribe*, 462 U.S. at 337-38, specifically the PACT Act and the CCTA, *see supra* at 18, pursuant to which the ATF has developed a cooperative law enforcement relationship with the Seneca Nation, *see supra* at 8-9.

from acting [under the prior approval system] and let principles of the existing Seneca free market economy govern the supply and distribution of the tax-free cigarettes," *id.*, the Nation cannot do so because, as the court's own findings confirm, the prior approval system will severely distort the operation of the Seneca market and will deny Seneca members and businesses the ability to engage in tax-exempt commerce with one another as is their right under federal law.

There exists no legal authority for the court's conclusion that a state may permissibly put an Indian nation to the choice of compromising its right of self-government or of refraining from taking governmental action and thereby abdicating other federally-protected rights. The Supreme Court held unequivocally to the contrary in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986). There, "North Dakota condition[ed] the Tribe's access to the [state's] courts on its waiver of its tribal sovereign immunity and agreement to the application of state civil law in all state court civil actions to which it is or may be a party." *Id.* at 889. The Supreme Court discussed the strong federal interest in Indians' access to the courts and held that the North Dakota scheme was "unduly burdensome," *id.* at 888, and "unduly intrusive . . . on [the plaintiff tribe's] ability to govern itself according to its own laws," *id.* at 891, because it would require the tribe to abandon its governmental immunity in order to maintain that access to the courts. The Court explained:

> The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts. . . . This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance. . . . [I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Id. at 889-91 (citing, *inter alia*, *Mescalero Apache Tribe*, 462 U.S. at 334-35 and *Fisher v. Dist. Court of the Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 388-89 (1976)).

The diminution in the Nation's right of self-government that the prior approval system would demand is equally impermissible. Just as the *Wold Eng'g* Court firmly rejected the argument that "the Tribe is not truly deprived of access to the courts by the North Dakota jurisdictional scheme because the Tribe could have unrestricted access to the State's courts by 'merely' consenting to the statutory conditions," 476 U.S. at 889, so too should the district court have rejected the argument that the prior approval system does not impermissibly require governmental action on the part of the Nation because the Nation always has the choice of allowing its tobacco economy to descend into chaos. The State may not put the Nation to the Hobson's choice of choosing between its own right of self-government and the protection of its members' immunity from State taxation, that is, to condition the full enjoyment of one federally-protected right on the surrender of another.

The Nation thus has a clear likelihood of success on the merits of its claim that the State's new tax scheme impermissibly burdens its right of self-government, just as it has a clear likelihood of success on its claim that the scheme impermissibly burdens the rights of its members and businesses to engage in tax-exempt commerce with one another.

III. The Nation and Its Members Will Suffer Irreparable Harm in the Absence of Preliminary Injunctive Relief and Such Relief Will Not Irreparably Harm the State

The district court had "little difficulty finding," SPA-41, that the Nation and its members would suffer immediate and irreparable harm to their core governmental and economic interests in the absence of injunctive relief.[10] As discussed above, the State's new tax scheme would require the Nation's government to act in a manner contrary to its own laws and policies in a likely futile attempt to protect its members' right under federal law to engage in tax-exempt commerce, and hence would infringe on the Nation's exercise of self-government. As the district court explained, "[w]here, as here, enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty, . . . the irreparable harm requirement [is] satisfied." SPA-41 (citing *Prairie Band of*

[10] Although the district court stated that the absence of a showing of a likelihood of success on the merits "renders analysis of irreparable injury and the public interest moot," SPA-37, the district court determined that "those factors must be weighed in considering whether to grant a stay pending appeal," SPA-37 n.11, and thus analyzed them in its order granting the Nation injunctive relief pending appeal, SPA-41—44.

Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989); *Winnebago Tribe of Neb. v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002)).

The district court and the Nation's witnesses also set forth in detail the significant economic harms that the new scheme would visit upon Seneca members and businesses. SPA-42—43. This Court has repeatedly held that the loss of commercial opportunities or market share for individual businesses can constitute irreparable harm. *See, e.g., Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004). 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) as well as Nation member consumers that stand to suffer as the result of the State's ill-conceived tax scheme. These harms would indeed be irreparable because the State's Eleventh Amendment immunity precludes the recovery of monetary damages.

By contrast, a preliminary injunction would not irreparably harm the State. In granting the Nation injunctive relief pending appeal, the district court explained:

> [T]he Court does not believe that the State of New York will suffer substantial injury if the stay is issued. . . . [A]s was made clear in the Court of Appeals' decision in *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614 (2010), New York voluntarily chose to forebear collection of cigarette taxes from Indian retailers for many years. . . . In light of the State's lengthy prior history of forbearance, the Court does not

> believe that the minimal, additional delay pending appeal will cause substantial injury [to the State], particularly when weighed against the potential irreparable harm to the Nations' tobacco economies.

SPA-43; *see also* SPA-65 (Hurd, J.) (explaining in the *Oneida Nation* matter that "[a]lthough New York may have an interest in obtaining revenue, injunctive relief will maintain the status quo, not reduce the State's revenue"). Moreover, although the State has never before *precollected* tax at the wholesale level on cigarettes sold in Indian country, the State has long collected that tax directly from individual non-exempt consumers pursuant to N.Y. Tax Law § 471-a. *See supra* at 6. The State has relied upon this statute to collect the cigarette tax for decades, and no inequity will result if it is required to do so, and even to increase the vigor with which it pursues this alternative, for a brief, additional period pending final resolution of the Nation's claims.

IV. The Public Interest Weighs in Favor of Preliminary Injunctive Relief

A preliminary injunction would also serve the public interest. The State's unprecedented new tax scheme promises to work a severe infringement on the Nation's federally-protected right of self-government and on the right of its members and businesses to engage in tax-exempt commerce with one another. A preliminary injunction would guard against these harms and would preserve the status quo while the courts fully consider the important questions raised by this litigation. SPA-44—45; *see also, e.g.*, *Muckleshoot Indian Tribe v. Hall*, 698 F.

Supp. 1504, 1516 (W.D. Wash. 1988) (finding that the enforcement of Indian nations' federally-protected rights "is an important public interest, and it is vital that the courts honor those rights").

CONCLUSION

For the foregoing reasons, the Seneca Nation requests that the Court reverse the district court's order denying the Nation's motion for a preliminary injunction and remand this case to the district court with directions to enter a preliminary injunction. *See Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction.").

Dated this 21st day of January, 2011.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SENECA NATION OF INDIANS, Plaintiff-Appellee – Cross-Appellant, v. DAVID A. PATERSON, *et al.*, Defendants-Appellants – Cross-Appellees.	No. 10-4265-cv(L) 10-4272-cv (CON) 10-4598-cv (CON) 10-4758-cv (CON) 10-4477-cv (XAP) 10-4976-cv (XAP) 10-4981-cv (XAP) CERTFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)(i)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C)(i), the foregoing Opening Brief of Plaintiff-Appellee – Cross-Appellant the Seneca Nation of Indians is proportionally spaced in Times New Roman font, has a 14 point typeface in both the text and footnotes and contains 13,773 words.

Dated this 21st day of January, 2011.

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