# 10-4265(L)

10-4272, 10-4477, 10-4598, 10-4758, 10-4976, 10-4981

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,*

UNKECHAUGE INDIAN NATION,
*Plaintiff-Appellee-Cross-Appellant,*

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

v.

DAVID PATTERSON, Governor of the State of New York, JAMIE WOODWARD, Acting Commissioner, New York State Department of Taxation and Finance, WILLIAM COMISKEY, Deputy Commissioner, Office of Tax Enforcement, New York State Department of Taxation and Finance, each in his or her official capacity,
*Defendants-Appellants,*

JOHN MELVILLE, Acting Superintendent, New York State Police, in his official capacity,
*Defendant-Appellant-Cross-Appellee*,

CAYUGA INDIAN NATION OF NEW YORK,
*Intervenor-Appellant.*

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

**OPENING BRIEF FOR THE ST. REGIS MOHAWK TRIBE**

Michael L. Roy
Marsha K. Schmidt
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, NW
Suite 700
Washington, DC 20037
(202) 822-8282

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**STATUTES:**

**REGULATIONS:**

## STATEMENT OF JURISDICTION

The district court's jurisdiction over this action by the St. Regis Mohawk Tribe to vindicate its right of tribal sovereignty protected by federal law arises under 28 U.S.C. §§ 1331 and 1362. The district court denied the plaintiff's motion for a preliminary injunction, and granted an injunction pending appeal, on November 9, 2010. SPA 85. The defendants filed a timely notice of appeal on November 9, 2010. JA 929. Plaintiff St. Regis Mohawk Tribe filed a timely notice of appeal on December 6, 2010. JA 931. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

1. Whether the District Court erred in holding that Appellant St. Regis Mohawk Tribe was unlikely to succeed on the merits of its claims that amendments to the N.Y. Tax Law §§ 471 (SPA 104) and 471-e (SPA 107) and implementing regulations impermissibly infringe on tribal sovereignty where (1) the District Court found, and uncontested evidence showed, that the "prior approval system" imposed by the law would (a) lead to the monopolization of tax-exempt cigarettes by state licensed wholesalers and inequitable distribution of cigarettes to tribal retailers, and the corresponding inability of tribal retailers to obtain tax-exempt product for sale to tribal members, and (b) burden the exercise by tribal members of their rights to purchase tax-exempt cigarettes, and (2) to avoid the

aforementioned problems, the Tribe would have to agree to implement in its sovereign capacity as the tribal government the State's "coupon system," thereby requiring the Tribe to implement State law and to adopt and administer a new regulatory scheme applicable to its tribal retailers.

2. Whether in denying the preliminary injunction, the District Court erred (A) in ruling, as a matter of law, that the prior approval provisions of the tax law are severable from the coupon provisions, so that the prior approval provisions may be upheld even if the coupon provisions impose an impermissible burden on tribal sovereignty, and (B) in upholding the amendments notwithstanding the District Court's finding that the coupon system imposes on the tribal government the burden of allocating coupons to its licensed retailers.

3. Whether the District Court abused its discretion in ruling that the Tribe will suffer irreparable injury due to the law's infringement on tribal sovereignty, and economic harm to tribal retailers and to the Tribe itself, which receives fees from cigarette sales to fund tribal programs.

4. Whether the District Court abused its discretion in ruling that an injunction to preserve the status quo was in the public interest when the State voluntarily chose to forebear collection of cigarette taxes from Indian retailers for many years.

## STATEMENT OF THE CASE

The decision before the court was issued by Judge Richard J. Arcara and is reported at *Unkechauge Indian Nation v. Paterson*, __ F.Supp.2d__, 2010 WL 4486565 (W.D.N.Y. Nov. 9, 2010). SPA 74.

Plaintiff-Appellee-Cross-Appellant St. Regis Mohawk Tribe of Indians (the "Tribe" or "Mohawk") commenced this action on August 24, 2010 in the Northern District of New York against the Governor of New York and New York State officials (the "State"), seeking declaratory and injunctive relief with respect to June 2010 amendments to the New York Tax Law, N.Y. Tax Law §§ 471 and 471-e (SPA 104-110), and associated regulations, which govern the assessment and collection of an excise tax on cigarettes sold to Indian reservation retailers in New York. JA 937. Immediately after a state court order enjoining the enforcement of the law was vacated, JA 974 ¶ 3, 979, the Tribe applied for a temporary restraining order and preliminary injunction enjoining administration and enforcement of the tax law amendments. JA 971. The District Court (Judge Lawrence E. Kahn) issued a TRO on September 16, 2010. JA 1065.

The District Court thereafter granted the State's motion to transfer the case to the Western District of New York, where two related cases were pending — *Seneca Nation of Indians v. Paterson*, No. 10-cv-687A, 2010 WL 4027795 (W.D.N.Y. Oct. 14, 2010), *appeal filed*, Nos. 10-CV-4272 (2d Cir. Oct. 25, 2010),

10-CV-4477 (2d Cir. Oct. 29, 2010), & 10-CV-4758 (2d Cir. Nov. 18, 2010), and *Unkechauge Indian Nation v. Paterson*, No. 10-CV-00711, *appeals filed*, Nos. 10-CV-4598 (2d Cir. Nov. 9, 2010), 10-CV-4976 (2d Cir. Dec. 6, 2010) & 10-CV-4981 (2d Cir. Dec. 7, 2010). On the eve of the Tribe's scheduled preliminary injunction hearing in the Western District, the court (Judge Arcara) ruled in *Seneca*, denying the motions of plaintiffs Seneca Nation and Cayuga Indian Nation for preliminary injunctions, SPA 3, 36-37, but granting a stay of enforcement of the tax law amendments pending appeal. SPA 38, 45. On the same day, the District Court for the Northern District (Judge David N. Hurd) preliminarily enjoined enforcement of the tax law amendments as applied to the Oneida Indian Nation. *Oneida Nation v. Paterson*, No. 10-cv-1071, 2010 WL 4053080 (W.D.N.Y. Oct. 14, 2010), *appeal filed*, No. 10-4265 (2d Cir. Oct. 22, 2010), SPA 47, 69.

On October 15, the District Court entered an order consolidating the Mohawk case with that of the Unkechauge Indian Nation ("Unkechauge"), granting a TRO, and setting a new hearing date on the tribes' preliminary injunction motions. SPA 71. After hearing arguments on October 26, 2010, the District Court denied the Tribe's motion for a preliminary injunction by Decision and Order dated November 9, 2010. SPA 74. In the same Decision and Order, the

District Court issued an injunction preventing implementation and enforcement of the June 2010 amendments and regulations pending appeal. SPA 86.

On November 9, 2010, the State filed its appeal and a motion in this Court to vacate the injunction pending appeal. This Court heard the motion together with a similar motion to vacate the injunction pending appeal in the *Seneca* case, and a motion to stay the injunction granted by the District Court in the *Oneida* case. On December 9, 2010, this Court issued orders denying the State's motions to vacate the injunctions, consolidating the related appeals, and setting an expedited briefing schedule.

## STATEMENT OF THE FACTS

### A. State Cigarette Excise Tax and History of Forbearance

Under well-recognized principals of federal law, a state cannot impose its sales or excise tax on cigarettes sold on-reservation to tribal members. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-81 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 n.26 (1980). A state can, however, impose the tax on cigarettes sold on-reservation to non-tribal members, where "the value marketed by the [reservation cigarette seller] to persons coming from the outside is not generated on the reservation." *Colville*, 447 U.S. at 155.

The State imposes an excise tax on cigarettes. N.Y. Tax Law § 471 (SPA

104-106). The legal incidence of the tax is on the retail purchaser, but the tax is collected through tax stamps which are affixed by a state-licensed stamping agent, and the tax is then added to and collected as part of the sales price as the cigarettes. N.Y. Tax Law §§ 471(2), (3) (SPA 105). If for any reason the tax is not paid by the consumer as part of the price of the cigarettes, then state law imposes a use tax on the consumer in the same amount as the excise tax. N.Y. Tax Law § 471-a; *see* JA 1168.

Since it first imposed the tax in 1939, however, the State has not required the pre-collection of the tax on cigarettes sold on-reservation to non-tribal members. *See Cayuga Indian Nation v. Gould,* 14 N.Y.3d 614, 622-29 (2010). Regulations adopted by the Department of Taxation and Finance ("Department") in 1988 to pre-collect the taxes on such sales were placed on hold pending a limited facial challenge by non-Indian wholesalers who were federally-licensed Indian traders. After the Supreme Court held that the regulations were not preempted by the Indian trader statutes, *Department of Taxation & Finance of N. Y. v Milhelm Attea & Bros.*, 512 U.S. 61 (1994), the Department nonetheless repealed the regulations and adopted a policy of forbearance under which it chose not to collect taxes from reservation retailers. *See Cayuga,* 14 N.Y.3d at 625-27.

The Department continued its forbearance policy when the Legislature enacted N.Y.Tax Law §471-e in 2003, and later when the Legislature amended

§ 471-e in 2005, failing to adopt regulations or issue tax-exempt cigarette coupons that were needed to implement the law. *See Cayuga,* 14 N.Y.3d at 627-28. Due to the forbearance policy, and the failure of the Department issue the coupons, state courts agreed that the statute was not in effect, and that the general directive in Tax Law § 471 prohibiting the possession or sale of untaxed cigarettes could not be enforced against tribal retailers or their wholesalers. *Day Wholesale v. New York*, 856 N.Y.S.2d 808, 812 (4th Dept. 2008); *Cayuga*, 14 N.Y.3d at 647-48.

**B. June 2010 Amendments to the Tax Law**

On June 21, 2010, the New York Legislature enacted amendments to Tax Law §§ 471 and 471-e, regarding the distribution and sale of cigarettes to Indian reservations in New York. *See* 2010 N.Y. Laws 134, Part D; N.Y. Laws 136, §1, (SPA 87, 103). On June 22, 2010, the Department adopted Emergency Regulations to carry out amendments to the Tax Law, which amendments were re-adopted on September 13, 2010. 20 N.Y.C.R.R. § 74.6 (SPA 120). On July 29, 2010, the Department also issued a guidance document to explain further how the system is intended to work. SPA 139 ("Guidance").

Under the June 2010 amendments and regulations (together the "New Tax Law"), the state excise tax must be precollected on all cigarettes sold within New York, including cigarettes that are to be sold to tribal retailers for sale to tribal members. N.Y. Tax Law §§ 471(5)(b) (SPA 106), 471-e(3)(c)(iii) (SPA 110); 20

N.Y.C.R.R. § 74.6(a)(3)) (120); *see* SPA 139. The New Tax Law provides, however, for a refund on limited quantities of tax-exempt cigarettes that the Department determines are necessary to meet the demand for cigarettes by tribal members on Indian reservations. Under the New Tax law, tribal retailers may obtain tax-exempt cigarettes in one of two ways—the Indian tax exemption coupon system or the prior approval system.[1]

1. Coupon System

A tribe may elect to use the Indian tax exemption coupon system on an annual basis. N.Y. Tax Law § 471-e(1)(b) (SPA 107). Under the coupon system, the tribe would receive from the Department coupons equal to the number of tax-exempt cigarettes permitted to be transferred to the reservation under the probable demand quota system. The Department calculates probable demand for cigarettes by tribal members on each reservation based on the reservation's population and cigarette per capita consumption data. 20 N.Y.C.R.R. § 74.6(e) (SPA 120). The probable demand is to be distributed on a quarterly basis. *Id*.

Once the Tribe obtains the coupons, it would be up to the tribal government to determine how to allocate the coupons among its various retailers. (SPA 141-42). The Guidance states: "The Tax Department will not distribute Indian tax

[1] The statute offers a third option, which is an agreement between a tribe and the State that is either approved by the Legislature or entered into as a stipulated settlement of litigation challenging the law. N.Y. Tax Law § 471(6) (SPA 106). No such agreement has been entered into.

exemption coupons directly to reservation cigarette sellers." SPA 142.

Once the coupons are distributed, a reservation retailer may obtain stamped but tax-exempt cigarettes from a state-licensed wholesaler without payment of the tax by providing an Indian tax exemption coupon. N.Y. Tax Law § 471-e(3)(c) (SPA 109-110). Because the tax has been prepaid, as required by state law and as evidenced by the tax stamp, the wholesaler must request a refund by submitting the coupons to the Department along with a refund claim form. *Id.* at § 471-e(4) (SPA 110).

2. Prior Approval System

If a tribe does not opt into the coupon system, the prior approval system applies by default. N.Y. Tax Law § 471(5) (SPA 106). Under the prior approval system, the quota of tax-exempt cigarettes available for sales to Indians within the tribe's territory is based on the Department's probable demand calculation. *Id.* Under this system, the wholesaler must obtain prior approval for the sale from the Department. N.Y. Tax Law § 471(5)(b) (SPA 105).

The regulations state that the system "may include the use of an interactive Web application." 20 N.Y.C.R.R. § 74.6(d)(3) (SPA 124). According to the Guidance, when a wholesaler logs on to the web interface to request prior approval, that agent will enter the amount of cigarettes requested by a specific tribe or tribal retailer. SPA 143. The interface would then determine if there is room

left in the quota for the sale. SPA 144. If the quota has not yet been reached, the wholesaler will be issued a confirmation number approving the sale. *Id.* The website then automatically deducts that amount from the Tribe's quota. *Id.* The wholesaler then has 48 hours to complete the transaction. *Id.* To do so, the wholesaler would report the name and address of the purchaser, the quantity sold, and an invoice number. *Id.* Upon reporting the sale, the system generates a confirmation number to be used by the wholesaler in requesting a refund of the prepaid taxes. *Id.*

The Department's only role in approving the sale is to determine whether or not the "probable demand" for a given reservation has been reached. The New Tax Law contains no mechanism for seeing that the limited quantities of tax-exempt cigarettes for a given reservation are fairly allocated to retailers on the reservation, or distributed rationally. Department officials have acknowledged that the system allows one wholesaler to monopolize the quota of tax-exempt cigarettes for a reservation, and further that a wholesaler can sell the entire quote to as few retailers as he chooses. JA 1161:17-1162:1, 1167:15-24. A state-licensed wholesaler testified that if the probable demand system takes effect, he intends to purchase the entire quota for each reservation, and also that a retailer on the Mohawk reservation has ordered the entire quota for the reservation from the wholesaler. JA 639 ¶¶ 28-29, 640 ¶ 35.

### C. Mohawk Regulation of Cigarette Sales and Reaction to New Tax Law

Mohawk is a federally-recognized Indian tribe with a reservation in northern New York, along the St. Lawrence River and the Canadian border. JA 953-954, ¶ 3. The Tribe has adopted a regulatory system to encourage tribal member owned businesses, and to generate tribal revenue. JA 983 ¶ 2, 987-1020. There are 141 registered Mohawk businesses, including 30 tribally-licensed tobacco retailers (all of them tribal members) who employ 417 local residents. JA 983-984 ¶ 3. The Tribe's tobacco regulations prohibit sales to minors and internet sales. JA 1006. Mohawk is also itself a retailer, with retail outlets at its gaming establishment. JA 953-954 ¶ 3.

Retailers must pay a Tribal Tobacco Fee, which is assessed at varying levels, and affix a tribal stamp on all tobacco products. JA 1000-1001 ¶ j, 1015-1016. The tobacco fees collected by the Tribe—which totaled $2 million in 2008—support tribal programs and services, including law enforcement, sanitation, the fire department, education, health and environmental services. JA 983-984 ¶ 3, 1036-1037 ¶¶ 6-8.

This regulatory scheme is administered and enforced by the Tribe's Compliance Department, with four employees. JA 983 ¶ 2. Apart from stamping, minimum pricing requirements, and licensing requirements, the Tribe does not

regulate the transactions between the reservation retailers and wholesalers, or between retailers and their customers. JA 984 ¶ 4.

The Emergency Regulations promulgated on June 22, 2010, announced that the deadline for a tribe to elect the coupon system for the 2011 fiscal year was August 15, 2010. JA 208 (§ 74.6(b)). The time allowed by the Department to elect the coupon system—less than two months—was inadequate for the Tribe to conduct a referendum on the matter. JA 1035-1036 ¶¶ 4-5. Under tribal law and custom, the Tribe would not have elected the coupon system without first holding a referendum to determine if its members were willing to have the Tribe elect and implement the coupon system and the burdens and infringements on tribal sovereignty it entails. JA 1035-1036 ¶ 4-5.

The Tribe's Compliance Department determined that implementation of the State's coupon system would require the Tribe to promulgate, implement and enforce a comprehensive new regulatory scheme to determine how to allocate the coupons to its 30 licensed retailers. JA 984-985 ¶ 4. The scheme would have to provide a process for determining how to allocate coupons, which would necessarily include procedures for input by tribally-licensed retailers, a determination by a tribal official/agency on the evidence submitted, and due process and appeal rights to the retailers. JA 984-985 ¶ 4. In addition, it would have to provide procedures to monitor and safeguard the coupons, and for

enforcement of the coupon system. JA 985 ¶ 4(c). The Tribe would have to hire additional personnel to administer and enforce such a regulatory scheme. JA 985 ¶ 4(e).

The probable demand calculation for the Tribe is 291,600 packs of cigarettes per quarter, or almost 1.2 million packs per year. 20 N.Y.C.R.R. §74.6(e) (SPA 125). The Tribe initially objected to this calculation as insufficient JA 1076, but later withdrew the objection JA 1112, and informed the State that it viewed the regulation as "an intrusion on our ability to govern our own affairs and to regulate commerce within our jurisdiction," and that it would neither opt for the coupon system nor allow the prior approval system to take effect. JA 1113. This lawsuit ensued.

**D. The District Court Rulings**

The District Court denied the preliminary injunction, and granted an injunction pending appeal, based largely on its earlier decision in *Seneca*. SPA 71, 80, 85. We therefore begin with a discussion of that decision insofar as it relates to the claims raised by Mohawk in this appeal.

4. *Seneca* Preliminary Injunction Ruling

The Seneca Nation ("Seneca") regulates the sale of tobacco products on its five reservations. SPA 4-5. It imposes a tribal tax on all cigarettes and the affixation of a tribal tax stamp, and uses the tax revenues for tribal programs.

SPA 5. Like Mohawk, Seneca licenses numerous tribal cigarette retailers. *Id*.

The District Court rejected the State's argument that the coupon system imposed no burden on Seneca because Seneca did not have to distribute coupons. "In order for the coupon system to work, the Nation must distribute coupons." SPA 29. The District Court acknowledged that distributing coupons "may require [Seneca] 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." SPA 30. The Court noted that the allocation of coupons "may be somewhat more onerous than the 'minimal burden' approved by the Supreme Court," and that *Attea* did not address the allocation issue, or how the system at issue there "would 'affect tribal self-government' as that issue was not properly before the Court." *Id*.

The District Court did not decide the issue, however, on the grounds that the coupon system was an optional system Seneca could decline to use, which Seneca had done. SPA 30-31.

With regard to the prior approval system, the District Court noted problems that the system would cause, the "most obvious" being "that the system creates incentive for a single wholesaler to acquire as much of the quota as possible so that s/he can then resell the tax-exempt cigarettes to reservation retailers at a premium."

SPA 32. The District Court noted that Peter Day, a state-licensed wholesaler, had testified that he intended to acquire "the entire tax-exempt allocation" for the Seneca, and that he intended to sell that quota only to his existing customers. *Id*. The District Court stated:

> 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.

SPA 33. The Court noted that witnesses testified that this scenario would result in some retailers not being able to obtain tax-exempt cigarettes, and higher prices for tax-exempt cigarettes. SPA 33-34.

Notwithstanding this uncontested evidence, the District Court held that the system was lawful because it did not mandate that Seneca allocate cigarettes. SPA 33, 36. The District Court found that while it may be "prudent" for the Seneca to act, it was not compelled to do so. SPA 33. The District Court acknowledged that higher prices to tribal member consumers may result, but that that was not prohibited because it was not the State that was charging the high price; rather, it was "simply . . . the natural consequence of putting a scarce commodity out on a highly competitive face market." SPA 34. The District Court held that if tribal members had to drive longer distance to obtain tax-exempt cigarettes that would

not constitute an impermissible burden. SPA 34.

The District Court therefore ruled that Seneca could not show likelihood of success, and denied the preliminary injunctions without addressing the irreparable injury or public interest requirements for a preliminary injunction. SPA 37 n.11.

5. *Seneca* Injunction Pending Appeal

In a separate decision, the District Court enjoined the enforcement of the Tax Law pending appeal. SPA 38. The Court noted that the standard for an injunction pending appeal differs from the applicable standard for a preliminary injunction to enjoin government action, in that a showing of likelihood of success on the merits is not a requirement. Rather, "movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." SPA 41 (internal quotations omitted).

The Court had "little difficulty" finding that Seneca and the Cayuga Indian Nation would suffer irreparable harm absent an injunction. SPA 41. The Court found irreparable harm in a threatened infringement on tribal sovereignty, and an adverse impact on the tribes' existing economies. SPA 41-42. The Court found that the tribal retailers will lose sales, and that many retailers would have to lay off employees or close their businesses. SPA 42. The tribes' revenues would suffer. *Id*.

The Court found that State would not suffer substantial injury if the injunction issued. SPA 43. While the State would lose some tax revenue, the State had long voluntarily chosen to forebear collection of taxes from reservation retailers. SPA 43. In light of this long-standing forbearance policy, "the Court does not believe that the minimal, additional delay pending appeal will cause substantial injury, particularly when weighed against the potential irreparable harm to the Nations' tobacco economies." *Id.*

The Court further found that although plaintiffs had failed to demonstrate a likelihood of success on the merits, they had raised "serious legal questions going to the merits of their claims." SPA 44. The Court noted that "some aspects of the new tax amendments are unprecedented," and that this Court might not agree with its ruling. *Id.*

6. Mohawk and Unkechauge Decision

Subsequent to its decisions in *Seneca*, the District Court entered a decision and order denying the Mohawk and Unkechauge motions for preliminary injunctions for failing to demonstrate likelihood of success, but granting an injunction pending appeal finding that the tribes would suffer irreparable harm absent an injunction and that an injunction was in the public interest. SPA 74.

The District Court rejected many of the tribe's arguments on the grounds that they had been rejected in the *Seneca* ruling, including arguments that the prior

approval and coupon systems require tribes to involve themselves in the allocations of either cigarettes or coupons. SPA 80. The Court addressed and rejected Mohawk's argument, not raised in *Seneca*, that the prior approval system must be struck down because the coupon system infringes on tribal sovereignty and the New Tax Law's prior approval provisions are not severable from the coupon system provisions. SPA 80. Without deciding whether the coupon provisions infringe on tribal sovereignty, the Court held that the provisions are severable because the coupon and prior approval systems are "mutually exclusive." SPA 80-81. The District Court also rejected Mohawk's equal protection argument, SPA 82-85,[2] and a Fifth Amendment claim made by Unkechauge. SPA 82.

The Court granted an injunction pending appeal, however, "consistent with the action taken by this Court in the *Seneca Nation* case," finding that absent an injunction, the tribes would suffer irreparable injury, and that an injunction pending appeal was in the public interest. SPA 85.

## SUMMARY OF ARGUMENT

The District Court erred as a matter of law in holding that Mohawk had not shown likelihood of success on the merits.

First, left to its own devices, without tribal action, the prior approval system imposed by the State will lead to the inability of tribal retailers to obtain tax-

[2] Mohawk is not pursuing its equal protection claim in this appeal.

exempt cigarettes for sale to tribal members. The system does not provide for the allocation of tax-exempt cigarettes to all tribal retailers. In fact, it allows wholesalers to monopolize the State's quota of tax-exempt cigarettes on a reservation, and further allows wholesalers to deal with a small number of retailers, leaving many tribal retailers without access to tax-exempt product. In failing to ensure tribal retailers access to tax-exempt cigarettes, the system infringes on the rights of the retailers to make tax-free sales to tribal members under both federal and tribal law, as well as the rights of tribal members to purchase such cigarettes. The prior approval system thereby burdens tribal commerce that is not within the State's jurisdiction, and so impermissibly infringes on the Tribe's sovereignty. The District Court erred as a matter of law in ruling to the contrary.

Second, the District Court erred as a matter of law in ruling that the New Tax Law does not infringe upon tribal sovereignty because it does not compel or mandate action by the Tribe. The New Tax Law offers the Tribe a coercive and invalid choice between two flawed systems. The first choice—allowing the prior approval system to operate without tribal action—infringes on the rights of tribal retailers to sell tax-exempt cigarettes, the rights of tribal members to buy them, and the right of the Tribe to regulate the tribal economy, and will result in economic harm. The other choice—the coupon system—is a coercive option, one that would avoid the prior approval system's failure to allocate cigarettes to tribal retailers, but

at the cost of the Tribe having to adopt a regulatory system to implement state law and allocate the State's tax-exempt cigarette coupons, a gross infringement of the Tribe's sovereign right to govern itself. Just as a state cannot impose its laws on a tribal government, neither can it coerce a tribal government by offering it illegitimate choices which infringe on its sovereignty.

Third, the District Court erred in holding that the coupon system is severable from the prior approval provisions. They cannot be severed because the Legislature intended tribes to have a choice between the two, and non-election of the coupon system is a condition for application of the prior approval system. To sever the coupon system would be to rewrite the law in a way unintended by the Legislature. The New Tax Law therefore fails in its entirety because the coupon system provisions infringe on tribal sovereignty by requiring that the Tribe implement state law.

The other requirements for the grant of a preliminary injunction are clearly met. In granting the injunction pending appeal, the District Court correctly held that Mohawk will be irreparably harmed absent an injunction. The threat to its tribal sovereignty constitutes irreparable harm. In addition, enforcement of the New Tax Law will adversely impact the tribal retailers, who will lose sales (to non-tribal members and tribal members), and also the Tribe, through reductions in the tribal tobacco fees that the tribe uses to fund tribal programs. The District Court

properly held that an injunction is in the public interest, in light of the State's long-standing policy of forbearance from pre-collection of the tax on Indian reservations.

## STANDARD OF REVIEW

This Court reviews a District Court's denial of a preliminary injunction for abuse of discretion, but reviews questions of law decided in connection with the denial of a preliminary injunction de novo. *Lusk v. Vill. of Cold Spring,* 475 F.3d 480, 484-85 (2d Cir. 2007); *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). The District Court's decision to grant the injunction pending appeal is also reviewed by this Court for an abuse of discretion. *See Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986); *Unicon Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 205 (2d Cir. 1966).

## ARGUMENT

## IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DENYING THE PRELIMINARY INJUNCTION ON THE GROUNDS THAT THE TRIBE HAD NOT DEMONSTRATED LIKELIHOOD OF SUCCESS ON THE MERITS

### E. Preliminary Injunction Standard

To obtain a preliminary injunction, a movant must demonstrate (1) irreparable harm absent injunctive relief, (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3)

that the public's interest weighs in favor of granting an injunction. *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010) (internal quotations and citations omitted). If, as in this case, a moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. *Alleyne*, 516 F.3d at 101.

### F. Tribes Have a Federally-Protected Right to Govern Themselves Free of State Interference

Indian tribes are self-governing sovereign governments, whose sovereignty is protected from state interference by federal law. Indian tribes possess "sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Tribes posses sovereign power to "prescribe conduct of tribal members," to "exclude nonmembers entirely" from the reservation, and to "make their own laws and be ruled by them." *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *Williams v. Lee,* 358 U.S. 217, 219-220 (1959)). A tribe has "authority, as sovereign, to control economic activity within its jurisdiction." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *see N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (recognizing the strong tribal interest "in regulating economic activity involving its

own members within its own territory").

"[T]ribal sovereignty is dependent on, and subordinate to, only the federal Government, not the States." *Colville*, 447 U.S. at 154. As a general rule, state law is inapplicable to on-reservation conduct involving only tribal members. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-24 (1993) (absent an act of Congress, state law has "no role to play" on a reservation); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 889 (1986) (*"Wold II"*) (requiring tribe to agree that state law applied to resolution of disputes arising on reservation would constitute a "severe intrusion on the Indians' ability to govern themselves according to their own laws"); *White Mountain Apache Tribe*, 448 U.S. at 144 ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable…."); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170-71 (1973) ("[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State law shall apply."); *Williams*, 358 U.S. at 220 (1959) ("the question has always been whether state action infringed upon the right of reservation Indians to make their own laws and be ruled by them"). "States . . . have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996).

States cannot tax Indians on their lands. *See e.g., Sac & Fox*, 508 U.S. at

123-124 (state cannot impose income tax on tribal member living and working on the reservation); *Attea,* 512 U.S. at 64 ("[e]nrolled tribal members who purchase cigarettes on Indian reservations are exempt" from state sales and excise taxes).

### G. States May Impose Only Minimal Burdens on Reservation Cigarette Sellers to Collect Taxes on Sales to Non-Indians

The Supreme Court has allowed a narrow exception to the general prohibition on state regulation of Indians in Indian country in a series of decisions involving cigarette excise taxes. In 1976, the Court decided *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, a case involving the imposition of Montana's sales tax on cigarettes sold by a tribal member to non-tribal members, where the legal incidence of the tax was on the purchaser. 425 U.S. 463 (1976). The Court held that the state sales tax could not be imposed on sales to Indians, *id*. at 475-80, but upheld the application of the tax to the non-Indian purchasers, and a requirement that the tribal member retailer collect and remit the tax on sales to non-Indians. The Court held: "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id*. at 483.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 ("*Colville*"), the Court stated: "[w]e recognized in *Moe* that if a

State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing the tax." *Id*. at 159. The Court upheld, as a minimal burden, requirements that the tribal retailer affix tax stamps on cigarettes sold to non-tribal members, keep records of tax-exempt and taxable sales, and require that Indian purchasers not known to the retailer present a tribal identification card. *Id*. The Court held that such burdens must also be "reasonably necessary" to collect the tax. *Id.* at 160.

*Moe* and *Colville* together stand for the proposition that "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Attea*, 512 U.S. at 73. [3]

The Department's 1988 regulations were before the Supreme Court in *Attea*, a pre-enforcement facial challenge brought by non-Indian cigarette wholesalers. 512 U.S. at 69. Under the 1988 regulations, in the absence of an agreement with a tribe to regulate the sale of cigarettes, the State was to limit the sale of untaxed cigarettes to reservation cigarette sellers through a probable demand calculation.

---

[3] The decisions in *Moe* and *Colville* were based in large part on the fact that the cigarettes at issue were not manufactured on the reservation. *Colville*, 447 U.S. at 155 ("the value marketed by the [reservation cigarette seller] to persons coming from the outside is not generated on the reservation") (citing *Moe*, 425 U.S. at 475-81). *Compare California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987) (holding that state could not regulate tribal casino, notwithstanding that patrons were non-tribal members coming onto the reservation; *Colville* distinguished because the tribes "are generating value on the reservations through activities in which they have a substantial interest").

*Id*. at 66. Under the regulations at issue in *Attea*, the Department was to provide coupons to reservation retailers based on the probable demand calculation for reservation, which would have entitled the retailer to its monthly allotment of tax-exempt cigarettes. *Id*. The wholesaler would in turn forward the coupons to the Department. *Id*. Under the *Attea* regulations, the tax was not pre-collected on the limited quantities of tax-exempt cigarettes. *Id*. at 69.

In *Attea*, the Court was "confront[ed] with the narrow question whether the New York scheme is inconsistent with the Indian Trader Statutes." *Id*. at 69-70.[4] The Court held that burdens that could be imposed on tribal retailers under *Moe* and *Colville* could also be imposed on wholesalers, because it would be "anomalous" to hold otherwise. *Attea*, 512 U.S. at 74. The Court then assumed the adequacy of the probable demand calculations—which were not challenged by the wholesalers, *id*. at 69—and upheld the probable demand mechanism as "reasonably necessary" to aid in collection of the excise tax on sales to non-tribal members. *Id*. at 75. In so holding, the Court noted that if the probable demand calculations were adequate, "tax-immune Indians will not have to pay New York

[4] The Indian Trader Statutes, 25 U.S.C. § 261 *et seq*., govern the licensing by the Commissioner of Indian Affairs of persons trading with reservation Indians. *See Attea,* 512 U.S. at 70.

cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption." *Id*.[5]

Because the case was brought as a facial challenge by a non-Indian wholesaler, and specifically in relation to the Indian Trader Statutes, it did not "require [the Court] to assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government." *Attea*, 512 U.S. at 69; *see Cayuga,* 14 N.Y.3d at 624 (noting this limitation). Under the regulations at issue in *Attea*, the Department—not the tribes or wholesalers, as under the New Tax Law—was to allocate the coupons directly to the tribal retailers. *Attea*, 512 U.S. at 66. The Court noted that "depending upon how they are applied in particular circumstances, [the allocation] provisions may present significant problems to be addressed in some future proceeding." *Id*. at 77. The Court declined to rule on these provisions, based on the record before it, and because how the cigarettes were allocated to retailers was irrelevant to the claims of the wholesalers. *Id*. at 77-78.

[5] In *Cayuga*, the New York Court of Appeals noted that "[t]his appears to have been an important consideration in the Court's decision to sustain the regulations as it restated this proposition later in the opinion." *Cayuga,* 14 N.Y.3d at 624 n. 2 (quoting *Attea*, 512 U.S. at 76 ("assuming that the 'probable demand' calculations leave ample room for legitimately tax-exempt sales, the precollection regime will not require prepayment of any tax to which New York is not entitled")).

### H. The District Court Erred in Holding that the New Tax Law Does Not Infringe on Tribal Sovereignty

#### 1. The Prior Approval System Infringes on Tribal Sovereignty By Failing to Ensure that all Tribally-Licensed Retailers Will Have Access to Tax-Exempt Cigarettes to Sell to Tribal Members

In deciding that the prior approval system did not infringe on tribal sovereignty, the District Court made fundamental errors of law. First, it reasoned that because action by a tribe is not "*mandate[d]*" or "*compelled*" by the New Tax Law, SPA 33, it did not burden tribal sovereignty. This is legal error because, *inter alia*, this is not the applicable legal standard. "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided." *McClanahan,* 411 U.S. at 170-71; *see supra* at 22-24. There is no doubt that a state law that mandates or coerces tribal action infringes on tribal sovereignty, *see infra* at 34-45, but a state law also infringes on tribal sovereignty when it acts on a tribal member's on-reservation conduct where the tribal member is subject to tribal law, and not state law. *See e.g. Williams*, 358 U.S. at 223 (state court could not exercise jurisdiction over an action by a non-Indian to collect a debt from an Indian arising on the reservation, because the action would "would infringe on the right of the Indians to govern themselves"); *Sac & Fox*, 508 U.S. at 123 ("Our decision in *McClanahan* [holding that state income tax does not apply to reservation Indians] relied heavily on the doctrine of tribal sovereignty.") (citing *McClanahan*, 411 U.S. at 168).

In the area of state cigarette excise taxes, the cases have distinguished between on-reservation sales to non-tribal members, and commerce between tribal members. As to the former, "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Attea*, 512 U.S. at 73 (emphasis added). In contrast, tribal members have a right to purchase tax-exempt cigarettes on reservation, *Moe*, 425 U.S. at 480-481, and tribal retailers have a corresponding "federally protected right to make tax-free sales to tribal members." *Cayuga,* 14 N.Y.3d at 647. Any infringement of those rights would infringe tribal sovereignty, without the necessity of showing any tribal mandate.

The record is clear that the rights of the Tribe's 30 licensed retailers and its tribal member consumers to purchase and sell tax-exempt cigarettes would be infringed by the New Tax Law, due to the inability of tribal retailers to obtain tax-exempt cigarettes for sale to tribal members. The State has calculated "probable demand" for the Tribe at 291,600 packs of cigarettes per quarter. *See* 20 N.Y.C.R.R. § 74.6(e)(2) (SPA 125). Under the prior approval system (and unlike the system at issue in *Attea*), the State will not allocate the cigarettes to the retailers. *Compare Attea*, 512 U.S. at 66. Instead, it will authorize sales each

quarter to one or more state-licensed wholesalers, who can then deal with the retailer or retailers they choose.

Uncontested evidence submitted in the court below demonstrated that the prior approval system will make it impossible for some retailers to obtain tax-exempt cigarettes. Mohawk submitted the affidavit of Peter Day (JA 634), a State stamping agent and wholesaler, who stated unequivocally the prior approval system allowed one wholesaler to purchase the entire allocation for a given reservation, that he in fact intended to purchase the entire allocation for each reservation, and that a retailer on the Mohawk reservation has ordered the entire quota from Mr. Day (and from other wholesalers as well) in an effort to secure the entire allocation for the reservation to himself. JA 639 ¶¶ 28-30, 640 ¶¶ 34-36.

Witnesses for the Department acknowledged that they could not prevent Mr. Day and the retailer from doing exactly what they intend. John Bartlett testified that "there's not anything [in the law or regulations] to expressly prohibit" one wholesaler from obtaining a tribe's entire quarterly quota. JA 1160-1161; *see also* JA 1163-1164. Joseph Vanderlinden testified that it is possible for "a single state-licensed wholesaler [to] claim the entire probable demand quota for the Seneca Nation for that particular quarter," and agreed that "[t]here's nothing to prevent that wholesaler from selling only to one or two reservation retailers." JA 1167. In its *Seneca* ruling, based on this testimony, the District Court found that

"there is a very realistic possibility that the scenario presaged by Day will occur." SPA 33. Further, the District Court found that "the system creates incentive for a single wholesaler to acquire as much of the quota as possible so that s/he can then resell the tax-exempt cigarettes to reservation retailers at a premium," SPA 32, and that "there may be occasions when a 'premium' charged by a monopolistic retailer eviscerates any tax savings to the individual member." SPA 34.[6]

The Department's failure to undertake any attempt at ensuring the availability of tax-exempt cigarettes to tribal retailers will leave many retailers without any tax-exempt cigarettes to sell, resulting in loss of revenues, layoffs, and business failures. This will be so even assuming the adequacy of the quota of tax-exempt cigarettes made available to the Mohawk Reservation as a whole under the prior approval scheme. 20 N.Y.C.R.R. § 74.6(e) (SPA 125). The sufficiency of this quota will be of no consequence to the tribal retailers who cannot obtain their fair share of it from the wholesaler(s) who controls it, or to tribal members who cannot purchase tax-exempt cigarettes from their local retailer or have to pay a premium to buy them. [7]

---

[6] Mr. Day testified by affidavit in the Mohawk case that the prior approval system would lead to higher prices to consumers. JA 640 ¶ 33. The State did not contest this evidence.

[7] In *Seneca,* the District Court rejected the argument that if a tribal member had to drive a longer distance—up to 30 miles in the case of Seneca—to purchase a pack of cigarettes tax-free, that would be no more than a minimal burden. SPA 34. In so ruling, however, the Court seemed to accept that tribal members would have to

Only one conclusion can be drawn from the uncontested evidence, and the District Court's findings of fact on this issue. The prior approval system, by failing to ensure that each retailer has a quantity of tax-exempt cigarettes sufficient to meet the needs of its tribal member customers, impermissibly burdens commerce between tribal members, and so cannot stand. The retailers' lack of access to tax-exempt product cannot be justified as a "minimal burden[] reasonably tailored to the collection of valid taxes from non-Indians." *Attea*, 512 U.S. at 73. First, it is a burden on a tribal retailers' access to product to sell to tribal members, and not a burden on the sales of cigarettes to non-members. Second, it is no way minimal. It differs in kind and severity from any minimal burden approved by the Supreme Court. The minimal burdens on retailers approved by the Supreme Court include obligations to collect and remit the tax, *Moe,* 425 U.S. at 483, to affix tax stamps on cigarettes sold to non-tribal members, to keep records of tax-exempt and taxable sales, and to require that Indian purchasers not known to the retailer present a tribal identification card. *Colville,* 447 U.S. at 159. The prior approval system imposes no such incidental burdens on retailers; instead, it creates a scheme

---

look elsewhere for tax-exempt cigarettes when they were not available at their local retailer. Similar long distances would apply on the 26,460 acre Mohawk reservation. *See Canadian St. Regis Mohawk Band v. State of New York*, 146 F.Supp. 2d 170, 178 (N.D.N.Y. 2001) (identifying Mohawk land areas consisting of 14,460 acre current reservation and additional 12,000 treaty area recognized by United States as reservation); *see also Cayuga*, 14 N.Y.3d at 637 (term "reservation" for purposes of cigarette excise tax refers to "any reservation recognized by the United States government").

whereby many tribally-licensed retailers will have no tax-exempt cigarettes at all to sell, making them unable to engage in the sale of tax-exempt cigarettes to tribal members as is their right under federal and tribal law, and resulting in serious harm or possibly the total destruction of their businesses. This is no minimal burden. Nor is it "reasonably related" to the tax collection efforts of the State, especially given that the State could undertake to allocate coupons to tribal retailers, as it planned in the regulations at issue in *Attea*, or could utilize tax collection schemes upheld in *Moe* or *Colville*.

The Supreme Court's decision in *Attea* indicates the importance of making tax-exempt product available to all tribal retailers. In *Attea,* the State was to allocate the coupons to the retailers. The Supreme Court did not address the allocation provisions, but noted that "depending on how they are applied in certain circumstances, [the allocation] provisions may present significant problems to be addressed in some future proceeding." 512 U.S at 77. The Court also stated its assumption that the State would not "stultify tribal economies by refusing certification to new reservation retailers." *Attea*, 512 U.S. at 77. Clearly, the Court was concerned that all tribal retailers have access to tax-exempt cigarettes for sale, to their tribal member customers a concern that is violated by the New Tax Law.

Similarly, the District Court erred in holding that the burdens on the tribal member consumers caused by the prior approval system were allowable. Those burdens—longer driving distances (with associated costs) and premium prices that eviscerate the tax savings—constitute unacceptable burdens to the tribal member consumers, who are not involved in transactions with non-tribal members that are subject to the state tax. The only burden that the Supreme Court has allowed to be placed on a tribal member cigarette purchaser is a requirement to present a tribal identification card at the time of sale if he or she is not known to the retailer. *Colville,* 447 U.S. at 159.

**2. The New Tax Law Infringes on the Tribe's Sovereignty By Offering the Tribe Coercive Choices**

Fundamental to the District Court's decision were its conclusions that the New Tax Law does not compel tribal action. In its *Seneca* ruling, the Court stated:

> While 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, the Nation is not actually *compelled* to do so. Instead, the Nation can simply refrain from acting and let principles of the existing Seneca nation free market economy govern the supply and distribution of the tax-free cigarettes.

SPA 33; *see also* SPA 80 ("Tribes have the option of doing nothing and permitting the allocation of cigarettes to be governed by free-market forces."). Similarly, the District Court declined to rule on whether the coupon system infringed on tribal sovereignty, stating: "If a tribe feels that the burden imposed under the coupon

system is unacceptable, it has the option to avoid that burden completely by choosing the prior approval system." SPA 81; *see also* SPA 30-31.

In upholding the New Tax Law because it does not mandate tribal action, the District Court ignored the coercive nature of the law. The New Tax Law presents Mohawk with a dilemma: it must choose between implementing and enforcing a State regulatory scheme (the coupon system)—a gross violation of the Tribe's sovereignty—or doing nothing, thereby allowing its retailers to suffer injuries to their "federally [and tribally] protected right to make tax-free sales to tribal members," *Cayuga,* 14 N.Y.3d at 647, and the rights of its tribal members to purchase tax-exempt product, injuries brought on by a State regulatory system that is deficient in its design and which is certain to create inequity in its implementation. In effect, the New Tax Law allows the Tribe to pick its poison, by offering two choices that infringe on its sovereignty, albeit in different ways.

One option offered to the Tribe—electing the coupon system, N.Y. Tax Law § 471-e—would require Mohawk to allocate to its 30 licensed retailers the coupons provided by the State. To do so, Mohawk would have to promulgate, administer and enforce a comprehensive new tribal regulatory scheme designed to implement the State's coupon system. JA 984-985 ¶ 4.[8] Accepting the coupon system would

[8] The scheme would have to provide a process for determining how to allocate coupons, which would necessarily include procedures for input by tribally-licensed retailers, a determination by a tribal official/agency on the evidence submitted, and

thus put the Tribe in the position of regulating and enforcing the State's regulatory scheme, and of regulating tribal retailers' sales in a manner that the Tribe has chosen not to regulate.[9] It appears clear that the State could not unilaterally require the Tribe to implement the coupon system, because to do so would "infringe upon the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 219; *see also Wold II*, 476 U.S. at 889. The cigarette tax cases are not to the contrary. Although "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians," *Attea*, 512 U.S. at 73 (emphasis added), the coupon system does not impose burdens on the Tribe as a retailer, but as a sovereign government. The coupon system is not intended to impose burdens on the Tribe to collect taxes on sales that the Tribe makes to non-Indians, but to use the Tribe to enforce state law as to tribal retailers, and to have the Tribe undertake the "prototypically governmental decision," in the State's words, JA 1115, of allocation of coupons. While a tribe is subject to the minimal burdens test when it acts as a retailer, *see Colville*, 447 U.S. at 144-145, there is no precedent for requiring a tribal

---

due process and appeal rights to the retailers. JA 984-985 ¶ 4. The scheme would have had to provide procedures to monitor and safeguard the coupons, and for enforcement of the coupon system. *Id.* The Tribe would need to hire personnel, at tribal expense, to administer the scheme. *Id.*

[9] The Tribe does not now regulate the distribution of cigarettes to retailers. *Id.*

government to assist the State in collecting taxes on sales made by tribal members to non-Indians.[10]

The District Court did not decide whether the coupon system was valid. Rather, it held that the system does impose the burden of allocating coupons on tribes, and indeed noted that this system "may be somewhat more onerous than the 'minimal burden' approved of by the Supreme Court." SPA 30. The Court, however, avoided ruling on the legal validity of the coupon system on the grounds that a tribe can opt to do nothing and allow the prior approval system to be implemented. SPA 30-31; *see also* SPA 80.

If the Tribe does nothing, however, its licensed retailers and tribal members will be harmed, as will the Tribe's ability "as a sovereign [to] regulat[e] economic activity involving its own members within its own territory." *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d at 1200. As discussed above, undisputed evidence showed, and the District Court found, that the prior approval system "creates incentive for a single wholesaler to acquire as much of the quota as possible so that s/he can then resell the tax-exempt cigarettes to reservation retailers at a premium." SPA 32; *see supra* at 30-31. Such a wholesaler can not only charge premium pricing; in addition, as the Department acknowledged, "[t]here's nothing to prevent that wholesaler from selling only to one or two reservation retailers." JA 1167:22-14.

[10] In any event, implementation and administration of a tribal regulatory scheme to allocate coupons would exceed any permissible minimal burden.

There is thus no dispute that the prior approval system fails to ensure that each retailer has a quantity of tax-exempt cigarettes sufficient to meet the needs of its tribal member customers. This failure will leave many retailers without any tax-exempt cigarettes to sell, resulting in loss of revenues, layoffs, and business failures.

The District Court's ruling ignores the coercive nature of the supposed choices provided to the Tribe by the New Tax Law. While the law purports to give the Tribe two valid options, in fact it gives the Tribe an invalid and coercive choice between (1) doing nothing while its tribal retailers suffer serious harm to their businesses and their right to sell tax-exempt cigarettes to tribal members under tribal and federal law (and tribal members suffer harm to their rights to purchase tax-exempt cigarettes), or (2) adopting a tribal regulatory system to implement and enforce the state's coupon system, a serious infringement on tribal sovereignty. The District Court ruling is contrary to cases that hold that where a government—tribal or state—cannot be forced to regulate, neither can it be forced to choose between two coercive choices offered to it.

In *Wold II*, 476 U.S. 877, the Supreme Court held that a state could not compel or coerce a tribe to agree to waive its sovereign immunity and to have state law govern the resolution of all suits in which the tribe was a party, by depriving a tribe that had not done so of the right to bring suit in a state court. While the

Supreme Court ultimately held that the state law was preempted by Public Law 280, 25 U.S.C. §1360, which governs the assumption of state court jurisdiction over actions arising on Indian reservations, *Wold II*, 476 U.S. at 887, 893, the Court also held that this coercive legislative scheme infringed on tribal sovereignty. *Id*. at 887-92. The Court rejected the state's argument that the tribe was not deprived of access to state courts because it could gain access by consenting to the statutory conditions, because "those statutory conditions may be met only at an unacceptably high price to tribal sovereignty." *Id*. at 889. The state legislative 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 gain access to state courts." *Id*. The Supreme Court held that the choice offered to the tribe between waiving its sovereign immunity and accepting state jurisdiction or forgoing the right to sue in state courts was impermissibly "coercive." *Id*. at 891.

There are numerous analogous cases striking down attempts by the federal government to coerce actions by states. Under the Tenth Amendment, "Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States,* 505 U.S. 144, 161 (1992) (internal quotations and citations omitted). Congress cannot circumvent this prohibition by offering a state coercive option: "A choice between two unconstitutionally coercive regulatory techniques is no

choice at all." *Id*. at 176. Nor can Congress give a state or local government a supposed "choice" between applying federal standards to a state or local activity, or abandoning the activity altogether. For example, in *Board of Natural Resources v. Brown*, 992 F. 2d 937 (9th Cir. 1993), the court rejected the government's argument that the state could avoid the federal timber sales standards at issue by "simply halting all sales of timber." *Id*. at 947. The court stated: "this alternative is a Hobson's choice . . . . It is a choice similar to the one declared unconstitutional in *New York*, [505 U.S. 144,] as it presents an alternative, halting all timber sales, that Congress has no authority to command." *Id.; see also Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County,* 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J., concurring) (offering a county government the choice to employ federal standards in a zoning procedure or to "abandon the business" of regulation of cellular towers is not really a choice at all.).

Under *Wold II*, and by analogy the Tenth Amendment cases, the State simply cannot offer tribes a supposed choice between either accepting the coupon system, which would work a "severe intrusion on the Indians' ability to govern themselves according to their own laws," *Wold II*, 476 U.S. at 889, or doing nothing, and thus allowing the improperly crafted prior approval system to result in undermining the ability of tribal retailers and tribal members to exercise their federally and tribally protected rights to purchase and sell tax-exempt cigarettes, to

their financial detriment.[11] The District Court's holding that the prior approval system "does not compel a tribe or nation to become actively involved in regulating the distribution of tax-exempt cigarettes and instead leaves allocation of tax-exempt cigarettes entirely to free market forces," (SPA 36), is inconsistent with the above line of cases, the tribal interests at stake, the governmental nature of a governmental quota, and the nature of the supposed "free market."

The allocation of coupons, or a governmental quota of cigarettes, is by its very nature a governmental function. In the District Court, the State acknowledged that "[h]ow to allocate a scarce resource (like the coupons) among tribal businesses and individuals would appear to be a prototypically governmental decision . . . ." JA 1115 (emphasis added). The State was referring to the allocation of coupons, but the same could be said about the allocation of cigarettes under the prior approval system, which foregoes the use of coupons. Both the coupon and the prior approval systems involve a quota determined by the State and the distribution of that quota. In the regulations at issue in *Attea*, the State was to make the protypically governmental decision as to how to allocate the quota among

[11] The State suggested in the District Court that if a tribe does not elect the coupon system, and finds itself in the prior approval system, "Indian tribes could ... impose their own regulations on their licensed reservation cigarette sellers to ensure that tax-exempt cigarettes are broadly available and are not monopolized by any one entity." JA 1116-1117. Adopting such a tribal regulatory system would be no less intrusive on tribal sovereignty as a tribal regulatory system designed to allocate the coupons.

reservation retailers. *Attea*, 512 U.S. at 66. The fact that the State has now chosen to forego making allocations and instead has created a system that will authorize sales through state-licensed wholesalers does not convert the system to a free market system, especially given the finding that the system "creates incentive for a single wholesaler to acquire as much of the quota as possible so that s/he can then resell the tax-exempt cigarettes to reservation retailers at a premium," SPA 32, and Department's admission that "[t]here's nothing to prevent that wholesaler from selling only to one or two reservation retailers." JA 1167:22-24.

The probable demand calculations, and the incentive for wholesalers to monopolize the quota in order to sell at a premium, can in no way be said to constitute a free market. On the uncontested facts, the market for tax-exempt cigarettes for sale on Indian lands will be anything but "free." Pursuant to a State legislative enactment, and Departmental regulations, the Department will authorize the sale to tribal retailers of a limited quantity of tax-exempt cigarettes by the first state-licensed wholesaler(s) to claim the quota on the Department's website. The supposed "free market" actually consists of a quota set by the Department, controlled by the wholesaler(s) who wins the race to the Defendant's website each quarter. That wholesaler or wholesalers in turn can deal with the retailer or retailers of his or her choosing, based on his or her own business or personal reasons, whether it be price, past business relationship, or other factors, however

subjective, self-serving, or arbitrary. The wholesalers' choice of whom to deal with is enforced by the State; a tribal retailer who cannot obtain tax-exempt products from that wholesaler or wholesalers cannot lawfully obtain tax-exempt product at all.

Even if free market forces were at work in the prior approval system, because the allocation of a government quota is a "prototypically governmental decision," it is not one that can be left to a free market. "To suggest that a local governmental body withdraw" from government regulation and leave private actions "to the whims of the market is nothing short of suggesting that it end its existence in one of its most vital aspects." *Petersburg Cellular Partnership,* 205 F.3d at 703 (Niemeyer, J., concurring).

Yet, the District Court's decision suggests just that—that is, that the Tribe can simply allow the prior approval system to operate, leaving the allocation of tax-exempt cigarettes to tribally licensed retailers in the hands of state-licensed wholesalers using the flawed prior approval system, making a mockery of the tribal retailers' licenses and the Tribe's authority to grant those licenses and to regulate commerce between tribal members on the reservation. Though the interests to be served by the collection of the State excise tax on sales to non-tribal members is clearly the State's interest, and the allocation is clearly a governmental decision, the State has intentionally created the prior approval system whereby tax-exempt

cigarettes will be allocated in an irrational manner harming tribal retailers, in an effort to coerce the Tribe to opt for the intrusive coupon system.

There are significant tribal interest at stake. Mohawk "has a strong interest as a sovereign in regulating economic activity involving its own members within its own territory, and it therefore may enact laws governing such activity." *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d at 1200 (citing *Merrion*, 455 U.S. at 137). Mohawk has acted to foster tribal member businesses, and has an obvious interest in the success of those businesses and that they be allowed to engage in commerce for which they have been licensed by the Tribe. *See* JA 983-984. Tribe's history of entrepreneurship, and that Tribe has licensed 141 businesses, including the 30 licensed cigarette retailers).[12] The Tribe has an interest in being free from State interference in the regulation of tribal member commerce, which is within its sphere of regulation, and in the legal rights and economic security of its members.

The District Court committed legal error in requiring that a law must mandate tribal action to be violative of tribal sovereignty, and in holding that because the Tribe could do nothing and leave cigarette allocations to the prior

[12] Federal policies strongly support tribal sovereignty and economic development. *See e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987) (noting congressional goal of supporting Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development).

approval system there is no infringement of its sovereignty. SPA 33, 80. The New Tax Law imposes a coercive system on the Tribe, requiring that the Tribe either undertake to implement a State scheme, or that it allow the rights of its members and its own ability to govern to be infringed by the State scheme. The New Tax Law therefore infringes on tribal sovereignty.

### 3. The District Court Erred in Holding that the Prior Approval System was Severable from the Coupon System, and in Failing to Find that the Two Systems Infringe on Tribal Sovereignty

The Court erred in holding that even if the coupon system provisions were violative of tribal sovereignty, they could be severed, leaving the prior approval provisions in effect, because the two systems are "mutually exclusive." SPA 80-81. The coupon system provisions cannot be severed because the coupon system and prior approval systems are intertwined, and the Legislature intended tribes to have a choice between the two systems.

Severance is appropriate only when (1) the legislative body, foreseeing the partial invalidity, would have intended the provision to be severed, and (2) the remaining provisions can function as a coherent whole. *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (applying New York law). Moreover, "severance is inappropriate when the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature never intended." *Id*.

The coupon system provision cannot be severed from the remainder of the statute because to do so would require rewriting the dual scheme intentionally adopted by the Legislature. Under the New Tax Law, a tribe may elect the coupon system on an annual basis, and the prior approval system applies in a year that the tribe does not elect the coupon system. N.Y. Tax Laws §§ 471(5) (SPA 105), 471(1) SPA 104, 471-e(1)(b) (SPA 107).

When adopting the June 2010 amendments to the Tax Law, the Legislature could have chosen to replace the coupon system in prior section 471-e of the Tax Law with the prior approval system, but it did not. Instead, it retained the coupon system provisions, amending them to make them subject to tribal option, and added the prior approval provisions. *See* 2010 New York Laws 134, Part D, § 6 (SPA 96-97) (amending § 471-e, showing changes to prior law). The prior approval system was intended by the Legislature to supplement, and not supplant, the coupon system, as an option available to tribes.

This choice of which system to adopt is central to the legislative scheme. As the State said in the District Court: "[T]he Legislature left it to tribal governing bodies the decision of which system [coupon or prior approval] to adopt and how to administer their chosen system on the reservation." JA 1118.

The coupon system cannot be severed to leave only the prior approval provisions, as the Legislature intended that tribes have a choice, and not that the

prior approval system operate alone. In *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), the court found that one option provided to regulated parties by the FCC to increase minority hiring constituted an impermissible raced-based preference, while the other did not. *Id*. at 18-22. The court ruled that notwithstanding a severance clause in the regulation, the impermissible option could not be severed to leave the permissible option in effect:

> The core of the rule, by Commission design, is to provide broadcasters with two alternatives. . . .The Commission understandably, therefore, did not consider the loss of flexibility that eliminating the "alternative recruitment program" in Option B would entail. Presumably, however, the Commission would not have created Option B if it believed that Option A by itself was sufficient to achieve the Commission's goals. In any event, the court cannot by severing one alternative make the other mandatory; to do so would undercut the whole structure of the rule.

236 F.3d at 22.

Here, the Legislature intended tribes to have a choice (albeit a coercive one). Removing one choice and leaving the other would be to rewrite the statute in a manner not intended by the Legislature. *MD/DC/DE Broadcasters Association,* 236 F.3d at 22; *National Advertising Co.*, 942 F.2d at 151 ("it is clear to us that the ordinance must be redrafted and that the Town of Niagara, not this court, should do it").

Further, the coupon and the prior approval provisions are intertwined. The prior approval provisions themselves provide that a tribe may elect the coupon

system, and that the prior approval system applies only if a tribe does not make the election. N.Y. Tax Law § 471(1) ("Indian tribes may elect to participate in the Indian tax coupon system . . . . If an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system, the prior approval system shall [apply]."") (SPA 104). The provision providing for the determination of the probable demand calculation is contained in the coupon provisions, N.Y. Tax Law § 471-e(2)(b)(i) (SPA 108), although it is of course necessary to the functioning of the prior approval system provided for in N.Y. Tax Law § 471(5) (SPA 110). Because the coupon and prior approval provisions are intertwined, they cannot be severed. *See National Advertising Co.*, 942 F.2d at 148-151 (refusing to sever intertwined provisions); *New York State Superfund Coalition, Inc. v. New York State Dep't of Environmental Conservation,* 550 N.E.2d 155, 157 (N.Y. 1989) (where invalid standard was interwoven throughout the regulatory scheme, "judicial excision of that provision to let the rest survive is inappropriate.").

The presence of a severance clause in the statute[13] does not change the result. *MD/DC/DE Broadcasters Association*, 236 F.3d at 22; *National Advertising Co.*, 942 F.2d at 148 (severance clause "is not dispositive"); *New York State Superfund Coalition,* 550 N.E.2d at 157.

For the foregoing reasons, the coupon provisions cannot be severed. As

[13] 2010 New York Laws 134, Part D § 25 (SPA 101).

discussed above at 35-36, the coupon system provisions unlawfully infringe on tribal sovereignty by requiring the Tribe to adopt a regulatory scheme to implement State law. The District Court therefore erred in holding that the Tribe had not shown likelihood of success on the merits on the Tribe's severance argument.

## V. THE TRIBE WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

In granting the injunction pending appeal to Mohawk, the District Court explicitly found that "[a]bsent a stay, . . . plaintiffs will suffer irreparable injury," citing to its previous ruling in *Seneca*. SPA 85. In *Seneca*, the district court correctly observed that infringement to tribal sovereignty constitutes irreparable harm:

> Where, as here, enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty, federal courts have found the irreparable harm requirement satisfied. *See e.g. Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (finding irreparable injury where state's conduct created the "prospect of significant interference with [tribal] self-government"); *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (finding irreparable injury where threatened loss of revenues and jobs created the "prospect of significant interference with [tribal] self-government") . . . .

SPA 41-42. As discussed above, the New Tax Law imposes substantial burdens on tribal sovereignty. It forces the Tribe to choose between implementing the coupon

system—itself an infringement of sovereignty—or doing nothing and allowing the rights of its tribal retailers and tribal members to be infringed.

The District Court also found that the Tax Amendments would "almost certainly have an adverse impact upon the Nations' existing tobacco economies. The amendments will curtail the Nations' existing tobacco business with nonmembers. . . . [M]any retailers will lay off employees or close their businesses." SPA 42. The court followed this ruling with respect to Mohawk. SPA 85. If the New Tax Law takes effect, the State will allow Mohawk retailers to sell only about 1.2 million packs of cigarettes per year, compared to the 7.2 million packs that the Tribe sold in 2009. JA 983-984 ¶ 3. In addition, as noted above, due to the allocation problems inherent in the prior approval system, some Mohawk tribal retailers will not be able to obtain any of the 1.2 million packs made available to wholesalers for sale to tribal retailers.

Enforcement of the Tax Amendments will also result in a reduction in tobacco fees received by the Tribe, which are used to support essential tribal programs. JA 983-984 ¶ 3; 1036-1037 ¶¶ 6-8. This reduction of tribal revenues is also irreparable. *See Seneca-Cayuga Tribe v. Oklahoma,* 874 F.2d 709, 716 (10th Cir.1989) (finding irreparable injury due to threatened loss of tribal revenues and jobs); *see Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002) (finding irreparable injury where state tax on tribe would result in loss

of revenues and resulting inability to fund tribal government programs).

## III. AN INJUNCTION TO MAINTAIN THE STATUS QUO IS IN THE PUBLIC INTEREST

As the District Court noted in granting the injunction pending appeal in the *Seneca* case (which it followed in the Mohawk's case, SPA 85), the State "voluntarily chose to forebear collection of cigarette taxes from Indian retailers for many years." SPA 43; *see supra* at 6-7. In light of this long-standing forbearance policy, "the Court does not believe that the minimal, additional delay pending appeal will cause substantial injury, particularly when weighed against the potential irreparable harm to the Nations' tobacco economies." SPA 43; *see also Oneida* order, SPA 65 ("Although New York may have an interest in obtaining revenue, injunctive relief will maintain the status quo, not reduce the State's revenue."). Because of the long-standing forbearance, the stay maintains the status quo. SPA 43-44. As the District Court in *Oneida* stated: "the State's policy of forbearance . . . was its own choice and has been in effect for many years . . . . The State has been depriving itself of these revenues for many years and cannot now use revenues as a 'public interest weapon' to prevent injunctive relief where it is otherwise deserved." SPA 65-66.

## CONCLUSION

The Court should reverse the District Court's order insofar as it denied the Mohawk motion for a preliminary injunction, and remand the case to the District

Court with instructions that the preliminary injunction be issued. Because the District Court has already determined that the Tribe has shown irreparable injury absent an injunction and that an injunction is in the public interest, and because this Court should rule that the Tribe has shown likelihood of success on the merits, there is no need for any further hearing on the preliminary injunction motion in the District Court. This Court has held: "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." *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986).

Respectfully submitted,

/s/

Michael L. Roy
Marsha Schmidt
Hobbs Straus, Dean & Walker, LLP
2120 L Street, NW, Suite 700
Washington, D.C. 20037
(202) 822-8282

Dated: January 21, 2011

**Federal Rules of Appellate Procedure Form 6:**
**Certificate of Compliance With Rules 28.1(e)(3) and 32(a)(7)(C)(i)**

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because:

   X this brief contains 12,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

   ***or***

   __ this brief uses a monospaced typeface and contains [***state the number of***] lines of text, excluding the parts of the brief ex empted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   X this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2007** in **14 point Times New Roman**,

   ***or***

   __ this brief has been prepared in a monospaced typeface using [***state name and version of word processing program***] with [***state number of characters per inch and name of type style***].

/s/ Michael L. Roy
Attorney for St. Regis Mohawk Tribe
Dated: January 21, 2011