10-4265(L)

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

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ONEIDA NATION OF NEW YORK,
Plaintiff-Appellee,

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

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York, THOMAS H. MATTOX, in his official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, RICHARD ERNST, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,
Defendants-Appellants,

JOHN MELVILLE,
Defendant-Appellant-Cross-Appellee,

CAYUGA INDIAN NATION OF NEW YORK,
Intervenor-Appellant.

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

OPPOSITION BRIEF FOR ONEIDA NATION OF NEW YORK

[Counsel Listed on Inside Cover]

Peter D. Carmen
Meghan Murphy Beakman
ONEIDA NATION LEGAL DEPARTMENT
5218 Patrick Road
Verona, New York 13478
(315) 361-8687 (telephone)
(315) 361-8009 (facsimile)

Michael R. Smith
R. Miles Clark
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 778-1800 (telephone)
(202) 822-8106 (facsimile)

Daniel F. Katz
Dennis M. Black
WILLIAMS & CONNOLLY LLP
725 12th Street NW
Washington, DC 20005
(202) 434-5517 (telephone)
(202) 434-5029 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

STATE REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

In their opening brief, the Appellants adopt a see-no-evil, hear-no-evil approach. The Appellants will not concede that the pre-payment and prior approval provisions of the new tax law impose any burden on the Oneida Nation. Remarkably, the Appellants do not even assert that the burdens that clearly are imposed are minimal and reasonably necessary to assure tax collection. Yet the Supreme Court's *Attea* and other decisions establish that state cigarette tax laws pass muster only if both the "minimal burden" and "reasonable necessity" tests are met. Notwithstanding the Appellants' suggestions to the contrary, the Supreme Court has not blessed all conceivable tax pre-payment and prior approval systems, no matter what the impact a particular system will have on an Indian tribe and no matter what reasonable alternatives exist to mitigate or eliminate that impact.

The undisputed record supports Judge Hurd's findings that the new pre-payment system will require the Oneida Nation to be perpetually out of pocket $3.5 million in tax payments and to lose over $200,000 annually in additional costs associated with those payments. The Appellants respond, not by disputing the numbers, but by arguing that the Nation does not pre-pay a tax at all—proposing an imaginary world in which a price that is made up of almost 50% tax is just a "market" price. Not surprising, having refused to acknowledge that there is even a

tax obligation, the Appellants never explain why it is "reasonably necessary" to impose a huge tax pre-payment obligation without making an interest payment to the Oneida Nation to compensate for the associated carrying or opportunity costs. It is, in fact, reasonable and easy to make such compensating interest payments, as they are common in a variety of tax and other situations.

The undisputed record also supports Judge Hurd's finding (which is similar to one of Judge Arcara's findings) that the prior approval system lacks necessary safeguards to prevent state-licensed wholesalers from using the system to deprive the Oneida Nation of its quota of untaxed cigarettes or from monopolizing that quota and charging inflated prices. The most obvious but missing safeguard is a requirement that a wholesaler not claim the Nation's quota unless that wholesaler has a purchase order from the Nation. In response, the Appellants' rely on *Attea*, but, in stark contrast to the new tax law, the law at issue in *Attea* required a wholesaler to have and provide the State of New York with a valid purchase order before the wholesaler could claim the quota of untaxed cigarettes.

The Appellants' further defense of the new prior approval system, that threat of predatory conduct by wholesalers is speculative, is belied by the specific factual record on which the District Court relied in making its findings of fact. And the Appellants' argument that the State is not responsible for wholesaler conduct willfully ignores the fact that the prior approval system enables the wholesaler's

conduct by giving it the Nation's entire quota even when there has been no order, and then enforces the wholesaler's resulting monopoly by making it illegal for another wholesaler to sell to the Nation and for the Nation to buy elsewhere.

As for reasonable necessity, the Appellants obviously cannot argue that it would be unreasonably difficult to allocate the state-controlled quota for untaxed cigarettes only to a wholesaler that has an actual order. The simple purchase order requirement discussed in *Attea* would address the problem. The requirement would convert wholesaler competition to unilaterally grab the Oneida Nation's quota into a more appropriate competition to obtain cigarette orders from the Oneida Nation before claiming the quota.

Most important, the Appellants fail to explain why the District Court abused its discretion in preserving a decades-long status quo while the parties address the merits of the significant issues raised by the Oneida Nation. The preliminary injunction rests on careful findings of fact, none of which the Appellants challenge as clearly erroneous. The Appellants, on the other hand, offer no evidence in support of their arguments. This Court should sustain the District Court's exercise of discretion.

ARGUMENT

I. *Attea* and Earlier Decisions Do Not Dispose of the Oneida Nation's Challenge to the Tribal Pre-Payment Obligation Imposed by the New Tax Law and Do Not Undermine the District Court's Findings that the Law Imposes a $200,000 Annual Cost on the Nation to Pre-Pay $3.5 Million in Cigarette Taxes.

The District Court found that the new tax law and regulations will require the Oneida Nation to have $3.5 million in cigarette tax pre-payments perpetually outstanding without compensating the Nation for its substantial carrying or opportunity costs, which were found to amount to more than $200,000 annually. SPA61-63. The Appellants do not dispute these factual findings, which rest on unrebutted evidence. Nor do they assert that these burdens are reasonably necessary to implement the pre-collection/pre-payment tax law. Instead, the Appellants urge a flawed reading of Supreme Court precedent and argue that the District Court's findings of fact are irrelevant as a legal matter because the Supreme Court has approved similar schemes in the past.

A. *Attea* Reaffirmed the Principles of Federal Indian Law on Which the New Tax Law and Regulations Founder.

1. The Supreme Court Has Not Addressed, Let Alone Decided, the Issues the Oneida Nation Raises.

The Appellants' brief repeatedly notes that *Department of Taxation & Finance v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), and, before it, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v.*

Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), approved tax pre-collection schemes to collect taxes on tribal retail cigarette sales to non-tribal members. The Oneida Nation does not dispute that a permissible pre-collection scheme can be designed. But the Appellants are wrong in asserting that *Attea*, *Moe* or *Colville* foreclose the Oneida Nation's specific challenges to the current tax pre-collection law. None of the cases addressed the huge quantum of tax prepayment under New York's new laws and regulations, and none addressed whether a state, when it requires an Indian tribe to pre-pay state taxes, must compensate the tribe for its carrying or opportunity costs in floating those tax payments to the state. Furthermore, Indian tribes were not even parties in *Attea*. 512 U.S. at 67, 69-70. And, although *Moe* and *Colville* were challenges by Indian tribes to state cigarette taxing schemes that involved pre-collection, the Court did not examine the pre-collection aspect and held only that the state could "require[] that the Indian tribal seller collect a tax" from the retail customer. *Moe*, 425 U.S. at 483; *see Colville*, 447 U.S. at 159.

The Appellants' contention that *Moe* rejected the notion that the State must pay interest is absurd. The Appellants' support for this argument is not a holding or even dicta from the Court's opinion, but a footnote in the brief of a party.[1] Brief

[1] The footnote stated, without elaboration, that the tribal retailer could "never recover the interest-free loan made to the state" when the retailer prepaid cigarette

at 33. The Supreme Court never addressed the footnote, and there is no analysis, let alone a holding, in *Moe* on the subject.

2. Under *Attea*, States May Not Impose a Tax or a Non-Minimal Burden on Tribes, and Even Non-Minimal Burdens Must Be Reasonably Necessary and Tailored to the Collection of Tax on Tribal Sales to Non-Members.

The Oneida Nation's challenges to the pre-collection/pre-payment feature of the new tax law and regulations are based on firmly established principles of federal Indian law set forth in *Attea*. A state may not tax a tribe, or impose a more-than-minimal burden on a tribe; indeed, a state may not impose even a minimal burden that is not reasonably necessary to the state's collection of tax on taxable tribal retail sales. The Appellants have not disputed these well-settled principles. *See Attea*, 512 U.S. at 64, 73, 75.

a. Huge magnitude of required tribal pre-payment. The Appellants contend that it is a minimal burden, and not a tax, for the State to require the Oneida Nation to prepay $3.5 million and to keep that amount perpetually on deposit with the State in order to maintain an adequate inventory of cigarettes for taxable sales. Brief at 34-36. For this remarkable position, the Appellants principally rely on the Supreme Court's generally approving the concept of pre-collection/pre-payment regimes in *Moe*, *Colville* and *Attea*.

---

taxes. Brief for Appellees, 1975 WL 173495, at *23 n.26, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Nos. 74-1656, 75-50).

The amounts at issue in *Moe*, *Colville* and *Attea* were small. The tax in *Moe* was only $1.20 per carton of ten packs of cigarettes, 392 F. Supp. 1297, 1313 (D. Mont. 1975); in *Colville* only $1.60 per carton of ten packs, 447 U.S. 134, 141 (1980); and in *Attea* only $5.60 per carton of ten packs, 512 U.S. at 64. Moreover, the parties never argued, and the Court never considered, whether the amount of a tax prepayment could become so large such that it constitutes both a tax and an undue burden. The tax here is nearly forty times larger than in *Moe* and nearly ten times larger than in *Attea*.[2] Such differences of degree amount to differences of kind. The Oneida Nation's $3.5 million tribal pre-payment obligation is both a tax and easily a more-than-minimal burden. *Cf. Confederated Tribes v. Gregoire*, 680 F. Supp. 2d 1258, 1264 (E.D. Wash. 2010) (concluding, without citation of authority, that magnitude of pre-payment obligation is irrelevant in assessing burden under *Attea*).

b. Substantial annual carrying/opportunity costs related to pre-payment. The Appellants contend not only that a huge tribal pre-payment obligation is supported by *Attea*, but also that the State is not obligated to compensate the Oneida Nation for the carrying and opportunity costs associated with having $3.5 million in prepayments outstanding at all times. The District

[2] Indeed, the State's $43.50 per carton tax, is approximately as large as the underlying price of cigarettes, and will overtake the price if the tax is increased in the future.

Court's finding is uncontested that the carrying/opportunity costs associated with such a prepayment are more than $200,000 every year. SPA61-62. Instead, the Appellants erroneously argue that *Moe* relieved states of any obligation to compensate tribes for the actual cost to the tribe of making prepayments. Brief at 36. As demonstrated above, *Moe* never addressed the issue.[3]

To the extent that pre-collection/pre-payment is recognized in *Attea* as conceptually permissible, the central logic is that tribes will recover pre-payments from retail customers—that there will be no unreimbursed cost. But the costs at issue here will *not* be recouped in later cigarette sales to non-member customers; they will not be paid to the Oneida Nation by anybody. Those costs are, instead, uncompensated tribal expenditures imposed by the State. Such costs violate the clear federal prohibition on state imposition of taxes or more-than-minimal burdens on tribes as part of a cigarette taxation regime.

c. Absence of reasonable necessity. The Supreme Court repeatedly has emphasized—even when it has upheld pre-collection laws—that "minimal

[3] *Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007), cited in the Appellants' Brief at 35, likewise lends no support to the Appellants' contention that *Moe* somehow relieved states of any obligation to pay compensating interest. The amount of uncompensated interest at issue in that case—approximately $475 per year—was *de minimis*, *id.* at 891, and the court did not even consider whether the state's failure to pay compensating interest to the tribe was reasonably necessary.

burdens" imposed on Indian tribes must be "reasonably tailored" and "reasonably necessary" to the collection of taxes from non-member retail customers. *Attea*, 512 U.S. at 73, 75; *see Colville*, 447 U.S. at 159, 160 (1980). The Appellants say not a word about why the challenged features of the new tax law are reasonably necessary to achieve the State's tax collection goal. Their failure to do so is fatal.

The State of New York simply refuses to mitigate the enormous costs and other burdens that the new tax law imposes on the Oneida Nation and other tribes. For example, it would lessen the burden if the State permitted tribes first to obtain an untaxed inventory and thereafter to use tax collections from retail customers to pre-pay tax on replenishing orders. Regarding carrying costs, the reality that the State of New York and other governments often pay interest on tax overpayments, which the Appellants have not disputed, conclusively demonstrates that it is not reasonably necessary to deny the Oneida Nation reimbursement for the costs imposed by the new tax law's huge prepayment obligation. *See, e.g.*, 26 U.S.C. § 6611 (interest on overpayment of any internal revenue tax); N.Y. Tax Law § 688 (interest on overpayment of personal income tax); *id.* § 1088 (interest on overpayment of corporate tax).[4]

[4] The Appellants suggest that costs or burdens imposed on the Oneida Nation and other tribes are permissible because they do not differ from costs or burdens imposed on non-Indian wholesalers or other non-Indians, whether in the context of cigarette sales or other contexts. But tribes are not like other retailers. There is no rule forbidding states from taxing or imposing non-minimal or unnecessary

B. The Appellants' Assertion that the New Tax Law Does Not Require the Oneida Nation to Pre-Pay State Sales Taxes Is Insupportable.

The Appellants erroneously assert that the out-of-pocket and carrying costs imposed on the Nation are not taxes, but merely "the free-market value of the cigarettes in the Tribes' inventory." Brief at 38. That is nonsense.

The law imposes a tax of $4.35 on every package of cigarettes possessed for sale in the State, whether possessed by Indian tribes or others. N.Y. Tax Law § 471(1); 20 N.Y.C.R.R. § 74.1(a)(2); SPA104 & 112. The new taxing scheme imposes a mechanism for collecting the tax from wholesalers at the top of the distribution chain and passing the tax through each point in the stream of commerce and on to the retail purchaser, who bears "the ultimate incidence of and liability for the tax." N.Y. Tax Law § 471(2); 20 N.Y.C.R.R. § 74.1(b)(1); SPA105 & 112. For the "ultimate incidence" of the tax to be on the retail customers, notwithstanding initial payment at the top of the chain, the Oneida Nation must pre-pay that tax when acquiring cigarettes in the middle of the chain and then subsequently recoup the tax from retail customers. The tribes retain the retail customers' tax payments precisely because tribes pre-paid the tax themselves.

---

burdens on other retailers. A rule that states may impose on tribes the same taxes and burdens they impose on non-Indians would sweep away an entire body of federal Indian law with respect to the rights of Indian tribes and state taxation.

The law also requires that any "dealer," which includes tribal retail sellers, "who shall pay the tax to the commissioner shall [then] collect the tax from the purchaser or consumer." N.Y. Tax Law § 471(2); *see id.* § 470(7) ("dealer" includes all retail dealers). The law further requires wholesalers to include the amount of "the taxes" as part of the price they charge Indian tribes for cigarettes. N.Y. Tax Law § 471(3); 20 N.Y.C.R.R. § 74.1(b)(1); SPA105 & 112.

Further reinforcing that the new tax law requires Indian tribes to pre-pay a tax, N.Y. Tax Law § 471-e(2)-(3) provides a limited exemption from tribal tax payments to cigarette wholesalers for cigarette purchases for tribal or member use. SPA108-10. For those transactions, tribes are "exempt from the imposition of the cigarette tax" they otherwise must pre-pay; "the tax will not be collected;" such cigarettes may be obtained "without payment of the cigarette tax;" and, as to such cigarettes, wholesalers "shall not collect the cigarette tax" from the tribes. *Id.*[5]

[5] *See also* 20 N.Y.C.R.R. § 74.6(c)(5), SPA123 (providing that wholesalers "shall not collect the tax from any purchaser to the extent the purchaser gives the wholesale dealer Indian tax exemption coupons entitling the purchaser to purchase such quantities of cigarettes . . . without paying the tax"); *id.* § 74.6(c)(6), SPA123 (providing for refunds to wholesalers who have "sold without collecting the tax because it accepted the tax exemption coupon from its purchaser"); *id.* § 74.6(d)(4), SPA124 (providing for refunds to wholesalers who "sold without collecting the tax"); TSB-M-10(6)M, at 4, SPA142 ("When the coupon system is in effect, an Indian nation or tribe may purchase stamped packs of cigarettes for its own official use or consumption from a wholesale dealer licensed under Tax Law Article 20 without paying the cigarette excise and prepaid sales taxes . . . ."); *id.* (same regarding reservation cigarette sellers); *id.* at 6, SPA144 (providing for refunds to wholesalers "for any cigarette tax and prepaid sales tax paid on stamped

In light of these provisions requiring tax payments throughout the cigarette distribution chain, and in light of those specifically exempting tribal purchasers from payment of a tax in defined circumstances, it is clear that the Oneida Nation and other Indian tribes are pre-paying state taxes—and not just a wholesaler's price for cigarettes—when they obtain cigarettes for retail sale to non-members.[6] Taxes are not "free market," private sector costs like the cost of shipping. They are charges imposed by the power of the state.

II. The Appellants Ignore the District Court's Findings that the New Tax Law Incentivizes and Empowers Non-Indian Wholesalers to Abuse the Prior Approval System and Erroneously Assert that *Attea* Approved the Same System.

The Appellants concede that the Oneida Nation has a federally protected right to untaxed cigarettes for its use and the use of its members, but without citing any authority dismiss that right by repeatedly asserting that those cigarettes are a

---

packs of cigarettes they sold without collecting the taxes because they accepted tax exempt coupon(s)").

[6] Like amicus New York Association of Convenience Stores, the Appellants confuse the pre-collection scheme at issue here—which legally requires the entire chain of distribution to pass on the entire tax to the consumer—with the kind of tax scheme at issue in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). *Wagnon* involved the imposition and collection of a tax at the first level of distribution only. Under such a scheme, taxes are collected, not prepaid, and the tax collection process is complete before the product is sold to the tribe. There is no legal obligation to pass on the tax, so the amount the state collects is simply one of many factors affecting the resale price. There is no balancing of state and tribal interests in that situation because the state is not involving the tribe in collecting its taxes, as New York is doing here.

small percentage of tribal sales. *Attea* and other cases, however, have never even suggested, let alone held, that the State can infringe members' access to untaxed cigarettes because tribes sell more cigarettes to non-tribal members. Both judges below found significant problems with the law's provisions regarding tribal members' right to untaxed cigarettes, but the Appellants brush aside these flaws in their brief.

A. Unlike the Prior Approval System at Issue in *Attea*, the New Tax Law and Regulations Permit Wholesalers to Claim the Oneida Nation's Entire Quota without a Purchase Order.

The Appellants contend that the new tax law's prior approval provisions are lawful because they are "patterned on the regulations upheld by the Court" in *Attea*. Brief at 1; *see id.* at 15, 52.[7] The State's new law and regulations, however, differ markedly and materially from the provisions previously upheld. The new statute and regulations: (1) do not require a purchase order from the Oneida Nation before a wholesaler claims the Oneida Nation's quota of untaxed cigarettes;

[7] The Appellants also incorrectly assert that, in *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), the Ninth Circuit "upheld" a prior approval system "nearly identical" to the system challenged here. Brief at 52. *Baker* involved the appeals of two individuals convicted of conspiring to traffic in contraband cigarettes and other offenses, who broadly asserted a host of challenges to Washington's cigarette tax scheme, including that it violated tribal sovereignty. 63 F.3d at 1489-91. No tribe was a party to the case; no evidence was offered regarding the impacts of the tax scheme on Indian tribes; and the court did not address any particular aspect of the tax scheme's prior approval provisions, other than to note generally that the scheme requires wholesalers selling cigarettes to Indian tribes to obtain prior approval. *Id.* at 1490 n.15.

and (2) once a wholesaler claims the Oneida Nation's quota, other wholesalers with legitimate purchase orders are precluded from claiming those cigarettes, and the Oneida Nation is precluded from buying from other wholesalers. SPA120-26 (regulations); SPA139-46 (informal guidance). Under the law and regulations at issue in *Attea*, a wholesaler could claim and draw down a tribe's quota of untaxed cigarettes only by providing the State with "evidence of valid purchase orders," *Attea*, 512 U.S. at 66. New York's new law and regulations even permit a single wholesaler to claim the Oneida Nation's quota without ever having spoken to a Nation representative, let alone having obtained an order. SPA62-63 (District Court findings of fact). The Appellants ignore this crucial difference between the new tax law and the provisions in *Attea*.

B. There is No Reasonable Necessity for the Absence of a Purchase Order.

Even minimal burdens placed on tribes by state cigarette taxation laws must be "reasonably necessary" to achieve the State's goal of collecting taxes from non-members. *Attea*, 541 U.S. at 73, 75. The Appellants do not (and cannot) argue that the absence of a purchase order requirement or some other safeguard to assure the Oneida Nation's consent to a claim on its quota is reasonably necessary. They offer no explanation for the State's failure to include that protection in the new law and regulations.

C. Quota-Grabbing and Monopolization by Non-Indian Wholesalers Is Not a Speculative Problem.

While the Appellants dismiss the wholesaler abuse problem as speculative, they have pointed to no evidence in the record that undermines the District Court's Rule 52 findings that the prior approval provisions in the new tax law and regulations actually incentivize misconduct. Specifically, the law will force wholesalers to race to be first in claiming an entire tribal quota, despite the absence of any tribal purchase order, so as "to leverage for a higher sales price" for untaxed cigarettes or to withhold the cigarettes entirely to direct purchases to non-Indian retail stores. SPA62-63. Similarly, the Appellants point to no evidence that wholesaler abuse of the prior approval system is a remote or even an unlikely problem. Indeed, the Appellants do not rely on *any* record evidence to contest the District Court's findings about the likelihood of quota-grabbing behavior by wholesalers.

Unlike the Appellants' evidence-free arguments, the District Court's findings are not clearly erroneous. Undisputed record evidence, including testimony by the State's own witnesses, establishes the concrete, non-speculative harm incentivized by the new tax law and regulations. JA753-54 (Vanderlinden Testimony at 105:15-106:21) (any wholesaler could claim a tribe's entire quota to maintain a monopoly and sell at a premium); JA756-61 (Bartlett Testimony at 47:17-48:1, 88:1-89:2, 89:15-90:13) (any wholesaler could claim a tribe's entire

quota without a purchase order from the tribe and re-claim the entire quota every forty-eight hours); JA744-46 (Saffire Decl. ¶¶ 13-18) (describing financial incentives to wholesalers to take advantage of defects in the system); JA766-69 (Day Aff. ¶¶ 25-30, 33-36) (identifying defects in the system); JA768 (Day Aff. ¶ 35) (stating intent of wholesaler to claim entire quota for every tribe as soon as system becomes operational).[8] Where there is no record evidence to the contrary, the District Court's findings should be given substantial deference.

D. The Oneida Nation Cannot Stop a Wholesaler from Grabbing the Nation's Quota.

The Appellants attempt to dismiss wholesaler manipulation of the prior approval system by arguing that the Oneida Nation "can simply continue [its] previous practice of purchasing cigarettes from wholesalers" that it selects. Brief at 51. This argument completely misses the point. The absence of a purchase order requirement *eliminates* the Oneida Nation's ability to choose its cigarette

[8] The Appellants do not dispute that the State's website will permit a single wholesaler to claim the Nation's quota of untaxed cigarettes even without a purchase order. The Appellants' brief speculates that the quota-grab would be only temporary because the quota is restored to the computer system unless the wholesaler reports a sale within forty-eight hours. Brief at 15, 54-55. But the District Court found that the wholesaler can re-claim the quota every forty-eight hours, holding onto it permanently. SPA62-63; *see* JA744 (Saffire Decl. ¶¶ 9-11); JA753-54 (Vanderlinden Testimony at 105:15-106:21); JA760-61 (Bartlett Testimony at 89:15-90:1). Because the wholesaler is claiming only a quota, and is not actually purchasing cigarettes, repeated claims on the quota are made *at no cost* to the wholesaler.

wholesaler. The prior approval system instead permits a single wholesaler to claim all of the Nation's quota, forcing the Nation to do business with that particular wholesaler and no other.

The Appellants' suggestion that the Nation can "protect" itself from the system's deficiencies by "simply refus[ing] to deal with abusive wholesalers" or "by taking [its] business elsewhere," Brief at 61, is untrue. The State's prior approval system gives a quota-grabbing wholesaler the exclusive right to sell untaxed cigarettes to the Oneida Nation. The Nation has nowhere else to go. No other wholesaler can access the Nation's quota once it has been claimed, even if that wholesaler has a written purchase order from the Nation. Thus, the Oneida Nation has no way to "protect" itself from wholesaler conduct that the State's prior approval system encourages.

E. The Appellants' "Free Market" Argument Cannot Excuse the Fatal Deficiencies in the Prior Approval System.

The Appellants argue that any harm to the Oneida Nation under the prior approval system is permissible because it "would result from the behavior of private parties in the free market," rather than "conduct by the State." Brief at 57. This argument ignores the role of state law in tightly controlling the market in which the Oneida Nation has a federally protected right to obtain cigarettes that are free from state taxes.

Because the new tax law and regulations forbid wholesalers from selling untaxed cigarettes to the Oneida Nation absent prior approval from the State, the State has placed itself in control of commerce in untaxed cigarettes. All such commerce must flow through the State—more specifically, through the State's website—which gives an exclusive right to the Oneida Nation's quota to the first wholesaler who is quick enough to claim it, whether that wholesaler is actually doing business with the Nation or not. 20 N.Y.C.R.R. § 74.6(d), SPA124-26; TSB-M-10(6)M, at 5-6, SPA143-44. The wholesaler's control of the Nation's quota is clearly not a function of the "the market," as the term is commonly understood. It is instead the function of the State's control over the market for untaxed cigarettes. The resulting effect on the Oneida Nation is purely a function of State regulation rather than of the free market that would exist in the absence of state regulation. But for the deficient prior approval system, wholesalers would have no ability to hoard the Nation's quota of tax-exempt cigarettes and demand monopoly prices or block untaxed sales to the Nation.

F. The Coupon System Cannot Save the Flawed Prior Approval System.

The Legislature established the prior approval system as the default system. It applies by operation of law to any tribe that, like the Oneida Nation, has not opted into the coupon system. N.Y. Tax Law § 471-e(1)(b); SPA107. The prior approval system exclusively governs the Oneida Nation's access to untaxed

cigarettes, and the Appellants do not argue that there is any basis in the record to apply the alternative coupon system. Thus, the coupon system cannot be invoked to undermine the District Court's injunction, which protects the Oneida Nation from a prior approval system that will unlawfully restrict the Nation's federally protected right to cigarettes that are free from state taxes.

III. The Appellants Cannot Dispute Irreparable Harm to the Oneida Nation by Re-Arguing the Merits.

The Appellants contend that the Nation's "merits arguments are so baseless" that it "cannot establish irreparable injury." Brief at 68. This argument inappropriately re-casts issues about harm to the Nation as merits issues. Moreover, as demonstrated above, the Appellants' defense on the merits fails.

The Appellants do not dispute the authority that the District Court relied upon, SPA59-60, and that the Nation's opening Brief discussed, at 25-26, explaining why state infringement of tribal sovereignty justifies injunctive relief. *See, e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001); *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). Nor do the Appellants suggest that the State has waived or will waive its Eleventh Amendment immunity to damages arising from interference with the Nation's access to untaxed cigarettes, requiring huge tax pre-payments, or failing to compensate for the Oneida Nation's carrying and opportunity costs. SPA60-61 (District Court finding regarding Eleventh Amendment). Most notably, the

Appellants do not dispute the irreparable harm that would flow if the new law and regulations are determined to violate tribal sovereignty.

IV. The Preliminary Injunction Promotes the Public Interest.

The Appellants do not dispute that a state taxing scheme that violates federal law is inconsistent with the public interest, and that federal courts often enjoin such unlawful schemes. *See, e.g., Winnebago Tribe v. Stovall*, 341 F.3d 1202 (10th Cir. 2004). Instead, they continue to argue that the State's revenue and public health concerns establish a public interest in immediate enforcement of the challenged tax collection scheme. Brief at 71-73. As the District Court correctly found, the State's long-standing and intentional forbearance undermine any claim of a compelling public need for immediate enforcement to generate revenue for the State, SPA65-66, and the record is devoid of any evidence suggesting that the new enforcement scheme is directed at public health concerns. SPA66 (note 6). The District Court's injunction does nothing more than preserve the parties' positions under the status quo ante litem.

The Appellants also argue that injunctions against state laws always cause irreparable harm to the state. Brief at 71. This argument is meritless. First, if it were true, state laws would be insulated from federal challenge. Second, the Appellants' citation to an out-of-context excerpt from an opinion by then-Justice Rehnquist sitting as a Circuit Justice is misplaced. In *New Motor Vehicle Board v.*

Orrin W. Fox Co., 434 U.S. 1345 (1977) (Rehnquist, J., in chambers), Justice Rehnquist stayed an injunction against a state law controlling the establishment of automobile dealerships. *Id.* at 1347. The rationale for the stay was that dealerships could be established during the life of the injunction and thereby make it impractical to remove them if the injunction were later reversed on the merits. *Id.* at 1353. There is no comparable basis in this case for reversing the District Court's entry of a preliminary injunction. And the stay in *New Motor Vehicle Board* certainly was not based on a rule precluding federal courts from enjoining state statutes that offend federal law. Here, without an injunction that simply preserves the status quo, a new scheme will go into effect that both judges below found would likely disrupt federally protected tribal access to untaxed cigarettes and would require millions of dollars in payments that could never be recouped.

Independent Living Center of Southern California, Inc. v. Maxwell-Jolley, 572 F.3d 644 (9th Cir. 2009), shows that there is no rule barring injunctions against the operation of state statutes that compromise federally protected rights. The court there considered whether to vacate a preliminary injunction against a state law that cut Medicaid payments to care providers in the face of a fiscal crisis. The court rejected the assertion that "merely by enjoining a state legislative act, we create a per se harm trumping all other harms." *Id.* at 658. Instead, "[f]ederal courts . . . have the power to enjoin state actions, in part, because those actions

sometimes offend federal law provisions, which, like state statutes, are themselves [enactments] of its people or their representatives." *Id.* (internal quotation marks omitted). The court upheld the preliminary injunction, finding that the interests of certain care providers and the social interest in adequate medical care trumped the state's budgetary concerns. *Id.*

Here, where state, federal and tribal interests are involved, the public interest lies with a preliminary injunction that will protect the longstanding status quo pending careful review on the merits—not in the immediate implementation of a hastily enacted state law that compromises federally protected tribal rights.

CONCLUSION

The District Court's discretionary entry of a preliminary injunction to maintain the status quo should be affirmed.

Dated: February 4, 2011

Respectfully submitted,

/s/ Peter D. Carmen
Peter D. Carmen
Meghan Murphy Beakman
ONEIDA NATION LEGAL DEPARTMENT
5218 Patrick Road
Verona, New York 13478
(315) 361-8687 (telephone)
(315) 361-8009 (facsimile)

/s/ Michael R. Smith
Michael R. Smith
R. Miles Clark
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 778-1800 (telephone)
(202) 822-8106 (facsimile)

/s/ Daniel F. Katz
Daniel F. Katz
Dennis M. Black
WILLIAMS & CONNOLLY LLP
725 12th Street NW
Washington, DC 20005
(202) 434-5517 (telephone)
(202) 434-5029 (facsimile)

Attorneys for Appellee Oneida Nation of New York

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 **5,460** 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 2003** 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*].

Dated: February 4, 2011

/s/ Michael R. Smith
Michael R. Smith

Attorney for Appellee Oneida Nation of New York

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, a true and correct copy of the foregoing Opposition Brief for Appellee Oneida Nation of New York was served on all counsel of record in this appeal, listed below, via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

Steven Wu
Alison Julie Nathan
New York State
Office of the Attorney General
120 Broadway
New York, NY 10271

Daniel J. French
Lee Alcott
French Alcott, PLLC
9th Floor
300 South State Street
Syracuse, NY 13202

David W. DeBruin
Scott Wilkens
Jenner & Block LLP
Suite 900
1099 New York Avenue, NW
Washington, DC 20001

Michael L. Roy
Marsha Schmidt
Hobbs, Straus, Dean & Walker, LLP
Suite 700
2120 L Street, NW
Washington, DC 20037

James Simermeyer
Law Offices of
James F. Simermeyer, PC
16th Floor
148 Madison Avenue
New York, NY 10013

Michael T. Feeley
Rupp, Baase, Pfalzgraf, Cunningham
& Coppola LLC
1600 Liberty Building
424 Main Street
Buffalo, NY 14202

Andrew D. Bing
New York State
Office of the Attorney General
The Capitol
Albany, NY 12224

Carol E. Heckman
Harter Secrest & Emery LLP
Suite 400
12 Fountain Plaza
Buffalo, NY 14202

Michael A. Siragusa
Office of the Attorney General
State of New York
Suite 300A
Main Place Tower, 350 Main Street
Buffalo, NY 14202

Riyaz A. Kanji
Kanji & Katzen, PLLC
Suite 555
303 Detroit Street
Ann Arbor, MI 48104

Cory J. Albright
Kanji & Katzen, PLLC
Suite 700
401 Second Avenue South
Seattle, WA 98104

Eric Proshansky
New York City Law Department
Room 20-99
100 Church Street
New York, NY 10007

Hillary A. Frommer
Farrell Fritz, P.C.
Suite 500
370 Lexington Avenue,
New York, NY 10017

Margaret A. Murphy
Law Office of Margaret A. Murphy
5354 Briefcliff Drive
Hamburg, NY 14075

James M. Wicks
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556

Thomas G. Jackson
Phillips Nizer LLP
666 Fifth Avenue
New York, NY 10103

Richard T. Sullivan
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, NY 14210

/s/ Michael R. Smith
Michael R. Smith