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 Courts
for the Northern and Western Districts of New York

RESPONSE BRIEF FOR NEW YORK STATE DEFENDANTS

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Dated: February 4, 2011

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PRELIMINARY STATEMENT

The 2010 amendments provide for the collection of taxes from cigarette sales to non-tribal members on Indian reservations. Those nonmember sales constitute the vast majority of the Tribes' cigarette economies and could generate more than a hundred million dollars in annual revenue for the State. Neither the Tribes nor the courts below question the State's authority to collect taxes on these nonmember sales.

For the minute fraction of the Tribes' cigarette economies that consist of sales to member Indians, the 2010 amendments allocate to each Tribe a quantity of tax-free cigarettes sufficient to satisfy the probable demand of the Tribe and its members. The Tribes also do not question the State's authority to limit their supply of untaxed cigarettes to this probable-demand amount.

Instead, these appeals concern a much narrower issue. The 2010 amendments provide two alternative mechanisms—the coupon and prior approval systems—for distributing the probable-demand quantity of tax-free cigarettes to member Indians. The Tribes' principal contention on appeal—and the only one made by all of the Tribes—is

that the implementation of these mechanisms will violate their sovereignty.

That claim is unlikely to succeed. A probable-demand allocation of tax-free cigarettes can be distributed on the reservation in one of three ways: by the State; by the Tribe; or by the free market. Although the Supreme Court previously upheld New York's authority to allocate tax-free cigarettes among reservation retailers itself, that approach proved impracticable because the retailers refused to participate. Moreover, allocation by the State on reservation territory, although permitted, is the least respectful of the three options toward tribal sovereignty because it would require the State to directly interfere with economic activity involving member Indians on tribal lands. By contrast, both tribal distribution (under the coupon system) and free-market distribution (under the prior approval system) leave the State out of internal tribal affairs. The coupon system properly permits tribal governments to determine the distribution of tax-free cigarettes on the reservation. And the prior approval system properly allows individual Indians and Indian-owned businesses to obtain tax-free cigarettes themselves through the same distribution channels that they already

use. Thus, under both systems, the State makes available an adequate supply of tax-free cigarettes but appropriately declines to interfere with tribal matters on the reservation.

By contrast, the Tribes' objections to the coupon and prior approval systems turn tribal sovereignty on its head. Rather than resisting state intervention, the Tribes contend that their sovereignty is infringed because the State does not intervene *enough*. Under both systems, the Tribes insist that the State is responsible for ensuring that individual Indians in fact obtain tax-free cigarettes on the reservation. And they insist that this responsibility requires the State to essentially become the supervisor and regulator of the Tribes' on-reservation tobacco economies.

Tribal sovereignty requires no such thing. The 2010 amendments properly respect individual Indians' right to a tax exemption by making an adequate supply of untaxed cigarettes available, either to tribal governments or on the free market. How that supply is distributed on the reservation is ultimately the responsibility of the Tribes, not the State. The Tribes may choose to become involved in either effecting or policing distribution, particularly because the limited quantities of tax-

free cigarettes permitted under the 2010 amendments to satisfy the demands of tribal members are only a tiny fraction of the essentially unlimited quantities that the Tribes and their retailers have become accustomed to selling, almost entirely to nonmembers. The Tribes' sovereign right to govern themselves means that choices regarding the on-reservation allocation of their tax-free allocations are most appropriately left to them.

ARGUMENT

POINT I

THE TRIBES HAVE NOT SHOWN A CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Prior Approval System Respects Tribal Sovereignty.

1. Supreme Court and court of appeals precedents support the validity of the prior approval system.

As the State noted in its opening brief (at 52-53), the prior approval system is a direct descendant of the preapproval system that the Supreme Court upheld in *Department of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 76 (1994).[1] The system is also essentially identical to Washington's preapproval system, which the Ninth Circuit upheld against tribal sovereignty and federal preemption claims in *United States v. Baker*, 63 F.3d 1478, 1489-90 (9th Cir. 1995).

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[1] The UIN contends that the regulations upheld in *Attea* "lacked the prior approval scheme." UIN Br. at 35. But in fact, as the Court itself noted, 512 U.S. at 76, the *Attea* regulations expressly required agents and wholesalers to "obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation." 20 N.Y.C.R.R. § 336.7(c)(2) (1990) (repealed) (SPA137).

By contrast, the Tribes have cited no case holding a State's prior approval system illegal. In light of this directly applicable case law, and in the absence of any contrary precedent, the Tribes have failed to show a likelihood of success on their challenge to the prior approval system.

The Tribes make no attempt to distinguish *Baker*. (Indeed, their opening briefs do not even cite the Ninth Circuit's decision.) And, although they attempt to distinguish *Attea*, their purported distinction only confirms *Attea*'s applicability to this case. The Tribes claim that *Attea* is distinguishable because the Court upheld only the legitimacy of the probable-demand limitation and declined to rule on "'problems involving the allocation of cigarettes'" on the reservation. SNI Br. at 22 (quoting *Attea*, 512 U.S. at 77); *see also* Mohawk Tribe Br. at 27. According to the Tribes, the Court's unwillingness to consider allocation problems makes that issue an open question here. But that interpretation misreads the straightforward import of the Court's reasoning.

In *Attea*, the Court was confronted with allocation arguments nearly identical to the ones made by the Tribes here. The SNI's amicus brief in *Attea* complained that "the realities of the marketplace" would

cause member Indians and reservation retailers to be "restricted in obtaining the kind and quantity of the cigarette brands of their choosing," since tax-free cigarettes would either be unavailable or inconvenient to obtain under the Department's preapproval system. Brief for SNI as Amicus Curiae, 1994 U.S. S. Ct. Briefs LEXIS 25, at *24, *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994) (No. 93-377); *compare with* SNI Br. at 30-32 & n.7. The Supreme Court, however, found these arguments insufficient to halt the implementation of New York's tax regulations. The Court held that its review of a preenforcement challenge was limited to "those alleged defects that inhere in the regulations as written" and would not consider "consequences that, while possible, are by no means predictable." 512 U.S. at 69. And the Court found that complaints about the on-reservation availability of tax-free cigarettes fell into the realm of "possible, [but] by no means predictable" consequences that were premature in a preenforcement challenge. *Id.* at 77-78. Any such problems were more appropriately "addressed in some future proceeding" initiated after the tax's actual implementation. *Id.* at 77; *see also id.* at 76 (holding that speculative concerns about the

Department's approval process "can be addressed if and when they arise").

Thus, *Attea* squarely held that a preenforcement claim premised on concerns about the availability of cigarettes on Indian reservations cannot invalidate a state tax law. The Tribes do not contest that their lawsuits are preenforcement challenges to the 2010 amendments: to the contrary, they acknowledge that the prior approval system has yet to be implemented. *See, e.g.*, OIN Br. at 11 ("the website identified in the informal guidance never has been operational"). And the Tribes cannot dispute that their challenge to the prior approval system here, like the arguments presented to and rejected by the Court in *Attea*, rest on their assertion that tax-free cigarettes may become unavailable or less conveniently available. *Attea* thus disposes of the Tribes' preenforcement challenge to the prior approval system.[2]

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[2] *Attea* also disposes of the UIN's separate contention (at 41-44) that the 2010 amendments violate the Indian Trader Statutes. *Attea* squarely held that "New York's cigarette tax enforcement regulations do not, on their face, violate the Indian Trader Statutes." 512 U.S. at 78. The UIN attempts to distinguish *Attea* by claiming (at 42) that it is bringing an as-applied and not a facial challenge under the Indian Trader Statutes. But, as with the other Tribes, the crucial factor requiring *Attea*'s application here is that the UIN filed suit "[b]efore

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2. The Tribes' concerns about the prior approval system's practical effects are overly speculative.

Attea's holding is related to another principle that independently undermines the Tribes' claims. As this Court has recognized, speculative claims of injury do not justify injunctive relief. *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). But the harms that the Tribes attempt to pin on the prior approval system rest on just this type of impermissible speculation. The Tribes complain that the prior approval system *might* make it more difficult or expensive for tribal retailers and member Indians to obtain tax-free cigarettes because wholesalers *might* abuse the system. Specifically, the Tribes suggest that wholesalers might "monopolize" a tribe's probable-demand amount by claiming the entire allocation on the Department's website and then might abuse their temporary monopoly over the following 48 hours by charging higher

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New York's cigarette tax enforcement scheme went into effect." *Id.* at 67-68. Thus, as in *Attea*, the preenforcement nature of the UIN's challenge makes it "essentially a facial one." *Id.* at 69.

prices or capriciously denying tax-free cigarettes to some or all reservation cigarette sellers. The Tribes do not contend that the 2010 amendments, as written, *compel* such behavior. Rather, their argument is that the prior approval system violates tribal sovereignty merely because it "permits" such outcomes (*cf.* JA744-746). UIN Br. at 31.

But the mere fact that certain consequences are possible does not mean that they are "actual and imminent," as required to justify a preliminary injunction. *Grand River Enter. Six Nations*, 481 F.3d at 66. And here, in addition to the points raised in the State's opening brief (at 53-57), there are at least three reasons to doubt that any of the Tribes' predictions will come to pass.

First, it is speculative that wholesalers will actually engage in any abusive monopolistic behavior because there are clear incentives for them to refrain from alienating Indian tribes and reservation cigarette sellers. Under the 2010 amendments, wholesalers will sell both taxed and untaxed cigarettes to reservation retailers. If present sales are any indication, their sales of untaxed cigarettes will likely constitute only a small fraction of their sales of taxed cigarettes, since the 2010

amendments impose no restrictions on their taxed-cigarette trade.[3] *See Attea*, 512 U.S. at 75 ("Indian traders remain free to sell Indian tribes and retailers as many [taxed] cigarettes as they wish, of any kind and at whatever price."). If a wholesaler engages in abusive monopolistic practices with respect to the probable-demand amount, the only benefit it could expect would be to seize a very small amount of tax-free sales. But reservation cigarette sellers that are upset with the wholesaler's abusive practices could refuse to deal with that wholesaler for the more significant quantities of taxed cigarettes that the wholesaler would wish to sell. In addition, the tribal government could revoke the abusive wholesaler's tribal license, or simply exclude the wholesaler altogether from doing business on the reservation. No reasonable wholesaler would risk such sanctions and the potential loss of its taxed cigarette sales for the relatively insignificant benefit of being the sole source of tax-free cigarettes.

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[3] Nonmember sales may decrease from present levels when the Tribes lose their ability to market a tax exemption. But nonmember sales today so vastly outnumber member sales that, even if there is a decrease in nonmember sales, they will likely still constitute the majority of the Tribes' on-reservation cigarette economies.

Second, even if a wholesaler attempted to engage in abusive monopolistic behavior, it is speculative whether that behavior would be at all effective. The Tribes' chief concern appears to be that monopolistic wholesalers will either charge reservation cigarette sellers higher prices for tax-free cigarettes or else limit their sales of such cigarettes "only to their favored retailers." SNI Br. at 26. But those tactics would be futile against the Tribes that operate their own retail shops (the OIN and CIN). Because those Tribes are the sole retail purchasers of cigarettes on their reservations, their market power easily counterbalances any temporary monopoly that a wholesaler may attempt to abuse. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103 (3d Cir. 2010) ("A firm that has substantial power on the buy side of the market (*i.e.*, monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."). And because those Tribes decide for themselves how to distribute the cigarettes they buy among the small number of retail shops that they operate, it will be impossible for a wholesaler to exclude any reservation cigarette seller from accessing tax-free cigarettes against the Tribes' wishes.

Wholesalers are also unlikely to be able to exercise monopoly pricing over the Tribes that principally regulate independent retailers. The chief impediment is that any exclusive control that a wholesaler may achieve over a Tribe's tax-free allocation will last only 48 hours. This extremely limited duration necessarily limits the wholesaler's ability to leverage its bargaining position. The Tribes do not contend that they will ever face an urgent need to purchase cigarettes within two days; to the contrary, they acknowledge that several weeks typically pass between a wholesale purchase and a retail sale (*see, e.g.*, JA723). As a result, a reservation cigarette seller that is not satisfied with a particular wholesaler's price is far from helpless. Instead, that seller need only reach a more favorable deal with a different wholesaler, which will be able to complete the tax-free sale within a day or two.[4]

[4] The only way that a wholesaler will be able to extend its claim on a Tribe's probable-demand amount beyond 48 hours is if that wholesaler repeatedly returns to the Department's website every two days, despite knowing that reservation cigarette sellers prefer to purchase from other sources. But, as the State noted in its opening brief (at 54-55), the Tribes have presented no evidence that any wholesaler will engage in such behavior, or that it will do so for any length of time rather than simply acceding to reservation cigarette sellers' demands.

Third, even if a wholesaler does claim a particular Tribe's entire probable-demand allocation; even if that wholesaler then abuses its temporary claim to reduce the Tribe's access to tax-free cigarettes or to extort higher prices; and even if the Tribe and its reservation cigarette sellers are in fact helpless to resist such abuses—even then, any actual injury to the Tribe, its businesses, or its members is speculative because corrective action may adequately address any problems that may arise. The 2010 amendments permit the State to respond flexibly to unforeseen circumstances. The Department has already revised its regulations to extend the deadline for tribes to elect into the coupon system in recognition of the delays caused by this litigation. *See* 20 N.Y.C.R.R. § 74.6(b)(1)(ii) (SPA121). Similarly, the State may modify the cigarette tax scheme's application to individual tribes in response to that tribe's specific concerns. *See* Tax Law § 471(6) (SPA106); *see also Attea*, 512 U.S. at 77 ("Agreements between the Department and individual tribes might avoid or resolve problems that are now purely hypothetical."). For example, nothing in the 2010 amendments or regulations precludes the Tax Department and a tribe from working

cooperatively to limit access to the Department's website to wholesalers that are approved by the tribe.

Similarly, the federal government—which has plenary power over Indian traders, *see* 25 U.S.C. § 261—may also intervene "to protect the Indians from unethical traders' exploitation of an essentially captive consumer market." *Ashcroft v. U.S. Dep't of Interior*, 679 F.2d 196, 198 (9th Cir. 1982); *see also* 25 C.F.R. § 140.22 ("It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable."). And, of course, the Tribes themselves are not without recourse against wholesalers' depredations. *See* State Br. at 61-62; *cf.* 25 C.F.R. § 141.11(b) ("Nothing in the regulations of this Part may be construed to preclude tribal enforcement of these [Indian trader] regulations."). Thus, many of the Tribes' concerns may very well be mooted by preemptive or remedial action by the State, the federal government, or the Tribes themselves.

At base, the Tribes' objection to the prior approval system is not that the system itself either effects or authorizes any injuries to Indian tribes. Rather, the Tribes' complaint is that the prior approval system does not *guarantee* that no harm will result. But "[t]he practicalities of

a tax system do not demand hypothetical or theoretical perfection, and these workaday problems are properly the concern of the [Department], not of the Courts." *Rudolph v. United States*, 370 U.S. 269, 275 n.9 (1962); *see also United States v. Correll*, 389 U.S. 299, 306-07 (1967) ("[W]e do not sit as a committee of revision to perfect the administration of the tax laws."). Federal courts have long been reluctant to interfere with the administration of state tax laws when "'the Federal rights of the persons [affected] could otherwise be preserved unimpaired.'" *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330 (2010) (quoting *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909)). For all their arguments to the contrary, the Tribes cannot really know how wholesalers, reservation cigarette sellers, and the Tribes themselves will in fact adjust to the prior approval system.[5] As a result,

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[5] Tellingly, the Tribes give inconsistent predictions of the harms that they posit will occur. Some Tribes assert that reservation cigarette sellers will induce wholesalers to claim a tribe's entire probable-demand allocation (JA639), while others assert that wholesalers will make such claims preemptively (JA745). After a wholesaler obtains its temporary monopoly, some Tribes suggest that the wholesaler will then "deny the [tribe] access to [tax-free] cigarettes" "by returning to the website every 48 hours" (OIN Br. at 23-24); while other Tribes suggest that the wholesaler will sell tax-free cigarettes, but only at "a higher price . . . in effect extracting a private tax" (SNI Br. at 26), or only to "as few

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the Tribes' speculative concerns must be rejected at the preenforcement stage.

3. The Tribes have no entitlement to more than the prior approval system already provides: an adequate supply of tax-free cigarettes, made available to the Tribes through existing wholesale channels.

Aside from being overly speculative and directly foreclosed by *Attea*, the Tribes' challenge to the prior approval system fails because it asserts entitlements that the Tribes do not have. The Tribes contend that they are entitled to convenient access to tax-free cigarettes—even after the State legitimately reduces the supply of such cigarettes to less than one percent of their current levels. The Tribes contend that they are entitled to a guarantee by the State that wholesalers will refrain from certain business practices—even though the State is generally not responsible for private behavior. And the Tribes contend that they are entitled to a state policy that ensures what they consider to be an adequate distribution of tax-free cigarettes—even though the

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retailers as he chooses" (Mohawk Tribe Br. at 10), or perhaps both. The Tribes' failure to agree about the actual effect of the prior approval system confirms that their guesses are based not on evidence but on speculation.

distribution takes place on tribal territories and among tribal members. None of these arguments has any merit.

a. First, the Tribes claim a violation of their right to tax-free cigarettes because the inevitable misbehavior of private parties under the prior approval system will significantly reduce the availability of tax-free cigarettes to reservation retailers and individual member Indians. *See, e.g.*, SNI Br. at 30; Mohawk Tribe Br. at 18-19. But this claim assumes that, even under the 2010 amendments, the Tribes' members and cigarette sellers are entitled to retain the same ease of access to tax-free cigarettes that they currently enjoy. That assumption sets the baseline for the Tribes' asserted entitlement too high. Tax-free cigarettes are readily available on the Tribes' territories today only because millions upon millions of unstamped, untaxed cartons are being sold on Indian reservations. Nearly all of these cigarettes—over 99%—are sold to nonmembers, but an incidental byproduct of these massive nonmember sales is the easy availability of untaxed cigarettes for the tiny fraction of the Tribes' tobacco economies that is engaged in legitimately tax-free transactions. Thus, any ease of access to tax-free cigarettes that members and reservation retailers currently enjoy

necessarily derives from the widespread availability of the millions of untaxed cartons that are being sold to nonmembers. Because the Tribes have no entitlement to this tax-free nonmember economy, as the Supreme Court has squarely held, *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980), they have no entitlement to retain the current easy availability of tax-free cigarettes that is an incidental benefit of that economy.

Instead, the Tribes are at most entitled only to access tax-free cigarettes up to the probable-demand amount of their members for personal consumption. *Attea* is unambiguous on this point. That case held that New York could limit wholesalers' and agents' *sales* of tax-free cigarettes to a probable-demand amount. *See* 512 U.S. at 75. Because wholesalers and agents are the Tribes' sole legal source for most of the cigarettes that they sell, *see* 20 N.Y.C.R.R. § 74.3(a)(1)(iii) (SPA114), that holding necessarily condones limiting the Tribes' *purchases* of tax-free cigarettes to a probable-demand amount as well. Although the Tribes attempt to distinguish *Attea* in other contexts, *see, e.g.*, *supra* Point I.A.1, none of them question the State's authority to impose a probable-demand limitation on their untaxed cigarette supply. That

concession necessarily defeats the Tribes' claim that they are entitled to maintain the easy access to unlimited tax-free cigarettes that they enjoy today.

b. Second, the Tribes claim that their rights are violated because the prior approval system is not guaranteed to preclude the potential misbehavior of independent wholesalers. *See* SNI Br. at 34 ("[A] State may not establish a regulatory system pursuant to which private actors are likely to act in ways infringing on federally-protected rights and yet escape responsibility for that system."). But this contention runs counter to the principle that the State is generally not responsible for private action.

Private action is "attributable to the State [only] if there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself." *United States v. Stein*, 541 F.3d 130, 146 (2d Cir. 2008) (quotation marks omitted). Contrary to the Tribes' characterization, this test is not satisfied simply because a private entity acts in an "extensively regulated" industry or because the State approves of or acquiesces in that entity's actions. *Blum v. Yaretsky*, 457

U.S. 991, 1004 (1982). Nor is private action attributable to the State simply because the State has "fail[ed] to supervise" a private actor's exercise of an exclusive right granted by the government. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987). In fact, even a State's explicit grant of an economic monopoly does not convert a private business's decisions into state action. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974). Instead, the State is responsible only for private action that it coerces, controls, or directly encourages. *See Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005).

Here, none of the private misbehavior identified by the Tribes has anything approaching the required nexus with the State. The State neither directs nor encourages wholesalers to engage in abusive actions. Nothing in the 2010 amendments, their implementing regulations, or the Department's informal guidance dictates or even mentions any of the conduct that the Tribes assert will occur. Thus, the Tribes' argument is that the State is responsible for the private misbehavior of wholesalers simply because those wholesalers are acting in a regulatory scheme set up by the State. That sweeping claim would improperly

broaden the circumstances under which a plaintiff may "seek[] to hold the State liable for the actions of private parties." *Blum*, 457 U.S. at 1004. Accordingly, the State cannot be held responsible for the private business practices of wholesalers under the prior approval system. And by extension the Tribes cannot claim a right to have the prior approval system comprehensively police wholesalers' private actions.

Contrary to the SNI's characterization, the cases cited in its brief (at 34-42)—a fishing rights case and several First Amendment and voting rights cases—do not stand for any broader principle of state liability for private conduct. To the contrary, the voting rights cases confirm the general rule that a state is responsible for private action only when it "endorses, adopts and enforces" private wrongdoing, such as by prescribing an election process that incorporates such misconduct. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000).

The First Amendment cases are distinguishable on two grounds. First, the Court held there that the states' disclosure polices *themselves* chilled free association because they directly led individuals to quit or decline to join civil-rights organizations due to the anticipation of private violence. *See NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

Here, by contrast, the prior approval system *itself* does not deter Indians from purchasing tax-free cigarettes (to the contrary, it makes those cigarettes available in the first place), and the Tribes' speculative assertions of harm would occur only if private wholesalers in fact engage in abusive behavior. In other words, while the disclosure policies in *NAACP* directly caused constitutional harm, the prior approval system is not the proximate cause of any harm; instead, the Tribes will be denied tax-free cigarettes only if their speculations about private wholesalers' subsequent intervening decisions come to pass. Second, the Tribes lack the type of undisputed and abundant evidence of past retaliation that supported the plaintiffs' fears of private violence in the civil-rights era. *See id.* at 462 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."); *see also Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99 (1982) (citing "proof of specific incidents of private and government hostility toward the [association] and its members within the four years preceding the

trial"); *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004) (declining to extend these cases to cover an asserted "right to conceal one's appearance in a public demonstration").

Finally, the fishing rights case, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), did not even purport to articulate a general principle about state responsibility for private conduct. Instead, the Court was interpreting a "specific provision" of a treaty that guaranteed significant fishing rights to an Indian tribe. *Id.* at 675. The Court specifically noted that in interpreting that provision it was required to interpret the treaty broadly "in the Indians' favor." *Id.* at 676. Here, by contrast, no treaty provision guarantees the Tribes any tax-free cigarettes.[6] The Tribes' invocation of *Washington* improperly attempts to derive "platonic

[6] Although the SNI contends that federal treaties of 1794 and 1842 allow it to sell unlimited quantities of tax-free cigarettes to nonmembers, the tribe has expressly declined to press those claims here (SPA19). *See* SNI Br. at 22 n.2. In any event, the SNI's treaty claims have been rejected by every court that has considered them, including this Court. *See United States v. Kaid*, 241 F. Appx. 747, 750, 2007 WL 2705574, at *2 (2d Cir. 2007) (summary order); *N.Y. State Dep't of Taxation & Finance v. Bramhall*, 235 A.D.2d 75, 85 (4th Dep't 1997); *Snyder v. Wetzler*, 193 A.D.2d 329, 331, 335 (3d Dep't 1993), *aff'd*, 84 N.Y.2d 941 (1994).

notions of Indian sovereignty" from a decision that is instead firmly rooted in "the applicable treaties . . . which define the limits of state power." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973).

c. Finally, the Tribes claim a right to have the State actively intervene on the reservation to ensure that individual Indians and Indian-owned businesses have convenient access to tax-free cigarettes. *See, e.g.*, Mohawk Tribe Br. at 38 ("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"); SNI Br. at 30 (State must "assure . . . access to any portion of the tax-free cigarette quota"). For example, the Tribes claim that the State is responsible for "fairly allocat[ing] [tax-exempt cigarettes] to retailers on the reservation" and cannot leave that allocation to the free market. Mohawk Tribe Br. at 10. In the Tribes' view, the State's allocation must ensure that tax-free cigarettes are close enough to the residences of member Indians so that those individuals will not be required "to travel significant distances to purchase those cigarettes." SNI Br. at 32. And the Tribes contend that the State must guarantee individual members

"the full economic value of their federally protected tax immunity" by policing the price of cigarettes sold to Indians in their territories. *Id.* at 26.

The Tribes' sweeping conception of the State's responsibilities is at odds both with their conception of tribal sovereignty and with the history of New York's attempts to implement the cigarette tax on Indian reservations. The core principle behind tribal sovereignty is that Indian tribes should be "free from state interference" regarding tribal governance of their members on their reservations. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 686-87 (1965); *see also Colville*, 447 U.S. at 158-59 (holding that state regulation did not violate tribal sovereignty when it did "not interfere with the Tribes' power to regulate tribal enterprises"). The Tribes' own briefs acknowledge this basic principle. The Tribes argue that "[a]s a general rule, state law is inapplicable to on-reservation conduct involving only tribal members." Mohawk Tribe Br. at 23; *see also* CIN Br. at 23. Consequently, the Tribes claim that their right of self-government gives them the sole prerogative "to control the economic activity within [their] jurisdiction." UIN Br. at 24; *see also* SNI Br. at 17; Mohawk Tribe Br.

at 22; *Montana v. United States*, 450 U.S. 544, 555 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). Here, there is no question that the tax-free cigarette trade is on-reservation economic activity that involves tribal members. And yet the Tribes paradoxically insist that the State is *required* to regulate that trade by determining which Indian-owned cigarette retailers may obtain tax-free cigarettes; by dictating the quantities of such cigarettes that each retailer may sell to member Indians; and by controlling the prices that reservation retailers may charge. Their own description of the tribal-sovereignty doctrine is at odds with this claim.

The Tribes' insistence that the State must directly regulate the cigarette trade on their reservations may be rooted in the Supreme Court's holding in *Attea* that the State was *permitted* to allocate tax-free cigarettes among retailers on the reservations. *See* UIN Br. at 36; *see also* Brief for SNI as Amicus Curiae, *supra*, 1994 U.S. S. Ct. Briefs LEXIS 25, at *18 (complaining that the *Attea* regulations "require[] extensive state involvement and control"). But nothing in *Attea*

requires the State to proceed in that manner, and the State has reasonably chosen not to do so in light of the subsequent history of the *Attea* regulations. The State Tax Department withdrew those regulations in 1998, noting that "the regulatory scheme is unworkable as it currently exists," Notice of Adoption, 20 N.Y. Reg. 22, 23 (Issue 17, Apr. 29, 1998), in part because "the vast majority of the Indian retailers refused to register with the Department." *N.Y. Ass'n of Convenience Stores v. Urbach*, 275 A.D.2d 520, 522 (3d Dep't 2000). The Tribes' current assertion that the State is essentially required to return to the *Attea* regulations ignores the historical fact that implementation of those regulations proved impracticable due to tribal intransigence.

The 2010 amendments' prior approval system was designed to respond to the implementation problems of the *Attea* regulations while still respecting tribal sovereignty. *Cf. Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 892 (6th Cir. 2007) (upholding cigarette tax scheme that was revised in response to an Indian tribe's "repeated, brazen, and willful attempts to avoid remittance of the tax so as to profit from illegal sales of tax-free cigarettes to non-tribal members"). As the State explained in its opening brief (at 50-53), the prior approval

system no longer requires the direct participation of the Tribes, and reservation cigarette sellers can purchase tax-free cigarettes for resale to member Indians without having to register with the Department or turn over their records.

Moreover, far from radically restructuring the Tribes' cigarette economies, the prior approval system appropriately leaves undisturbed the existing structure of the Tribes' cigarette trade. Under the currently existing cigarette economy, Indian tribes and tribal retailers obtain nearly all of their cigarettes from non-Indian manufacturers, stamping agents, and wholesalers. Those non-Indian entities thus already control the supply of cigarettes to Indian reservations. *Cf.* 20 N.Y.C.R.R. § 74.3(a)(1)(iii) (SPA114) (cigarettes intended for sale in New York may be imported only by being sold to licensed stamping agents). The only effect of the prior approval system is to designate a portion of that supply as tax-exempt. The system does not otherwise alter the existing means by which cigarettes are imported into the State and distributed on Indian reservations. Instead, tax-free cigarettes—like nearly all other cigarettes sold on Indian reservations—will

continue to be supplied to reservation sellers by the non-Indian wholesalers that are already performing that function.

The prior approval system thus satisfies the State's limited responsibility to Indian tribes. The system makes available a quantity of tax-free cigarettes sufficient to satisfy the demand of the Tribes and their members. The system places that tax-free quantity in the distribution channels that the Tribes and their retailers already use to obtain their current supply of cigarettes. And, as the Western District properly concluded (SPA33), the system permits the allocation to be made without any involvement by the Tribes. Should the Tribes wish to become involved, the prior approval system leaves any decisions about the appropriate allocation of cigarettes on the reservation to them, in recognition of the Tribes' principal responsibility over their own people and tribal businesses. No principle of tribal sovereignty mandates that the State do more.

4. The Tribes' other arguments against the prior approval system are meritless.

a. The prior approval system's validity does not depend on the validity of the coupon system because the coupon system's provisions are severable.

The Mohawk Tribe and UIN contend that, if the coupon system is struck down, the rest of the 2010 amendments, including the prior approval system, must also be invalidated because the coupon provisions are non-severable. *See* Mohawk Tribe Br. at 45-49; UIN Br. at 55-57. Because the coupon system is valid, *see infra* Point I.B, this argument is meritless for that reason alone. But even if the coupon system were invalidated, the prior approval system would survive, as the Western District correctly concluded below (SPA80-81).

Under New York law, severability is a matter of legislative intent: "'The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'" *Ass'n of Surrogates & Supreme Court Reporters Within City of N.Y. ex rel. O'Leary v. State*, 79 N.Y.2d 39, 47-48 (1992) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). Here, the

Legislature could not have made its intent plainer. The 2010 amendments included a severability clause declaring "the intent of the legislature that this act would have been enacted even if such invalid provision had not been included herein" (JA190).[7] "[T]he inclusion of such a clause creates a presumption that [the Legislature] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also Jefferson County v. Acker*, 527 U.S. 423, 441 n.11 (1999) (holding that, if the county some day exceeded constitutional limits on its tax enforcement endeavors, a federal court would conserve what was constitutional in line with the severability clause in state law).

The Legislature's intent to make the coupon-system provisions severable is confirmed by other statutory provisions. The 2010 amendments revised Tax Law § 471-e—the provision establishing the coupon system—to emphasize that the remainder of the law should be implemented even if the Department never issued coupons (JA187).

[7] The UIN's contention that there is no severability clause is thus incorrect. *See* UIN Br. at 57.

And the 2010 amendments created the coupon system and the prior approval system as separate and independent mechanisms for distributing tax-exempt cigarettes to Indian tribes; each system was designed to, and can in fact, function without the other. Thus, even if the coupon system were invalidated, the prior approval system should not be.

b. The prior approval system does not prevent the Tribes from enforcing their own regulations.

The UIN contends that the prior approval system "has eradicated the Nation's sovereign right to freely choose with whom it trades" because "any State-licensed wholesaler may acquire and sell tax-free cigarettes to the Nation's reservation retailers, regardless of whether such wholesaler is approved and licensed by the Nation or agrees to follow the Nation's tribal laws." UIN Br. at 32. But, as the State argued in its opening brief (at 62-63), nothing in the prior approval system purports to preempt tribal regulations that approve only specific wholesalers to transact business on the reservation. Under the prior approval system, the UIN can continue to police against unapproved wholesalers that attempt to sell tax-free cigarettes to reservation

retailers, just as it currently prevents unapproved wholesalers from selling any other type of cigarettes. Thus, the 2010 amendments do not interfere with the UIN's own regulation of its tobacco economy.

B. The Coupon System Is Also Consistent with Tribal Sovereignty.

1. The coupon system imposes no burden whatsoever on the Tribes that operate their own cigarette retailers.

The State's opening brief argued (at 44-45) that the coupon system must be upheld as to the Tribes that operate their own cigarette retailers (the OIN and CIN) because the sole and minimal effect of the system is to give those Tribes a mechanism for purchasing tax-free cigarettes. Because these Tribes operate all of the cigarette retailers on their respective territories, they keep and use all of the coupons themselves, and so the issue of coupon allocation never arises. The OIN's opening brief—like the OIN's complaint (JA712-713) and its submissions before the district court (SPA57-58)—continues to raise no objection to the coupon system. The CIN does object to the coupon system, but its brief (at 42) simply incorporates the arguments made "by the Seneca and Mohawk Nations," even though those other Tribes

have substantially different relationships to their reservation cigarette sellers.

The CIN nonetheless makes two arguments in an attempt to hitch its position to that of the Tribes that regulate retail establishments rather than operating them. First, the CIN contends that the 2010 amendments must be evaluated, not simply on the basis of "a tribe's [current] on-reservation operations," but also on the basis of any future operations that a tribe may adopt. CIN Br. at 42. In other words, even if the coupon system imposes no undue burden on tribes that operate their own cigarette retailers, it cannot be applied to those tribes because they might later decide to become regulators instead. Second, the CIN contends that the State cannot impose a tax scheme unless it is universally applicable to all tribes; a scheme's invalidity as to any "number of tribes renders it invalid as to all tribes in the State." CIN Br. at 43.

These arguments ignore basic tenets of federal court jurisdiction. The CIN's attempt to invoke possible future policies as a shield against the 2010 amendments runs counter to the principle that federal courts do not "issue advisory opinions . . . to declare rights in hypothetical

cases." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). And the CIN's attempts to invalidate the coupon system because it may infringe other Tribes' sovereignty contravenes the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Accordingly, if the coupon system is valid as to the CIN and the OIN, then the 2010 amendments will apply to those Tribes regardless of the outcome of the other Tribes' suits.

2. The coupon system also respects the sovereignty of the Tribes that principally regulate independent retailers.

The Tribes that principally serve as regulators (the SNI, UIN, and Mohawk Tribe) contend that the coupon system infringes on their sovereignty by compelling the Tribes to "promulgate, implement and enforce a comprehensive new regulatory scheme to determine how to allocate the coupons to [their] licensed retailers." Mohawk Tribe Br. at 12. But the coupon system contains no such mandate—nothing in the 2010 amendments or the Department's regulations require the Tribes to pass any law or erect any administrative scheme. Instead, the coupon

system simply gives the Tribes control over the on-reservation distribution of an economic resource that is intended exclusively for their members' consumption. How that distribution occurs is left to the sole discretion of tribal governments.

Such a policy is consistent with tribal sovereignty. As noted earlier, *see supra* Point I.A.3.c, the Tribes themselves acknowledge that their sovereignty gives them the principal and sometimes exclusive authority to regulate economic activity on the reservation, particularly activity that concerns their own members. But the Tribes paradoxically contend—as they did with the prior approval system—that the coupon system infringes their tribal sovereignty *because* it allows the Tribes to distribute an economic resource on the reservation among their members. Even more paradoxically, the Tribes assert that the State *better* respects tribal sovereignty by taking over the distribution decision itself. *See* UIN Br. at 35-36; SNI Br. at 11. As explained above, this argument ignores history—the Department's attempt to allocate the coupons itself under the *Attea* regulations failed because the reservation retailers refused to cooperate—and is inconsistent with

the Tribes' own assertion of their primary authority to regulate transactions between members on their lands.

Having thwarted the State's earlier attempt to allocate the coupons, the Tribes now contend that the coupon system violates their considered sovereign decision not to intervene in their "well-regulated, private sector tobacco econom[ies]." SNI Br. at 14; *see also id.* at 9 ("the Nation's government eschews an expansive role as a cigarette retailer or command regulator"); UIN Br. at 4 ("the Nation deliberately refrains from interfering with or managing the retailers' business operations"). As the Western District recognized, the 2010 amendments in fact respect the Tribes' refusal to act by providing the prior approval system as an alternative means of distributing tax-free cigarettes without the Tribes becoming "actively involved" (SPA36). But even if the prior approval system did not exist, the Tribes' refusal to govern would not justify invalidating the 2010 amendments. The Tribes contend that any state cigarette tax scheme must guarantee member access to tax-free cigarettes, and that, if they can block that access by refusing to act, they can therefore prevent the State from collecting the tax concededly due on tribal sales of cigarettes to nonmembers. But the Supreme Court

reached precisely the opposite conclusion in *Colville*, holding that Indian tribes could legitimately be deprived of even tax-free cigarettes "if the Tribes do not cooperate" with the State's tax law. 447 U.S. at 161. Thus, although the Tribes may refuse to distribute tax-exemption coupons, they cannot render the 2010 amendments unenforceable as a matter of law simply by refusing to cooperate.

Even if the coupon system did impose some sort of burden on tribal sovereignty, the Tribes have failed to show that any such burden is excessive. As an initial matter, the Tribes simply exaggerate the difficulty of distributing tax-exemption coupons, particularly in light of the comprehensive regulatory schemes they already have in place. For example, the Tribes complain that they will need to adopt new procedures "to resolve disputes" by retailers "regarding the distribution of the coupons." UIN Br. at 29; *see also* Mohawk Tribe Br. at 12 (asserting that the coupon system will require new procedures for "due process and appeal rights"). But there is no reason that their existing court systems and tobacco regulations cannot provide for adequate review of any disputes (*e.g.*, JA73 ("Commission action that is arbitrary and capricious shall be subject to judicial review in the Nation's

Courts.")). Similarly, the Tribes complain about needing to collect sales data to determine how to distribute the coupons (*e.g.*, JA984), but their own rules already require such data to be collected and reported (*e.g.*, JA1004).

The Tribes' exaggerations extend to speculation about regulations that they *might* have to pass to deal with problems that *might* occur. The Mohawk Tribe, for example, asserts that it will "have to provide procedures to monitor and safeguard the coupons, and for enforcement of the coupon system." Mohawk Tribe Br. at 12-13. But as the Tribe admitted below, those procedures would be required only if "the coupons disappeared, were counterfeited, or were otherwise misused" (JA985)—events that obviously have yet to occur. Similarly, the SNI contends that the coupon system would force the tribal government to respond to "significant and destabilizing charges of favoritism, incompetence, and graft." SNI Br. at 46. But it is of course entirely speculative that the SNI will in fact engage in "favoritism, incompetence, and graft" in distributing tax-exemption coupons, and it is likewise speculative that its members would falsely accuse the tribal government of such wrongdoing. Thus, far from accurately describing what would be

required to distribute tax-exemption coupons on the reservation, the Tribes have instead engaged in speculative exaggeration to inflate the burdens that they assert are associated with the coupon system.

In fact, the only "burden" imposed by the coupon system is the expectation that the Tribes will distribute tax-exemption coupons. As the State's opening brief noted (at 45-48), that alleged burden is significantly less onerous than the specific, affirmative duties that the Supreme Court has upheld in its cigarette-tax precedents. The Tribes attempt to distinguish these cases by claiming that the burdens there were imposed only on tribal governments "acting in a proprietary capacity as market participants," SNI Br. at 47, rather than as "sovereign government[s]," Mohawk Tribe Br. at 36. But this distinction misreads the Court's cases. One of the burdens asserted by the plaintiff tribes in *Moe* and *Colville* was an asserted inability to impose a separate tribal tax on cigarettes. *See Colville*, 447 U.S. at 157-58; Brief for Appellees, 1975 WL 173495, at *24, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Nos. 74-1656, 75-50). As here, the regulations at issue in *Moe* and *Colville* did not forbid any tribal tax, but the plaintiff tribes claimed nonetheless that they would

feel pressure to abandon their taxes in order to maintain competitive prices on their cigarettes. *See* Brief for Appellee Indian Tribes, 1979 WL 200129, at *58-*60, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (No. 78-630). Even though "[t]he power to tax is an essential attribute of Indian sovereignty," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), the Court rejected the tribes' claims and upheld the state tax schemes at issue in those cases. The same analysis applies here.

C. The Tribes' Remaining Arguments Are Meritless.

1. New York May Precollect Taxes from Cigarettes Destined for Sale to Nonmembers.

The two Tribes that operate as cigarette retailers (the OIN and CIN), and one Tribe that operates principally as a cigarette regulator (the UIN), contend that the 2010 amendments' precollection mechanism intrudes on their sovereignty. They argue that requiring tribal retailers to purchase cigarettes that are destined for sale to *nonmembers* at a price that includes the precollected cigarette tax improperly deprives the Tribes of the use of their money for the period of time between when the Tribe first purchases cigarettes and when it finally sells them to

nonmembers. According to the Tribes, "[f]or the entire time that the carton is held in inventory before it is sold, those funds essentially have been loaned by the Indian nation to the State." CIN Br. at 31-32. The Tribes argue that the State must either desist from precollecting taxes for *any* cigarettes that will be sold to tribal retailers, or else pay interest to the Tribes for the State's allegedly premature confiscation of the Tribes' funds. *See* OIN Br. at 20. The Western District correctly rejected this argument (SPA23-25), although the Northern District mistakenly adopted it (SPA61-63).

This argument both mischaracterizes the 2010 amendments' precollection mechanism and ignores directly applicable Supreme Court precedent. Contrary to the Tribes' characterization, the State is never in possession of "tribal funds" that it is obligated to later return under the 2010 amendments. OIN Br. at 20. That characterization is mistaken in two respects: the precollected taxes are not tribal funds, and they are not held by the State subject to any obligation to return them. Instead, the State collects cigarette taxes exclusively from non-

Indian stamping agents and wholesalers off the reservation.[8] Moreover—unlike in the case of an injunction bond, *see Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 455 (7th Cir. 2010); or the excessive withholding of income, *see Maxfield v. U.S. Postal Service*, 752 F.2d 433, 434 (9th Cir. 1984)—the agents that prepay the tax (and the subsequent purchasers that incur and then pass along the cost of the tax) have no continuing claim on the money that the State has precollected, since the State is entitled to that money without qualification as satisfaction of a tax liability owed to it.

A retailer does not "loan" money to the State (or to the wholesaler that actually takes the retailer's money) when it pays for cigarettes at a price that includes the cost of the precollected tax. That reasoning would imply that the retailer also "loans" the nontax portion of the purchase price to the wholesaler, since the retailer recoups the nontax portion (like the portion of the price reflecting the tax) only upon

[8] Indeed, because the precollection occurs upon the initial importation of any cigarette carton, "prior to the time such cigarettes are offered for sale," 20 N.Y.C.R.R. § 74.3(a)(2) (SPA114), the State has no way of knowing whether those cigarettes are destined for resale to member Indians on the reservation or nonmembers instead.

completing a retail sale. But even the Tribes would not contend that wholesalers owe retailers interest for the nontax portion of the wholesale price.

Thus, tax precollection under the 2010 amendments does not involve the State's direct appropriation of tribal funds. Instead, the State precollects the cigarette tax from stamping agents at the start of the distribution chain and expects each subsequent sale to incorporate the cost of the tax as part of the purchase price of cigarettes until the ultimate nonmember consumer pays a price that includes the tax. The Supreme Court has twice specifically upheld this precise precollection mechanism against lawsuits by both tribally owned and independent reservation cigarette sellers that, like the Tribes here, objected to "pay[ing] the tax to the wholesaler and add[ing] it to the purchase price of the cigarettes." *Moe v. Confederated Salish & Kootenai Tribes*, 392 F. Supp. 1297, 1308 (D. Mont. 1974). In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-83 (1976), the Court squarely concluded that the States' precollection did not impose "a tax at all"; did not cause reservation cigarette sellers to "suffer[] a measurable out-of-pocket loss"; and accordingly did not violate tribal sovereignty. And in

Colville, the Court concluded that "the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe." 447 U.S. at 159; *see also Attea*, 512 U.S. at 76 ("By requiring wholesalers to precollect taxes on, and affix stamps to, cigarettes destined for nonexempt consumers, New York has simply imposed on the wholesaler the same precollection obligation that, under *Moe* and *Colville*, may be imposed on reservation retailers."); *Baker*, 63 F.3d at 1490 ("[T]he Supreme Court's decision in [*Attea*] was based on the assumption that the states can validly impose a prepayment requirement directly on reservation retailers.").

The Tribes attempt to distinguish these directly applicable cases by contending that the amount of the cigarette tax today is much higher than the taxes at issue in *Moe* and *Colville*. *See* OIN Br. at 19; CIN Br. at 19, 35-36. But in *Colville* the Supreme Court rejected the plaintiff tribes' similar argument that *Moe* was distinguishable because "the economic impact on tribal retailers [was] particularly severe" under Washington's precollection scheme. 447 U.S. at 151 n.27; *see also Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996)

("[T]he mere fact that a tax upon a non-Indian may ultimately have an economic impact on a tribe is not sufficient to defeat the tax."). Instead, the crucial factor in both *Moe* and *Colville*, as in these appeals, was that the tribes did not suffer any cognizable burden to their sovereignty due to precollection because the legal incidence of the tax fell on nonmember consumers. *See Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1263-64 (E.D. Wash. 2010) (rejecting argument that *Colville* no longer controlled the question of legal incidence of the tax, which had increased by 500% since *Colville*).

If anything, the increase in the amount of the tax only further justifies the State's precollection. *Colville* found that precollection properly advanced the State's interest in eliminating reservation retailers' "artificial competitive advantage over all other businesses in a State" due to their marketing of a tax exemption to nonmembers. 447 U.S. at 155. That "artificial competitive advantage" is even greater now that the tax is $4.96 (the cigarette tax plus the associated sales tax) rather than 56 cents per pack.

In short, when the State precollects the tax from wholesalers, it is not borrowing money from anyone, much less borrowing money from

the Tribes or their members, who are several steps down the distribution chain from the entity that prepays the tax. Moreover, if precollecting tax from the wholesalers were erroneously deemed to be the equivalent of borrowing from the Tribes, absurd consequences would result. The State would be required to pay interest to the Tribes for money that the State collected from other parties. The amount of the State's obligation would be wholly determined by the Tribes' unilateral decisions about the sizes of their own inventories. And the duration of the State's obligation would also depend solely on when the Tribes decide to sell their cigarettes at retail (*see* CIN Br. at 32). Under the Tribes' position, their cigarette inventories would essentially become guaranteed (and generous) investment vehicles, subject only to limitations self-imposed by the Tribes. Nothing supports these absurd results.

2. The UIN has no basis to demand certification, an evidentiary hearing, or mediation.

Alone among the Tribes, the UIN raises three arguments that are independent of the main issues on review in these appeals. First, the UIN contends that this Court should certify certain questions to the

New York Court of Appeals. *See* UIN Br. at 58. Second, the UIN criticizes the district court for failing to hold an evidentiary hearing. *See id.* at 45. Third, the UIN contends that the district court should have ordered mediation. *See id.* at 46-50. None of these arguments has merit.

a. There are no grounds for certification here. Whether the 2010 amendments comply with tribal sovereignty is a question of federal law, *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985), that does not require a dispositive state-court ruling. And although the severability of the coupon-system provisions is a matter of state law, the language of the 2010 amendments clearly supports severability, and, as demonstrated earlier, *see supra* Point I.A.4.a, "sufficient precedents exist" for this Court to reject the UIN's argument. *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 370 (2d Cir. 1999). While certification is useful in appropriate cases, this Court "resort[s] to certification sparingly," *Highland Capital Mgmt. LP v. Schneider*, 460 F.3d 308, 316 (2d Cir. 2006), and there is no need to do so here.

b. The Western District did not abuse its discretion in denying the UIN a preliminary injunction without holding an evidentiary hearing. *See Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000). The UIN does not appear to have ever requested an evidentiary hearing in its preliminary-injunction papers and has thus waived the issue. *See Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 441-42 (2d Cir. 1977). And even if it had, the UIN does not identify any disputed facts that the Western District resolved against the UIN. Instead, the Western District found as a matter of law that the 2010 amendments should be upheld because the prior approval system imposes no mandates on tribal governments (SPA80).

c. The Western District also did not abuse its discretion when it denied the UIN's motion for mediation because "[i]t is doubtful that any court-ordered negotiations would be successful at this juncture in the litigation" (SPA85). Under the Western District's rules, cases that "implicat[e] issues of public policy, exclusively or predominantly" are exempted from mediation (JA816). The UIN's lawsuit falls under this provision because it attempts to halt implementation of an important new tax law. In addition, mediation is inappropriate if it "has no

reasonable chance of being productive" (JA817). Here, the parties' disagreement over fundamental legal principles makes a settlement unlikely. For example, as the OIN points out (at 13), court-ordered mediation between the State and the OIN recently failed (JA711). The UIN has not explained why it has a better chance than the OIN to reach an agreement with the State.

Tax Law § 471(6) is not to the contrary. *See* UIN Br. at 46-47. That provision was intended to give Indian tribes and the State some flexibility in implementing the 2010 amendments. It was not intended to provide an avenue for Tribes to avoid the 2010 amendments altogether, as the UIN is attempting here. Thus, the UIN's request for court-ordered mediation was properly denied.

POINT II

THE PUBLIC INTEREST AND THE TRIBES' FAILURE TO IDENTIFY IRREPARABLE INJURY ALSO COUNSEL AGAINST A PRELIMINARY INJUNCTION

As they did below, the Tribes contend here that they will suffer irreparable injury due to infringements on their sovereignty and the loss of their extremely lucrative tax-free cigarette sales to nonmembers.

See SNI Br. at 53-54; Mohawk Tribe Br. at 49-50; CIN Br. at 43-44; OIN Br. at 25-26. But, as the State argued in its opening brief (at 66-69), the asserted harm to the Tribes' sovereignty relies solely on the Tribes' baseless arguments on the merits and thus cannot support a preliminary injunction. Moreover, the speculative nature of the Tribes' sovereignty claims makes it uncertain whether they will in fact suffer any harms to their right to self-government. And the Tribes' attempt to protect their existing tobacco economies fails under the Supreme Court's clear holding that Tribes have no cognizable interest in maintaining tax-free nonmember sales, no matter how lucrative or essential the revenue from those sales may have been. *See Colville*, 447 U.S. at 154-55.

By contrast, the State has already suffered concrete harm due to the delay in implementing the 2010 amendments. The new tax scheme is already five months behind schedule (SPA101, 103). Due to that delay, the State has lost millions of dollars in anticipated revenue, prejudicing the public-health programs that rely upon that revenue (JA201). Moreover, tax-free cigarettes continue to be widely available

on Indian reservations, thwarting the State's efforts to deter cigarette smoking with the excise tax. *See* State Br. at 70-74.

The Tribes mistakenly contend that there is "no evidence" that the 2010 amendments serve public-health purposes. OIN Br. at 28. But, as the State's opening brief noted (at 71-73), both New York law and the legislative history of the 2010 amendments expressly identify the amendments' public-health objectives. The Tribes also mistakenly contend that "the State's asserted interests in public health and raising revenue conflict with one another." CIN Br. at 47. But there is no conflict because most of the revenue from the cigarette tax will be devoted to promoting public health. *See* Tax Law § 482(b); Public Health Law § 2807-v. Thus, the 2010 amendments promote the State's health objectives whether the cigarette tax deters smoking or instead raises revenue to counter smoking's deleterious effects.

The Tribes also attempt to question the State's interest in collecting cigarette taxes on Indian reservations by noting that, prior to the passage of the 2010 amendments, the Department had not engaged in such collection. *See* SNI Br. at 54-55; Mohawk Tribe Br. at 51; CIN

Br. at 46; OIN Br. at 17. But the State's prior difficulties in collecting these taxes point in just the opposite direction.

The 2010 amendments are the culmination of years of legislative, administrative, and political attempts to collect cigarette taxes from nonmember sales by reservation retailers. Since 1988, the year that the *Attea* regulations were promulgated, the State has repeatedly returned to this collection issue. The State initially adopted the forbearance policy, not because it had disavowed the public interests served by collection, but because of significant practical problems that arose during the State's earlier efforts to implement the *Attea* regulations—problems that included "civil unrest, personal injuries and significant interference with public transportation on the State highways" caused by member Indians when the State attempted to collect the tax. *N.Y. Ass'n of Convenience Stores*, 275 A.D.2d at 523. The forbearance policy put a temporary end to these problems, but the State continued to pursue various legislative and negotiated resolutions. *See* Notice of Adoption, 20 N.Y. Reg. at 24 ("In addition to the repeal of the subject regulations, the Executive has also sent three complementary pieces of legislation to the Legislature."); *Cayuga Indian Nation of N.Y. v. Gould*,

14 N.Y.3d 614, 627-28 (2010) (describing legislative and regulatory enactments in 2003 and 2005); *Day Wholesale, Inc. v. State*, 51 A.D.3d 383, 384 (4th Dep't 2008) (addressing Attorney General's attempts to enforce the 2005 legislation).

The 2010 amendments were enacted to overcome these practical obstacles and to begin collection of a tax that the State is concededly owed. Accordingly, the Department revoked the forbearance policy in anticipation of the 2010 amendments (JA873), and upon the passage of the new law, the State moved quickly to implement it, including promulgating emergency regulations the day after the law's passage (JA875) and successfully moving to vacate a state-court injunction that had itself been premised on the forbearance policy (JA835-837). Thus, contrary to the Tribes' suggestions, the State has long asserted that the collection of cigarette taxes on Indian reservations serves important public interests. Any further delay in implementing the 2010 amendments only exacerbates the injury that has already been caused to those interests.[9]

[9] The SNI also contends that there is no urgency to implement the 2010 amendments because the State can simply collect the tax " directly

(*continued on next page*)

A preliminary injunction is particularly inappropriate here because the Tribes' claims focus on only a small part of the 2010 amendments. The Tribes seek—and the Northern District granted—an injunction preventing the State from collecting taxes on *any* cigarettes sold on Indian reservations. But the Tribes' claims focus on only a portion of their cigarette trade: as the Tribes themselves admit, their objection to the 2010 amendments "lies not with its provisions concerning the sale of cigarettes to non-tribal members, but rather, with its overreaching regulation of the constitutional sale of tax-free cigarettes to Nation members for their own use and consumption." UIN Br. at 34. There is no dispute here that member sales in the Tribes' territories constitute only a tiny fraction—less than one percent—of their cigarette sales to nonmembers. The Tribes' concern about this narrow sliver of their tobacco economy should not prevent the State

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from individual non-exempt consumers pursuant to N.Y. Tax Law § 471-a." SNI Br. at 55. But, as the Supreme Court has noted, that remedy is too ineffective to adequately serve the State's interests. "Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." *Moe*, 425 U.S. at 482.

from collecting a concededly legitimate tax on the remaining 99% of their cigarette sales.

The Tribes have tried to frame their challenge to the 2010 amendments as one that strikes at the heart of the new tax scheme. But they are mistaken. They concede, as they must, that the State can tax nearly all of the cigarette sales on the reservation (SPA19). They concede, as they must, that the States may restrict tax-free cigarettes on their reservations to a probable-demand amount that is only a fraction of their current untaxed supply (SPA21). And they concede, as they must, that the State is entitled to impose burdens directly on the tribes themselves to ensure that cigarette taxes are properly collected from nonmembers on the reservation (SPA18-19).

In other words, both the core of the 2010 amendments and the most significant portion of its intended application are not at issue in these appeals. The Tribes' grievances thus identify only problems at the margins of the new tax scheme. Implementation of the entire 2010 amendments should not be delayed while the Tribes seek a resolution on their narrow and peripheral claims.

CONCLUSION

The Western District's orders denying preliminary injunctions should be affirmed, and the Northern District's order granting a preliminary injunction should be reversed.

Dated: New York, NY
February 4, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,208 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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