To be Argued by:
PAUL J. CAMBRIA, JR., ESQ.
(Time Requested: 30 Minutes)

APL-2017-00029
Appellate Division Docket No. CA 15-01764
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Court of Appeals

of the

State of New York

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

– against –

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

LIPSITZ GREEN SCIME CAMBRIA LLP
Paul J. Cambria, Jr., Esq.
Erin E. McCampbell, Esq.
Attorneys for Plaintiffs-Appellants
Eric White and Native Outlet
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
Tel.: (716) 849-1333
Fax: (716) 855-1580

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STATEMENT PURSUANT TO RULE 500.1(f)

Native Outlet is not a publicly-held company and is fully owned by Eric White.

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In their opening brief to this Court, Plaintiffs Eric White ("Mr. White") and Native Outlet ("Native Outlet") (collectively, "Plaintiffs") asserted that New York State ("State") and its officers, agents, and representatives lack the authority to force Indian[1] retailers, like Plaintiffs, to participate in the State's scheme to tax the sale of cigarettes (which is found in Tax Law §§ 471 *et seq.*), when such sales occur between Indian retailers located on the sovereign land of the Seneca Nation and non-Indian customers, lest the Indian retailers risk criminal and civil sanctions.

The enforcement of Tax Law § 471 is incompatible with the plain language of Indian Law § 6, which codified the State's obligation to refrain from taxing "*for any purpose whatever*, upon any Indian reservation." Similarly, such enforcement of Tax Law § 471 violates the plain language of the State's solemn promise to "protect such of the lands of the Seneca Indians . . . *from all taxes*, and assessments for roads, highways, *or any other purpose*" as set forth in the Buffalo Creek Compromise Treaty of 1842, US-Seneca Nation, May 20, 1842, 7 Stat. 586 ("Buffalo Creek Treaty"), which is binding on the State and under full force of the law by nature of the Supremacy Clause of the United States Constitution. Finally, the State's enforcement of Tax Law § 471 on the transactions at issue in this appeal runs afoul of the Supreme Court's

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[1] To conform with the terms used in the various statutes and treaties at issue on appeal, and to avoid confusion, the term "Indians" will be used instead of "Native Americans" to refer to the members of the Seneca Nation, or more generally, members of Native American Nations.

decision in *The New York Indians*, 72 U.S. 761 (1866) prohibiting interference with Indian lands.

In the Brief the Defendants-Respondents submitted ("Defendants' Brief"), Defendants invite this Court to rubber stamp enforcement of Tax Law § 471, the State's taxing scheme *du jour*, on sovereign Indian reservations under a variety of theories, each of which this Court should reject. Instead, this Court should restore the force and effect of Indian Law § 6 and the solemn promise the State made in the Buffalo Creek Treaty to refrain from enforcement of "all taxes" for roads, highways "or any other purpose" on sovereign Indian reservations. The State has been allowed to neglect its obligations under the Buffalo Creek Treaty (and Indian Law § 6) for far too long.

ARGUMENT

I. Tax Law § 471 is not enforceable on the transactions between Indian-owned retailers, like Plaintiffs, on Indian land, between Indian retailers and their non-Indian customers.

As set forth in detail in Plaintiffs' opening brief, the enforcement of Tax Law § 471 on the cigarette sales of Indian-owned retailers to their non-Indian customers on an Indian reservation (1) is inconsistent with the solemn obligations of the State under the Buffalo Creek Treaty to refrain from taxation "for any purpose whatever" as subsequently codified in Indian Law § 6, (2) violates the Supreme Court's decision in the *New York Indians* case, and (3) strips those unambiguous provisions of their

intended meaning in violation of the mandatory rules of treaty and statutory construction. Moreover, the State's view of these provisions is out of step with contemporary society's respect for the autonomy of indigenous people. The Defendants have said nothing that undercuts Plaintiffs' position on the State's broad promise to refrain from taxation on Indian lands codified in Indian Law § 6 (and its predecessor provision, as well as the Buffalo Creek Treaty), especially lands that have always been possessed by the Senecas as their sovereign freehold.

A. The plain and unambiguous language of Indian Law § 6 and the Buffalo Creek Treaty precludes the State from enforcement of any form of taxation on the Seneca lands.

Defendants contend that the plain language of Indian Law § 6 indicates that this provision bars only enforcement of land-related taxes on Indian reservations and does not prevent the enforcement of Tax Law § 471 on transactions between Indian retailers and non-Indian customers on Indian reservations. (*See* Defs.' Br. at 21-25.) Defendants are mistaken. The plain language of Indian Law § 6 unambiguously prohibits such enforcement.

Under Indian Law § 6,

> Exemption of reservation lands from taxation
>
> No taxes shall be assessed, *for any purpose whatever*, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.

Indian Law § 6 (emphasis added). Based on the plain language of this provision, the State cannot impose its taxes within any Indian land "for any purpose whatever" *Id.*, including the collection cigarette excise taxes. Indeed, the phrase "for any purpose whatever" could not be any clearer.

Further, in the title of Indian Law § 6, "Exemption of reservation lands from taxation," the plural term "lands" connotes geography; otherwise, the Legislature would have used the singular term "land" to mean "real property only."

Defendants contend that this broadly worded protection from taxation "for any purpose whatever" pertains only to land-related taxes. The interpretation that Defendants advocate misses the distinction between the terms "land" and "reservation."[2] The term "land" simply sets forth the geographic boundaries for the protection from taxation for "any purpose whatever" within the confines of an Indian "reservation" so long as that land remained the property of the Indian Nation at issue. The term "land" does not signify that the protection the Legislature contemplated was protection from land-related taxes.

Similarly, Defendants contend that the plain language of the Buffalo Creek Treaty does not prohibit the State from enforcement of Tax Law § 471 on

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[2] The lands of the Senecas have always been theirs. The Senecas were not like other tribes, for whom the United States set aside a parcel of land as a reservation. Instead, they have always exercised their original sovereign jurisdiction over their lands.

transactions between Indian retailers and non-Indian customers on Indian reservations because that treaty, too, does nothing more than preclude the State from enforcement of "land" taxes. (*See* Defs.' Br. at 25-27.) Again, Defendants are wrong.

Under the Buffalo Creek Treaty, the State promised to:

> . . . *protect such of the lands of the Seneca Indians*, within the State of New York, as may from time to time remain in their possession *from all taxes*, and assessments for roads, highways, *or any other purpose* until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

Buffalo Creek Treaty, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added). The plain language of this provision indicates that the State promised to refrain "*from all taxes*" for roads, highways "*or any other purpose*" until the Seneca Nation relinquished its title to its land. *Id.* (emphasis added). The State did not promise to refrain from imposition of just land taxes. Instead, it promised to refrain from "all taxes" related to "roads" and "highways" and "*any other purpose.*" If the Legislature meant land-related taxes only, it would have said so.

B. This Court should not adopt the flawed interpretation of the lower courts of Indian Law § 6 and the Buffalo Creek Treaty.

Defendants suggest that this Court should adopt their incredibly restrictive interpretation of the broad protection from taxation for "any purpose whatever"

codified in Indian Law § 6 and the Buffalo Creek Treaty to pertain solely to a promise to refrain from imposing taxes on "land" because two lower courts have rubber-stamped the Defendants' interpretation in *Snyder v. Wetzler*, 193 A.D.2d 329 (3d Dep't 1993) and *Matter of New York State Dep't of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75 (4th Dep't 1997). (*See* Defs.' Br. at 20-21.) Tellingly, Defendants do nothing more than identify those cases, with little to no analysis of the holdings and whether they were correct or whether they disposed of the precise arguments raised by Plaintiffs in this case. The analysis in those cases does not withstand critical scrutiny of any kind.

In *Snyder v. Wetzler*, 193 A.D.2d 329 (3d Dep't 1993), *aff'd* 84 N.Y.2d 941 (1994), the Third Department rubber stamped the Defendants' interpretation of these provisions, which this Court should set aside for several reasons. *Snyder* is not binding on this Court and is an inherently flawed decision. First, *Snyder* failed to recognize that federal cases resolving claims between different tribes and different states were irrelevant to its inquiry into the distinct relationship between the *State* and the *Seneca Nation*. *See Snyder*, 193 A.D.2d at 333-35. Second, *Snyder* was devoid of any discussion of the cannons of construction mandating courts to "liberally" construe the Buffalo Creek Treaty and Indian Law § 6 in favor of the Seneca Nation. *See Snyder*, 193 A.D.2d at 330-35. Indeed, the Third Department's

failure to "liberally" construe these texts (or even to acknowledge its obligation to do so) has resulted in the narrowest and most restrictive interpretation possible.

Moreover, this Court's affirmance of the result in *Snyder* creates no barrier to this Court's examination of that decision. In affirming the result, this Court expressly disclaimed any consideration of the arguments Plaintiffs assert—that Tax Law § 471 violates Indian Law § 6 and the treaties underpinning that provision—because the litigants in that action failed to preserve that issue for appellate review. *See Snyder*, 84 N.Y.2d at 942 ("To the extent plaintiff contends that the State tax statutes at issue violate either the Supremacy Clause or New York law, his arguments are unpreserved and cannot be considered on this appeal.").

With *Snyder* correctly set aside, Plaintiffs respectfully urge this Court to reject *Matter of Dep't of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75 (4th Dep't 1997), *appeal dismissed* 91 N.Y.2d 849 (1997), as that case, too, was wrongly decided. In *Bramhall*, the Tax Department sought an order confirming its seizure of gasoline being transported to retailers located on the Seneca Nation, who, the Tax Department alleged, sold that fuel in violation of a taxing scheme similar to Tax Law § 471. *Bramhall*, 235 A.D.2d at 78. The retailers opposed the Tax Department's request on a number of grounds. However, the court ruled in favor of the Tax Department. *Id.* at 82-86.

In reaching its result, the court construed the relevant treaties as narrowly as possible, ruling that no treaty other than the Buffalo Creek Treaty provided the Seneca Nation with protection from enforcement of the State's taxing schemes, and that such protection was solely from taxation of "lands," *i.e.*, real property. *Id.* at 85. Much like *Snyder*, there is no mention, much less recognition that the court was *required to construe the treaties "liberally" in favor of the Seneca Nation*. *Id.* Notably, with no discussion of the merits of the opinion, the court repeatedly cited to *Snyder*, and ruled that "Indian Law § 6 . . . bar[s] only the imposition of a tax on reservation land." *Id.* Similarly, the court erred by relying *generally* on federal precedent resolving disputes between different tribes and different states for the *distinct* proposition that the State's taxing scheme did not violate the sovereign and independent rights of the Seneca Nation. *Id.* Thus *Bramhall*, too, with its brief, and at times, incomplete analysis, should be set aside.

Finally, the restrictive and narrow construction collides with the prior, broader, and analytically sounder conclusions of the Court of Appeals. Long before *Snyder* and *Bramhall*, this Court recognized the absolute and original sovereignty of the Seneca Nation. *See Hastings v. Farmer*, 4 N.Y. 293, 294 (1850) (explaining that any member of one of the tribes of the Six Nations is "governed by the laws and usages of his tribe, and is only subject to our laws, so far as the public safety

requires"). Indeed, in *Patterson v. Council of Seneca Nation*, 245 N.Y. 433 (1927), the Court of Appeals explained that the State had long "acknowledged the *Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them.*" *Id.* at 443 (emphasis added). These decisions, never overruled, were conveniently absent from discussion in *Snyder* and *Bramhall* and are squarely at odds with them.

C. No federal court has independently analyzed the issue before this Court on this appeal.

Defendants suggest that this Court should adopt their restrictive interpretation of Indian Law § 6 and the Buffalo Creek Treaty as pertaining solely to protection from taxation of "land" because the Supreme Court has ruled that states have the authority to require Indian Nations to collect their cigarette taxes for them and in the absence of federal authority prohibiting the State's enforcement of Tax Law § on the transactions of Indian retailer with non-Indian customers on Indian reservations, this Court should bless Defendants' conduct. (*See* Defs.' Br. at 18-20.) To bolster their argument, Defendants point to *Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Washington v. Confederated Tribes of Colville Indian Reserv.*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463 (1976); and *Oneida Nation of*

N.Y. v. Cuomo, 645 F.3d 154 (2d Cir. 2011), all of which, they contend, allow this State to enforce Tax Law § 471 on the transactions of Indian retailers and non-Indian customers on the Seneca Nation's reservations.

Defendants' reliance on these cases is misplaced. *None* of these cases addressed the authority of states to enforce cigarette taxing schemes on anything other than challenges based on principles of *federal* law such as sovereignty, treaty, and statutory based challenges. *See Milhelm Attea*, 512 U.S. at 64-78 (noting that the sole issue before the Court was whether the State's authority to enact a cigarette taxing scheme was preempted by the federal Indian Trader Statutes); *Moe*, 425 U.S. at 475-83 (evaluating a challenge to a Montana taxing scheme under the federal common law principle of tribal self-determination and other federal statutes concerning Indian relations); *Colville*, 447 U.S. at 152-64 (addressing challenges to Washington's cigarette taxation scheme under federal common law and statutes, and the Indian Commerce Clause); *Oneida Nation*, 645 F.3d at 164-75 (evaluating challenges to Tax Law § 471 under the federal doctrine of preemption and the right of self-determination).

Indeed, none of those cases addressed the issue before this Court, namely, *this State's* ability to enforce Tax Law § 471 on the Seneca Nation's reservations in light of *this State's* enactment of Indian Law § 6 and *this State's* acquiescence to the terms

set forth in the Buffalo Creek Treaty, including the promise to refrain from "all taxes" for "roads, highways, *or any other purpose*."

Defendants proclaim *United States v. Kaid*, 241 F. App'x 747 (2d Cir. 2007), an unreported summary order from the Second Circuit, is as an example of a federal court that has rejected Plaintiffs' interpretation of Indian Law § 6 and the Buffalo Creek Treaty. (*See* Defs.' Br. at 20-21, 23-24, 27.) This Court should reject the *Kaid* summary order because it did nothing more than rubber-stamp the lacking analysis of *Snyder* in *two sentences*. *See Kaid*, 241 F. App'x at 750. Instead, the focus of that summary order was resolution of weighty appellate issues such as the propriety of evidentiary rulings at defendants' trial, claims of ineffective assistance of counsel, and the severity of the sentences imposed. *Id.* At 750-53. The Second Circuit's rushed analysis of the issue before this Court offers no substantive guidance on Plaintiffs' and Defendants' positions in this litigation. All that court did was cite the flawed decisions beginning with *Snyder* and thereafter rubber stamped by the Fourth Department.

In sum, the plain language of Indian Law § 6 precludes the State from enforcing Tax Law § 471 on the sovereign Seneca reservations. There Supreme Court has never addressed this issue. Although the Third Department's opinion in *Snyder* has been cited by the Fourth Department and the Second Circuit (albeit, in

an unreported summary order), neither *Snyder* nor the three decisions to cite it have done anything other than engage in a rote dismissal of the position Plaintiffs' advocate. This Court's critical review of this vital issue should not be guided by those flawed rulings. Instead, this provision must be viewed in light of special rules of construction derived from the Supreme Court, and the treaties on which it is based, as well as the historical pronouncement of numerous State officials regarding its enactment and purpose.

D. The mandatory rules of statutory and treaty construction indicate that Indian Law § 6 and the Buffalo Creek Treaty preclude the State from enforcement of any form of taxation on the Seneca reservations.

Although the plain language of Indian Law § 6 and the Buffalo Creek Treaty preclude the State from enforcement of Tax Law § 471 on Indian reservations on transactions between Indian retailers and non-Indian customers, should this Court find any ambiguity in those provisions, the mandatory rules of statutory and treaty construction dictate the same result. It is well-settled that, in the case of ambiguity, statutes enacted for the benefit of Indians, like Indian Law § 6, "are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)); *accord County of Yakima v. Confed. Tribes of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with these

two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quotations omitted)). Similarly, in the case of ambiguity, "[t]he language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001).

The Defendants' interpretation of Indian Law § 6 and the Buffalo Creek Treaty, which was adopted by the lower courts, violates these mandatory rules of construction. Defendants advocate transforming a broad prohibition from taxation "for any purpose whatever" into protection from nothing more than land-related taxes. They suggest that this court diminish the clear protection "from ***all taxes***" into protection from land-related taxes. Aside from construing these provisions to the detriment of Indians, in violation of the mandatory rules of construction, such an interpretation is at odds with what the Indians would have understood protection "from ***all taxes***" or from taxation "for ***any purpose whatever***" to have meant. At the time the Buffalo Creek Treaty was negotiated, the State taxed many items *in addition to* real property, such as salt, mills, and dogs. *See* T.S. Gillett, *General Index of the Laws of the State of New York*, 623, 679, 681 (1859). Thus, protection "from all

taxes" would have been understood to mean protection from land-related taxes and all of the other taxes in existence at that time, including nascent forms of sales or excise taxes on items of personal property such as salt, mills, and dogs. This Court should decline Defendants' invitation to ignore these mandatory rules of construction and should interpret the terms of Indian Law § 6 and the Buffalo Creek Treaty to the benefit of the Indians, which means what those provisions say, protection from "all taxes" or taxation "for any purpose whatever."

To distance themselves from these mandatory rules of construction, which uniformly favor Plaintiffs, Defendants suggest that the legislative history underlying enactment of Indian Law § 6 and the signing of the Buffalo Creek Treaty confirms that Indian Law § 6 and the Buffalo Creek Treaty do not bar the State from enforcement of Tax Law § 471 on transactions between Indian retailers and non-Indian customers on Indian reservations because those provisions do nothing more than protect the Indians from land-related taxes. (*See* Defs.' Br. at 27-29.) There are several flaws with this assertion.

First, this Court should only consider the legislative history of Indian Law § 6 to the extent that the Court finds that provision ambiguous (which it is not). Second, a review of the legislative materials upon which Defendants rely indicate

that far more was at stake for the State and the Seneca Nation in the mid-1800s than simply land-related taxes.

The mid-1800s was a dark chapter for the history of the Seneca Nation, as it was for many Nations. The Ogden Company, a land company, used "improper means . . . to obtain the assent of the Seneca chiefs" to sell the Ogden Company its four reservations in a treaty solemnized at Buffalo Creek Treaty in 1838. *See* Report of Special Committee to Investigate the Indian Problem of the State of New York, Appointed by the Assembly of 1888, transmitted to the Legislature February 1, 1889 (the "Whipple Report"), at 27. The Seneca Nation *purportedly* agreed to relinquish their reservations and to relocate to a different state. *Id.* However, as time passed, the majority of the members and chiefs of the Seneca Nation protested, indicating that the sale was invalid because the Seneca Nation:

> Had ninety-one chiefs and a majority had not signed; that a part of those who had signed were not chiefs; that some names were forged; that some chiefs had been bribed by the agents of the Ogden Company, and that the contracts of bribery had been in writing and were in their custody; that, while the resolution of the Senate required that the assent of the chiefs should be made in council, only sixteen had signed in council, and the remainder out of council and separately, with other objections.

Id. at 28. Fearing that they would be unable to litigate the validity of the sale before they were required to vacate their sovereign land, the Seneca Nation, initiated

negotiations with the Ogden Company, and the Federal and State governments. *Id.* at 29. The result was a restoration of their full rights with respect to the Alleghany and Cattaraugus reservations in compromise recorded as the Buffalo Creek Treaty.

The Report of the Judiciary Committee on the Memorial of the President and Councilors of the Seneca Nation of Indians for Relief From Taxes, Senate Doc. No. 29 (January 22, 1857) ("1857 Senate Report") indicates that the State recognized that the Seneca Nation occupied the Cattaraugus and Allegany reservations in 1842 "with the same right and title in all things as they had and possessed therein immediately before the date of the treaty of 1838." *Id.* at 87; *accord id.* at 88 ("[T]here can be no doubt but this treaty placed the title of the Senecas to the Allegany and Cattaraugus reservations in the same condition that it was prior to the treaty of 1838."). The 1857 Senate Report further elaborated that:

> [T]he Senecas do not hold the title to the Cattaraugus and Alleghany reservations under the State of New York, nor under the United States, but their title to the same is *original, absolute and exclusive*. . . . They are rather to be regarded as a distinct and independent nation, having a constitution and representative government of their own.

Id. at 89 (emphasis added).

Furthermore, the legislative history makes it clear that the State understood that it had no right to enforce *any* of its tax statutes on the Seneca reservations:

> The State of New York being a party to the treaty of 1842, is of course bound by the provisions, and is also bound not to impose *taxes* on said reservations.

Id. at 88 (emphasis added). The author's use of the term "taxes" instead of "tax" suggests that the Buffalo Creek Treaty prohibited more than one kind of tax (a land-related tax), but instead, contemplated a much broader protection from "taxes" as Plaintiffs have asserted. Similarly, the [January 17, 1857 Report] indicated that the State agreed to refrain from enforcement of taxation "for highway *and other purposes*." *Id.* at 2.

The foregoing makes it clear that the contemporaneous understanding of the signatories to the Buffalo Creek Treaty at the time it was executed and, shortly thereafter, the time Indian Law § 6 was enacted was the restoration of all sovereign rights to the Seneca Nation over their reservations, which included, among other things, protection "from all taxes" or taxation "for any purpose whatever." Otherwise, the sovereign Seneca Nation would have relinquished its sovereignty to the State, subjugating itself to the State's unlimited power to impose taxes. That view runs contrary to the well-documented sovereignty of the Seneca Nation and the inability of the State to impose taxes on the Seneca Nation and its reservations discussed in contemporary official reports.

Moreover, any inquiry beyond the plain and unambiguous text of Indian Law § 6 and the Buffalo Creek Treaty should also involve a review of the contemporaneously issued judicial opinions, pronouncements from State officials, and the history of Indian-State relations as recorded by the leading scholar on Indian-State history at that time, all of which indicate that the Seneca Nation was a sovereign Nation that was not subject to the laws of the State, including the State's taxation schemes, nor would the Nation have agreed to subject itself and its members to every form of taxation other than land-related taxation. (*See* Pls.' Opening Br. at 10-16.) Thus, at the time the Buffalo Creek Treaty was executed, and shortly thereafter, at the time Indian Law § 6 was enacted, the Seneca Nation, and the State's Legislature, Governors, and courts understood that the State had no authority whatsoever to impose taxes "for any purpose whatever" on the Seneca Nation's reservations because the Senecas held original title as a separate sovereign entity.

II. The enforcement of Tax Law § 471 on the transactions at issue on this appeal constitutes enforcement of a tax.

Defendants contend that enforcement of Tax Law § 471 is not the enforcement of a tax at all, rather, it is enforcement of a tax-inclusive price. (*See* Defs.' Br. at 29-31.) This Court should reject this nonsensical argument.

The provision at issue is *Tax* Law § 471. It is entitled, "Imposition of cigarette *tax*." The text of *Tax* Law § 471 refers to the subject of the provision as a *tax* thirty-

four times. And this provision is just one of the numerous provisions that regulate enforcement of this cigarette *tax*. *See* Tax Law §§ 470, 471, 471-a, 471-b, 471-c, 471-d, 471-e, 472, 473, 473-a, 473-b, 474, 475, 476, 478, 479, 480, 480-a, 480-b, 480-c, 481, 482, 482-a. Moreover, Tax Law § 471 is located within Chapter 60 of the State's Consolidated Laws, known as the Chapter on "Tax Law," which sets forth nothing but the various State *taxes* to be imposed.

To side-step the State's repeated and express concession that its cigarette tax as a *tax*, Defendants point to *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463 (1976) to contend that enforcement of Tax Law § 471 does not constitute enforcement of a tax because the cigarette taxation scheme in that case was akin to this State's Tax Law § 471 and that scheme was deemed to result in a tax-inclusive price and not a true tax. (*See* Defs.' Br. at 29-30.) This case is readily distinguishable from the instant proceeding. In *Moe*, the Supreme Court evaluated challenges brought against the purported cigarette taxing scheme of another state, Montana, by an Indian Nation that did not possess the unique rights of sovereignty of the Seneca Nation and did not involve a State with a provision akin to Indian Law § 6. *See Moe*, 425 U.S. at 475-83. Notably, the Supreme Court has ruled otherwise when evaluating challenges to taxation brought by the Seneca Nation. For example, when the Supreme Court reviewed the mere assessment of a

tax to be paid by non-Indians in the *New York Indians* case, the Court held that the assessment violated the sovereign rights of the Seneca Nation to be free from taxation as secured by the Buffalo Creek Treaty. *See New York Indians*, 72 U.S. 761, 769-72 (1866) (precluding the State from engaging in a mere assessment of a tax to be paid by non-Indians). If the mere assessment of a tax to be paid by non-Indians was recognized as a *tax*, this Court should recognize the enforcement of Tax Law § 471 as the enforcement of a *tax* and not the convoluted concept of a tax-inclusive price.

III. Tax Law § 471 has not impliedly repealed the State's obligation to refrain from enforcement of taxes "for any purpose whatever" on the Seneca Nation's reservation.

Defendants contend that, if this Court finds that Tax Law § 471 is incompatible with Indian Law § 6, this Court should nonetheless maintain that Tax Law § 471 is enforceable on the transactions at issue because enactment of Tax Law § 471 impliedly repealed Indian Law § 6. (*See* Defs.' Br. at 31-35.) There are several reasons why this Court should reject Defendants' invitation to invalidate the State's declaration to refrain from taxation "for any purpose whatever" found in Indian Law § 6.

First, the theory as to why Tax Law § 471 overrides Indian Law § 6—implied repeal—is a rule of construction that is shaky at best. The doctrine of implied repeal

"is heavily disfavored." *Ball v. State*, 41 N.Y.2d 617, 622-23 (1977) (declining to rule that a subsequently enacted statute impliedly repealed an earlier statute). Indeed, the theory of implied repeal should not allow a subsequently enacted statute to trump the plain and unambiguous language of an earlier statute that was honored, in force, and relied upon for over 150 years before enactment of the latter statute, particularly because Tax Law § 471 says nothing about the Legislature's intent to repeal Indian Law § 6. *See Cimo v. State*, 306 N.Y. 143, 148-49 (1953) ("The absence of an express provision in a later statute, for repeal of an earlier one, gives rise to a presumption that repeal was not intended."). Such a holding would create chaos because it would mean that New York law is only as dependable as the courts deem the Legislature to allow or disallow based not on explicit legislation, but the courts' interpretation of Legislative action by implication. Moreover, Indian Law § 6 is Federal treaty based and a Federal treaty cannot be disregarded especially by some assumed, unexpressed repeal.

Second, with proper guidance from this Court as to the scope of its enforcement, Tax Law § 471 can be harmonized with Indian Law § 6. There are two types of retailers located on the Seneca Nation's reservations: *Indian* owned retailers and *non-Indian* owned retailers. Plaintiffs do not object to the enforcement of Tax Law § 471 on the transactions between *non-Indian* owned retailers and their

non-Indian customers because the signatories to the Buffalo Creek Treaty did not contemplate any protection of *non-Indians* on the sovereign land of the Seneca Nation. Critically, Tax Law § 471 recognizes that "no tax shall be imposed on cigarettes sold under such circumstances that this *[S]tate is without the power to impose.*" Tax Law § 471(1) (emphasis added). Because the State has the power to impose its tax schemes on non-Indian retailers, but is without the power to impose its tax schemes on Indian retailers, this provision can be interpreted to carve out transactions between Indian retailers and their customers (Indian and non-Indian), yet allow for continued enforcement of Tax Law § 471 on the transactions of non-Indian retailers and their non-Indian customers. Under such an interpretation, Tax Law § 471 would remain in force *and* in harmony with the State's obligations under Indian Law § 6 and implied repeal is not appropriate. *See Cimo v. State*, 306 N.Y. 143, 148-49 (1953) (declining to conclude that a subsequent statute impliedly repealed an earlier statute because, among other reasons, "[i]f by any fair construction, both statutes can be given operation, implied repeal will not be declared").

Further, even if this Court rules that Tax Law § 471 is incompatible with and trumps Indian Law § 6, Tax Law § 471 cannot and does not trump the State's solemn promise in the Buffalo Creek Treaty to refrain from "all taxes" for roads, highways,

"or any other purpose" which is binding and which would remain in force by virtue of the Supremacy Clause regardless of whether this Court rules that Indian Law § 6 has been impliedly repealed by Tax Law § 471. Defendants have provided no argument to the contrary. The Buffalo Creek Treaty will remain in place unless it is renegotiated by its signatories and replaced with a new treaty.

IV. Tax Law § 471 is incompatible with the Supreme Court's holding in the *New York Indians* case.

Defendants contend that Tax Law § 471 is consistent with the holding in *New York Indians*, 72 U.S. 761 (1986). (*See* Defs.' Br. at 35-40.) To bolster their argument, Defendants once again trot out *Moe*, *Colville*, and *Milhelm Attea*, arguing that these cases demonstrate that the notion that Indian sovereignty trumps a state's ability to enforce taxation on Indian reservations as articulated in the *New York Indians* case has since been rejected by the Supreme Court. (*See id.*) Again, Defendants are mistaken.

Much like the legislative reports Defendants cited, the *New York Indians* case is a contemporaneous explanation of the limitations of State taxing power on the reservations of the Seneca Nation around the time that the Buffalo Creek Treaty was executed and Indian Law § 6 was enacted. Regardless of what the Supreme Court said at later times, under federal principles only, about the relationship between Nations who had been removed to states like Montana and Washington in cases like

Moe and *Colville*, the Supreme Court was clear that, when it came to the Seneca Nation, the State's *mere assessment of a tax to be paid by non-Indians* violated the Seneca Nation's sovereignty as understood at that time, *see New York Indians*, 72 U.S. at 771 (describing such a tax assessment to be paid by non-Indians as "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations"), which was after execution of the Buffalo Creek Treaty and enactment of Indian Law § 6.

Although Defendants argue that *Moe* and *Colville* represent a shift by the Supreme Court away from principles of tribal self-determination and sovereignty, the Supreme Court has never addressed the unique sovereignty of the Seneca Nation as documented in the Buffalo Creek Treaty and Indian Law § 6. In *Milhelm Attea*, the Court expressly ruled that those issues were not before it in that case, *see Milhelm Attea*, 512 U.S. at 77 n.11, which this Court recognized in *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 624 (2010), explaining that *Milhelm Attea* "was commenced by non-Indian wholesalers" to address the "narrow preemption issue." *Id.* At 624. Indeed, by virtue of the parties and issues before it, the Supreme Court did not take into consideration "the interests of Indian nations or tribes affected by the regulations," *id.*, nor Indian Law § 6, and this Court should not rely on that case, as Defendants suggest, as an authority on the issues before this Court. The *New York*

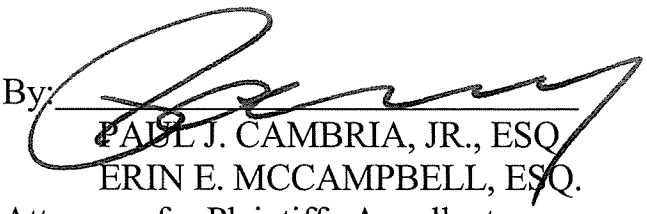
Indians case alone precludes enforcement of Tax Law § 471, which is clearly more of an "unwarranted interference, inconsistent with the original title of the Indians, and offensive to their tribal relations" than a mere assessment to be paid by non-Indians.

CONCLUSION

This Court should bar the State from enforcement of Tax Law § 471 on the cigarette sales of Indian-owned retailers to their non-Indian customers on an Indian reservation because such enforcement is (1) is inconsistent with the solemn obligations of the State under the Buffalo Creek Treaty to refrain from taxation "for any purpose whatever" as subsequently codified in Indian Law § 6, and (2) violates the Supreme Court's decision in the *New York Indians* case. The State unilaterally violated the Buffalo Creek Treaty by thrusting its tax laws onto the reservations of the sovereign Seneca Nation. This Court should restore the previously defined boundaries of the laws of the Seneca Nation and the laws of the State by ruling in Plaintiffs' favor. Otherwise, the truly unique sovereignty of the Seneca Nation, which should be a detail of pride for the residents of the Seneca Nation and the State alike, will be forever extinguished. This appeal is the last opportunity for the Seneca Nation to impress upon this Court its unique status as an autonomous Nation as reflected in numerous treaties, including the Buffalo Creek Treat, and as codified in Indian Law § 6.

DATED: Buffalo, New York
September 20, 2017

LIPSITZ GREEN SCIME CAMBRIA LLP



By: _____
PAUL J. CAMBRIA, JR., ESQ.
ERIN E. MCCAMPBELL, ESQ.
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word Version 2010.

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LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
PAUL J. CAMBRIA, JR., ESQ.
ERIN E. MCCAMPBELL, ESQ.
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333