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To be argued by:
Andrew D. Bing
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APPELLATE DIVISION DOCKET NO. CA 15-01764
CATTARAUGUS COUNTY INDEX NO. 82670

State of New York
Court of Appeals

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.

BRIEF FOR DEFENDANTS-RESPONDENTS

BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
ROBERT M. GOLDFARB
Assistant Solicitor General
of Counsel

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Defendants-Respondent
The Capitol
Albany, New York 12224-0341
(518) 776-2015

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PRELIMINARY STATEMENT

The Supreme Court of the United States has established that cigarettes sold on an Indian reservation by an Indian retailer to non-Indians "are legitimately subject to state taxation," "reject[ing] the proposition that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere." *Department of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64, 72 (1994).

In accordance with this precedent, New York's Tax Law § 471 imposes a cigarette tax on all on-reservation sales to non-Indians. Tax Law § 471(2). The statute requires licensed agents or wholesalers to prepay the tax to the State by purchasing tax stamps which are affixed to the cigarette packages. The taxes are then added to and collected as part of the sales price of the cigarettes when they are purchased by the Indian retailer and sold to the non-Indian customer, who bears the ultimate liability for the tax. Tax Law § 471(2).

Plaintiff Eric White is an enrolled member of the Seneca Nation of Indians who operates a convenience store, plaintiff Native Outlet, located on Seneca Nation lands, which sells cigarettes to Indians and non-Indians. Plaintiff brought this action for declaratory and injunctive relief alleging that Tax Law § 471, insofar as it authorizes the collection of taxes on cigarette sales by Indians to non-Indians on Seneca Nation lands, violates another New York statute, Indian Law § 6, as well as the Buffalo Creek Treaty of 1842 between the Seneca Nation and the United States, and the Due Process and Commerce Clauses of the United States Constitution. Supreme Court, Cattaraugus County, entered judgment dismissing the complaint.

By memorandum and order entered on June 10, 2016, the Appellate Division, Fourth Department, modified the judgment by reinstating the complaint to the extent it sought a declaration, and granted a declaration in favor of defendants (243-245).[1] The court held, in accord with every other court that has construed the provisions, that Indian Law § 6 and the Buffalo Creek Treaty only bar the State's taxation of Indian reservation land or real property. The court further

[1] References are to the record on appeal.

held that Tax Law § 471 did not violate federal law under established Supreme Court precedent, rejecting plaintiffs' contention that the statute violated the holding in *The New York Indians,* 72 U.S. 761 (1866). Accordingly, the court declared that Tax Law § 471 is not inconsistent with Indian Law § 6, the Buffalo Creek Treaty of 1842 or the Due Process or Commerce Clauses.

This Court should affirm the Appellate Division's declaration. The terms and the history of both Indian Law § 6 and the Buffalo Creek Treaty make clear that those provisions bar the State only from taxing Indian reservation land or real property, and do not bar taxing non-Indians who engage in a transaction with Indians merely because it occurs on a reservation. The validity of Tax Law § 471 is established by the Supreme Court's repeated decisions holding that a State's taxation of cigarettes sold on an Indian reservation to non-Indians is permissible under federal law and does not unduly burden tribal sovereign interests. Accordingly, the Appellate Division correctly declared that Tax Law § 471 is consistent with both state and federal law and the judgment should be affirmed.

ISSUES PRESENTED

1. Whether Indian Law § 6 and the Buffalo Creek Treaty of 1842, by their terms and history, bar the State only from taxing Indian reservation land or real property.

2. Whether, in any event, if Tax Law § 471 were incompatible with Indian Law § 6, the later statute, Tax Law § 471, would control.

3. Whether Tax Law § 471 is consistent with *The New York Indians*, 72 U.S. 761 (1986), and subsequent Supreme Court decisions holding that a State's taxation of cigarettes sold by Indian retailers on reservation land to non-Indians does not violate federal law.

STATUTORY BACKGROUND

In June 2010, the Legislature enacted L. 2010, ch. 134, which amended Tax Law §§ 471 and 471-e to their present form. L. 2010, ch. 134, pt. D, §§ 1-4, 6-9. These amendments supplied the statutory cigarette tax collection mechanism for on-reservation cigarette sales to non-tribe members that this Court had earlier held was missing from prior law. *See Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 653-654, *cert. denied*, 562 U.S. 953 (2010). In *Oneida Nation of N.Y. v. Cuomo,* 645 F.3d 154 (2d Cir. 2011), the Second Circuit upheld the 2010

amendments, denying a preliminary injunction on the ground that the plaintiffs, including the Seneca Nation, had no likelihood of success on their arguments that the amendments violated federal law. That court found that "New York's precollection scheme is materially indistinguishable from those" previously upheld by the Supreme Court. *Id.* at 169. Contrary to plaintiffs' argument, the 2010 amendments were not "sudden [and] unexpected" (Br. at 10), but instead were the culmination of more than two decades of legislative and regulatory efforts to implement New York's authority to collect the taxes lawfully due for on-reservation cigarette sales to non-tribe members. *Id.* at 159-160.

Tax Law § 471(1) imposes a "a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation . . ." *See also* Tax Law § 471-e(1)(a) ("Notwithstanding any provision of this article to the contrary qualified Indians may purchase

cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations.")

While the statute recognizes that "New York lacks authority to tax cigarettes sold to tribal members for their own consumption," *Department of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994), "[o]n reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation." *Id.* Accordingly, Tax Law § 471(1) provides that "[t]he tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp." *See also* Tax Law § 471-e(1)(a) ("qualified Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state").

Under Tax Law § 471, an agent licensed by the Commissioner of Taxation and Finance "shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the

commissioner by purchasing" tax stamps, which the agent must affix to the cigarette packages. Tax Law § 471(2). The taxes paid by the agent shall then "be added to and collected as part of the sales price of the cigarettes." Tax Law § 471(3). Thus, "[i]t is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the commissioner shall collect the tax from the purchaser or consumer." Tax Law § 471(2).

The Tax Law provides two methods for Indian nations or tribes and reservation retailers to purchase tax-free cigarettes for on-reservation sales to their members—a "tax exemption coupon system" and a "prior approval system." Tax Law §§ 471(1), (5); 471-e. If the tribe or nation elects to participate in the "tax exemption coupon system," tax exemption coupons are "provided to the recognized governing body of such Indian nation or tribe to ensure that such Indian nation or tribe can obtain cigarettes upon which the tax will not be collected that are for the use or consumption by the nation or tribe or by the members of such nation or tribe." Tax Law § 471-e(2)(a). The amount of Indian tax exemption coupons provided to a nation or tribe is

"based upon the probable demand of the qualified Indians on such nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use." Tax Law § 471-e(2)(b); 20 N.Y.C.R.R. § 74.6(e)(1) (determination of probable demand). An Indian nation or tribe and a reservation cigarette seller may present the coupons to a licensed wholesale dealer in order to purchase stamped cigarettes exempt from the imposition of the tax. Tax Law § 471-e(1)(b). Qualified Indians may then "purchase cigarettes from a reservation cigarette seller exempt from the cigarette tax even though such cigarettes will have an affixed cigarette tax stamp." *Id.* Wholesalers may then submit the coupons to the Department of Taxation and Finance for a refund of the prepaid tax. Tax Law § 471-e(4).

If the tribe or nation does not elect to participate in the tax exemption coupon system, then the "prior approval system" is the mechanism for delivery of tax-exempt cigarettes to the nation or tribe for personal use by qualified members of the nation or tribe. Tax Law § 471(1). Under this system, "Indian nations or tribes or reservation cigarette sellers may purchase from New York state licensed cigarette stamping agents and wholesalers an adequate quantity of tax-exempt

cigarettes based on probable demand on their nations' or tribes' qualified reservation for official nation or tribal or qualified Indian use or consumption from agents and wholesalers who have received prior approval from the department." Tax Law § 471(5)(b). Wholesalers may claim a refund of the taxes they prepaid upon prior approval and proof of a legitimate tax-free sale.

In sum, Tax Law § 471 does not impose a tax on the Seneca Nation of Indians, nor on the Seneca reservations or lands, nor on the members of the Seneca Nation of Indians, nor on the plaintiffs. The tax is imposed only on plaintiffs' non-Seneca cigarette customers and is borne by those customers.

HISTORY OF THE BUFFALO CREEK TREATY OF 1842 AND INDIAN LAW § 6

Plaintiffs argue that Indian Law § 6 and a tax proviso contained in the Buffalo Creek Treaty of 1842, 7 Stat. 586, 590, from which section 6 is derived, bar New York from imposing its cigarette tax on their on-reservation cigarette sales to nonmembers of the Seneca Nation. But the history of the treaty tax proviso and section 6 establishes that they were concerned solely with protecting reservation lands from real property taxation.

The 1842 Buffalo Creek treaty was a compromise treaty in which Ogden and Fellows[2] deeded back to the Seneca Nation two of the four reservations that the Senecas had sold to them in the Buffalo Creek Treaty of 1838, 7 Stat. 550. *See generally* 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 ("Whipple Report"), at 25-29.

In the 1838 Buffalo Creek treaty, the Senecas agreed to sell their Buffalo Creek, Tonawanda, Cattaraugus, and Allegany Reservations to Ogden and Fellows and to relocate within five years to lands set aside for them by the United States west of the State of Missouri. 7 Stat. at 551, 553. In 1840 and 1841, before the five years specified in the 1838 treaty for the Senecas' removal from their reservations had run, New York State enacted statutes authorizing the construction of roads and bridges on the reservations and the imposition of taxes "laid on the reservations" to pay for these improvements. *See Fellows v. Denniston*,

[2] In 1838 and 1842, Ogden and Fellows were the holders of the right of preemption to the Seneca reservations. The "right of preemption" is the underlying fee title to lands that are subject to the Indian right of occupancy, which ripens into fee simple absolute title when the right of occupancy is extinguished. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

23 N.Y. 420, 422, 429 (1861), *reversed, The New York Indians,* 72 U.S. 761 (1867). The acts also authorized the sale of the lands for unpaid taxes, although the 1841 act specified that such sales should not affect the Senecas' right of occupancy. *Id.* at 429-431.

Following the 1838 treaty, a number of observers contended that the Senecas' sale of their lands had been procured through improper means, and many Senecas refused to leave the reservations. *See* Whipple Report at 27-28; 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. 28 (January 22, 1857) ("1857 Senate Report"), at 3. To settle their differences, the parties agreed to the 1842 treaty, in which Ogden and Fellows returned the Cattaraugus and Allegany reservations to the Seneca Nation, and the Nation confirmed the rights of Ogden and Fellows in the Buffalo Creek and Tonawanda reservations. 7 Stat. at 587-588; *see Fellows v. Blacksmith,* 60 U.S. 366, 368-369 (1857). The indenture containing the 1842 agreement between Ogden and Fellows and the Seneca Nation was quoted in full in the 1842 treaty. 7 Stat. at 587-590. The 1842

treaty provided that the United States consented to "the several articles and stipulations" contained in that agreement. *Id.*

The ninth article of the 1842 agreement between Ogden and Fellows and the Seneca Nation specifically addressed the issue of taxes "laid on the reservations":

> The parties to this compact mutually agree to solicit the influence of the Government of the United States 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.

7 Stat. at 590.

Despite this proviso, property taxes continued to be assessed on the Allegany and Cattaraugus reservations and in November 1853, the Comptroller sold large tracts of those reservations for unpaid taxes. *See* Report of the Comptroller in Reply to a Resolution of the Assembly Relative to Sales of Indian Lands, Assembly Doc. No. 12 (Jan. 12, 1857), at 2-3. The United States Interior Department objected to these sales in a letter to the Governor of New York, dated December 22, 1856, citing the United States' agreement in the 1842 treaty "to use its influence to protect the lands of the said Seneca Indians" from "taxation

for highway and other purposes." Communication from the Governor Transmitting a Communication from the U.S. Commissioner for Indian Affairs Relative to the Sale of Lands Belonging to the Seneca Indians, Assembly Doc. No. 17 (Jan. 17, 1857), at 2. The letter asked the Governor to seek legislation remitting the taxes and penalties and cancelling the Comptroller's sales. *Id.*

In response, the Senate Judiciary Committee determined that the State "should redeem these lands, and make provision against their assessment in the future." 1857 Senate Report, at 6. In February 1857, New York enacted chapter 45 of the Laws of 1857. That statute returned to the Seneca Nation title to the lands in the Allegany and Cattaraugus reservations that the Comptroller had sold for taxes. L. 1857, ch. 45, § 1. Chapter 45 also provided that:

> No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section, are hereby repealed.

L. 1857, ch. 45, § 4. In 1860, in response to tax sales of Tonawanda lands, the State enacted similar legislation on behalf of the Tonawanda Band regarding the Tonawanda reservation. L. 1860, ch. 491, § 4. *See*

Communication from His Excellency, the Governor, Transmitting a Communication from the Agent of the Tonawanda Band of Seneca Indians, Assembly Doc. No. 28 (Jan. 21, 1860), at 2-3.

In 1867, the Supreme Court of the United States invalidated the taxes imposed on the lands of the Buffalo Creek, Cattaraugus, and Allegany reservations. *The New York Indians*, 72 U.S. 761 (1867). The Court did not refer to the tax proviso of the 1842 treaty, instead relying on general federal law principles governing state "taxation of Indian lands." *Id.* at 769-770. The Court also referred to the Seneca Nation's rights "as guaranteed to it by treaties with the United States." *Id.* at 772. The Court stated that it was "gratified" that New York had adopted the tax exemption in chapter 45 of the Laws of 1857. *Id.* at 771.

In 1892, the Legislature "extended" the tax exemption contained in chapters 45 and 491 "to all reservations," enacting section 6 of the Indian Law in its present form. Report of the Commissioners of Statutory Revision, Senate Doc. No. 10 (January 12, 1892), at 2111, 2117. Section 6 of the 1892 Indian Law provided:

> **§ 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.

L. 1892, ch. 679, § 6 (emphasis in original). Section 6 was reenacted without amendment by chapter 31 of the Laws of 1909, and has not been amended since.

PROCEEDINGS AND DECISIONS BELOW

In June 2014, plaintiffs commenced this action for declaratory and injunctive relief (38-47). Plaintiff Eric White is an enrolled member of the Seneca Nation of Indians who operates a convenience store, plaintiff Native Outlet, which is located on Seneca Nation lands within the City of Salamanca, New York (38-39). Through Native Outlet, Mr. White sells cigarettes to Indians and non-Indians.

The complaint alleged that Tax Law § 471 resulted in "an illegal and injurious imposition of tax upon" plaintiffs, and sought a declaration that "the enactment and enforcement against [p]laintiffs" of Tax Law § 471 and related statutes violates Indian Law § 6, treaties with the Seneca Nation, and the Due Process and Commerce Clauses (40, 46). The complaint also sought injunctive relief barring the enforcement of Tax Law § 471 against plaintiffs (46).

After plaintiffs moved for a preliminary injunction, defendants cross-moved to dismiss the complaint for failure to state a cause of action (96-98). By order dated March 9, 2015, Supreme Court granted defendants' motion, finding that the complaint "fail[ed] to state a cause of action under existing and controlling New York law" (6-8).

By memorandum and order entered June 10, 2016, the Appellate Division, Fourth Department, reinstated the complaint to the extent that it sought a declaration and declared, in favor of defendants, that Tax Law § 471 is not inconsistent with Indian Law § 6, the Buffalo Creek Treaty of 1842 or the Due Process or Commerce Clauses (243-245). The court adhered to its prior decision in *Matter of New York State Dep't of Tax. and Fin. v. Bramhall*, 235 A.D.2d 75 (4th Dep't), *appeal dismissed,* 91 N.Y.2d 849 (1997), holding that "the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, 'sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations'" (244) (quoting *Bramhall*, 235 A.D.2d at 85). The court observed that the plain language of the Treaty supported its prior determination that it only prohibited the State from taxing the real property of the Seneca Nation

(244). The court explained that even construing Indian Law § 6 liberally in favor of the Indians, the history of the provision supported the court's holding in *Bramhall*, and that "the limiting language in the title of the section 'effectuate[s] the legislative intent' (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194), i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band" (244-245).

The court added that, even if it had interpreted the language of the Treaty and statute too narrowly, plaintiffs were not entitled to the declaratory relief sought (245). The court explained that "[i]t is well established that 'the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations,' and thus "'States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.'" (245) (quoting *Department of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73, (1994)). The court observed that "[a]lthough plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at

the time of the sale, 'this burden is not, strictly speaking, a tax at all.'" (245) (quoting *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463, 483, (1976)).

ARGUMENT

The Supreme Court of the United States has squarely "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere.'" *Department of Tax. and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 72 (1994) (quoting *Washington v. Confederated Tribes of Colville Indian Reserv.*, 447 U.S. 134, 155 (1980)). Rather, the Court has made "clear that the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations" and "that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Milhelm Attea*, 512 U.S. at 73. Accordingly, the Court has held that "[o]n-reservation cigarette sales to persons other than reservation Indians" are "legitimately subject to state taxation." *Id.* at

64; *see Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463, 483 (1976) (finding "nothing in this burden which frustrates tribal self-government, or runs afoul of any congressional enactment dealing with the affairs of reservation Indians") (citation omitted).

In accordance with this precedent, Tax Law § 471 requires that cigarettes sold by an Indian retailer on a reservation to non-Indian customers bear a tax stamp, reflecting a cigarette tax paid to the State by the off-reservation agent from whom the Indian retailer has purchased the cigarettes, which is collected by the Indian retailer from the non-Indian customer as part of sales price of the cigarettes. *See* Tax Law § 471(1)-(3). The Second Circuit has upheld Tax Law § 471 based on the principles established in *Attea*, *Colville*, and *Moe*. *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).

The Appellate Division correctly rejected plaintiffs' arguments that Tax Law § 471 is "incompatible" with Indian Law § 6, the Buffalo Creek Treaty of 1842 between the United States and the Seneca Nation or the Supreme Court's decision in *The New York Indians*, 72 U.S. 761 (1866). The court correctly held, in accord with every other court that

has construed the provisions, that Indian Law § 6 and the Treaty only bar the State's taxation of Indian reservation land. And Supreme Court decisions after *The New York Indians,* including *Milhelm Attea*, make clear that a State's taxation of cigarettes to be sold on an Indian reservation to non-Indians is permissible under federal law and does not unduly burden tribal sovereign interests.

POINT I

INDIAN LAW § 6 AND THE BUFFALO CREEK TREATY ONLY BAR THE STATE'S TAXATION OF INDIAN RESERVATION LAND AND ARE NOT INCOMPATIBLE WITH TAX LAW § 471

Although this Court has not had occasion to address the provisions, every other state and federal court that has construed Indian Law § 6 and the Buffalo Creek Treaty has held that the statute and Treaty bar only the State's taxation of Indian reservation land, and not, as plaintiffs contend (Br. at 20), the State's taxation of cigarette sales made on reservation land by Indian retailers to non-tribe members. *See Snyder v. Wetzler*, 193 A.D.2d 329 (3d Dep't 1993), *aff'd on other grounds*, 84 N.Y.2d 941 (1994); *Matter of New York State Dep't of Tax. and Fin. v. Bramhall*, 235 A.D.2d 75 (4th Dep't), *appeal dismissed*, 91 N.Y.2d 849 (1997); *United States v. Kaid*, 241 Fed. Appx.

747 (2d Cir. 2007) (summary order). The language and history of the provisions confirm that those courts were correct, and this Court should hold the same.

A. The Plain Language Of Indian Law § 6 Bars the State Only From Taxing Reservation Land

Indian Law § 6, entitled "Exemption of reservation lands from taxation," provides:

> 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.

Although, as plaintiffs note, ambiguities in statutes and treaties relating to Indians are generally construed to their benefit, *see County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 501 U.S. 251, 269 (1992), "[t]he canon of construction regarding the resolution of ambiguities in favor if Indians . . . does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). In interpreting such provisions, "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later

claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). That is the case here.

The plain language of the Indian Law § 6 states its sole purpose: to prohibit taxes assessed against reservation land itself. The statute prohibits any "Indian reservation" from being assessed for taxes, so long as "the land" remains "the property" of the Indians. The bar on property tax assessment applies only insofar as the Indian nation, tribe or band "occup[ies] the same," and only real property can be "occupied." Thus, every reference to the object of the prohibited assessment is to real property owned and occupied by the Indian nation, tribe or band. The statute does not at all address the State's taxation of non-Indians who engage in transactions on those lands. Had the Legislature also intended to bar the application of a tax to an on-reservation retail sale of chattels to non-Indians, it would have included language reflecting such an intent. Indeed, plaintiffs concede (Br. at 20) that the State may "of course" collect the taxes due for on-reservation cigarette sales made by non-Indian retailers to non-Indian customers, despite the transactions having occurred "on sovereign Indian lands."

The title of the statute—"Exemption of reservation lands from taxation"—confirms that its prohibition is limited to taxation of reservation real property. Although "the title of the legislation may not trump the clear language of the statute, it may help in ascertaining the [legislative] intent," *Matter of Avella v. City of N.Y.*, 2017 N.Y. LEXIS 1403, *16 (2017), and here the title is consistent with the statute's clear text. Like the statutory language, the title indicates that the statute exempts only "reservation lands" from tax assessments, not sales transactions with non-Indians on reservation lands. *See D'Amico v. Christie*, 71 N.Y.2d 76, 84 (1987) (a statute's limitation was "made plain even by its title"); *Snyder*, 193 A.D.2d at 332 (Indian Law § 6 "by its title . . . obviously relates solely to the exemption of reservation *lands* from taxation") (emphasis in the original).

The language relied on by plaintiffs—"for any purpose whatever"—modifies the verb "assessed" and does not expand the items, *i.e.*, the "Indian reservation" or "land," that cannot be assessed for taxes. Thus, the provision protects reservation land from tax assessments for any purpose, but does no more. See *Kaid*, 241 Fed. Appx. at 750

(Indian Law § 6 "clearly prohibit[s] only the taxation of real property, not chattels like cigarettes").

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Supreme Court construed an analogous provision providing that where lands or rights are taken into trust for an Indian tribe by the United States, "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 465. The Court rejected the Tribe's contention that the statute barred a State's gross receipts tax on income generated from the Tribe's ski resort located on land covered by the provision. The Court stated that "[o]n its face, the statute exempts land and rights in land, not income derived from its use." 411 U.S. at 155. The Court explained that "absent clear statutory guidance, courts ordinarily will not imply tax exemptions," and will not infer unstated exemptions "simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156. The Court concluded "[o]n the face of § 465, therefore, there is no reason to hold that it forbids income as well as property taxes." *Id.* at 157.

So too here. On its face, Indian Law § 6 prohibits only taxes assessed against reservation land itself, and does not address, nor

prohibit, a tax imposed on non-Indians who engage in a transaction on reservation land. Accordingly, the Appellate Division properly joined the other courts which have construed the provision in holding that the statute bars only the taxation of reservation land.

B. The Plain Language Of The Buffalo Creek Treaty Addresses The State's Taxation Only Of Reservation Land

The Buffalo Creek Treaty of 1842 between the United States and the Seneca Nation also addresses the State's taxation only of Seneca reservation land. The treaty quotes Article Ninth of an indenture between the Seneca Nation and Thomas L. Ogden and Joseph Fellows which provided:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States 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.

7 Stat. 686, 590. The Treaty thereafter states that the United States consents to the articles and stipulations contained in the recited indenture between the Seneca Nation and Ogden and Fellows. *Id.*

Preliminarily, Article Ninth by its terms does not bar any taxation. By consenting to this article in the indenture between the Seneca Nation and Ogden and Fellows, the United States government only "agreed to use its influence to protect the lands of the said Seneca Indians, remaining in their possession in the State of New-York from taxation for highway and other purposes, until such lands should be disposed of by them, and the possession thereof relinquished." Communication from the Governor Transmitting a Communication from the U.S. Commissioner for Indian Affairs Relative to the Sale of Lands Belonging to the Seneca Indians, Assembly Doc. No. 17 (Jan. 17, 1857), at 2.

In any event, like Indian Law § 6, Article Ninth by its plain terms addresses the State's taxation only of reservation land. The parties agreed to solicit the federal government to protect the "lands" of the Seneca Nation from being taxed or assessed until "such lands" are sold and conveyed by the Indians and the possession of those lands is relinquished. Again, plaintiffs' reliance on the "or any other purpose" language is unavailing to expand the provision's application beyond "lands." That phrase modifies the term "assessments," precluding

assessments against the "lands" for any purposes including for roads, highways, and bridges. Thus, the provision addressed tax assessments against reservation land for any purpose, but nothing more. *See Snyder*, 193 A.D.2d at 331 (Article Ninth of the Treaty "clearly refers only to taxes levied upon real property or land"); *Kaid*, 241 Fed. Appx. at 750 ("Both the [Buffalo Creek] treaty and [Indian Law § 6] clearly prohibit only the taxation of real property, not chattels like cigarettes").

C. The History Of Indian Law § 6 And The Buffalo Creek Treaty Confirms That They Bar The State's Taxation Only Of Reservation Land

The history of Indian Law § 6 and of the 1842 Buffalo Creek treaty confirm beyond any doubt that they bar the taxation only of reservation land. As this Court has noted, the Court has a "long tradition of using all available interpretive tools to ascertain the meaning of a statute" including "'the history of the times [and] the circumstances surrounding the statute's passage.'" *Riley v. County of Broome*, 95 N.Y.2d 455, 464 (2000) (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124, at 253).

As explained above, the 1842 treaty focused on Seneca *lands*, restoring to the Seneca Nation two of the four reservations it had sold

four years earlier. By its terms, the tax proviso in the ninth article was intended to "protect" those "lands," which the parties had just taken great pains to recover, from taxation at a time when the State was asserting the right to tax the Seneca lands and sell them for nonpayment. 7 Stat. at 590. Plaintiffs admit (Br. at 3) that Indian Law § 6 "codified" the 1842 treaty tax proviso.

After the United States, citing the 1842 treaty's tax proviso, objected to the Comptroller's tax sales of lands that the 1842 treaty had returned to the Senecas, the State enacted chapter 45 of the Laws of 1857 to "redeem these lands, *and make provision against their assessment in the future.*" 1857 Senate Report, at 6 (emphasis added). The State adopted similar legislation following tax sales of Tonawanda lands, L. 1860, ch. 491, and in 1892 these provisions were extended to all reservations in New York using almost identical language. L. 1892, ch. 679, §6. The title of section 6, "Exemption of reservation lands from taxation," succinctly summarizes the intent of both the 1842 treaty's tax proviso and the statutes derived from it. This history of the treaty and the statute contains no hint that they were intended to apply to

anything other than real property taxes and assessments on reservation lands, and fully confirms the Fourth Department's holding (244-245).

D. In Any Event, Tax Law § 471's Requirement that Reservation Retailers Charge Non-Indian Customers A Tax-Inclusive Price Is Not A Tax

Alternatively, even if plaintiffs were correct that Indian Law § 6 bars the State from assessing any tax within "the confines of an Indian reservation" (Br. at 27) – which they are not – Tax Law § 471 would be consistent with Indian Law § 6 so construed. The Appellate Division correctly understood that Tax Law § 471 simply does not assess a tax within the confines of a reservation (245). Rather, the cigarette tax is precollected from the off-reservation wholesaler who affixes the tax stamps. The reservation retailer's obligation to pay the off-reservation agent—and then charge non-Indian customers—a sales price that includes the amount of the tax "is not strictly speaking, a tax at all" within the reservation. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463, 481-483 (1976).

In *Moe,* the Supreme Court held unanimously that a State had validly imposed a sales tax on cigarettes purchased by non-Indian customers from Indian retailers on reservations, and could lawfully

"require the Indian proprietor simply to add to tax to the sales price and thereby aid the State's collection and enforcement thereof." 425 U.S. at 483. The Court rejected the Indian retailer's assertion that making it an "involuntary agent" for collection of taxes owed by non-Indians was a "gross interference with [its] freedom from state regulation." *Id.* at 482. The Court observed that "[t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id.* at 483. The Court held that "[s]ince this burden is not, strictly speaking, a tax at all," it was not governed by language in the Court's precedent dealing with the "special area of state taxation" of Indian income or lands. *Id.*

The same is true here. There is no merit to plaintiffs' complaint that Tax Law § 471 is "an illegal and injurious imposition of tax upon" them (40). Under *Moe*, plaintiffs' obligation to pass through the tax to their non-Indian customers as part of the purchase price of the cigarettes is not a tax within the reservation at all. Instead, the tax is initially collected from the off-reservation agents, who pass it through to

plaintiffs, and is ultimately borne by plaintiffs' non-Indian customers. Accordingly, even under plaintiffs' erroneous interpretation of Indian Law § 6 or the Buffalo Creek Treaty, the declaration in defendants' favor was proper.

POINT II

IF, AS PLAINTIFFS ARGUE, TAX LAW § 471 WERE INCOMPATIBLE WITH INDIAN LAW § 6, TAX LAW § 471 WOULD CONTROL

As explained above, Indian Law § 6 bars the State only from taxing reservation land and is not incompatible with Tax Law § 471. If, however, plaintiffs were correct that the two statutes are in conflict, the later one, Tax Law § 471, would control.

Tax Law § 471(1) provides, in crystal clear language, that "[t]he tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp." *See also* Tax Law § 471-e ("all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp."). Thus, these provisions of the statute,

enacted in 2010 and 2005, respectively, plainly subject an on-reservation sale of cigarettes to a non-Indian to the tax. L. 2010, ch. 134, pt. D, § 1; L. 2005, ch. 61, pt. K, § 2.

Plaintiffs' contention (Br. at 20) that the statute's exception for "cigarettes sold under such circumstances that this state is without power to impose such tax" was intended to exempt all cigarette sales by Indian retailers—to Indians and non-Indians alike—cannot withstand scrutiny. That interpretation would nullify the specific provisions quoted above providing that *all* cigarettes sold on a reservation to non-Indians are taxable, violating a fundamental principle of statutory construction. *See Rangolan v. County of Nassau*, 96 N.Y.2d 42, 48 (2001) ("Such a construction, resulting in the nullification of one part of the [statute] by another, is impermissible, and violates the rule that all parts of a statute are to be harmonized with each other, as well as with the general intent of the statute.") (internal quotation marks omitted).

And it is not true that the exception is "meaningless" (Br. at 20) if the exception does not cover all sales by Indian retailers, including sales to non-Indians. The provision gives examples of circumstances where the State lacks power to impose the tax, "including sales to qualified

Indians for their own use and consumption on their nations' or tribes' qualified reservation." Tax Law § 471(1).[3] Thus, harmonizing the statute's clear provisions, it exempts an Indian retailer's on-reservation sales to qualified Indians, which the State lacks power to tax, and taxes on-reservation sales to non-Indians, which the State has power to tax. *See Milhelm Attea*, 512 U.S. at 64 ("New York lacks authority to tax cigarettes sold to tribal members for their own consumption" but "[o]n-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation.").

Thus, Tax Law § 471 clearly and unequivocally states the Legislature's intent that an Indian retailer's on-reservation cigarette sales to non-Indians are to be taxed. If plaintiffs were correct that Indian Law § 6, an earlier statute last enacted in 1909, barred such taxation, § 6, to that extent, would have been impliedly repealed by § 471. Although a statutory "repeal by implication is heavily disfavored in the law and may be resorted to only in the clearest of cases," it will be

[3] The provision also notes that the State lacks power to tax cigarettes "sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales." Tax Law § 471(1).

found where "'the conclusion is unavoidable, as when repugnancy between the statutes is plain.'" *Ball v. State*, 41 N.Y.2d 617, 622 (1977) (quoting *Cimo v. State*, 306 N.Y. 143, 148 (1953)). If, as plaintiffs argue, Indian Law § 6 bars application of the cigarette tax to an Indian retailer's on-reservation sales to non-Indians, while Tax Law § 471(1) expressly requires that the tax be "imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians," then Indian Law § 6 has been impliedly repealed to the extent it bars such taxation.

No such holding is required in this case, however, because "[i]f by any fair construction, both statutes can be given operation, implied repeal will not be declared." *Cimo*, 306 N.Y. at 149. Here, both statutes may be harmonized and construed in a way that renders them internally compatible. *See Matter of Corrigan v. New York State Off. of Children & Family Servs.*, 28 N.Y.3d 636, 643 (2017). As explained above, Indian Law § 6, properly construed, bars the State only from taxing reservation land, and does not bar the imposition of sales and excise taxes on cigarettes sold to non-Indians on a reservation, as Tax Law § 471 requires. Thus, a fair and correct construction of the

statutes permits their harmonious operation in the manner that the Legislature intended.

POINT III

TAX LAW § 471 IS CONSISTENT WITH THE HOLDING IN *THE NEW YORK INDIANS* AND IS LAWFUL UNDER SUBSEQUENT SUPREME COURT DECISIONS

Tax Law § 471 is not, as plaintiffs contend (Br. at 28-30), inconsistent with the United States Supreme Court's holding in *The New York Indians*, 72 U.S. 761 (1986). Moreover, subsequent Supreme Court decisions specifically addressing state taxation of cigarettes sold by Indian retailers on reservation land to non-Indians confirm that Tax Law § 471 does not violate federal principles of Indian law.

The New York Indians addressed a New York statute that taxed Indian reservation land. *Id.* at 771 ("the taxes are imposed upon the lands in these reservations, and it is the lands which are sold in default of payment"). The Supreme Court explained that "this law, taxing the lands in the reservations, authorizes the county authorities to enter upon them, survey and lay out roads, construct and repair them, construct and repair bridges, assess and collect taxes to meet the expenses, and survey the lands for the purpose of making the

assessments, and in pursuance of these powers the proper officers of the counties have assessed upon them large sums." *Id.* at 768. The Court held that the State's taxation of reservation real property was "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 771; *see People ex rel. Ray v. Martin*, 294 N.Y. 61, 70 ("*The New York Indians* . . . forbade State taxation of tribal lands on this reservation because such taxation would be 'offensive to their tribal relations'"), *aff'd*, 326 U.S. 496 (1945). Tax Law § 471 does not tax reservation land and does not contravene the holding in *The New York Indians*.

Moreover, subsequent Supreme Court decisions addressing the specific context here—a State's taxation of on-reservation cigarette sales by a reservation retailer to non-members of the reservation's governing tribe including non-Indians—confirm the State's authority to do so. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962) (the "general notion drawn from" *The New York Indians* and other older decisions "that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with

diverse concrete situations"). Contrary to plaintiffs' assertions (Br. at 10, 14), it is now settled that a reservation is part of the state in which it is located. *See Nevada v. Hicks*, 533 U.S. 353, 361-362 (2001); *Organized Village of Kake*, 369 U.S. at 72.

In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463 (1976), the Court upheld a State's cigarette tax on a tribal member's on-reservation sales to non-Indians, holding that "the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid in the enforcement thereof." *Id.* at 483. And in *Washington v. Confederated Tribes of Colville Indian Reserv.,* 447 U.S. 134 (1980), the Court noted that what the reservation retailers offer their non-Indian "customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.* at 155. There, the Court sustained a similar taxing scheme and held that the State could "validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe." *Id.* at 159. The *Colville* Court also held that the State could lawfully "require[] the Indian retailer to keep detailed

records of exempt and nonexempt sales in addition to simply precollecting the tax." *Id.* at 151, 160.

Thereafter, in *Department of Tax. and Fin. of N.Y. v. Milhelm Attea*, 512 U.S. 61, 72 (1994), the Court held that Tax Law § 471(1)'s record-keeping requirements and quantity limitations imposed on agents/wholesalers who sold untaxed cigarettes to reservation Indians were not preempted by the federal Indian Trader Statutes, 25 U.S.C. § 261 *et seq.* The Court observed that "[b]y 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." *Id.* at 76. The Court explained that "[j]ust as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose." *Id.* at 74.[4]

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[4] The Supreme Court noted in *Milhelm Attea* that the Seneca Nation, as amicus, had argued that New York's cigarette tax regulations as then in effect violated treaties between the Seneca Nation and the United States, but

Moe, *Colville* and *Milhelm Attea* refute any argument that Tax Law § 471 is inconsistent with the principles of tribal sovereignty articulated in *The New York Indians* that precluded the State from taxing Indian reservation land. To the contrary, these decisions have squarely "rejected the proposition that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere," and have settled that "[o]n reservation sales to persons

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the Court did not address this argument because it "differ[ed] markedly" from the wholesalers' arguments and had not been addressed by this Court. *Id.* at 77 n. 11. In its Supreme Court amicus brief, the Nation argued in particular that the tax regulations violated the 1842 Buffalo Creek treaty. Brief of Seneca Nation of Indians as Amicus Curiae, 1994 U.S. S. Ct. Briefs LEXIS 25 at *42-47. In his amicus brief on behalf of the United States, the Solicitor General disagreed, explaining that the tax proviso in article 9 of the 1842 treaty "is limited to taxes assessed against the land itself. It does not, on its face, address the distinct question of the extent to which the State may assess its sales tax against non-Indians who engage in transactions with Indians on those lands." Brief for the United States as Amicus Curiae, 1994 U.S. S. Ct. Briefs LEXIS 29 at *41. The Solicitor General also noted that *The New York Indians* "invalidated state taxes assessed on reservation lands owned by the Indians. It did not speak to the validity of taxes imposed on non-Indians." *Id.* at *41 n. 15. Finally, the Solicitor General explained that the other federal treaties cited by the Seneca Nation "do not address the subject of state taxing and other jurisdiction over non-Indians" within the Nation's territory and "do not suggest that the principles applicable to state taxing and other jurisdiction over non-Indians on reservations in New York differ from those applicable on reservations elsewhere in the United States." *Id.* at *39.

other than reservation Indians" are "legitimately subject to state taxation." *Milhelm Attea*, 512 U.S. at 64, 72; *see also Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 169 (2d Cir. 2011) (plaintiffs, including Seneca Nation, had no likelihood of success on challenge to Tax Law § 471 as amended in 2010, because "New York's precollection scheme is materially indistinguishable from those upheld in *Moe* and *Colville*"). Accordingly, the Appellate Division correctly declared that Tax Law § 471 is consistent with both state and federal law and the judgment should be affirmed.

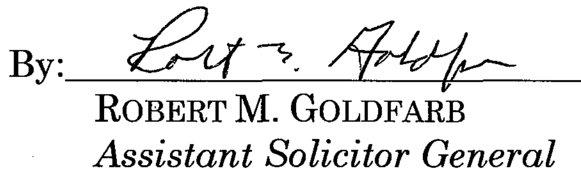
CONCLUSION

The judgment appealed from should be affirmed.

Dated: Albany, New York
September 5, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants-Respondents

By: 

ROBERT M. GOLDFARB
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2015

BARBARA D. UNDERWOOD
Solicitor General
ANDREW D. BING
Deputy Solicitor General
ROBERT M. GOLDFARB
Assistant Solicitor General
of Counsel

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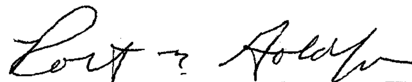
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Robert M. Goldfarb, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,391 words, which complies with the limitations stated in § 500.13(c)(1).



ROBERT M. GOLDFARB

State of New York
Court of Appeals

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs-Appellants,

-against-

ERIC T. SCHNEIDERMAN, ET AL.,

Defendants-Respondents.

COURT #APL-2017-00029 - AD #CA 15-01764 – INDEX #82670 - OAG # 14-174303

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

WILLIAM H. COLLINS being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the **Defendants-Respondents**, herein.

On **5th** day of **September, 2017** I served the annexed **Brief For Defendants-Respondents** upon the individual named below, by depositing **3 copies** thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said individual at the address within the State respectively theretofore designated by them for that purpose as follows:

LIPSITZ GREEN SCIME CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ERIN E. MCCAMPBELL, ESQ.
42 DELAWARE AVENUE, SUITE 120
BUFFALO, NY 14202

Sworn to before me this
5th day of September, 2017

NOTARY PUBLIC

KENNETH KRUEGER
Notary Public, State of New York
Reg. No. 01KR6271239
Qualified in Albany County
Commission Expires October 29, 2020