UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS, Plaintiff, v. DAVID PATERSON, Governor of the State of New York; JAMIE WOODWARD, Acting Commissioner, New York State Department of Taxation and Finance; WILLIAM COMISKEY, Deputy Commissioner, New York State Department of Taxation and Finance; and JOHN MELVILLE, Acting Superintendent, New York State Police, each in his or her official capacity, Defendants.	No. 10 Civ. 687-A **Hon. Richard J. Arcara**

MEMORANDUM OF LAW OF *AMICI CURIAE*
NEW YORK ASSOCIATION OF CONVENIENCE STORES,
WILSON FARMS, INC., AND NOCO ENERGY CORP.
IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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Introduction and Summary of the Argument

After nearly a quarter century of inaction, debate, rancor, litigation, fits and starts, and *billions* of dollars of tax evasion (and lost sales by these *Amici*), the State of New York has finally put together a comprehensive, enforceable system that will do what so many other States have been able to accomplish: collect all cigarette taxes on Native American sales to non-Indians while respecting Native American tribal sovereignty, all in accordance with Supreme Court of the United States precedent. That day comes none too soon. *Amici* have been among the hardest hit of all stakeholders in this process. They have seen their sales plummet, crippled by enormous excise taxes (now the highest in the nation), which they must pay but which the Seneca Nation of Indians ["SNI"] and its members will not. SNI and its members continue to insist on doing *precisely* what the Supreme Court has repeatedly ruled they may not do: "market an exemption from state taxation to persons who would normally do their business elsewhere," thereby seizing an unfair and unlawful "artificial competitive advantage over all other businesses in [the] State." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

SNI says it "firmly believes" that the Supreme Court's Native American cigarette tax decisions do not apply to it. Sen. Br. at 8 n.1.[1] The Court, however, has held *five times* since 1976 that States may tax and regulate *all* tribal cigarette sales other than sales by a tribe or tribal

[1] One SNI official testified to a New York Senate committee last October that, although New Yorkers "wrap yourselves in the illusory comfort that you think the *Attea* case and these other cases provide you … it is a fundamental principle of international law that every sovereign nation has the right to interpret its treaties with other nations as it sees fit. The *Attea* case is meaningless to us and does not bind our conduct. . . . [T]he Nation and the Seneca people will never allow the State to tax our commerce." J.C. Seneca 10/27/09 Test. at 8-9, 18 (attached as Exhibit H to the Declaration of James Calvin) ["Calvin Declaration"].

retailer to members of the same tribe for consumption on that tribe's reservation.[2] Moreover, the Court repeatedly has held that States may impose reasonable requirements on tribal governments and retailers to assist in tracking, collecting, remitting, and reporting all such taxes, and may take a variety of direct and indirect collection and enforcement actions, including "upstream" and "downstream" off-reservation measures, if tribes and their members refuse to cooperate.

SNI complains that the State of New York is seeking to "impose an absolute embargo on the distribution of non-New York stamped cigarettes" to the reservation, together with "a strict quota" on tax-exempt (though stamped) cigarettes for internal tribal consumption (*id.* at 2). But that is *precisely* the approach that many States have implemented and that the Supreme Court and lower federal courts have repeatedly upheld. As demonstrated below, none of the considerations invoked by SNI — its supposedly special treaty rights, its sovereign right to self-government, various federal statutes, or the severity of the potential impacts on the reservation economy — justify giving it special rights and exemptions not enjoyed by any other Native American tribe to engage in "tax free commerce" with non-Indians and members of other tribes. Neither SNI nor its members have such "supersovereign authority" to immunize their commerce with nontribal members from state taxation and regulation. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995).

> What plaintiff ultimately seeks in this case is something that no other sovereign has — the ability of a Tribe to immunize goods [originating from] within its borders from taxation and regulation by other sovereigns once those goods leave

[2] *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.6, 482-83 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 151-62 (1980); *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11-12 (1985) (per curiam); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 512-14 (1991); *Dep't of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 72-76 (1994).

> its boundaries. Just as China or New York State may not decree that their products are immune from [state] taxation when those goods enter this State, neither may a Native American tribe claim such special treatment.

Muscogee (Creek) Nation v. Henry, Civ. No. 10-019, 2010 WL 1078438, at *3 (E.D. Ok. Mar. 18, 2010) (denying preliminary injunction motion against universal state stamping and tax-prepayment system similar to New York's).

SNI's motion for a temporary restraining order or preliminary injunction should be denied for two fundamental reasons:

First, although the overwhelming majority of SNI's "tax-free commerce" involves sales to non-Indians and members of other tribes, SNI has presented absolutely *no* grounds for enjoining the State's new system with respect to *those* sales. This litigation involves two distinct markets for cigarette sales by SNI and its members — sales to individuals who are *not* enrolled members of the tribe, and sales to the (at most) several thousand adult smokers who are enrolled SNI members. Amici suspect that full disclosure by SNI would demonstrate that sales to non-tribal members account for all but a fraction of one percent of all cigarette sales by SNI and its members. These non-tribal sales, which include hundreds of millions of packs every year, are the only reason why SNI's "tobacco economy" includes 28 tribally licensed wholesalers, 15 tribally licensed stamping agents, 172 tribally licensed retailers, and some 3,000 employees. See Br. at 3, 7, 22, 37. The activities of SNI and its members in these two markets — sales to SNI members, and sales to everyone else — are governed by entirely different legal principles.

Yet SNI is seeking to blur the distinction between these two markets and the legal principles that govern them. It is attempting to use three specific objections to how the new state tax and regulatory system allegedly will work in connection with *intratribal* sales to obtain a sweeping across-the-board injunction that applies not just to such *intratribal* sales, but to sales to *nonmembers* as well. SNI offers no reason to enjoin the application of the new system with

respect to *non-tribal* sales, nor could it under the relevant Supreme Court and other federal court decisions. By definition, state taxation and regulation of tribal cigarette commerce with non-Indians and members of other tribes do not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." *Colville*, 447 U.S. at 161; *see also Rice v. Rehner*, 463 U.S. 713, 720 n.7 (1983) ("Regulation of sales to non-Indians or nonmembers of the . . . Tribe simply does not 'contravene the principle of tribal self-government'") (citation omitted). Nor do any federal statutes preempt state taxation and regulation of such sales. To the contrary, the strong federal policy embodied in such laws as the Contraband Cigarette Trafficking Act ["CCTA"], 18 U.S.C. § 2341 *et seq.*, and the Prevent All Cigarette Trafficking Act ["PACT Act"], Pub. L. No. 111-154, 124 Stat. 1087, is to *support* and *facilitate* state taxation and regulation of such sales, including by tribes and tribal retailers.

Second, SNI has no likelihood of success on the merits of its specific objections to how the new system supposedly will work in providing its tribal members the tax-free cigarettes to which they are entitled. To the contrary, New York's new tax system provides SNI with a range of choices for securing ample supplies of tax-free cigarettes for sale to its (at most) several thousand adult tribal smokers. SNI may select, if it so desires, the "pre-approval" system (discussed in detail below) that imposes few if any burdens on the tribal government. In the alternative, if SNI wishes to exercise more control (with slightly more administrative effort) over the allocation of tax-free cigarette sale opportunities, it can opt for the tax exemption coupon system. If SNI dislikes *both* of these systems, it can negotiate a government-to-government plan with the State that is customized to meet the needs of SNI and its members.

SNI argues that this new range of options "infringes unduly on the Nation's right of self-government." Br. at 22, 31-36. It argues that the new system will "compel" it to "abandon" its

"free market principles" and "instead to nationalize its tobacco economy" and introduce "command and control dictates into that economy." Br. at 32. That is absolutely false. SNI has a broad range of choices in how to ensure that its adult smokers receive the tax-free cigarettes to which they are entitled. For example, by simply arranging to allocate its tax exemption coupons among adult tribal smokers (numbering no more than several thousand), it could ensure that "free market principles" flourish: adult tribal smokers could use their coupons at the tribal retail outlets of their choice to purchase whatever brands they wish. Although SNI claims that the State may not "commandeer" the tribal government to help administer the state cigarette tax system (Br. at 2, 33), the Supreme Court and lower courts have repeatedly ruled otherwise. *See, e.g., California State Bd. of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 12 (1985) (per curiam) ("if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers") (citation omitted).[3]

SNI also argues that the new cigarette tax system imposes "undue burdens on the Nation's tobacco economy." Br. at 36; *see id.* at 22, 36-41. Here again it is important to distinguish sales to *nonmembers* from sales to *SNI members*. With respect to tribal sales to

[3] SNI attempts to distinguish the governing precedents by arguing that they all involve tribes that were "acting as market participants" by selling and distributing cigarettes themselves, as opposed to a tribal government like SNI that is acting solely in its "sovereign governmental capacity." Br. at 34. But upon information and belief, SNI *itself* is a "market participant" in the tobacco economy through its chain of tribally owned and operated "Seneca One Stop" convenience stores. The tribal government also derives enormous licensing and tax revenues on sales by private operators to non-Indians and members of other tribes. Many of those private operators who own manufacturing, distribution, and retail firms that engage in "tax free" sales to nonmembers are themselves high tribal officials responsible for overseeing SNI's so-called "well-regulated free market tobacco economy." *Id.* at 3. Whether in its capacity as "market participant" or "sovereign government," the burdens imposed on SNI are measured, appropriate, and reasonable under the circumstances, particularly given the tribal and private fortunes that have been made from "tax free" sales and the tribe's continued refusal to submit in any way to the Supreme Court's governing decisions. *See* pp. __-__ below.

nonmembers, the Supreme Court has repeatedly emphasized that States may tax and regulate such sales "*even if* [the result] seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Colville*, 447 U.S. at 151 (emphasis added); *see also Ward v. New York*, 291 F. Supp. 2d 188, 203, 205 (W.D.N.Y. 2003) (State may tax and regulate tribal cigarette commerce with *nonmembers* even if the result "completely arrests Indian commerce" with such persons and "completely destroys the business of reservation cigarette retailers").

As for SNI's allegations of "undue burdens" with respect to *intratribal* cigarette sales, many of those supposed burdens of SNI's own creation. As SNI explains, "Nation members may only exercise their federally protected right to purchase tax-free cigarettes *if* the Nation administers the tax exemption coupon quota in a manner that permits them to do so," but the tribal government will not "administer a tax-exempt cigarette quota on the State's behalf." Br. at 39 (emphasis added). SNI is entitled to refuse to cooperate with the State, but it cannot then turn around and complain about the resulting increased burdens and inconvenience caused by *its* intransigence. *See especially Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881, 892 (6th Cir. 2007) (upholding prepayment/refund system imposed by Michigan on tribal government; tribe's "consistent refusal to cooperate with the state only serves to make the collection process more burdensome on both parties" and "force[s] the state to take a more aggressive approach to the collection of tobacco taxes"). Reasonableness is a two-way street, and a State may require more onerous measures when a tribe refuses to assist with less burdensome and intrusive alternatives.

Nor is SNI likely to succeed in its challenge to the new system's universal stamping and tax "prepayment" requirements. *See* Br. at 22, 41-43. Many States have successfully implemented such systems. *See* p. __ & n.__ below. And *every* federal court to have addressed

the issue has concluded that a State may require tribal sellers to purchase only state-stamped, tax-prepaid cigarettes, subject to providing them with a coupon, refund, or other mechanism to ensure timely adjustments for all documented tax-free sales to enrolled tribal members. Such a universal stamping and tax-prepayment system is "a permissible means of requiring [a tribe to] 'aid the State's collection and enforcement' of valid taxes imposed on non-tribal members," particularly where there has been a history of "illegal sales of tax-free cigarettes to non-tribal members … which have wrongfully deprived the state of legitimate revenue[.]" *Keweenaw Bay*, 477 F.3d at 892-93 (citation omitted); *see also Muscogee (Creek) Nation v. Henry,* 2010 WL 1078438, at *1 (denying preliminary injunction motion against Oklahoma's universal state stamping and tax-prepayment requirements); *Confederated Tribes and Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1263-64 (E.D. Wash. 2010) (dismissing claims against Washington's universal state-stamping and tax-prepayment requirements).[4]

BACKGROUND

A. The State's Excise Tax on Cigarettes

Article 20 of the New York Tax Law imposes an excise tax on the sale or use of cigarettes in the State of New York. N.Y. Tax Law §§ 471, 471-A. The statute imposes the "ultimate incidence of and liability for the tax" on the consumer. *Id.* § 471(2). In practice, however, the State usually collects the excise tax by licensing certain distributors as "stamping agents," *i.e.,* companies that purchase "tax stamps" from the State and affix them to cigarette

[4] The recent amendment to the New York Tax Law includes a provision expressly allowing retailers, such as NYACS' members including Wilson Farms and Noco Energy, to sue the Department of Taxation and Finance if it fails to implement the tax laws with regard to reservation cigarette sales. 2010 New York Laws, ch. 134, pt. D, § 12. To date, the State appears to have taken all steps necessary to enforce the amended tax laws. However, if and when the State does not take such action (whether by its own decision, court order, or otherwise), Amici may initiate an action pursuant to its statutory authority and/or seek to intervene in this action as party.

packs before reselling them to other cigarette distributors and retailers. *Id.* § 472. The State collects the excise taxes from the stamping agent when the agent purchases the tax stamps. The stamping agent then passes the cost of the stamps and thus the tax down the distribution chain to retailers and, ultimately to the consumer. *See generally City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 337 (E.D.N.Y. 2008).

B. The State's Long Struggle to Collect Excise Taxes on Cigarettes Sold Through New York Reservation Sellers to Non-Tribal Members

The Supreme Court has made it clear that "on-reservation cigarette sales to persons *other than reservation Indians* . . . are legitimately subject to state taxation." *Milhelm Attea*, 512 U.S. at 64 (emphasis added, citation omitted). Tribes and their members may not "market an exemption from state taxation" to nontribal customers, and are not entitled to "an artificial competitive advantage over all other businesses in a State." *Colville*, 447 U.S. at 155. Moreover, New York may impose reasonable tax-collection burdens on Native American tribes and retailers as an adjunct to the State's "valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations" by non-tribal members. *Milhelm Attea*, 512 U.S. at 73.

The danger of such evasion is very real. The New York Department of Taxation and Finance has indicated that one third (34%) of all cigarettes sold in New York are sold untaxed through reservation sellers.[5]

Though SNI describes itself as an "ally" of federal law enforcement officials in the fight against illegal and untaxed cigarette sales and advises that "contraband cigarette trafficking is not an issue in the [Seneca] Territories" (*see* Br. at 5-7), the realities are very different. Simply put,

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[5] *See* Testimony of William J. Comiskey, Department of Taxation and Finance Deputy Commissioner (October 27, 2009) (attached as Exhibit E to the Affidavit of James Calvin).

SNI's so-called "well-regulated free market tobacco economy" (*id.* at 3) is one of the central hubs of the nationwide market in contraband cigarette smuggling, and has wreaked economic and law enforcement havoc not only in New York State but across the country. One common thread in federal and state contraband cigarette cases is that they so often involve members of SNI's "tobacco economy" who have orchestrated the wholesale or retail shipment of huge quantities of untaxed, unstamped cigarettes into States ranging from Maine and New Jersey in the East to California, Oregon, and Washington in the West, along with many points in between.[6] As the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("AFTE") recently

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[6] For a sampling of recent federal and state enforcement cases involving contraband cigarettes that either flowed through the SNI reservation or whose shipments were orchestrated from there, *see, e.g.*, *United States v. Montour*, No. CR09-0214MJP, 2010 WL 3211888 (W.D. Wash. Aug. 12, 2010) (*re* pending perjury charges against owner of Seneca importer and distributor Native Wholesale Supply ["NWS"]); *Oklahoma v. Larkin*, *et al.,* No. 09-CV-124-TCK-TLW, 2010 WL 1542573, at *4 (N.D. Okla. Apr. 14, 2010) (*re* sale and delivery by Seneca-based NWS of over 5 million contraband cigarettes to Oklahoma tribes); *Muscogee (Creek) Nation v. Henry*, 2010 WL 1078438, at **3-4 (case involves contraband cigarettes imported and distributed by Seneca-based NWS to Oklahoma tribe); *Idaho v. Native Wholesale Supply Co.*, No. 08-CV-396-S-EJL, 2009 WL 940731, at *1 (D. Id. Apr. 6, 2009) (*re* alleged sales of "over 90 million cigarettes in Idaho" by Seneca-based NWS); *California v. Native Wholesale Supply Co.*, 632 F. Supp. 2d 988, 990 (E.D. Cal. 2008) (*re* alleged sales by Seneca-based NWS of "approximately 250 million cigarettes" to California tribes for resale to non-Indians); Stipulation for Settlement in *State of Washington Dep't of Revenue v. Scott Maybee*, No. C05-5078FBD (W.D. Wash. Oct. 31, 2006) (requiring SNI member Scott Maybee and his websites "to immediately and continuously comply with all aspects and provisions of the Jenkins Act"); Stipulated Judgment and Order in *United States v. 1,250,000 in United States Currency*, No. 06-CV-0542A (W.D.N.Y. July 12, 2005) (requiring Maybee to turn over historic customer records and prospectively file "all current Jenkins Act reports by the tenth day of each month"); *State ex rel. Wasden v. Maybee*, 148 Idaho 520, 224 P.3d 1109, 1115 (2010) (*re* Internet sales by SNI member of over 2.5 million contraband cigarettes to Idaho consumers); *Department of Health and Human Services (Maine) v. Maybee*, 965 A.2d 55, 56-57 (Me. 2009) (affirming imposition of civil penalties and fines against SNI member for Internet sales to Maine consumers); *Milgram v. Red Jacket Tobacco*, No. C 132-08, slip op. at 14-20 (N.J. Super. Ct., Ch. Div. Oct. 2, 2009) (holding that Seneca Internet seller's offers of "TAX FREE CIGARETTES DELIVERED TO YOUR DOOR" and "fail[ures] to disclose that purchasers of non face-to-face sales are required to pay cigarette and sales taxes" violate the New Jersey Consumer Fraud Act "by advertising and selling cigarettes in New Jersey through unconscionable commercial practices, misrepresentations and knowing omissions"); *State v.*

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explained to this Court, "***most*** Seneca Internet and mail order cigarette businesses are still involved in activities which deprive the States of substantial amounts of tobacco tax revenue; these activities are not conducted in accordance with the provisions of Federal law in that these sales are generally not reported to state taxation authorities as is required by the Jenkins Act."[7] *See also* Declaration of Patrick Simet (filed July 24, 2009 in *City of New York v. Milhelm Attea & Bros., Inc.,* Civil No. 06-CV-3620 (E.D.N.Y.) (providing Investigative Reports by New York State Department of Taxation and Finance undercover agents of purchasing untaxed and unstamped cigarettes on Seneca reservation in Salamanca, New York).[8] The Seneca leadership has "refused to require these businesses to come into compliance with the Jenkins Act despite repeated efforts of ATF to achieve voluntary compliance."[9]

Today, according to the Department of Justice, SNI's "tobacco economy" depends "near exclusively [on] the evasion of State excise taxes and the refusal to affirmatively report . . . tax-free sales as required by law."[10] Indeed, the United States advised that this Court could "reasonably conclude" that SNI tobacco retailers "are conducting their business in violation of

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Footnote continued from previous page
Native Wholesale Supply, ___ P.3d ___, 2010 WL 2674999 (Okla. Sup. Ct. Jul. 6, 2010) (*re* allegation that Seneca-based NWS arranged for sale and distribution "over a fifteen-month period [of] more than one hundred million cigarettes … into the Oklahoma market"); *Oregon v. Maybee*, 235 Or. App. 292, 232 P.3d 970 (2010) (affirming injunction against SNI member prohibiting illegal Internet sales of contraband cigarettes to Oregon consumers); *State v. Grand River Enterprises, Inc.*, 2008 SD 98, 757 N.W.2d 305 (2008) (*re* contraband cigarettes imported to SNI reservation and distributed from there to Nebraska and South Dakota).

[7] Declaration of Ronald B. Turk, Bureau of Alcohol, Tobacco, Firearms, and Explosives, at ¶ 10 (filed in *Red Earth, LLC, at al. v. United States*, No. 10-CV-530 (W.D.N.Y. July 6, 2010) ["Turk Affidavit"] (emphasis added), at ¶ 10 (attached as Exhibit I to Calvin Affidavit).

[8] The Simet Declaration is attached as Exhibit E to the Sullivan Affirmation, filed herewith.

[9] Turk Affidavit, at ¶ 10.

[10] United States' Memorandum In Opposition to Plaintiffs' Motion for a Preliminary Injunction, at 11, *Red Earth, LLC, at al. v. United States*, No. 10-CV-530 (W.D.N.Y. filed July 21, 2010) ["United States *Red Earth* Mem."].

the mail and wire fraud statutes, in that [such retailers] utilize[] the instrumentalities of interstate commerce — the mails and the wires — in furtherance of a scheme or artifice to defraud the states of excise tax revenues."[11] The United States was preparing to sue SNI retailers for failure to comply with the federal Jenkins Act — enacted to help ensure payment of all lawful state excise taxes—when Congress enacted the PACT Act.[12]

This case is fundamentally about New York finally ending its long history of not collecting the excise taxes that are lawfully owed the State on the hundreds of millions of packs of cigarettes Native American retailers sell to non-tribal members very year. A brief review of this history is important for understanding the context of this litigation and the new tax enforcement regime.

C. The State's Early Efforts to Collect Excise Taxes on Native American Cigarette Sales to Non-Tribal Members

The Department of Taxation and Finance ["DTF" or "the Department"] first adopted regulations requiring Native American cigarette retailers to collect sales and excise taxes on sales to non-tribal members over twenty years ago, in 1988. *See New York Ass'n of Convenience Stores v. Urbach*, 275 A.D.2d 520, 521 (3d Dep't 2000) ["*NYACS II"*]. DTF acknowledged that tribal members had a right to purchase and consume cigarettes on a tax-free basis from tribal retailers on their reservation. *Milhelm Attea*, 512 U.S. at 65. To ensure that these tax-free sales were limited to qualified purchases (*i.e.*, only on-reservation sales to tribal members), however, DTF planned to provide Native American retailers with a supply of "Tax Exemption Coupons" equal to the number of cigarettes qualified tribal members were expected to purchase on a tax-free basis. *Id.* at 65-66. With these coupons, reservation retailers could purchase and resell

[11] United States' *Red Earth* Mem., at 10.

[12] Turk Affidavit, ¶ 11.

cigarettes on a tax-free basis in those limited circumstances where tax free sales were permissible. *Id.*

New York suspended implementation of its Native American tax plans when a group of cigarette wholesalers challenged them on federal pre-emption grounds. This litigation culminated in a U.S. Supreme Court ruling that the Department's regulations were not pre-empted by federal law. *Id.* at 75. The Supreme Court ruled that New York's effort "to stanch the illicit flow of tax-free cigarettes early in the distribution scheme" by using its coupon system to limit tax-free sales to the expected demand for cigarettes by qualified tribal members was a "'reasonably necessary' method of 'preventing fraudulent transactions'" that "'polices against wholesale evasion of [New York's] own valid taxes without unnecessarily intruding on core tribal interests.'" *Id.* (*citing Colville*, 447 U.S. at 160, 162. The Court observed that the recordkeeping and administrative tasks associated with New York's coupon system would not "unduly interfere with Indian trading," and thus concluded that "assuming that the 'probable demand' calculations leave ample room for legitimately tax-exempt sales," *New York's tax system passed constitutional scrutiny*. 512 U.S. at 76-78.

1. New York Decides to "Forebear" From Collecting the Taxes That *Milhelm Attea* Confirmed as Lawful

In the wake of the June 1994 *Milhelm Attea* ruling, New York established an "Implementation Task Force" to put into effect its plan to collect excise taxes on non-exempt sales by Native retailers. *New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 210 (1998) ["*NYACS I*"]. But that Task Force promptly announced that it was delaying any enforcement of the coupon tax regulations because of "potential legal obstacles to enforcement" and "serious discussions with several Indian Nations regarding our respective sovereign concerns." *Id.* at 210.

New York's lack of implementation of the coupon tax plan continued for more than a year after the Supreme Court's *Milhem Attea* ruling. In August 1995, NYACS sued to compel the state taxing authority to enforce the coupon tax plan. *Id.* The Supreme Court and the Appellate Division both found New York's decision not to enforce its tax laws only as to Native retailers to be an unlawful "denial of equal treatment." *See New York Ass'n of Convenience Stores v. Urbach*, 230 A.D.2d 338, 343 (3d Dep't 1997).

In early 1997, after the Albany County Supreme Court had ordered New York to begin enforcing the collection of excise taxes equally against qualified Native retailer cigarette sales, DTF announced that it would begin doing so on April 1, 1997. As the Attorney General explained, the tribes did not comply with the law or follow legitimate processes to change the law — instead, many tribal members resorted to violence:

> The commencement of enforcement resulted in vigorous tribal opposition including demonstrations, blockading of public highways, tire burning, confrontations with State Police, arrests, violence, and threats of violence.[13]

Just a few weeks after the *NYACS* case was argued in the New York Court of Appeals, New York repealed the regulations setting forth the coupon plan for collecting excise taxes on appropriate Native retailer cigarette sales. *NYACS I,* 92 N.Y.2d at 213-14. The Court then reversed and remanded for reconsideration under a different equal protection standard. *Id.* at 215.

On remand, the trial court and the Appellate Division held that there was a "rational basis for [New York's] indefinite forbearance" in collecting taxes associated with reservation seller sales of cigarettes to non-tribal members. *NYACS II*, 275 A.D.2d at 522. The Appellate Division

[13] Brief for Appellants, *Day Wholesale, Inc., et al. v. New York*, at 6 (4th Dep't No. 681, filed Apr. 10, 2008).

explained that, in its view, "the [tax] statutes cannot effectively be enforced without the cooperation of the Indian tribes." *Id.*

D. New York Enacts a New Tax Law But Does Not Implement The Necessary Regulations or Tax Exemption Coupons

In 2003, the Legislature enacted Tax Law § 471-e, which "directed the Department to issue whatever regulations would be necessary to collect cigarette taxes on reservation sales to non-Indians." *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 627 (2010), *petition for cert. filed*, No. 10-206 (Aug. 9, 2010). The Department in response issued new draft regulations to collect such taxes, but never actually adopted them. *Id.*

As a result, the Legislature in 2005 amended Tax Law § 471-e to make clear that while Native Americans were free to purchase tax-free cigarettes for their own consumption from retailers on their reservation, "non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state." Tax Law § 471-e[1]; *see Cayuga Indian Nation,* 14 N.Y.3d at 627. The statute further detailed the mechanism for collecting tax on reservation sales to non-tribal members while assuring that tribal members could enjoy tax-free cigarette purchases on their reservation.

Although it differed from the 1988 regulatory scheme, Tax Law § 471-e also used a coupon system as the mechanism of enforcement. The Department was required to determine the "probable demand" for cigarettes by tribal members through various means (including potential agreements with the tribes) and periodically issue to the governing body of a tribe tax exemption coupons representing the amount of cigarettes likely to be consumed by tribal members each quarter. Cigarette wholesalers were to pay the sales taxes on all cigarettes in their possession, meaning all packages were to bear tax stamps, even those destined for on-reservation sales to tribe members. A tribe could purchase cigarettes for use by members without paying

sales taxes by proffering tax exemption coupons provided by the Department. The wholesaler, in turn, would use the coupons to obtain a refund from the Department for its overpayment of cigarette taxes (the wholesaler would have already paid the sales taxes on the cigarettes it provided to the tribes in exchange for the coupons). *Cayuga Indian Nation,* 14 N.Y.3d at 627.

The 2005 Amendments to Tax Law § 471-e specified that they would "take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of this act . . . are authorized and directed to be completed before such date." *Id.* (quoting N.Y. Tax Law § 471-e). However, the Department did not take the steps necessary to implement the Legislature's plan. It issued no regulations, did not calculate "probable demand" for Indian tax-free on-reservation purchases, and failed to issue the tax exemption coupons that were essential to allowing legitimate tax-free purchases. *Id.* Instead, the Department in March 2006 issued an advisory opinion indicating that "it intended to continue its policy of forbearance, meaning that it would not actively attempt to collect from wholesalers, distributors, or Indian retailers, cigarette taxes associated with on-reservation sales." *Id.* (citing New York State Dep't of Taxation and Fin., Advisory Opinion Petition No. M060316A (Mar. 16, 2006)).

Shortly after the Legislature's March 1, 2006 effective date for the new tax system, a Seneca retailer and a non-Indian wholesale supplier filed suit seeking a declaration that Tax Law § 471-e was not "in effect" until the Department issued the regulations and tax exemption coupons necessary to implement the new law. On January 2, 2007, the New York Supreme Court for Erie County preliminarily enjoined the Attorney General and other New York officials from enforcing Tax Law § 471-e. As the Court explained:

> It is undisputed that, at present, Indian tax exemption coupons have not been issued or distributed as contemplated by the statute. It is difficult to imagine this statute functioning without enabling rules and regulations governing, at a minimum, the printing, allocation, and distribution of Indian tax exemption

> coupons. What is absolutely clear, however, is that Tax Law, § 471-e cannot, by its terms, function without a system that involves Indian tax exemption coupons. The creation and distribution of those coupons is, under any reading of the statute, one of the "actions . . . necessary to implement the provisions of this act."

Day Wholesale, Inc. v. State, No. 06-7668, 2007 WL 6830371 (Sup. Ct. Erie Co. Jan. 2, 2007). The Appellate Division affirmed the issuance of the preliminary injunction. *Day Wholesale, Inc. v. State of New York,* 51 A.D.3d 383 (4th Dep't 2008).

1. The New York Courts Enjoin the State's "Certification" Requirement

In December 2008, and in the face of the continued non-enforcement of the current tax regime, the Legislature amended the cigarette tax laws to provide that manufacturers could sell unstamped cigarettes only to those New York stamping agents that had provided a certification that they would not resell those cigarettes in violation of the tax law. *See* N.Y. Tax Law § 471(4). Governor Paterson's press release announcing the signing of the legislation explained that the cigarette tax laws require that "cigarettes sold by Indian retailers to non-Indians must be taxed" and the new law "will prohibit cigarette manufacturers from selling unstamped cigarettes to stamping agents who have not provided them with a certification, under penalty of perjury, that the cigarettes will not be resold in violation" of the cigarette tax laws.[14]

Day Wholesale — a cigarette distributor and New York licensed stamping agent that sells principally to New York Native American retailers — filed suit in a New York trial court seeking a preliminary injunction against enforcement of Tax Law § 471(4). On January 27, 2009, the court granted that preliminary injunction "until the New York State Department of Taxation and Finance . . . has taken the necessary action including, but not limited to, distributing Indian tax-exemption coupons to the recognized governing bodies of [the New York

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[14] Press Release, "Governor Paterson Signs Cigarette Tax Legislation" (December 15, 2008), *available at* www.state. ny.us/governor/press/press_1215081.html.

Native American tribes], and has adopted the necessary rules and regulations to implement the Indian tax-exemption coupon system." *Day Wholesale, Inc. v. New York*, Index No. 2006/7668, Prelim. Inj. (Sup. Ct. Erie Co., entered Jan. 27, 2009).

2. The State's New Tax System

Starting in January of this year, the Legislature and the Paterson Administration began formulating a new budget for the State, in the midst of one of the worst economic recessions the State has ever faced. In that context, Governor Paterson proposed a budget in January that included an increase in the cigarette excise tax coupled with a proposal to end the non-enforcement policy. These two proposals worked in tandem: it was well understood that any further increase in the excise tax rate would seriously exacerbate the market distortions already created by the sale of untaxed cigarettes through the reservations. To that end, the Department of Tax and Finance on February 23, 2010 withdrew the March 2006 Advisory Opinion.[15]

During this same period, the New York State Senate Standing Committee on Investigations and Government Operations conducted extensive hearings on the State's cigarette tax collection system and potential ways in which it could be repaired. Among the key witnesses was Columbia Law School Professor Richard Briffault, who submitted a detailed analysis on *State Authority to Tax Tribal Cigarette Sales to Non-Members* and testified at length on the federal Indian law standards by which any new legislation would be judged.[16] The Committee's June 2010 report, *Executive Refusal: Why the State Has Failed to Collect Cigarette Taxes on Native American Reservations*, drew extensively from Professor Briffault's report, carefully

[15] *See* N.Y. Dep't of Tax and Fin., "TSB-A-06(2)M is Revoked," *available at* http://www.tax.state.ny.us/pdf/advisory_opinions/misc/a06_2m.pdf.

[16] *See* Calvin Affidavit (filed herewith) Exhibit G.

considered the treaty rights and other federal Indian law issues, and served as the foundation for the Legislature's revision of the State's cigarette tax laws.[17]

On June 21, 2010, New York enacted a budget package that included a general increase in the cigarette excise tax of $1.60 (to $4.35 per pack), as well as amendments to the cigarette Tax Law that mandated the collection of excise taxes on cigarettes sold through reservations by September 1, 2010. In particular, these amendments, consistent with the guidance of *Milhelm Attea* and other decisions, included a new system designed to permit the State to collect cigarette excise taxes on tribal sales to non-tribal members while, at the same time, ensuring ample supplies of tax-free cigarettes for tribal members' personal consumption on their reservations. *See* 2010 Session Law N.Y. Ch. 134, Part D (signed June 21, 2010), 2010 Session Law N.Y. Ch. 136, § 1 (signed June 22, 2010) ["New Tax Act"].

Critically, this legislation removed any discretion on the part of the Department whether or not to move forward with collection. The New Tax Act specifically mandates that the law be implemented within 60 days of enactment, and makes clear that wholesalers' obligation to begin tax stamping all cigarettes by that date remains in effect regardless of whether the State takes all steps necessary to implement the law by that date. 2010 Session Law N.Y. Ch. 134, Part D, §§ 9, 11.

3. The Legislation

The New Tax Act amends Tax Law § 471 to make clear that the State's cigarette excise tax (a) does not apply to "sales to qualified Indians for their own use and consumption on their nation's or tribes' qualified reservation"; but (b) "is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." *Id.* Under the new

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[17] *See* Calvin Affidavit (filed herewith) Exhibit B.

legislation, "[a]ll cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp." N.Y. Tax Law § 471(2).

The New Tax Act provides two alternative methods, the tax exemption coupon system and the prior approval system, to ensure that all legitimately owed taxes are collected from licensed stamping agents. At the same time, both methods ensure that there are ample supplies of tax-exempt cigarettes available for consumption by New York's Native American tribal members. *Id*. §§ 471-e, 471(5). In addition, the statute expressly contemplates a third option — namely, that the State and a tribe may enter into a compact which can result in an altogether different agreement and mechanism as to taxation.[18] Importantly, the tax collection mechanism operates not through the tribes, but rather through the State's licensed stamping agents. These stamping agents — none of which are located on tribal reservations — have for many years borne the responsibility of placing excise tax stamps on cigarettes prior to re-sale, and remitting the corresponding tax receipts to the State.

a. Tax Exemption Coupon System

The governing body of an Indian tribe may annually elect to participate in the "Indian tax exemption coupon system." *Id.* § 471-e(1)(b). If the governing body so elects, the Department must provide the tribe with coupons sufficient to "ensure an adequate quantity of cigarettes on Indian reservations which may be purchased by qualified Indians exempt from the cigarette tax."

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[18] N.Y. Tax Law § 471(6). To date, no Indian nation or tribe has entered into any such agreement. Such compacts must, under New York separation-of-powers principles, be approved by the Legislature. *See, e.g., Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y. 2d 801, 822, 824 (2003); *Huron Group v. Pataki*, 5 Misc. 3d 648, 668, 785 N.Y.S. 2d 827, 843 (Sup. Ct. Erie Cty. 2004); *Peterman v. Pataki*, No. 99-0520, 2004 WL 5555578, at *2 (Sup. Ct. Oneida Cty. June 25, 2004); *Rego Props. Corp. v. Fin. Adm'r*, 102 Misc. 2d 641, 644-45 (Sup. Ct. Queens Co. 1980).

Id. The amount of the tax exempt coupons a tribe will receive 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." *Id.* § 471-e(2)(b). The statute provides that in determining the probable demand of a particular Indian tribe, the Department should reference data including "United States average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of qualified Indians for each such affected Indian nation or tribe." *Id*. § 471-e(2)(b)(i). The statute also instructs the Department to "take into consideration any evidence submitted by such recognized body relating to such probable demand." *Id.* § 471-e(2)(b)(ii).

The statute instructs cigarette wholesalers to sell stamped cigarettes to Indian tribes and retailers, but to subtract the amount of the excise tax on cigarettes for which the tribal purchaser presents tax-exempt coupons. *Id.* § 471-e(3)(d). The wholesaler can then turn the coupons into the Department for a refund of the tax paid. *Id.* § 471-e(4).

b. Prior Approval System

If a tribe does not elect to use the tax exemption coupon system for a given year, the New Tax Act provides that the tribe and tribal retailers can still use the alternative "prior approval system" to purchase adequate quantities of tax-exempt cigarettes for the personal use and consumption of qualified members of the Indian nation or tribe. *Id.* § 471(5)(b). Under this system, stamping agents and cigarette wholesalers can secure prior Department approval to sell tax-exempt cigarettes to Indian tribes or retailers. The cigarettes must bear tax stamps, but the seller can secure a prompt refund of the tax paid through the stamp. *Id.* The Department will grant prior approval for sales up to the tribe's total "probable demand," which it will calculate in the same fashion as for the tax exemption coupon system. *Id.*

c. State/Tribal Agreement to Adopt Another System

Finally, a tribe that is dissatisfied with both the tax exemption coupon system and the prior approval system is free to negotiate a different, customized, system with the State. *Id.* § 471-e(5). The tribe is thus free to seek a system that provide the desired balance between tribal control and tribal burden. *Id.*

ARGUMENT

I. SNI FUNDAMENTALLY MISDESCRIBES THE GOVERNING LAW

A. It Is Settled Law That New York May Tax and Regulate SNI's Cigarette Sales to Nonmembers, and That SNI and its Members Are Required to Provide Reasonable Assistance.

The federally protected right of a Native American tribe and its members to engage in "tax free commerce" in cigarettes is extremely limited. Enrolled members of a federally recognized Native American tribe who purchase cigarettes from their own tribe or fellow tribal members on their own tribe's reservation for consumption on that reservation are exempt from state and local cigarette taxes. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 475-81 (1976); *see also Milhelm Attea*, 512 U.S. at 64 (tax exemption applies only to cigarettes "*to be consumed on the reservation by enrolled tribal members*") (emphasis added). That is as far as the exemption goes. "On-reservation cigarette sales to persons *other than* reservation Indians . . . are legitimately subject to state taxation." *Milhelm Attea*, 512 U.S. at 64 (emphasis added) (citation omitted). Tribes and their members may not "market an exemption from state taxation to persons who would normally do their business elsewhere"; nothing in federal Indian law "goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." *Colville*, 447 U.S. at 155; *see also id.* at 157 (State may "prevent the Tribes from marketing their tax

exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservation"); *Milhelm Attea*, 512 U.S. at 71-72.

Nor can tribes "oust" state power to tax cigarette sales to non-Indians "by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises." *Colville*, 447 U.S. at 154-55; *see also id.* at 158. Because non-Indian purchasers remain fully subject to state taxes, the supposed "competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax." *Moe*, 425 U.S. at 482 (emphasis in original); *see also Milhelm Attea*, 512 U.S. at 71; *Colville*, 447 U.S. at 150-51.

A large portion of SNI's "reservation tobacco economy" involves the bulk shipment of unstamped, untaxed cigarettes to other Native American reservations in New York and throughout the United States, almost all of them destined for eventual retail sale to non-Indian smokers. Although SNI's motion papers speak in places about the right of a tribe to do business with its own members, elsewhere they include broad claims of a right to engage in "Indian-to-Indian commerce" and a "right of *all* individual Indians and *all* reservation retailers to engage in tax-free commerce." Br. at 34, 40-41 (emphasis added). There are *no* such broader rights under federal Indian law. Although the *Interstate* Commerce Clause has a "dormant" component that prevents States from unduly burdening *interstate* commerce in goods even in the absence of a conflict with a specific Congressional enactment, the *Indian* Commerce Clause imposes no comparable "dormant" restraint on state regulation of *intertribal* commerce. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (Interstate Commerce Clause "is premised on a structural understanding of the unique role of the States in our constitutional

system that is not readily imported to cases involving the Indian Commerce Clause"; the two clauses "have very different applications," and it would be "'treacherous to import to one notions of pre-emption that are properly applied to the other'") (citation omitted).

Instead, the Supreme Court has long emphasized that federal Indian law only prevents States from taxing and regulating sales by a tribe or member of a tribe to other members of that *same* tribe on that *same* tribe's trust lands for consumption on *those* lands. That is as far as the tribal immunity goes:

> Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. . . . Nor would the imposition of Washington's tax on these [nonmember Indian] purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.

Colville, 447 U.S. at 160-61; *see Duro v. Reina,* 495 U.S. 676, 686-87 (1990) ("We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. . . . *But this rationale does not apply to taxation of nonmembers, even where they are Indians.*") (emphasis added); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) (tribal member's commerce with "Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred" is fully subject to state licensing and regulation).[19]

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[19] *See also Muscogee (Creek) Nation v. Henry,* No. Civ. 10-019, 2010 WL 1078438, at *3 (E.D. Ok. Mar. 18, 2010) ("[T]he Supreme Court has repeatedly held that Native American immunities from state taxation and regulation only extend to commerce *within* a particular tribe, not to commerce *among* different tribes or their members"; tribal plaintiffs were "seeking 'supersovereign status' — the ability to avoid state taxation and regulation of their commerce with non-Indians and members of other tribes even where that commerce travels outside of Indian country. Such an immunity . . . would truly be unprecedented.") (emphasis in original).

B. SNI Does Not Have "Supersovereign Authority" Greater Than Other Tribes, and Is Not Entitled to a Special Exception From Generally Applicable Principles of Federal Indian Law.

SNI contends that it is not to be subject to these general principles of federal Indian law. It claims, in essence, a "supersovereign authority" greater than other tribes to follow its own rules in selling and distributing cigarettes to non-Indians and members of other tribes who live on other reservations. *Chickasaw Nation*, 515 U.S. at 466. None of SNI's arguments hold up under even cursory examination.

1. SNI's Treaty Rights Do Not Exempt It From Federal Indian Law Principles That Apply to All Other Tribes.

SNI "firmly believes" that its treaties with the United States, "[p]rincipal[ly]" the 1794 Treaty of Canandaigua, 7 Stat. 44, reserve a special "treaty-protected sovereignty" that is greater than that enjoyed by any other tribe, and thus that the generally applicable principles of federal Indian law discussed above "*do not apply to the Nation*." Br. at 8 n.1, 23-24, 36 (emphasis added). Federal courts, state courts, and the federal Executive Branch have repeatedly rejected this claim. New York's power to tax and regulate SNI's cigarette sales does not turn on the language of any particular treaty. The principles of federal Indian law that allow States to tax and regulate tribal cigarette sales to nonmembers apply to all of the hundreds of federally recognized tribes throughout the United States, even though most of the hundreds of governing treaties between the tribes and the United States did not explicitly authorize state regulation and taxation of such tribal commerce. As the Sixth Circuit has explained, one of the key purposes of *all* Indian treaties was to make federal law applicable to the tribes and geographic areas covered by the treaties, and "[f]ederal law allows states to require tribes to aid in the collection and enforcement of taxes from non-tribal members. . . . [States] are clearly permitted to require the

assistance of tribes in collecting legitimate taxes from non-tribal members." *Keweenaw Bay Indian Country v. Rising,* 477 F.3d 881, 893 (6th Cir. 2007).

Various tribes and tribal retailers throughout the country have argued that their *particular* treaties with the U.S. government exempted them from the usual rules that govern all other state and tribal governments. Federal and state courts have *repeatedly* rejected such claims to special treaty-rights immunities from state taxation and regulation. *See, e.g., Colville*, 447 U.S. at 155-56 (rejecting argument that 1855 Lummi, Makah, or Yakima treaties "pre-empt Washington's sales and cigarette taxes" on tribal sales to nonmembers); *Keweenaw Bay,* 477 F.3d at 893 (rejecting argument that 1842 Chippewa treaty "placed Indian commerce under the exclusive jurisdiction of federal law and stripped the states of all jurisdiction to tax it," or "was intended to prevent states from regulating trade in the [ceded] territory"); *Confederated Tribes and Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010) (same with respect to 1855 Yakama treaty).[20]

Neither the 1794 Treaty of Canandaigua nor any of SNI's other treaties with the United States give it "supersovereign authority" above and beyond that enjoyed by other tribes. *Chickasaw Nation*, 515 U.S. at 466; *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) (refusing to make tribes or their members "'super citizens' who [can] trade in a traditionally regulated substance free from all but self-imposed regulations"). SNI relies on language in Articles 2 and

[20] In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the Ninth Circuit held that one specific provision of Washington's contraband cigarette laws was preempted by the Yakama's 1855 treaty — a requirement that Yakama tribal members give advance notice to state officials before traveling on public highways with contraband cigarettes, which in the court's view violated the Yakama's treaty-protected right to travel off the reservation without prior permission from the State. *Id.* at 1265-66, 1272. With this one narrow exception, Washington's cigarette excise tax laws otherwise apply with full force to Yakama tribal sales to nonmembers. *See United States v. Fiander,* 547 F.3d 1036, 1040 (9th Cir. 2008); *Gregoire,* 680 F. Supp. 2d at 1267-68.

3 of the 1794 treaty promising that the United States "will never disturb" the tribe "in the *free use and enjoyment*" of its reservation lands. Federal courts, state courts, and the federal Executive Branch have consistently concluded, however, that the "free use and enjoyment" language simply bars taxation of the lands themselves and *perhaps* the products of the lands, but not economic activity occurring *on* those lands. *See, e.g.*, *Lazore v. Comm'r of Internal Revenue*, 11 F.3d 1180, 1185-87 (3rd Cir. 1993) (1794 Canandaigua Treaty's "free use and enjoyment" language did not include an exemption from income taxes, with possible exception for income derived directly from land); *Cook v. United States*, 32 Fed. Cl. 170, 174 (1994) (1794 treaty's "free use and enjoyment" language "applies to the use of land," whereas excise taxes apply to "a particular activity, not the land itself or the [Indians'] use of the land"), *aff'd*, 86 F.3d 1095, 1097-98 (Fed. Cir. 1996) (treaty only "applies to the use of land," not to excise taxes "on the sale of a commodity"); *New York State Dep't of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75, 85, 667 N.Y.S.2d 141, 147-48 (1997) ("The immunity from taxation that [Seneca retailers] claim here is not conferred by Federal treaties . . . or by case law interpreting those treaties …. The 1784, 1789 and 1794 Treaties . . . do not confer any immunity from taxation[.]"). As the U.S. Department of Justice has demonstrated, the 1794 treaty and its predecessors "do not address the subject of state taxing and other jurisdiction over non-Indians within the territories of the Six Nations," and do not afford the Six Nations any greater protection than "the relevant language in the treaties and statutes protecting the use and occupancy of the reservations in *Moe*, *Colville* and *Potawatomi* appear to afford those Tribes[.]"[21] The courts and federal Executive Branch have

[21] Brief of United States as *Amicus Curiae* in *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, No. 93-377, 1994 U.S. S. Ct. Briefs LEXIS 29, at **37-39.

likewise rejected similar SNI claims with respect to its other treaties.[22] Simply put, SNI and its members are bound by the same rules that apply to all other tribes and their members.

2. Federal Policy Strongly Supports State Taxation and Regulation of Tribal Cigarette Sales to Nonmembers.

SNI argues that various federal statutes dating back to 1975 "underscore[]" a supposed federal policy of promoting tax-free cigarette sales in Indian country and imposing "strict limitations on state authority over Indian nations and their members [in] the taxation, distribution, and sale of cigarettes in Indian country." Br. at 25-27. SNI does not attempt to reconcile these supposed federal statutory policies with the governing Supreme Court decisions holding that federal Indian law provides the *opposite* rule. The narrow federal policy, when accurately described, is to provide adult tribal smokers with the tax-free cigarettes they seek for personal consumption on reservation lands. *See* p. __ above. As District Judge Skretny concluded after a comprehensive review in 2003, "[t]here does not appear to be any federal policy approving or promoting cigarette sales by Indians. Indeed, the federal government seems

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[22] For example, *every* court to have addressed the 1842 Treaty of Buffalo Creek, 7 Stat. 586, in the context of cigarette taxation has held that it permits the State of New York to tax SNI sales to nonmembers. *See, e.g.*, *United States v. Kaid*, 241 Fed. App'x 747, 750 (2d Cir. 2007) (summary order) (rejecting argument that 1842 SNI treaty preempted New York taxation and regulation of tribal cigarette sales to nonmembers); *Bramhall*, 235 A.D.2d at 85, 667 N.Y.S.2d at 147-48 (although 1842 treaty "prohibits the State from taxing reservation land, it does not bar the imposition of excise and sales taxes on cigarettes and motor fuel sold to non-Indians on the Seneca Nation's reservations"); *Snyder v. Wetzler*, 193 A.D.2d 329 (3d Dep't 1993) (same), *aff'd*, 84 N.Y.2d 941 (1994); Brief of United States in *Milhelm Attea*, at *41 (Article 9 of the 1842 treaty "does not have a preemptive force that is broader for present purposes than that of the western treaties. Article 9 provides that such 'lands' as may remain in the possession of the Senecas are protected 'from all taxes, and assessments for roads, highways, or any other purpose.' As the Appellate Division observed in *Snyder v. Wetzler* … that language 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. … The validity of other state taxes imposed on Indians and non-Indians therefore should instead be resolved under the general preemption principles this Court has developed.").

decidedly in favor of state regulation of such sales." *Ward v. New York,* 291 F. Supp. 2d 188, 206 (W.D.N.Y. 2003); *see also id.* at 204 ("[T]his Court could not find any evidence of a federal policy favoring or promoting tribal control over the sale of cigarettes or confirming the power of tribes to regulate such sales. In fact, the federal government has been generally supportive of *state* regulation of cigarette sales.") (emphasis in original). As this Court knows well from the *Red Earth* and *SFTA* litigation, this federal statutory support of state regulation of cigarette sales — inside as well as outside of Indian country — has only grown stronger over the past seven years.

Indian Self-Determination and Education Assistance Act of 1975 ["ISDEA Act"]. SNI argues that the ISDEA Act, 25 U.S.C. § 450 *et seq.*, somehow demonstrates a Congressional intent to displace state taxation and regulation of tribal cigarette sales to nonmembers. *See* Br. at 25. But the Supreme Court rejected this precise argument in *Colville*, holding that, "even when given the broadest reading to which they are fairly susceptive," neither the ISDEA Act nor other federal statutes "go[] so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." 447 U.S. at 155. The ISDEA Act and other federal laws, in other words, do *not* "authorize Indian tribes … to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*; *see also Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816, 822 (S.D. Iowa 2004) (neither ISDEA Act nor other federal statutes "contain provisions which explicitly or implicitly preempt" state regulation of tribal cigarette sales to nonmembers).

Contraband Cigarette Trafficking Act ["CCTA"]. SNI claims that, under the CCTA, state and local governments may not "target … activities in Indian country" for taxation and regulation and that "state taxation of cigarette sales in Indian country" is somehow restricted.

Br. at 25. This turns the CCTA on its head. The fundamental purpose of that statute is to *strengthen* state and local taxation and regulation of cigarette commerce by making it illegal under federal law "knowingly to ship, transport, receive, possess, sell, distribute, or purchase" cigarettes "which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found" (subject to enumerated exceptions not applicable here). 18 U.S.C. §§ 2341(2), 2342(a). This Court and numerous others have held that these prohibitions of the CCTA are of "general applicability" and "appl[y] equally to Native Americans, even on the reservation." *United States v. 1,920,000 Cigarettes*, No. 02-CV-437A, 2003 WL 21730528, at *4 (W.D.N.Y. Mar. 31, 2003); *see also Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177-78 (9th Cir. 2002); *United States v. Gord,* 77 F.3d 1192, 1193-94 (9th Cir. 1996); *United States v. Baker*, 63 F.3d 1478, 1484-86 (9th Cir. 1995); ATF Circular No. 99-2 (June 16, 1999) ("Sales or shipments of cigarettes from Native American Reservations are not exempt from the requirements of the Contraband Cigarette Trafficking Act and the Jenkins Act.").

The snippets of legislative history cited out of context by SNI relate to 18 U.S.C. § 2346(b)(1), which created a special cause of action for States, local governments, and certain private parties to enforce the CCTA but exempted suits "against an Indian tribe or an Indian in Indian country." This restriction on the scope of one new *remedial* provision did not alter the CCTA's *substantive* applicability to tribal cigarette commerce and its reliance on *substantive* state and local law, nor did it affect the many *alternative* remedies available for violations in Indian country (including "upstream" and "downstream" remedies, enforcement actions against tribal suppliers, off-reservation *in rem* seizures of tribally owned product, and the like). *See generally Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498

U.S. 505, 514 (1991) (such alternative remedies should "produce the revenues to which [States] are entitled").

Prevent All Cigarette Trafficking Act ["PACT Act"]. SNI also claims that the newly enacted PACT Act imposes "strict limitations on state authority" to tax and regulate cigarette commerce in Indian country and places tribal law "on an equal footing" with state law — even though SNI argued only a month ago in *Red Earth* and *SFTA* that the PACT Act "unlawfully interfere[s] with the Nation's 'ability to exercise its sovereign functions'" by "empower[ing]" state and local officials to interfere with cigarette commerce in Indian country. *Compare* Br. at 26 *with* SNI *Amicus* Brief in *Red Earth*, at 13-14. SNI cannot have it both ways; the PACT Act either strengthens state power or tribal power, but not both. As this Court recently explained, the whole point of the PACT Act was to *strengthen* state power and *increase* compliance with state law:

> In enacting the PACT Act, Congress was clearly concerned with the loss of state and local tax dollars each year. Congress attributed some of those losses to the fact that state and local governments were unable to collect taxes from Native American retailers who, in Congress's view, had improperly asserted sovereignty as a basis for avoiding taxes. … [T]he PACT Act was intended to curtail what Congress believed to be improper assertions of sovereignty by Native American retailers[.]

Red Earth LLC v. U.S., Nos. 10-CV-530A, 10-CV-550A, 2010 WL 3061103, at *14 (W.D.N.Y. Jul. 30, 2010). SNI relies on the savings provisions in Section 5 of the PACT Act, without noting that those provisions equally preserve *state* as well as tribal jurisdiction and authority, as well as all "*limitations*" on tribal authority. Br. at 27 (emphasis added). Thus, when the savings provisions preserve "Federal common law," they preserve the generally applicable principles of federal Indian law set forth in *Moe*, *Colville*, *Potawatomi*, *Milhelm Attea*, and other decisions.

3. The Allegedly Severe Harms to SNI and Its Members Do Not Warrant an Exception From the Normal Rules.

SNI emphasizes the potential "loss of commercial opportunities [and] market share" for tribal businesses if the new collection system is enforced. Br. at 21. It warns that "the entire Seneca tobacco economy, which consists of approximately two hundred companies that together employ roughly 3,000 workers … stands to suffer" if state taxes are collected on sales to nonmembers. *Id.* at 22. But the Supreme Court has repeatedly emphasized that States may tax and regulate such sales "*even if* [the result] seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Colville*, 447 U.S. at 151 (emphasis added); *see also id.* at 156 (State not barred from enforcing tax "merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving"). *See generally Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005) ("But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues."); *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, ___ F.3d ___, No. 09-5123, 2010 WL 2700535, at *9 (10th Cir. Jul. 9, 2010) (State may enforce its rights to collect tax on tribal transactions with nonmembers "even if such enforcement significantly touches the political and economic interests of [the tribe]"; tribe "cannot seriously argue" otherwise); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 (9th Cir. 1986) ("a state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs"); *Gregoire*, 680 F. Supp. 2d at 1263-64 (rejecting argument that *Colville* should not apply because "the tax rate has increased at least 500% since *Colville*, placing a much more onerous burden on [tribal] retailers" required to prepay the state tax and then seek a refund; allegedly increased tribal burdens "ha[ve] no bearing on the legal question"); *Ward v. New York*, 291 F. Supp. 2d 188, 203, 205 (W.D.N.Y. 2003) (State may tax and regulate tribal cigarette

commerce with nonmembers even if the result "*completely arrests* Indian commerce" with such persons and "*completely destroys* the business of reservation cigarette retailers") (emphasis added).

II. NEW YORK'S AMENDED TAX ENFORCEMENT SYSTEM DOES NOT VIOLATE SNI'S RIGHT OF SELF-GOVERNMENT

SNI argues that New York's new system will "infringe[] unduly on the Nation's right of self-government." Br. at 22, 31-36. By definition, however, state taxation and regulation of tribal cigarette commerce with non-Indians and members of other tribes does not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 158, 160-61 (1980); *see also Rice v. Rehner*, 463 U.S. 713, 720 n.7 (1983) ("Regulation of sales to non-Indians or nonmembers of the … Tribe simply does not 'contravene the principle of tribal self-government'") (citation omitted); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government.").

SNI argues, however, that the State cannot "commandeer the Nation's government for its own fiscal ends" or ask it to assist in tracking and collecting taxes "on the State's behalf." Br. at 2, 33. But the Supreme Court has squarely held just the opposite: a State "has the *right* to require [a tribe] to collect the tax on [the State's] behalf"; "the State may impose on the tribe the burden of collecting that tax from the purchasers." *Chemehuevi Indian Tribe*, 474 U.S. at 12 (emphasis added); *see also Chickasaw Nation*, 515 U.S. at 459 ("if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, and may place on a tribe or tribal members 'minimal burdens' in collecting the toll").

SNI analogizes to Tenth Amendment decisions holding that the federal government may not "commandeer" state governments to carry out certain federal functions, and reasons that tribes "stand on an equal footing" with States. Br. at 33, 35 (citing, *e.g.*, *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)). This analogy is completely misplaced. Tribes are not States. The Tenth Amendment does not apply to SNI, and a tribe does not "stand on an equal footing" with a State for these purposes. As the Supreme Court has emphasized many times, States occupy a very different position in our constitutional system than tribes and are subject to different rules. *See, e.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192-93 (1989) (Interstate Commerce Clause "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause"; the two clauses "have very different applications," and it would be "'treacherous to import to one notions of pre-emption that are properly applied to the other'").[23]

[23] Tribes do not retain the full sovereignty of foreign nations or the fifty States; they are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy."); *Colville*, 447 U.S. at 165 (1980) (Brennan, J., concurring in part and dissenting in part) ("While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries."); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986) ("An Indian tribe's sovereignty is not that of a state. … The attributes of sovereignty possessed by the Chemehuevi Tribe do not negate the fact that the Chemehuevi Reservation is a part of the State of California" and thus subject to California's tax and regulatory authority with respect to on-reservation cigarette sales to nonmembers) (citation omitted). *See generally Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719 (2008); *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962).

The salient point is that the Supreme Court has held repeatedly that a State has the "*right*" to enlist a tribal government and its retailers in collecting state taxes on tribal cigarette sales to nonmembers and ensuring that such taxes are not evaded. *Chemehuevi*, 474 U.S. at 12 (emphasis added). SNI's refusal to honor that right is not a legitimate matter of "self government," but a simple act of nullification and refusal to submit to binding federal law. *See especially Cooper v. Aaron,* 358 U.S. 1, 19-20 (1958) ("obedience" by all parties to Supreme Court's decisions is "indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us").

III. NEW YORK'S AMENDED TAX ENFORCEMENT SYSTEM DOES NOT IMPOSE EXCESSIVE BURDENS ON SNI OR ITS MEMBERS

SNI also argues that the new cigarette tax system imposes "undue burdens on the Nation's tobacco economy." Br. at 36; *see id.* at 22, 36-41. SNI bears the burden of proof on this issue, with doubts resolved in favor of the State. *See, e.g., Milhelm Attea*, 512 U.S. at 76; *Colville*, 447 U.S. at 160. SNI cannot meet that burden here for many reasons.

Sales to nonmembers. To begin, the vast majority of SNI's "tobacco economy" — sales to *nonmembers*, and the procurement of cigarettes used for such sales — is not even subject to the "undue burdens" analysis. As discussed above, States may tax and regulate such sales "*even if* [the result] seriously disadvantages or eliminates the Indian retailer's business with non-Indians," "completely arrests Indian commerce" with such persons, and "completely destroys the business of reservation cigarette retailers." *Colville*, 447 U.S. at 151 (emphasis added); *Ward*, 291 F. Supp. 2d at 203; pp. __-__ *supra.*[24]

[24] This is not to suggest that SNI and its members have no right to ship tax-free cigarettes to nonmember out-of-state purchasers, simply that any such right is defined by state law and enjoyed in common with all potential distributors. Under New York law, a tribal or nontribal entity desiring to ship tax-free cigarettes out of state has at least two options: *First*, it may

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Range of minimally burdensome options. It is settled law that States may require at least *some* action by tribes to assist in the tax collection and enforcement process, so long as the burdens are not "unduly burdensome" and are "reasonably tailored to the collection of valid taxes from non-Indians." *Milhelm Attea*, 512 U.S. at 73, 76; *see also Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 624 (2010), *petition for cert. filed*, No. 10-206 (Aug. 9, 2010). The courts have consistently recognized that States have broad latitude to put in place reasonable tax collection mechanisms, and mechanisms far more burdensome that the ones employed here have repeatedly been approved. *See, e.g., Moe*, 425 U.S. at 483 (Montana system requiring tribal retailer to collect and remit state taxes on sales to nonmembers was "minimal burden"); *Colville*, 447 U.S. at 157 (State of Washington's collection system imposed only

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become a licensed stamping agent, the only entity other than a manufacturer or government entity authorized to deal in untaxed, unstamped cigarettes within the State. *See* NY Tax Law § 472 (authorizing Tax Commissioner to license agents to buy and affix tax stamps to cigarettes); NYCRR tit. 20, §§ 74.3 (requiring that unstamped cigarettes entering the State be sold exclusively to licensed stamping agents), 76.1(a)(2) (providing that, with limited exceptions, only licensed stamping agents may purchase and resell untaxed cigarettes). Licensed stamping agents may purchase untaxed cigarettes, apply tax stamps to cigarettes sold in New York, or resell the cigarettes untaxed and unstamped where the cigarettes are exempt from tax and stamping, such as to entities located outside the State that do not intend to resell the cigarettes in New York. *See* NY Tax Law § 473 (requiring stamping agents to affix stamps to packages of cigarettes before they are sold); NYCRR tit. 20, §§ 74.3 (requiring stamping agents to affix a stamp to cigarettes prior to resale, unless exempt from tax), 76.3 (authorizing stamping agents to sell unstamped cigarettes to out-of-state purchasers). "No person other than a duly licensed cigarette [stamping] agent (or its employees) may possess in this State cigarettes upon which the tax has not been prepaid and precollected for purposes of making out-of-state sales where such cigarettes have come within the jurisdiction of New York State for purposes of taxation." NYCRR tit. 20, § 76.3(c).

Second, any seller can apply for and receive a tax refund for taxed and stamped cigarettes sold to an out-of-state purchaser. NY Tax Law § 476; NYCRR tit. 20, § 77.1(a). The seller need only submit an application and supporting documents to the tax commissioner within two years of when the stamps were affixed and void or obliterate the New York tax stamps affixed to the cigarette packages. *See* NYCRR tit. 20, § 77.1(a)(2); http://www.tax.state.ny.us/pdf/2010/altab/cg114i_710.pdf (instructions for refund form CG-114). The Commissioner, if satisfied that the seller is entitled to a refund, will issue a refund. NY Tax Law § 476; NYCRR tit. 20, § 77.1.

"minimal burdens" and was "reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers"); *Chemehuevi Indian Tribe*, 474 U.S. at 12 (upholding California's "pass on and collect" requirement on tribe that sold cigarettes to nonmembers; "the State may impose on the tribe the burden of collecting [state] tax from the [nonmember] purchasers"). States may go so far as actually requiring tribes and their members to "collect state taxes from non-tribal members, remit those proceeds to the state, and maintain records regarding the collections of taxes." *Keweenaw Bay*, 477 F.3d at 891. States may even require tribal governments and retailers to purchase only state-stamped, tax-prepaid cigarettes even for resale to qualified members, subject to the provision of a mechanism for obtaining a refund from the state tax authority on documented qualified sales. *Id.* at 891-93.

New York has not gone nearly so far as what these many cases have already approved. The State is not requiring tribal members to collect or remit tax, affix stamps, maintain and submit records of tax collection, or await a post-purchase refund. As an initial matter, the State imposes only one obligation — it requires state-licensed stamping agents to do what they are legally required to do, namely place excise tax stamps on *all* cigarette packages prior to re-sale and remit the corresponding tax receipts to the State. The State has then gone farther to ensure that legitimate tax-exempt purchases can be made, while ensuring that all other sales are taxed. To accomplish this, the State has simply put into place two alternative systems that require tribes and tribal businesses to do almost nothing to obtain legitimately tax exempted product. Each system imposes far fewer burdens on Native American tribes and retailers than systems that already have been approved by the federal courts, and by giving tribes a choice among systems the State has even further reduced any potential burdens on tribes and tribal retailers.

Under the ***tax exemption coupon system***, the Department has established base estimates of probable demand by each tribe for tax-exempt cigarette purchases. *See Amendments to the Tax Law Relating to Sales of Relating to Sales of Cigarettes on Indian Reservations,* TSB-M-10(6)M (July 26, 2010) ("*Tax Law Guidance*"), at 2; *see also* 20 N.Y.C.R.R. § 74.6(e). If a tribe wishes to submit additional information to the Department showing that this estimate should be changed, it may (but is not required to) do so. *See* Tax Law, § 471-e(2)(b)(ii); *Tax Law Guidance*, at 2.

If a tribe chooses to use the tax exemption coupon system, it need only notify the Department of this election. *See* 20 N.Y.C.R.R. § 74.6(b). The Department will then provide a number of tax exemption coupons equal to the tribe's projected demand to the tribe's governing body. The governing body keeps the number of coupons needed by the tribal government and distributes the remainder as it sees fit. *Id.* § 74.6(c). The tribe and its retailers can use these tax exemption coupons to purchase tax-free cigarettes from wholesalers. *Id.* § 74.6(c)(5). As discussed above, one option for a tribe that wants to maximize free market choices is simply to distribute the coupons directly to qualified adult tribal smokers (in the case of the Senecas, several thousand smokers at most) and then let them choose which tribal retailers to patronize and which brands to purchase. Tribal retailers can then use the coupons provided to them by their customers to purchase the desired brands free of state tax.

This hardly represents a "centralized command economy" using "command and control dictates," let alone the "*nationaliz[ation]*" of SNI's "tobacco economy." Br. at 19-20, 32 (emphasis added). The coupon system imposes virtually no burden on tribal members and gives the tribes the widest possible latitude to manage their tax exempt status in any way they see fit. Tribes are not required to maintain records or send any tax payments to the State, even though

the Supreme Court has approved these more burdensome requirements. Tribal retailers can buy cigarettes for resale to tribal members on a tax-free basis by using the coupons, without having to pay tax up front and await a refund — yet another way in which New York's system on its face is less burdensome that many others that have been upheld by the federal courts.

Under the ***prior approval system***, tribes and their members face even fewer burdens. The statute provides that if a tribe does not affirmatively opt for the tax exemption coupon system, it will automatically be eligible to receive tax exempt cigarettes through the pre-approval system. N.Y. Tax Law § 471(5)(b). Virtually the entire burden of the prior approval system is borne by the Department and by cigarette stamping agents. Upon receiving a request from a Native American retailer to purchase cigarettes, the stamping agent logs into the Department's computer system to determine if that tribe has exhausted its allocation of tax-free cigarettes for the year. *Tax Law Guidance*, at 6-7. If an allocation of tax-free cigarettes is still available, the stamping agent enters the number of cartons of cigarettes to be sold to the reservation cigarette seller. *Id.* Upon submitting the request, the Department will make a corresponding reduction to the available tax-free allotment for the tribe in its computer system and issue an authorization number for the sale. *Id*. The stamping agent will then sell the approved amount of stamped cigarettes to the reservation cigarette seller. The price charged will not include tax. Upon completing the sale, the stamping agent will submit to the Department the quantity sold and the purchaser's name within 48 hours of receiving the authorization number. *Id*. There is no burden whatsoever on the tribe, even though the Supreme Court has authorized States to impose burdens of direct tax collection and recordkeeping on tribal governments.

Conjecture and speculation. Many of SNI's allegations of "undue burdens" are at this point nothing more than conjectural and speculative. It is *possible* that New York could be late

in distributing refunds, or make mistakes in allocating tax-exempt coupons, or not provide sufficiently timely guidance to regulated parties, or ignore reasonable requests from tribes (such as not to ship product to rogue tribal retailers). It is much more likely, however, that the State will faithfully and reasonably carry out its responsibilities. It should be given the opportunity to demonstrate that it can do so. *See Milhelm Attea*, 512 U.S. at 76-77 ("possibility" of implementation problems "may provide the basis for a *future* challenge," but courts should not "assume" that such problems will occur; potential delays and other problems "are now purely hypothetical" and "can be addressed if and when they arise") (emphasis added); *Keweenaw Bay*, 477 F.3d at 893 (tribe could seek relief in future if "problems continue" and the State "refuses" to address legitimate tribal concerns).

Countervailing tribal benefits. The tribal burdens discussed above range from the minimal to the nonexistent. The reasonableness and fairness of these burdens becomes even more apparent when one considers the enormous financial benefits that SNI has derived and continues to derive — directly and indirectly — from tribal cigarette sales to nonmembers. Although SNI creates the impression of an entirely private tobacco economy on the reservation, the tribe *itself* is a market participant in that economy through its "Seneca One Stop" chain of brick-and-mortar outlets. Moreover, SNI collects licensing, "import," and "export" revenues from private cigarette sellers on its reservation. Because SNI derives substantial financial benefits from reservation sales to non-tribal members (both directly as a market participant and indirectly through licensing and tax revenues), asking it to provide minimal assistance in ensuring that its own adult qualified tribal members receive the tax-free cigarettes to which they are entitled is a modest, reasonable, and proportionate burden.

Tribal refusal to cooperate. Many of the allegedly "undue" burdens are entirely of SNI's own creation. It acknowledges that Nation members depend on the tribal government to help them "exercise their federally protected right to purchase tax-free cigarettes," but stubbornly refuses to undertake any such effort "on the State's behalf." Br. at 39. SNI is of course entitled to take this position, but it is estopped from then turning around and complaining about the resulting increased burdens and inconvenience to *its* members caused by *its* intransigence. SNI's "consistent refusal to cooperate with the state only serves to make the collection process more burdensome on both parties" and "force[s] the state to take a more aggressive approach to the collection of tobacco taxes." *Keweenaw Bay*, 477 F.3d at 892.

Compact option. If a particular tribe does not wish to use either the tax exemption coupon system or the prior approval system, it is also free to negotiate with the State a customized system to ensure an ample and efficient supply of tax free cigarettes for tribal members to purchase. *See* N.Y. Tax Law § 471-e(5); see n. __, *above*. Tribes are thus free to negotiate the most appropriate balance for them between tribal control of how the tax-free cigarettes are allocated on tribal land, on the one hand, and the burden of making that decision, on the other. *Id.* The availability of such a compact option further serves to mitigate the already modest burdens faced by SNI and its members. *See Keweenaw Bay*, 477 F.3d at 892.

Respect for tribal sovereignty. Any system that looks to a tribe's government for assistance and gives it a voice in ensuring that tax free cigarettes reach only qualified tribal members and are not diverted to unqualified recipients creates the potential for at least occasional burdens and problems, though *amici* believe those burdens are virtually nonexistent under New York's new system. The alternatives to such tribal outreach, however, would be far more problematic. If the State itself sought to distribute tax free coupons *directly* to tribal

members, it would inevitably be accused of making "membership" decisions that are reserved for the tribal government, of interfering with reservation affairs and the tribe's relationship with its members, and so forth. Likewise, if the State dealt only with tribal retailers without inviting direction from and dialog with the tribal government, it inevitably would be accused of disrespecting tribal sovereignty. By providing tribes with a range of alternative approaches that have been used in other States and allowing tribes to choose which system best suits their situations, the State shows much *greater* deference to a tribe's control over its membership and its internal relations with its members than under other approaches. *See Keweenaw Bay*, 2005 WL 2207224, at *9 (the prepayment/refund system "also promotes tribal sovereignty and self-government because it enables the Community to determine its own process to ensure that only qualified Indian consumers claim the exemption from state taxes"). And of course, the "compact" option allows a tribe and the State to address tax collection issues and burdens and to agree on different procedures.[25]

[25] SNI relies on a portion of *Ward v. New York* which found that the tribal challengers were "likely to succeed on the merits of their claim that the Statute unconstitutionally restricts the shipment and transportation of cigarettes from individuals located off of the reservation to tribe members located on the reservation." Br. at 40, *citing Ward*, 291 F. Supp. 2d at 207. But the State had defended this portion of the law only on standing grounds, not "on the merits," and the court relied "principally" on the State's failure to "identif[y] the specific off-reservation effects implicated by these types of transactions," not on any determination that such shipments to the reservation had no detrimental off-reservation effects. *Id.* The record before this Court — as embodied in the legislative history of the PACT Act, the legislative history of New York's newly revised cigarette tax laws, the DTF rulemaking record, and the parties' evidentiary submissions — amply demonstrates that the continuing shipments of hundreds of millions of packs of unstamped, untaxed cigarettes to reservation retailers and distributors have caused serious and widespread off-reservation injuries to lawful retailers and distributors, the public fisc, and public health.

IV. NEW YORK'S "PREPAYMENT" SYSTEM FULLY COMPLIES WITH THE REQUIREMENTS OF FEDERAL INDIAN LAW.

SNI argues that "[t]he Supreme Court … has never approved the prepayment of tax on cigarettes bound for purchase by tax-exempt Indians" (Br. at 42), without disclosing that *every* federal court that *has* addressed the issue has *upheld* such a system. Many other States require tribal sellers to purchase only state-stamped, tax-prepaid cigarettes, subject to a "coupon," "refund," or other mechanism to ensure appropriate adjustments for documented tax-free sales to qualified tribal members.[26] These "prepayment" systems have repeatedly been upheld as "a permissible means of requiring [tribes to] 'aid the State's collection and enforcement' of valid taxes imposed on non-tribal members," particularly where there has been a history of serious tax evasion. *Keweenaw Bay*, 477 F.3d at 890-95; *see also Muscogee (Creek) Nation v. Henry,* No. Civ. 10-019, 2010 WL 1078438, at *1 (E.D. Ok. Mar. 18, 2010) (denying preliminary injunction motion against Oklahoma's universal state stamping and tax-prepayment system);[27]

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[26] Many other States have successfully implemented analogous systems to collect taxes on cigarette sales by Indian retailers to non-Indians. *See, e.g.*, Alaska Admin. Code tit. 15, § 50.100 (tribal certification that untaxed cigarettes sold only to tribal members); Arizona Rev. Stat. §§ 42-3301 to 42-3306 (special stamps for cigarettes sold by Native American sellers); Florida Stat. § 210.1801 (coupon system); Iowa Admin. Code § 701-83.11(453A) (refund system); Michigan Comp. Laws § 205.30c (compact or refund system); Montana Code Ann. § 16-11-111 (quota system; compacts provide for tax sharing); 316 Nebraska Admin. Code § 57-019 (refund system.); Nevada Rev. Stat. § 370.280 (tribal tax parity; where no tax parity, refund system); Oklahoma Stat. tit. 68, § 349.1 (quota system for non-compacting tribes); Oregon Rev. Stat. § 323.401 (compacts providing for refunds, based on quota system); South Dakota Codified Laws § 10-12A-4 (compacts providing for revenue sharing); Utah Code § 59-14-204.5 (refund of tribal tax); Washington Rev. Code §§ 43.06.455 to 43.06.466, Washington Admin. Code § 458-20-192 (quota system or compact providing for tribal tax in lieu of state tax); Wisconsin Stat. §§ 139.323 and 139.325, Wisconsin Admin. Code §§ Tax 9.08, 9.09 (revenue sharing system; quota system for untaxed cigarettes; compacts provide for refunds in lieu of quota system).

[27] The Oklahoma collection system at issue in *Muscogee (Creek) Nation* provides, among other things, that "(1) all cigarette and other tobacco product sales within the Nation's Indian country are subject to State excise taxes; (2) all cigarettes, including those sold by the Nation or its licensees, must bear a stamp issued by the State evidencing that the cigarettes are tax free, or

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Confederated Tribes and Bands of the Yakama Nation v. Gregoire, 680 F. Supp. 2d 1258, 1263 (E.D. Wash. 2010) (dismissing claims against Washington's universal state-stamping and tax-prepayment system).[28]

SNI seriously mischaracterizes the Supreme Court's *Milhelm Attea* decision, claiming that the Court held there that a "precollection regime *[should] not* require prepayment of any tax to which New York is not entitled." Br. at 42 (quoting *Milhelm Attea*, 512 U.S. at 76) (emphasis added). The Supreme Court did not say that States "*[s]hould not*" require prepayment, but that, under the particular version of New York's law then in effect, wholesalers "*will not*" be required to make any prepayments that must subsequently be refunded, which was one of several factors that led the Court to conclude that the burdens on tribes and their suppliers were not "undue." 512 U.S. at 76 (emphasis added). *Milhelm Attea* did not remotely suggest that *any* precollection of tax on product destined for tax free sales would be invalid under an undue burdens analysis; it simply noted that, under the version of New York's quota system then in effect, no precollection would be necessary *at all* if the "probable demand" calculation were accurate. *See id.* at 75-76. Suggesting that precollection might be unnecessary, thereby reducing the overall burden, is a far cry from a conclusion that *any* precollection of taxes that must later be refunded would *per se* constitute an "undue burden." Nothing in *Milhelm Attea* suggests as much. Nor does the New York Court of Appeals' decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010), whose discussion of *Milhelm Attea* was simply intended to illustrate the kind of "careful

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that the State tax has been paid; [and] (3) all Nation licensed retailers must purchase cigarettes and tobacco products only from State licensed wholesalers[.]" 2010 WL 1078438, at *1.

[28] The Washington collection system at issue in *Gregoire* requires wholesalers to prepay the state tax and apply state stamps on all cigarettes and allows Indian retailers to purchase only "pre-stamped cigarettes," subject to their ability to obtain tax refunds on exempt sales to tribal members. *See* 680 F. Supp. 2d at 1260, 1263-64

analysis" of pros and cons that must be undertaken in evaluating any particular tax collection and enforcement mechanism. *Id.* at 650, *petition for cert. filed*, No. 10-206 (Aug. 9, 2010). *Cayuga Nation* observed that the avoidance of any need to refund overpaid taxes "*appears* to have been *an important consideration*" in the Supreme Court's *Milhelm Attea* analysis. *Id.* at 624 n.2 (emphasis added); *see also id.* at 627-28 & n.4. That hardly amounts to a conclusion that *any* prepayment requirement would be impermissible where a portion of the precollected taxes must ultimately be refunded; that issue was not even involved in *Cayuga Nation*.

Most important, where the issue *has* squarely been raised, *every* federal case considering a universal prepayment system since *Milhelm Attea* has upheld such a system and rejected undue-burdens challenges. *See* p.__ above. The Sixth Circuit's decision in *Keweenaw Bay* is particularly instructive. Although the court acknowledged that "Michigan has gone further than any taxation scheme that has explicitly been approved by the Supreme Court" and that "the refund system could create a greater potential burden than a quota system," it concluded after a detailed analysis that "any additional burden created by the refund system is minimal" as well as justified under the circumstances. 477 F.3d at 892; *see id.* at 891-93. Indeed, as the Sixth Circuit noted, the district court concluded that a universal prepayment system coupled with a refund mechanism "compares favorably" with other systems in terms of minimizing potential tribal burdens. *Id.* at 891-92; *see also Keweenaw Bay Indian Community v. Rising*, No. 2:03-CV-111, 2005 WL 2207224, at **8-9 (W.D. Mich. Sept. 12, 2005), *aff'd*, 447 F.3d 881 (6th Cir. 2007) (noting that other systems are "equally comprehensive" and impose their own sets of burdens, and concluding that universal prepayment coupled with a refund mechanism can provide tribal retailers and consumers with greater flexibility and less cumbersome procedures, while "also promot[ing] tribal sovereignty and self-government").

SNI complains that there is "no set timeline as to when [the State] will return [any] money" that is precollected and then must be refunded, and speculates that DTF will drag the refund process out so as "to capture the 'float' on these funds." Br. at 43. That is sheer conjecture, and there is no basis to presume that the State will fail to process refund requests in a timely and efficient manner. It should be given the opportunity to demonstrate that it can do so. As other courts have concluded with respect to "precollection" systems, if the State fails to "timely process" tribal refund claims, *that* will be the time for SNI to seek appropriate relief to make the State "live up to its financial obligations"— not before. *Keweenaw Bay*, 2005 WL 2207224, at *7 & n.3; *see also Keweenaw Bay*, 477 F.3d at 892-93 (upholding dismissal of tribal challenge to "precollection" system while reserving the possibility of future relief if State failed to process refund requests within 45 days).

V. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST ENTRY OF ANY INJUNCTION

As explained above, Plaintiff has failed to justify entry of an injunction by showing that it is likely to succeed on the merits. *See Metropolitan Taxicab Bd. of Trade v. City of New York*, __ F.3d __, 2010 WL 2902501, at *2 (2d Cir. July 27, 2010). But the Court should further deny the requested injunction because the balance of hardships and the public interest strongly weigh against interference with New York's new tax system. *See id.*

The injunction plaintiff requests would "damage public interest and fiscal soundness" by denying New York state tax revenue to which it plainly entitled. *See Muscogee (Creek) Nation,* 2010 WL 1078438, at * 6. It would, moreover, continue to inflict irreparable harm on law-abiding retailers like *Amici* who pay New York's cigarette excise taxes but must compete against tribal retailers that gain an enormous competitive advantage because they sell untaxed (and thus inexpensive) cigarettes to non-tribal-members.

Balanced against these concrete and irreparable harms, Plaintiff's only real interest in securing injunctive relief is a desire to maintain its members unfair and illegal ability to "market an exemption from state taxation to persons who would normally do their business elsewhere," thereby seizing an unfair and unlawful "artificial competitive advantage over all other businesses in [the] State." *Colville*, 447 U.S. at 155. The desire not to pay lawfully-imposed taxes is simply not an injury this Court should recognize in deciding whether to enjoin New York's carefully-crafted effort to collect legitimate taxes on the cigarette sales of Plaintiff's members made to non-tribal members.

CONCLUSION

For the reasons set forth above and in *Amici*'s accompanying affidavits and exhibits, SNI's motion for a TRO or preliminary injunction should be denied in its entirety.

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Respectfully submitted,

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