No. 18-

IN THE

Supreme Court of the United States

ERIC WHITE, *et al.*,

Petitioners,

v.

BARBARA D. UNDERWOOD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

PAUL J. CAMBRIA, JR.
Counsel of Record
ERIN E. MCCAMPBELL
LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue
Buffalo, New York 14202
(716) 849-1333
pcambria@lglaw.com

Counsel for Petitioners

281844

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The decision below ruled that New York's promise to the Seneca Nation of Indians to refrain from assessing taxes "for any purpose whatever, upon any Indian reservation in this state" as memorialized in a treaty and statute should be interpreted to allow New York to assess and collect any taxes it desires within the Seneca Nation of Indians so long as New York claims the taxes will be paid by non-Indians.

Does this interpretation directly conflict with this Court's decision in *The New York Indians*, 72 U.S. 761 (1866), in which this Court specifically prohibited New York from assessing taxes within the Seneca Nation of Indians, even those to be paid by non-Indians, because that mere assessment violated the ancient rights of the Seneca Nation of Indians as memorialized in treaties and a statute?

Does this interpretation violate this Court's canons of construction governing the interpretation of treaties executed and statutes enacted for the benefit of Indians?

PARTIES TO THE PROCEEDING

Eric White and Native Outlet, petitioners on review, were the plaintiffs-appellants below.

Eric T. Schneiderman, New York State Attorney General, in his official capacity; and Thomas H. Mattox, Commissioner of the New York State Department of Taxation and Finance, in his official capacity, respondents on review, were the defendants-appellees below.

At the time the action was commenced, Eric T. Schneiderman was the New York State Attorney General, and Thomas H. Mattox was the Commissioner of the New York State Department of Taxation and Finance. Both were named in their official capacity, and were the defendants-appellees below. Since then, Barbara D. Underwood succeeded Eric T. Schneiderman and Jerry Boone succeeded Thomas H. Mattox. Both have been substituted as respondents on review.

CORPORATE DISCLOSURE STATEMENT

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

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Eric White and Native Outlet respectfully submit this petition ("Petition") for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at ___ N.E.3d ___, 2018 WL 2724989 (Jun. 7, 2018). (App.1a-10a.) The opinion from the Supreme Court, Appellate Division, Fourth Department is reported at 140 A.D.3d 1636 (App. Div. 2016). (App. 11a-15a.) The opinion from the Supreme Court, Cattaraugus County is unreported but reproduced at App. 16a-18a.

JURISDICTION

The New York Court of Appeals entered judgment on June 7, 2018. Petitioner filed a timely petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND TREATIES

Article 9 of the Buffalo Creek Compromise Treaty of 1842, United States-Seneca Nation, May 20, 1842, 7 Stat. 586, 590 ("Buffalo Creek Treaty") states:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until

> such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

New York's Indian Law § 6 states:

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

New York's Tax Law § 471 states:

> There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale . . . . The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians and evidence of such tax shall be by means of an affixed cigarette tax stamp.

INTRODUCTION

At the inception of this Nation, the Seneca Nation of Indians ("Seneca Nation") and other Indian Nations located within the geographic boundaries of what would ultimately become the State of New York ("State" or "New York") were autonomous and negotiated numerous treaties at arm's length with the fledgling United States. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 418 (1945 ed.) at 10-11, 27. One of the rights the Seneca Nation secured through a treaty, which was subsequently

codified as State law, was a promise from New York to refrain from assessing taxes "for any purpose whatever, upon any Indian reservation in this state." This restriction on a State's ability to assess and collect taxes within the lands governed by the Seneca Nation is unique and reflects the status the Seneca Nation held at the time it negotiated treaties.

Although this Court has previously ruled that *other* states have the authority to impose their cigarette excise taxes on non-Indian purchasers on lands governed by *other* Indian tribes or nations, this Petition presents this Court with the first opportunity to address a novel issue; namely, whether *New York's* unique and broad promise to refrain from assessing taxes "for any purpose whatever, upon any Indian reservation in this state" can be interpreted to mean that New York can *assess and impose* any tax it desires within Indian reservations so long as the tax is said to be paid by non-Indians. This interpretation, articulated in the decision below, is dead wrong.

This Court should grant this Petition because the lower court's interpretation squarely conflicts with decisions from this Court. First, this interpretation directly conflicts with this Court's opinion in *The New York Indians*, 72 U.S. 761 (1866). In that case, this Court ruled that the *mere assessment* of a tax within the Seneca Nation on a non-Indian violated the ancient rights of the Seneca Nation as secured through its treaties and a State statute. Because this Court ruled that the *mere assessment* was unlawful, surely the State's *assessment and collection* of its cigarette excise tax on transactions occurring within the Seneca Nation should not stand.

Second, the Court of Appeals compounded its error by taking the straight-forward text of a statute and turning it on its head. The Court of Appeals' interpretation violates this Court's canons of construction governing interpretation of statutes enacted for the benefit of Indians. The plain text of the statute indicates that New York has no authority to *assess* taxes "for any purpose whatever, upon any Indian reservation in this state" regardless of who pays the taxes. The decision below interpreted this plain language in a manner that allows New York to *assess and collect* any tax it desires as long as it is said that the tax will be paid by a non-Indian. This court-created exception constitutes an interpretation that is inconsistent with the plain language of the statute and operates to the detriment of the Indians, which this Court has prohibited.

Without this Court's intervention, this flawed interpretation of the statute will cause instability in the Seneca Nation's economy. After hundreds of years of refraining from assessing taxes of any kind within the Seneca Nation, the State unilaterally decided that it should have the authority to *assess and collect* its cigarette excise tax on transactions involving non-Indians that occurred within the Seneca Nation. This seismic shift in New York's understanding of its jurisdiction had a dramatic and negative impact on the Seneca Nation's tobacco economy. What other commercial activity occurring within the Seneca Nation will New York decide that it has the newfound jurisdiction to tax? Is an investment in a business operating within the Seneca Nation under the current laws worth the risk in light of the fact that New York could enact a game-changing statute that obliterates the value of the business, just as it did by

enacting a cigarette excise tax to be enforced within the Seneca Nation?

This Court's intervention is urgently needed because reversal of the decision below is the only way to restore certainty and order to the decisions of businesses and investors operating within the Indian Nations, including the Seneca Nation.

STATEMENT OF THE CASE

I. History of New York's Cigarette Excise Tax

Like many States, New York taxes the sale of cigarettes through an excise tax. New York first enacted its excise tax in 1939, which was codified as Tax Law § 471. Prior to 1939, there was no State excise tax on the sale of cigarettes. Moreover, for nearly 50 years after enactment of the tax, New York did not seek to enforce its cigarette excise tax on transactions between Indian-owned retailers and consumers occurring on land governed by the Indian Nations located within the geographic boundaries of New York. Instead, enforcement was limited solely to transactions between retailers and consumers occurring on land governed by New York.

In 1988, the New York Department of Taxation and Finance ("Department") promulgated regulations authorizing enforcement of the State's cigarette excise tax on sales between Indian-owned retailers and non-Indian consumers occurring on land governed by the Indian Nations. This seismic and unilateral shift in the scope of the State's enforcement of its cigarette

excise tax spawned years of litigation as to its propriety. In 1998, the Department voluntarily repealed the controversial regulations on the basis of the "State's respect for Indian Nations' sovereignty." 1998-17 N.Y. State Reg. 22, Apr. 29, 1998, at 23.

In 2003, the State Legislature enacted Tax Law § 471-e, which directed the Department to promulgate regulations necessary to collect the State's cigarette excise tax on transactions between Indian-owned retailers and non-Indian consumers occurring on land governed by the Indian Nations. However, the Department failed to carry out the Legislature's prerogatives.

In 2010, the State Legislature amended Tax Law §§ 471 and 471-e, which remain in effect and are at issue in this Petition. Under Tax Law § 471, a tax must be "paid on all cigarettes possessed in this state by any person for sale." Tax Law § 471(1). The State expressly conceded that it was "without power to impose" its cigarette excise tax on "sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation." *Id.*[1]

However, the amended statute stated that "[t]he tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians." The State enforces Tax Law § 471 through a pre-collection scheme

1. The State has enacted regulations for the sale of non-taxed cigarettes to members of the Indian Nations based on probable demand, which are not at issue in this Petition.

by which cigarettes that enter the State are sold exclusively to licensed stamping agents, who purchase tax stamps from the State and affix a stamp to each package of cigarettes as evidence of payment of the State's cigarette excise tax. *See* Tax Law § 471(2); 20 N.Y.C.R.R. § 74.3(a)(1)(iii), (2). The stamped cigarettes are then sold to retailers at a price that includes the cost of the cigarette excise tax that was paid to obtain the stamp. *See* Tax Law § 471(2). Critically, "[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." *Id.*

The State has justified this intrusion into the lands governed by the Seneca Nation by claiming that "the ultimate incidence of and liability for" the cigarette excise tax falls on the consumer. Tax Law § 471(2), (3).

II. History of Indian Nations Located within the Geographic Boundaries of New York

The State's unilateral decision to authorize the assessment and collection of its cigarette excise tax on transactions occurring on land governed by Indian Nations is inconsistent with the well-documented relationship between the State and the Indian Nations, particularly as relevant here, the Seneca Nation, as detailed in several treaties, State statutes, and contemporaneous judicial opinions.

The Seneca Nation has a unique and unbroken chain of possession of and sovereign governance over its lands, which has been recognized in treaties since the inception of the United States. *See* Fort Stanwix Treaty of 1784,

US-SN, Oct. 22, 1784, 7 Stat. 15, 15 (recognizing the "boundary of the lands of the Six Nations"); *see also* Fort Harmar Treaty of 1789, US-SN, Jan. 9, 1789, 7 Stat. 33, 33 (confirming that the previously agreed "boundary line" would "remain as a division line between the lands of the said Six Nations and the territory of the United States, forever"). Notably, in the Canandaigua Treaty of 1794, the United States recognized "all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim, the same, *nor disturb* the Seneca Nation . . . in the free use and enjoyment thereof." Canandaigua Treaty of 1794, art. III, US-SN, Nov. 11, 1794, 7 Stat. 44 (emphasis added). The United States vowed "never to claim" the land of the Seneca Nation as its own and vowed "not to disturb" the Seneca Nation in exchange for peace. *Id*., art. IV.

In 1842, the Seneca Nation made a pact with the United States and New York, indicating that:

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

Buffalo Creek Treaty, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added). The Buffalo Creek Treaty, and the promises it contains, remain the "supreme law of the land." U.S. Const., art. VI, cl. 2.

Several actions occurred after the signing of the Buffalo Creek Treaty, which are significant to the instant Petition. First, the Seneca Nation enacted its own constitution to govern its lands. *See generally* Seneca Nation Const. of 1848 (as amended Nov. 9, 1993). The State and Federal governments quickly recognized the Seneca Nation's sovereignty and right to self-governance. *See Hastings v. Farmer*, 4 N.Y. 293, 294 (1850) (explaining that any member of one of the tribes of the Six Nations of the Iroquois Federacy is "governed by the laws and usages of his tribe, and is only subject to our laws, *so far as the public safety requires*" (emphasis added)); *Fellows v. Denniston*, 23 N.Y. 420, 432 (1861) (recognizing the Six Nations of the Iroquois Confederacy as "distinct and separate communities"), *rev'd in part by The New York Indians*, 72 U.S. 761 (1866); *see also United States v. City of Salamanca*, 27 F. Supp. 541, 544 (W.D.N.Y. 1939) (holding that each of the members of the Six Nations are "recognized as separate political communities authorized to administer their own internal affairs.").

Second, the State codified its promise to refrain from assessing taxes of any kind within the Seneca Nation as Indian Law § 6, which remains in effect today. Under that provision:

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

Indian Law § 6 (emphasis added).

III. Procedural History

This case was borne out of the inconsistency between the State's promise to refrain from assessing taxes "for any purpose whatever" over "any Indian reservation," *i.e.*, lands governed by the Seneca Nation, and the State's enactment of Tax Law § 471 and its attendant assessment and collection of that tax on "Indian reservations."

A. The Parties

Mr. White, a member of the Seneca Nation, operates a convenience store, Native Outlet, located on the Allegheny Territory, which is governed by the Seneca Nation. Native Outlet sells a variety of products, including cigarettes, and has been subjected to the State's assessment and enforcement of Tax Law § 471 on its transactions in violation of the Buffalo Creek Treaty and Indian Law § 6, as recognized by this Court in *The New York Indians*.

B. The Action

Mr. White and Native Outlet commenced an action in the New York Supreme Court, Cattaraugus County, seeking to enjoin assessment and collection of the cigarette excise tax codified in Tax Law § 471 on transactions between Indian-owned retailers and non-Indian consumers occurring on land governed by the Seneca Nation. Mr. White and Native Outlet asserted that assessment and collection of the tax on such transactions ran afoul of this Court's decision in *The New York Indians*, contradicted Indian Law § 6, and violated the Buffalo Creek Treaty.

The Supreme Court, Cattaraugus County denied the motion for a preliminary injunction. (App. 18a.) The Appellate Division, Fourth Department affirmed. (App. 12a.)

The New York Court of Appeals issued a decision affirming the Fourth Department. The Court recognized that "tribal retailers must prepay the tax to wholesalers when purchasing inventory." (App. 4a.) Yet, the Court ruled that "the law's prepayment obligation does not constitute a direct tax on tribal retailers and is therefore not prohibited by federal law" because the retailers have the opportunity to pass the tax along to cigarette consumers in setting their price. (App. 5a.) Regarding the grounds raised for invalidating the tax—the Buffalo Creek Treaty and Indian Law § 6—the Court ruled that those provisions pertain only to "taxes," and because the "precollection mechanism at issue here is not a tax on the retailer and is borne instead by the consumer . . . . [n]either the Treaty nor the statute supports an argument that any indirect impact on Indian retailers resulting from permissible taxation of non-Indian customers is prohibited." (App. 9a.) Consequently, the Court declined to address Petitioners' argument that assessment and collection of the tax ran afoul of this Court's decision in *The New York Indians*. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. This Court should grant the Petition because the Petition allows this Court to vacate the decision below which contravenes this Court's holdings in *The New York Indians*.

This Court should grant the Petition because the Petition allows this Court to vacate the decision below which contravenes this Court's holdings in *The New York Indians*. In *The New York Indians*, this Court expressly rejected the notion that the assessment of a tax within the Seneca Nation was permissible so long as the tax was to be paid by a non-Indian. *See The New York Indians*, 72 U.S. 761, 770 (1866). Instead, the *mere assessment* of such a tax was incompatible with the ancient rights of the Seneca Nation as documented in numerous treaties and the predecessor statute to Indian Law § 6. *See id*. at 767-72 (invalidating New York's tax statute as incompatible with the Seneca Nation's "possession, and occupation, and exercise of authority" over its reservations).

Critically, although the decision below declined to address *The New York Indians*, the Court of Appeals' conclusion was grounded on a premise that was expressly rejected by this Court in *The New York Indians*. Moreover, the State's conduct at issue in this Petition—the *assessment and collection* of a tax within the Seneca Nation—involves an even greater violation of the rights of the Seneca Nation than the *mere assessment* disallowed by this Court in *The New York Indians*.

A. The decision below says that the assessment and collection of a State tax within the Seneca Nation is permissible so long as it can be said that the tax is paid by non-Indians.

The Court of Appeals found that the assessment and collection of the State's cigarette excise tax on transactions between Indian-owned retailers and non-Indian consumers occurring on land governed by the Seneca Nation did not violate the Buffalo Creek Treaty or Indian Law § 6, because those provisions only bar imposition of taxes to be paid by Indians, and the cigarette excise tax is said to be paid by non-Indian cigarette consumers. (App. 9a.) Because the decision below indicated that Tax Law § 471 was not a tax to be paid by Indians or Indian-owned retailers, the Court of Appeals claimed it was unnecessary to address *The New York Indians*. (*Id.*)

B. This Court has ruled that the mere assessment of a tax within the Seneca Nation is unlawful regardless of who pays the tax.

The decision below was erroneous because *The New York Indians* makes it clear that the *mere assessment* of a tax, *regardless of who pays the tax*, is illegal when the assessment abridges the rights of the Seneca Nation as memorialized in the Buffalo Creek Treaty and subsequently codified as Indian Law § 6. As the facts underlying *The New York Indians* demonstrate, the only purported tax at issue in that case was the mere assessment of a tax (not the collection of the tax) on non-Indians, and that mere assessment was found to be incompatible with the ancient rights of the Seneca Nation as memorialized in numerous treaties.

This Court noted that by 1838, Thomas L. Ogden and Joseph Fellows had obtained the right of pre-emption concerning conveyance of the Seneca Nation's lands, including the Allegheny, Cattaraugus, Buffalo Creek and Tonawanda reservations. *See The New York Indians*, 72 U.S. at 767. In 1838, the Seneca Nation entered into a treaty whereby it agreed to remove to lands west of the Mississippi River and the United States agreed to provide assistance with the relocation. *See id.* The Seneca Nation agreed to convey each of its reservations to Messrs. Ogden and Fellows five years after proclamation of the treaty, which occurred on April 4, 1840. *See id.* The Seneca Nation remained in possession of its reservations; however, by 1842, disputes had arisen concerning the 1838 treaty, and the Seneca Nation entered into another treaty, commonly referred to as the Buffalo Creek Treaty, in which the parties agreed that the Seneca Nation would retain the Allegheny and the Cattaraugus reservations "with all their original rights." *Id.*

Against this backdrop, the New York Legislature enacted legislation to facilitate the assessment and collection of taxes for roads to be built within the reservations, even though those reservations were still occupied and governed by the Seneca Nation. The enactment at issue before this Court authorized the sale of the lands for non-payment of the taxes, but noted that such a sale "shall not in any manner affect the right of the Indians to occupy said lands." *Id.* at 764. Pursuant to the enactment, taxes were assessed to Messrs. Ogden and Fellows, non-Indians, even though they would not take possession of the lands until 1845 at the earliest. *See id.* at 766-68. The lands were sold for non-payment, and Mr. Fellows brought a suit seeking a declaration that the

statute authorizing the assessment of taxes was invalid. *See id.* at 765.

With respect to the taxes assessed on the Buffalo Creek reservation, which was sold to Messrs. Ogden and Fellows in 1838 (with the sale being reconfirmed in 1842 in the Buffalo Creek Treaty), this Court ruled that the mere assessment of the tax on lands the Seneca Nation had sold and agreed to remove from, but still occupied, violated the rights of the Seneca Nation. *See id.* at 770 ("Until the Indians have sold their lands, *and removed from them* in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and are under their original rights, and entitled to the undisturbed enjoyment of them." (emphasis added)). Even under a scenario in which the interests of the Seneca Nation in a reservation appeared to be greatly diminished from their original rights, *mere assessment* of the tax on non-Indians who hoped to one day own and possess the reservation "was premature and illegal." *Id.*

This Court described the enactments as an "extraordinary[] exercise of power over these reservations and the rights of the Indians, so long possessed and so frequently guaranteed by treaties." *Id.* at 766. It did not matter that the enactment stated that this tax would only be imposed on the purchasers of the land (non-Indians Ogden and Fellows) or that sale of the land for default on the payments would not impact the rights of the Seneca Nation to continue its occupation of the reservations. The Legislature's attempts to dress up the State's blatant interference with the rights of the Seneca Nation was unlawful. *See id.* at 768 ("[T]he rights of the Indians do not depend on this or any other statutes of the State, but

upon treaties, which are the supreme law of the land."). Instead, the assessment of the tax had interfered with the Seneca Nation's "possession, and occupation, and *exercise of authority*" over the reservation. *Id.* at 768-69 (emphasis added). The assessment of that tax on non-Indians "may well [have] embarrass[ed]" the Indians remaining on the reservations prior to removal, which was "illegal, and void as in conflict with the tribal rights of the Seneca [N]ation as guaranteed to it by treaties with the United States." *Id.* at 770-72.

This Court's rulings in *The New York Indians* demonstrate that the decision below is wrong. First, if the *mere assessment* of a tax to be paid by a non-Indian violated the rights of the Seneca Nation as memorialized in the Buffalo Creek Treaty (and subsequently codified in Indian Law § 6), then the *assessment and collection* of the cigarette excise tax surely violates the rights of the Seneca Nation, because here, the State has gone beyond mere assessment to *actual collection*, a far greater interference.

Second, in *New York Indians*, this Court found that assessment of a tax violated the rights of the Seneca Nation, even though the Seneca Nation had what appeared to be a diminished or lesser interest in the Buffalo Creek reservation than the rights at issue in this Petition. By the time the tax was assessed on Messrs. Ogden and Fellows, the Seneca Nation had *twice agreed to sell* the Buffalo Creek reservation and had agreed that all of its members would *remove from the land* within five years. Yet, assessing the tax on non-Indians while Indians remained on the reservation violated the rights of the Seneca Nation as memorialized in the Buffalo Creek Treaty. *See New York Indians*, 72 U.S. at 768-72. In contrast, the rights

of the Seneca Nation over the reservation at issue in this Petition, the Cattaraugus reservation, are not diminished in any sense. Instead, having never sold or removed from the Cattaraugus reservation, the Seneca Nation is "to be regarded as still in [its] ancient possession, and [is] under [its] original rights, and entitled to the undisturbed enjoyment" of its land. *Id.* at 770. The Seneca Nation's "possession, and occupation, and *exercise of authority*" over the Cattaraugus reservation are as strong today as they were before the arrival of the colonists. *Id.* at 768-69 (emphasis added).

Finally, the level of the State's violation of the rights of the Seneca Nation in *The New York Indians* was far less than what is at issue in this Petition. The taxes assessed and at issue in *The New York Indians* required no action from members of the Seneca Nation to be carried out. Here, quite differently, assessment of Tax Law § 471 requires action from members of the Seneca Nation to be collected. Indian-owned retailers *must pay* the cigarette excise tax to wholesalers to obtain cigarettes to sell to their consumers. *See* Tax Law § 471(2); 20 N.Y.C.R.R. § 74.3(a)(1)(iii), (2). There is no lawful method of obtaining cigarettes from cigarette manufacturers other than from the state-licensed stamp agents. The State prohibits cigarette manufacturers from selling unstamped cigarettes to Indian-owned retailers. *See* Tax Law § 471(2). Tax Law § 471 interferes with the supply chain in the tobacco economy and requires active participation by members of the Seneca Nation for collection. This far greater interference is yet another affront to this Court's decision in *The New York Indians*.

Because the decision below violates this Court's decision in *The New York Indians* in several ways, this

Court should grant certiorari to reaffirm that the State cannot interfere with the rights of the Seneca Nation through assessment and collection of taxes, even when those taxes are said to be paid by non-Indians, because the mere assessment, alone, of a tax to be paid by non-Indians is "illegal, and void as in conflict with the tribal rights of the Seneca [N]ation as guaranteed to it by treaties with the United States." *The New York Indians*, 72 U.S. at 770-72.

II. This Court should grant the Petition because the Petition gives this Court the opportunity to correct an error of statutory interpretation that is an affront to this Court's mandate to give plain language its meaning and to interpret statutes enacted for the benefit of Indians in a manner that benefits Indians.

This Court should grant the Petition because the Petition gives this Court the opportunity to correct an error of statutory interpretation that is an affront to this Court's well-settled canons of construction. The Court of Appeals erred by interpreting the plain language of the Buffalo Creek Treaty and its codification as Indian Law § 6 to the detriment of Indians in violation of this Court's mandate to interpret such provisions for the benefit of Indians.

In the decision below, the Court of Appeals ruled that Tax Law § 471 "does not operate as a direct tax" on Indian-owned retailers or members of the Seneca Nation, and, as a result, does not violate the Buffalo Creek Treaty or Indian Law § 6 because the treaty and the statute only prohibit collection of State taxes on

Indian-owned retailers or members of Indian Nations. (App. 1a-2a, 5a.) To reach this conclusion, the Court interpreted Indian Law § 6, which broadly restricts the State's ability to assess taxes "for any purpose whatever, upon any Indian reservation" in a narrow manner, indicating that the State was free to assess *and collect* any tax it desired within the Seneca Nation so long as the tax can be said to be paid by non-Indians.[2] (App. 9a.)

This interpretation of Indian Law § 6 is contrary to the plain and unambiguous language of the statute. The statute restricts the State's ability to *assess* its taxes "for any purpose whatever, upon any Indian reservation." Indian Law § 6. There is no exception that allows the State to *assess and then collect* taxes on non-Indians when non-Indians engage in transactions within the Seneca Nation. Instead, the State is restricted from *assessing* taxes "for any purpose whatever" within the Indian reservations located within the geographic boundaries of New York, including the Seneca Nation, *regardless of who pays the taxes*. The only way the Court of Appeals was able to reach its ultimate conclusion was to create an exception to the unambiguous language of Indian Law § 6 that is absent from the text of the statute.

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2. In interpreting Indian Law § 6, the Court of Appeals correctly rejected the decisions of lower courts that had narrowly interpreted New York's promise to refrain from assessing taxes "for any purpose whatever, upon any Indian reservation" as restricted solely to property taxes. (App 9a (holding that "the plain language of both the Treaty and Indian Law § 6 establish that they only apply to 'taxes'" with no indication that those "taxes" are restricted solely to property taxes).)

This court-created exception to the unambiguous language of Indian Law § 6 violates well-settled statutory interpretation rules. First, when a statute is plain and unambiguous, like Indian Law § 6, courts must afford the statute its plain and unambiguous meaning. *See, e.g.*, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))).

Second, and more important to the issues raised in this Petition, the Court of Appeals interpreted Indian Law § 6—a statute enacted for the benefit of Indians—to the detriment of the Indians because the interpretation severely limits the broad protection from taxation that was memorialized first in the Buffalo Creek Treaty and then as codified in its present form in Indian Law § 6. It is well-settled that "[t]he language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001). Similarly, "the general rule [is] that statutes passed for the benefit of . . . Indian tribes or communities are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

Here, the court-created exception strips Indian Law § 6 of its intended meaning. Any time the State

determines that it would be beneficial to assess and collect one of its taxes within the Seneca Nation, the State can enact the tax and then point to the decision below as its authority for assessing and collecting its tax within the Seneca Nation. Absent intervention from this Court, the decision below invites the State Legislature to engage in limitless intrusions into the Seneca Nation's economy, which is both unlawful and destabilizing. Indian-owned businesses, like all businesses, need certainty in the law to make investment decisions. The decision below deprives Indian-owned businesses of that certainty because the State now has the authority to re-write its tax rules at any time to the detriment of Indian-owned businesses. Today it is imposition of the State's cigarette excise tax. Tomorrow it could be imposition of a multitude of new, never before envisioned taxes. And under the decision below, the Seneca Nation and the Indian-owned businesses that operate on the Seneca Nation are powerless to stop the State's intrusion into their commercial transactions.

Finally, even if there were ambiguity in the language of Indian Law § 6, the decision below violated yet another canon of construction—this Court's mandate to construe ambiguous statutes in favor of the Indians. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 174 (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)) (construing land allotment in favor of tribe to prohibit collection of oil royalties from the tribe, and explaining that words should never be construed to the prejudice of a tribe and should not be given technical interpretations); *see also County of Yakima v. Confed. Tribes of the Yakima Indian Nation*, 502 U.S. 251, 269

(1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))).

For all these reasons, this Court should grant the Petition.

III. The Petition presents this Court with its first opportunity to address a novel issue of law.

This Petition presents this Court with its first opportunity to address a novel issue of law; namely, whether a statute enacted for the benefit of the Indians, in which New York declared it would refrain from assessing taxes "for any purpose whatever, upon any Indian reservation in this state," may be interpreted as allowing the State to assess and collect taxes within Indian reservations, in direct contravention of both the rights of the Seneca Nation as recognized in *The New York Indians* and, this Court's canons of construction for statutes enacted for the benefit of Indians. None of this Court's prior opinions address this important issue.

For example, in *Department of Tax. & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), this Court evaluated the validity of an earlier version of New York's cigarette excise tax. However, the sole issue before this Court in that case was whether the State's authority to enact the tax was preempted by the Indian Trader Statutes, 25 U.S.C. §§ 261 *et seq.* *See id.* at 64 ("The question presented is whether

New York's program is pre-empted by federal statutes governing trade with Indians."). Moreover, because that action was commenced by non-Indian wholesalers, it has been noted that this Court did not consider "the interests of Indian nations or tribes affected by the regulations." *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 624 (2010). This Petition allows this Court to consider the unique interests of the Seneca Nation as memorialized in the Buffalo Creek Treaty and codified as Indian Law § 6.

Further, none of this Court's opinions resolving disputes between *other* states and *other* Indian Nations have presented this Court with the opportunity to address this important issue. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reserv.*, 447 U.S. 134, 154 (1980) (resolving challenge to Washington's cigarette excise tax under pre-emption, the tribal right to self-governance, and negative or dormant Indian Commerce Clause); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reserv.*, 425 U.S. 463, 481-83 (1976) (evaluating the validity of Montana's cigarette excise tax achieved through a pre-collection scheme under federal tribal right to self-governance and federal statutes).

This Petition should be granted because it allows this Court to rule on this novel and important issue that impacts thousands of commercial transactions on a daily basis.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Paul J. Cambria, Jr.
Counsel of Record
Erin E. McCampbell
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue
Buffalo, New York 14202
(716) 849-1333
pcambria@lglaw.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE STATE OF NEW YORK COURT OF APPEALS, DATED JUNE 7, 2018

STATE OF NEW YORK COURT OF APPEALS

No. 59

ERIC WHITE *et al.*,

Appellants,

v.

ERIC T. SCHNEIDERMAN, &C. *et al.*,

Respondents.

GARCIA, J.:

Plaintiffs assert that enforcement of Tax Law § 471, which imposes requirements on Indian[1] retailers located on reservation land to pre-pay the tax on cigarette sales to individuals who are not members of the Seneca Nation of Indians, is inconsistent with Indian Law § 6 and the Buffalo Creek Treaty of 1842. We hold that because the Tax Law's precollection mechanism does not operate as a direct tax on the retailers or upon members of the Seneca

1. To conform with the treaty and statutes at issue, and with the phrasing adopted by the parties, the term "Indians" will be used to refer to the members of the Seneca Nation, or more generally, Native Americans.

Nation, it does not conflict with either the Treaty or the statute.

I.

Plaintiff Eric White, a member of the Seneca Nation of Indians, operates a convenience store, plaintiff Native Outlet, located on Seneca Nation lands. Through Native Outlet, White sells cigarettes to tribal members and non-members, and is therefore subject to Tax Law § 471. The statute provides that the tax shall be imposed "on all cigarettes possessed in the state by any person for sale," including "all cigarettes sold on an Indian reservation to non-members of the Indian Nation or Tribe," but contains an exception for cigarette "sales to qualified Indians for their own use and consumption on their nation's qualified reservation" (Tax Law § 471 [1]).

Plaintiffs commenced this action seeking (1) a declaration that Tax Law § 471 is unconstitutional and invalid and (2) a permanent injunction enjoining defendants from enforcing the law against them. The complaint alleged that the tax law conflicts with the Buffalo Creek Treaty of 1842 and Indian Law § 6. After plaintiffs moved for a preliminary injunction, defendants cross-moved to dismiss the complaint for failure to state a cause of action. Supreme Court granted defendants' motion and dismissed plaintiffs' motion for a preliminary injunction as moot.

The Appellate Division, among other things, modified the judgment by reinstating the complaint to the extentit

sought a declaration and granted judgment in favor of defendants, declaring that the tax law is not inconsistent with either Indian Law § 6 or the Treaty (140 AD3d 1636 [4th Dept 2016]). Construing the Treaty and Indian Law § 6 liberally in favor of plaintiffs, the court nevertheless determined that they were not entitled to declaratory relief in light of Supreme Court precedent holding that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax exempt cigarettes on reservations," and to curb that practice, "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*id.* at 1638, quoting *Department of Tax &Fin of New York v Milhelm Attea & Bros. Inc.*, 512 US 61, 73 [1994]). Accordingly, the court concluded that although the law requires plaintiffs to prepay the amount due as tax, because it is the non-Indian consumers who ultimately have the tax liability, "'th[e] burden is not, strictly speaking, a tax at all'" (*id.* at 1638-1639, quoting *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483 [1976]). The court also declined to revisit its 1997 holding that "the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of... 'sales taxes on cigarettes...sold to non-Indians on the Seneca Nation's reservations'" (*id.* at 1637, quoting *Matter Of New York State Dept. of Tax & Fin v Bramhall*, 235 AD2d 75, 85 [4th Dept 1997]).

This Court granted plaintiffs leave to appeal (28 NY3d 1170 [2017]).

Appendix A

II.

In 2010, the Legislature amended Tax Law §§ 471 and 471-e and the Department of Taxation and Finance adopted implementing regulations. The law provides that a tax must be "paid on all cigarettes possessed in this state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation" (Tax Law § 471 [1]). Under the amended tax law, the Department "precollects" the tax on non-exempt cigarettes from state-licensed stamping agents who purchase tax stamps from the State and affix the stamps to each package of cigarettes to demonstrate payment of the tax (Tax Law § 471 [2]; 20 NYCCRR § 74.3 [a] [1] [iii], [2]). Agents incorporate the cost into the pack's price, which is passed along the distribution chain to the consumer who bears "the ultimate incidence of and liability for" the tax (Tax Law § 471 [2], [3]; *see Oneida Nation of New York v Cuomo*, 645 F3d 154; 158 [2d Cir 2011]). As a result, although tribal retailers must prepay the tax to wholesalers when purchasing inventory, they ultimately recoup the tax by adding it to the retail price for cigarettes sold to non-members of the Nation. The law also permits tribes or reservation retailers to purchase "a limited quantity of cigarettes" based on their "probable demand" without prepaying the tax to wholesalers (*see* Tax Law § 471 [1]; [5] [a], [b]).[2]

2. In 2011, it was estimated that New York would generate approximately 110 million dollars in annual tax revenue if it curbed

III.

We agree with the courts below, and the Second Circuit, that the law's prepayment obligation does not constitute a direct tax on tribal retailers and is therefore not prohibited by federal law (*see Oneida Nation*, 645 F3d at 168-169).

There is a long history of legal challenges to attempts by individual states, including New York, to tax transactions taking place an Indian land (*see Milhelm Attea & Bros., Inc.*, 512 US at 64; *Oklahoma Tax Comn v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 [1991]; *Washington v Confederated Tribes of Colville Reservation*, 447 US 134, 160-161 [1980]; *Moe v Confederated Salish and Kootenai Tribes of Flathead*, 425 US 463 [1976]; *see also Cayuga Indian Nation of NY v Gould*, 14 NY3d 614, 622-629 [2010] [discussing New York's efforts to tax cigarette sales made on reservations to non-Indians]). In assessing these challenges, the Supreme Court has made clear that federal law prohibits states from taxing cigarette sales to enrolled tribal members on their own reservations for personal use, but permits states to tax on-reservation cigarette sales

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tax evasion linked to cigarette sales on reservations (*see Oneida Nation of New York v Cuomo*, 645 F3d 154, 159 [2d Cir 2011]). As an example of potential lost revenue, in 2009, the year before passage of the statutory provisions at issue here, the Seneca Nation had approximately 8,000 members and a yearly probable demand of 67,500 cartons of cigarettes, yet that year alone, the Seneca Nation purchased 10 million untaxed cartons from state-licensed distributors (*id.* at n 6).

to persons other than reservation Indians (*see Moe*, 425 US at 475-481; *Milhelm Attea & Bros., Inc.*, 512 US at 64). In *Moe*, the Supreme Court upheld a precollection tax scheme that required the cigarette seller to prepay the tax and pass the cost on to the purchaser (425 US at 483). The tribe argued that the prepayment of the tax constituted an impermissible tax on the tribal retailer. The Court rejected that argument because the tax was, as New York's is, ultimately borne by the non-Indian consumer (*id.* at 481-482). The Court explained that the precollection scheme was "not, strictly speaking, a tax at all," and was a "minimal burden" on tribes "to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax" on non-Indians *(id.* at 483; *see Milhelm Attea & Bros., Inc.*, 512 US at 73, 76).

This Court recognized these guiding principles in considering a challenge based on federal law to a requirement that an enrolled member of the Seneca Nation collect and remit sales, use and excise taxes on sales of cigarettes and gasoline made on the reservation to non-Indian consumers (*Synder v Wetzler*, 84 NY2d 941 [1994]). In rejecting that challenge, we noted that the "Supreme Court has clearly established that State tax statutes requiring Indian retailers to collect and remit taxes on sales to non-Indian purchasers, and to keep the records necessary to ensure compliance, violate neither the Commerce Clause nor the constitutional proscription against direct taxation of Indians" (*id.* at 942). And, in *Oneida Nation*, the Second Circuit, in considering a request for a preliminary injunction with respect to the

tax laws at issue here, found a failure to demonstrate a likelihood of success on the merits with respect to claims that "the precollection scheme impermissibly imposes a direct tax on tribal retailers, or alternatively, [that it] imposes an undue and unnecessary economic burden on [those] retailers" (645 F3d at 175). As the Second Circuit noted, "it is the legal burden of a tax—as opposed to its practical economic burden—that a state is categorically barred by federal law from imposing on tribes or tribal members" (*Oneida Nation*, 645 F3d at 168). The express language of New York's tax law provides that "the ultimate incidence of and liability for the tax shall be upon the consumer," and mandates that the tax money advanced by any "agent or dealer" be paid back by the consumer (Tax Law § 471 [2], [3]; *see Cayuga Indian Nation*, 14 NY3d at 647).[3] Accordingly, New York's "precollection mechanism is materially indistinguishable from those upheld in *Moe* and *Colville*" (*Oneida Nation*, 645 F3d at 169; *see Milhelm Attea & Bros., Inc.*, 512 US at 76).

IV.

With any challenge to the pre-collection mechanism based on federal law effectively foreclosed, plaintiffs look to the Treaty and Indian Law § 6 for support. Neither the Treaty nor the statute provide plaintiffs the relief sought.

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3. The Supreme Court has "suggested that such dispositive language from the state legislature is determinative of who bears the legal incidence of a state excise tax" (*Wagnon v Prairie Band Potawatomi Nation*, 546 US 95, 102 [2005] [internal quotation marks and citations omitted]).

Appendix A

It is well-established that statutes and treaties with Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" (*Montana v Blackfeet Tribe of Indians*, 471 US 759, 766 [1985]; *see also County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 501 US 251, 269 [1992]), and that the words used must be understood "in the sense in which they would naturally be construed by the Indians" (*Washington v Washington State Commercial Passenger Fishing Vessel Assn*, 443 US 658, 676 [1979] [internal quotation marks and citations omitted]). However, "[t]he cannon of construction regarding the resolution of ambiguities in favor of Indians...does not permit reliance on ambiguities that do not exist" (*South Carolina v Catawba Indian Tribe, Inc.*, 476 US 498, 506 [1986]).

Article 9 of the Buffalo Creek Treaty of 1842 provides:

> "The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all *taxes*, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them"

(7 US Stat 586, 590). Section 6 of the Indian Law, which was derived from the Treaty and is entitled "Exemption of reservation lands from *taxation*," provides:

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

(Indian Law § 6 [emphasis added]). The plain language of both the Treaty and Indian Law § 6 establish that they only apply to "taxes." There is no "ambiguity" here. As noted above, the pre-collection mechanism at issue here is not a tax on the retailer and is borne instead by the non-Indian consumer. Neither the Treaty nor the statute supports an argument that any indirect impact on Indian retailers resulting from permissible taxation of non-Indian customers is prohibited.

V.

Tax Law § 471 does not constitute a tax on an Indian retailer, and therefore it does not run afoul of the plain language of the Treaty or Indian Law § 6. As a result, we need not address plaintiffs' claim that the Treaty and statute prohibit more than the assessment of taxes on real property within the reservation. For the same reason, we decline to address plaintiffs' argument that the tax law cannot be reconciled with the Supreme Court's decision in *The New York Indians* (72 US 761 [1866]). Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

***

Appendix A

Order, insofar as appealed from, affirmed, with costs. Opinion by Judge Garcia. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Wilson and Feinman concur.

Decided June 7, 2018

APPENDIX B — MEMORANDUM AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT, DATED JUNE 10, 2016

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

448 CA 15-01764

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs-Appellants,

v.

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,

Defendants-Respondents.

MEMORANDUM AND ORDER

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 12, 2015. The judgment granted the cross motion of defendants to dismiss

plaintiffs' complaint and dismissed as moot the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that Tax Law § 471 is not inconsistent with Indian Law § 6, the Treaty of 1842 (7 US Stat 586), or the Due Process or Commerce Clauses of the United States Constitution,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this declaratory judgment action, alleging that the enactment and enforcement of Tax Law § 471, which imposes requirements on plaintiffs to pre-pay the amount of the tax to be assessed on the sale of cigarettes to non-Indians and non-members of the Seneca Nation (collectively, non-Indians), violates Indian Law § 6 and certain treaties between the Seneca Nation and the United States of America, particularly the Treaty of 1842 (7 US Stat 586). Plaintiffs sought a preliminary injunction enjoining enforcement of the Tax Law, and Supreme Court granted defendants' cross motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint. Because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951,

954, 538 NE2d 334, 540 NYS2d 982 [1989]). We therefore modify the judgment accordingly.

Plaintiffs contend that we erred in determining in *Matter of New York State Dept. of Taxation & Fin. v Bramhall* (235 AD2d 75, 667 NYS2d 141 [1997], *appeal dismissed* 91 NY2d 849, 690 NE2d 493, 667 NYS2d 684 [1997]) that the Treaty of 1842 and Indian Law § 6 bar the taxation of reservation land, but do not bar the imposition of, inter alia, "sales taxes on cigarettes . . . sold to non-Indians on the Seneca Nation's reservations" (*id.* at 85), and request that we reconsider our determination. We adhere to our determination in *Bramhall.*

The Treaty of 1842, which provided, inter alia, that the Seneca Nation would retain the Allegany and Cattaraugus reservations, stated at article ninth that "[t]he parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such lands* of the Seneca Indians, within the State of New York, . . . *from all taxes,* and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them" (7 US Stat 586, 590 [emphasis added]). We conclude that the plain language of that treaty supports our determination that it prohibited the state from imposing taxes on the "lands" (*id.*), i.e., the real property, of the Seneca Nation.

Indian Law § 6, entitled "Exemption of reservation lands from taxation," states that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian

reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." That section has remained unchanged since 1909 (L 1909, ch 31), and it cites to, inter alia, chapter 45 of the Laws of 1857 as the source of the legislation, and to *Fellows v Denniston* (23 NY 420 [1861], *revd sub nom. The New York Indians*, 72 US 761, 18 L Ed 708 [1866]). Chapter 45 of the Laws of 1857, entitled "An Act to relieve the Seneca nation of Indians from certain taxes on the Allegany and Cattaraugus reservations" required, inter alia, that, parcels or lots that were sold by the comptroller for taxes were to be released "by the State to the Seneca nation of Indians residing on said reservation" (L 1857, ch 45, § 1), and that "[n]o tax shall hereafter be assessed or imposed on either of said reservations, or any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section[ ] are hereby repealed" (L 1857, ch 45, § 4). The Supreme Court determined in *The New York Indians* (72 US at 770-772) that the State was without authority to impose taxes on real property to defray the costs of building and repairing roads and bridges. Thus, even construing the statute liberally in favor of the Indians, as we must (*see County of Yakima v Confederated Tribes & Bands of Yakima Indian Nation*, 502 US 251, 269, 112 S Ct 683, 116 L Ed 2d 687 [1992]), we conclude that the statutory history of Indian Law § 6 supports our determination in *Bramhall*, and that the limiting language in the title of the section "effectuate[s] the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 94, Comment at 194),

i.e., that Indian Law § 6 was enacted to bar taxes on real property that was part of an Indian nation, tribe or band.

Even assuming, arguendo, that we have interpreted the language of the Treaty of 1842 and Indian Law § 6 too narrowly, we nevertheless conclude that the court properly agreed with defendants that plaintiffs are not entitled to the declaratory relief they seek. It is well established that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians" (*Department of Taxation & Finance of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61, 73, 114 S Ct 2028, 129 L Ed 2d 52 [1994]). Although plaintiffs are obligated to pay the amount due as tax from non-Indians who have the tax liability, and from whom the amount is collected at the time of the sale, "this burden is not, strictly speaking, a tax at all" (*Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 483, 96 S Ct 1634, 48 L Ed 2d 96 [1976]).

APPENDIX C — ORDER OF THE STATE OF NEW YORK SUPREME COURT FOR THE COUNTY OF CATTARAUGUS, DATED MARCH 9, 2015

STATE OF NEW YORK SUPREME COURT
COUNTY OF CATTARAUGUS

Index No. 82670

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs,

against

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY;

and

THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY,

Defendants.

At a Special Term of the Supreme Court, held in and for the County of Cattaraugus, at the Cattaraugus County Courthouse, 303 Court Street, Little Valley, New York, on the 19th day of February, 2015.

PRESENT: Honorable Jeremiah T. Moriarty, J.S.C., Justice Presiding

Appendix C

ORDER

This matter having come before the Court on the August 11, 2014 Motion of Plaintiffs ERIC WHITE and NATIVE OUTLET seeking an Order pursuant to CPLR Article 63 preliminarily enjoining the Defendants ERIC T. SCHNEIDERMAN, in his official capacity as New York State Attorney General, and THOMAS H. MATTOX, in his official capacity as Commissioner of the New York State Department of Taxation and Finance, from enforcement of New York State Tax Law § 471 during the pendency of this action, and the December 26, 2014 Cross-Motion of Defendants seeking an Order dismissing Plaintiffs' Verified Complaint pursuant to CPLR 3211(a)(7).

NOW upon reading and filing Plaintiffs' Verified Complaint dated June 13, 2014 and filed on June 23, 2014; Notice of Motion for a Preliminary Injunction dated August 11, 2014, Affirmation of Paul J. Cambria, Jr., Esq. dated August 11, 2014; Affidavit of Eric White, sworn to June 13, 2014, Memorandum of Law in Support of Motion for Preliminary Injunction dated August 11, 2014 submitted in support of Plaintiffs' motion; Defendants' December 26, 2014 Notice of Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction and in support of Defendants' Cross-Motion to Dismiss dated December 26, 2014, submitted in support of said cross-motion and in opposition to Plaintiffs' motion; and Plaintiffs' Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Preliminary Injunction and In Opposition to Defendants' Cross-Motion to Dismiss dated February 12, 2015, submitted in further support of Plaintiffs' motion for

preliminary injunction and in opposition to Defendants' cross-motion to dismiss; and

After hearing Paul J. Cambria, Jr., Esq. on behalf of Plaintiffs and Assistant Attorney General, David J. Sleight, on behalf of Defendants; and after due deliberation being had thereon, it is hereby

ORDERED, that for the reasons set forth on the record at the hearing of said motions (a transcript of which is attached hereto and made a part hereof), Defendants' Cross-Motion is granted for the reasons set forth in Defendants' papers; and the application to dismiss the Verified Complaint of Plaintiffs pursuant to 3211(a)(7), in that said pleading fails to state a cause of action under existing and controlling New York law, is granted; and it is further

ORDERED, that based upon the foregoing, Plaintiffs' motion for a preliminary injunction is moot.

/s/ Jeremiah J. Moriarty
HON. JEREMIAH J. MORIARTY,
J.S.C.

Entered: New York, New York
March 9, 2015

/s/
Clerk of Court

APPENDIX D — EXCERPTED TRANSCRIPT, STATE OF NEW YORK SUPREME COURT COUNTY OF CATTARAUGUS, DATED FEBRUARY 27, 2015

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

INDEX N0. 82670

ERIC WHITE AND NATIVE OUTLET,

Plaintiffs,

-vs-

ERIC SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, AND THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAX FINANCE,

Defendants.

303 Court Street
Little Valley, NY 14755
February 19, 2015
ARTICLE 78 MOTION

BEFORE:

HONORABLE JEREMIAH J. MORIARTY
Supreme Court Justice

***

[28]THE COURT: Yes?

MR. CAMBRIA: One other thing I forgot to say, from a preliminary injunction standpoint and this idea of irreparable injury and so on, these tax laws, for the first time, even though they were enacted many moons ago, the regulations that were in force weren't passed until 2010; and so, for all these years those taxes were not imposed. So, who has the greater punishment here, if you will, from a preliminary injunction standpoint in balancing the equities? Years and years of no application of the tax compared to 2010 when they started imposing the tax? So, I think the equities balance in favor of the Natives, Your Honor.

THE COURT: Anything, Mr. Sleight?

MR. SLEIGHT: No, Your Honor.

THE COURT: As I said, the Court has reviewed the submissions which were excellent, and we very much appreciate the hard work that went into that and, of course, the arguments of counsel.

It is the decision of the Court that the cross motion of the defendants is granted for the reasons set forth in their papers; and the application to dismiss the complaint pursuant to 3211(a)(7), in that the pleading fails to state a cause of action under existing and controlling New York law, is granted.

[29] Based upon the foregoing, the plaintiff's motion for a preliminary injunction is moot. Thank you, gentlemen,

very much, and good luck.

MR. SLEIGHT: Judge, would you like me to submit an order?

THE COURT: Yes. I would ask you to please submit a order on notice to counsel.

MR. SLEIGHT: Yes, Your Honor.

(Whereupon, proceedings concluded.)

****

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ABOVE-ENTITLED ACTION.

Dated: February 27, 2015

/s/_____
Kathleen M. Trost,
Court Reporter