No. 18-297

IN THE

Supreme Court of the United States

ERIC WHITE, *et al.*,

Petitioners,

v.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL OF NEW YORK, *et al.*,

Respondents.

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

BRIEF FOR *AMICI CURIAE* THE SENECA NATION OF INDIANS AND THE CAYUGA NATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*

The Seneca Nation of Indians is a federally recognized Indian Nation with five sovereign territories in Western New York. The Cayuga Nation is a federally recognized Indian Nation with reservation land in Central New York (collectively the "Nations").[1] Petitioner Eric White is a tribal member of the Seneca Nation and operates Native Outlet on the Seneca Nation's Territory.

The Nations submit this *amici curiae* brief because the ramifications of the Court of Appeals' decision extend beyond the parties and subject matter implicated by the facts in this case. The Court of Appeals' decision sanctions the State's unlawful intrusion of regulatory law onto Indian reservations in New York – impacting the tribal economies located in the State.

The *amici curiae* Nations exercise comprehensive regulatory and law enforcement jurisdiction over the tobacco economies in their respective territories in New York. These economies represent a considered use by the Nations of their lands for their members' benefit. The Nations also submit this *amici curiae* brief because of their strong interest in and unique understanding of legal issues surrounding state taxation within New York's Indian country. The Nations' insight into the arguments

1. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this *amici curiae* brief 10 days prior to the due date for such brief and have consented to its filing. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

below and the issues presented by the Petition will assist the Court's consideration of whether to grant *certiorari*.

SUMMARY OF THE ARGUMENT

In this case, the Court of Appeals approved the application of N.Y. Tax Law §§ 471 and 471-e to the sale of cigarettes by an Indian retailer located on the Seneca Nation's Indian reservation. In doing so, the Court ignored N.Y. Indian Law § 6, which provides that: "No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state[.]" The Court of Appeals failed to even acknowledge that the transactions in question occur on Indian reservations – an exercise in wordsmithing that had the effect of avoiding the N.Y. Indian Law § 6. Yet a plain reading of these statutes demonstrates that the Court of Appeals erred – the State lacks the power and authority under state law to tax the transactions at issue because of their location on an Indian reservation.

The Nations therefore urge this court to grant the Petitioner's Writ of Certiorari in order to specifically consider the novel issue of how N.Y. Indian Law § 6 applies to the State's cigarette tax regime.

ARGUMENT

I. THE NEW YORK COURT OF APPEALS IMPROPERLY EXPANDED THE STATE'S REGULATORY AUTHORITY IN INDIAN COUNTRY

The State has long refrained from imposing taxes on Indian reservations, with the restriction codified by

N.Y. Indian Law § 6. The New York State Legislature passed the current version of N.Y. Indian Law § 6 in 1909, which provides a blanket state tax exemption upon the reservations located in the State: "**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." N.Y. Indian Law § 6 (emphasis added).

Despite this restriction, the State has implemented N.Y. Tax Law §§ 471 and 471-e on Indian reservations with the intention of taxing cigarette sale transactions with non-Indian purchasers. The tax is meant to be imposed at the point of sale: "[T]he ultimate incidence of and liability for this tax shall be upon the consumer, and any agent or dealer who shall pay the tax to the commissioner shall collect the tax from the purchaser or consumer." N.Y. Tax Law § 471(2). N.Y. Tax Law § 471-e – entitled "Taxes imposed on qualified reservations" – specifically addresses taxation of cigarettes on Indian reservations: "[A]ll cigarettes **sold on an Indian reservation** to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp." (emphasis added). The meaning of N.Y. Tax Law §§ 471 and 471-e could not be more clear – cigarettes sold to non-Indians on an Indian reservation must be taxed.

The Court of Appeals was asked to address the validity of this on-reservation tax in *White*. The Petitioner, an Indian retailer engaged in the sale of cigarettes on the Seneca Nation's Territory, challenged the validity of N.Y. Tax Law §§ 471 and 471-e as the statutes are applied to

on-reservation cigarette sales to non-Indians.[2] The Court of Appeals described how the State implements these statutes in practice:

> Under the amended tax law, the Department "precollects" the tax on nonexempt 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. 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.

Id. at *2 (internal citations omitted). The Court of Appeals determined that N.Y. Tax Law §§ 471 and 471-e do not constitute a tax on the Indian retailers: "[T]he pre-collection mechanism at issue here is not a tax on the retailer and is borne instead by the non-Indian consumer." Using this reasoning, the Court of Appeals refused to consider the applicability of N.Y. Indian Law § 6, finding that the statute does not prohibit "any indirect impact on Indian retailers resulting from permissible taxation of non-Indian customers[.]"

The Court of Appeals erred by misconstruing what N.Y. Tax Law § 471-e represents – a state tax in Indian country. The decision improperly focuses upon whom

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2. Neither the parties to this action nor the Nations dispute that the Seneca Nation's Territory constitutes an "Indian reservation" for the purposes of N.Y. Tax Law §§ 471 and 471-e and N.Y. Indian Law § 6.

the tax is imposed, instead of where the tax is imposed. N.Y. Indian Law § 6 asks only if the tax is "assessed, for any purpose whatever, upon any Indian reservation in this state[.]" N.Y. Tax Law §§ 471 and 471-e do just that. The Court of Appeals itself recognizes that the taxed transactions occur on reservations, yet it justifies the tax only by distinguishing that the ultimate on-reservation consumer is a non-tribal member. In conducting such a tortured interpretation of N.Y. Tax Law §§ 471 and 471-e, the Court of Appeals plainly ignored what the legislature itself acknowledged in the title of the statute – that Tax Law 471-e creates "[t]axes imposed on qualified reservations." By both the language of the statute, and the interpretation of the tax statute by the Court of Appeals, the taxed transaction in question occurs on an "Indian reservation in this state." N.Y. Indian Law § 6. The Court of Appeals fails to recognize the importance of that distinction, instead focusing on the customer divorced from location. Because N.Y. Tax Law §§ 471 and 471-e constitute a tax "imposed on qualified reservations," they plainly violate N.Y. Indian Law § 6.

The Court of Appeals misconstrued the nature of the State's cigarette tax and ignored the plain language of both N.Y. Tax Law §§ 471 and 471-e, and N.Y Indian Law § 6. In the process, it upended the regulatory framework of Indian country within the State. This error, which allows the State to violate its own statutory tax constraints, requires review by the Court to protect the delicate balance of regulatory jurisdiction within the State's Indian country.

II. FEDERAL LAW DICTATES THE EXTENT OF STATE JURISDICTION IN INDIAN COUNTRY

The present case draws an important distinction without precedence in any case previously before this Court – the tax imposed by the State appears facially valid under the Supreme Court cigarette tax cases (*see, e.g., Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)), but violates state statutory law. Simply put, by virtue of N.Y. Indian Law § 6, New York has restricted where it can impose a tax within the State – narrowing its ability to tax cigarette sales in Indian country beyond the parameters defined by the Supreme Court in its cigarette tax cases. Thus, the Court of Appeals' consideration of this case under federal precedents should not have ended the inquiry – it also was required to consider the State's self-created limitations upon its jurisdiction on Indian reservations.

The *White* decision creates a novel inquiry for this Court – what standard should courts apply where the state itself creates a limitation on its own jurisdictional authority within Indian country in light of *Moe* and its progeny? Determination of the boundaries of state jurisdiction in Indian country has long been the province of the federal courts, consistent with the Indian Commerce Clause. This reflects the bedrock principle that jurisdiction over Indian reservations is exclusively a federal concern unless divested by federal government. *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) ("Congress has also acted consistently upon the assumption that the

States have no power to regulate the affairs of Indians on a reservation."). "[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 1260, 36 L. Ed. 2d 129 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945)).

States have gained the authority to exercise jurisdiction over Indian country only where Congress expressly granted that right. *Id.* at 221. This principle is especially important with respect to the ability of the states to tax within Indian country, and the Supreme Court has concluded that "the *McClanahan* presumption against state taxing authority applies to all Indian country[.]" *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 113 S. Ct. 1985, 1992, 124 L. Ed. 2d 30 (1993). The Supreme Court has carved out only one clear exception to the principle that only Congress can authorize states to impose taxes in Indian country – allowing states to tax cigarette sales made by Indians to non-Indians visiting the reservation. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); W*ashington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

The Court has repeatedly accepted *certiorari* to determine whether the imposition of state taxes in Indian country is permissible. *See, e.g., Arizona Dept. of Revenue v. Blaze Const. Co., Inc.*, 526 U.S. 32, 119 S.Ct. 957, 143 L.Ed.2d 27 (1999); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982); *Central Machinery Co. v. Arizona*

Tax Comm'n, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980). Here, the Court of Appeals erred by allowing an impermissible tax within Indian country. The Supreme Court has not, and should not, allow such overstepping of jurisdictional limits on the sovereign land of Indian Nations.

III. THE COURT OF APPEALS' DECISION WILL IMPERMISSIBLY INFRINGE ON THE SOVEREIGN RIGHT OF INDIAN NATIONS IN NEW YORK TO GOVERN THEIR OWN ECONOMIES

Alarmingly, the Court of Appeals' flexible definition of the tax imposed by Tax Law § 471-e can now be applied to economies outside of the cigarette market. The Court of Appeals created this opening by interpreting N.Y. Tax Law § 471-e as "not a tax on the retailer [but] is borne instead by the non-Indian customer." *White*, 31 N.Y. at *3. Because the tax is ostensibly imposed outside Indian country (a contortion necessary to circumvent the tax restriction imposed by N.Y. Indian Law § 6), it is not subject to the jurisdictional framework for state jurisdiction in Indian country established by federal law. Under this precedent, nothing prevents the State from applying these same principles to any other type of tax on goods entering Indian reservations within the State. This creates a substantial threat to other types of markets located on the Nations' territories.

By interpreting the tax imposed by N.Y. Tax Law § 471-e this way, the Court of Appeals has invited the State to intrude upon Indian reservations through the implementation of taxes on *any* product entering the

reservation, so long as that product passes through the State. That intrusion would be in plain violation of N.Y. Indian Law § 6, just as N.Y. Tax Law § 471-e violates N.Y. Indian Law § 6. And that type of intrusion would substantially threaten the economic vitality of Indian Nations located within the State.

State regulation of tribal economic activities, especially through taxation, conflicts with the sovereign interest of tribes in regulating conduct within their territories. This occurs in two ways.

First, state taxes on Indian retailers reduce non-Indian patronage of tribal businesses, especially where non-Indian customers would otherwise be hesitant to travel to Indian reservations. The resulting reduction in tribal retailers' potential customer base reduces the viability of tribal economic ventures, compounding the already substantial economic disadvantage created by the Indian reservation system.

Second, state taxes compromise the ability of tribal governments to impose their own taxes on their retailers. An Indian Nation's "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). The Court acknowledged the damage to tribal sovereignty caused by state taxation in *Colville*, where it noted that tribal retailers would be at a competitive disadvantage due to the "overlapping impact of tribal and state taxation." *Colville*, 447 U.S. at 157. Consequently, in the face of state taxation of Indian retailers, tribes are faced with a Hobson's choice – tax

their own members' businesses out of competition, or forego tax revenue.

The Court has found that such an intrusion is permissible in the context of cigarettes. Yet that intrusion has not been permitted in other economic contexts. While the Court in *Colville* found a burden on Indian commerce permissible in the context of taxes on cigarettes, the Court recognized its role in guarding against burdens on Indian Commerce in other contexts. *Colville*, 447 U.S. at 157 (noting that the Indian Commerce Clause has some "role to play in preventing undue discrimination against, or burdens on, Indian commerce").

The Court of Appeals' decision in *White* created a workaround – designed to avoid New York's own statutes – to allow the State to impose taxes on all transactions occurring within Indian country involving a non-member. Such taxes threaten to crush tribal economies and jeopardize revenue streams for tribal governments. They are also not allowed under federal case law interpreting the Indian Commerce Clause. This Court should also accept *certiorari* in this case to protect against the negative economic impacts the Court of Appeals' decision will cause in Indian country.

IV. THE COURT'S PREVIOUS DECISION IN *MILHELM* DID NOT ADDRESS THE NOVEL ISSUE RAISED BY N.Y. INDIAN LAW § 6

This Court has exercised its authority to review the New York Court of Appeals' interpretation of the State's cigarette tax regime once before, in *Department of Tax. and Fin. of New York v. Milhelm Attea & Bros., Inc.*,

512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). That case addressed the narrow issue of whether the State's cigarette tax scheme in place at that time complied with the Indian Trader Statutes, and did not address whether that tax regime ran afoul of N.Y. Indian Law § 6. The scope of N.Y. Indian Law § 6's protections have never been considered by this Court, and present a novel question of statutory interpretation with respect to a state's voluntary limitation of civil regulatory jurisdiction in Indian country.

CONCLUSION

For the foregoing reasons, the Nations respectfully urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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