UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE,

Plaintiff

v. C.A. No. 03-296S

STATE OF RHODE ISLAND, et al.,

Defendants

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND THE RHODE ISLAND AFFILIATE, THE AMERICAN CIVIL LIBERTIES UNION

This brief addresses the three central legal issues confronting the Court in this litigation:

(1) Does the state of Rhode Island have the authority to tax the sale of cigarettes from the Narragansett Tribe's Smoke Shop?

(2) Does the state of Rhode Island have the authority to enter the Narragansett Indian Reservation and seize tribal property?

(3) Does the state of Rhode Island have the authority to require the Narragansett Tribe to purchase various state licenses to engage in commercial activities on the reservation?

Ultimately, three bedrock principles of Federal Indian Law--cited by this Court and the First Circuit in resolving earlier controversies between the state of Rhode Island and the Narragansett Tribe--also help determine the outcome of this case. They are:

1. Indian tribes possess inherent sovereign powers.

2. Congress can authorize a state to enforce its laws on an Indian reservation, but unless and until Congress expressly confers that authority, a state generally has no jurisdiction over the tribe or its members on the reservation. This prohibition is "categorical" regarding any state tax whose legal incidence would fall on the tribe or tribal members.

3. If any doubt exists as to whether Congress has consented to state jurisdiction over an Indian tribe or tribal members, the doubt must be resolved in favor of the Indians.

A discussion of these three principles is necessary at the outset.

A.

Federally recognized Indian tribes, such as the Narragansett Tribe, "retain their sovereign powers in full measure unless and until Congress acts to circumscribe them. See United States v. Wheeler, 435 U.S. 313, 323 (1978)." Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701 (1st Cir.), cert. denied, 513 U.S.919 (1994). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Wheeler, 435 U.S. at 323. See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 701; Bottomly v. Passamoquoddy Tribe, 599 F.2d 1061, 1065-66 (1st Cir. 1979). This principle is known as the Indian sovereignty doctrine, or the doctrine of inherent tribal sovereignty.

The sovereign powers that Indian tribes possess are original powers, although Congress may limit them. "The Tribe's retained sovereignty predates

federal recognition--indeed, it predates the birth of the Republic, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)--and it may be altered only by an act of Congress." Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 694 (citation omitted). "Indian tribes . . . are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. [They are] qualified to exercise powers of self-government . . . by reason of their original tribal sovereignty." National Labor Relations Board v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnotes and citations omitted).

B.

Congress has followed a fairly steady course--particularly during the past half-century--of supporting and encouraging tribal independence and self-government, and of keeping Indian tribes free from state interference. Although Congress has the authority to extend the reach of state law into Indian country and limit tribal powers, it has largely refrained from doing so. There exists, as the Supreme Court has recognized, "a 'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'" Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993), quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973). See also Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 702 (noting "the strong congressional bias, especially noticeable in the past generation, against policies that would promote Indian assimilation"). For much the same reason that Rhode Island has limited

jurisdiction to regulate activities within Massachusetts, it has limited jurisdiction to regulate activities within the Narragansett Indian Reservation.

Traditionally, the Indian sovereignty doctrine "gave state law 'no role to play'" within an Indian reservation unless Congress had given its express consent. See Sac and Fox Nation, 508 U.S. at 124 (1993), quoting McClanahan, 411 U.S. at 168. This once-absolute test of state jurisdiction, however, has softened over the years. Today, certain extensions of state jurisdiction may occur in Indian country even without express congressional consent. See, e.g., Nevada v. Hicks, 533 U.S. 353 (2001) (holding that a state may enter an Indian reservation to serve criminal process on tribal members who commit crimes *outside* the reservation, even without congressional consent). See generally Sac and Fox, 508 U.S. at 123-24; Pevar The Rights of Indians and Tribes (2002) at 128-134.

For two reasons, as explained more fully later, this "softening" of the Indian sovereignty doctrine is of no avail to Rhode Island in the instant case. First, this case involves a state's attempt to impose *the legal incidence* of a tax directly on an Indian tribe without congressional consent, and the Supreme Court categorically prohibits such attempts. See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995); Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). See also Winnebago Tribe of Nebraska v. Stovall, 216 F. Supp.2d 1226, 1234 (D. Kan. 2002) (noting that in Chickasaw Nation, the Court "held that if the legal incidence of a state tax falls upon a tribe or tribal members for sales made within Indian

country, the imposition of the tax is categorically barred as a matter of federal law.")

The prohibition on state taxation of Indian tribes and tribal members without the express consent of Congress is based on the principle that the power to tax is the power to destroy. The Supreme Court has therefore forbidden a state to exercise this formidable and destructive power unless Congress has expressly authorized it; indeed, congressional consent must be unambiguous. See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992) ("And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" Internal citation omitted.) This rule pays proper deference to the Indian sovereignty doctrine. As the Supreme Court recently reiterated:

> "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . ., and *in recognition of the sovereignty retained by Indian tribes* even after the formation of the United States, *Indian tribes generally are exempt from state taxation within their own territory*." Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985).

Chickasaw Nation, 515 U.S. at 455 (emphasis added). As explained below, the Settlement Act does not evince a clear congressional purpose to confer on the state of Rhode Island the taxing power it seeks to assert in this case, and therefore the state's efforts must be enjoined.

Another reason why Rhode Island obtains no succor from the modern Indian sovereignty doctrine is because the state activities challenged here--that of placing the legal incidence of a state tax directly on an Indian tribe, entering

the reservation and seizing tribal property, and compelling the tribe to comply with state licensing laws--are among the most virulent and destructive forms of state control over tribal affairs imaginable. Tribal sovereignty could be rendered nugatory at the Governor's whim if Rhode Island is free to exercise the powers that were employed here against the Narragansetts. Whatever may be said about the "softening" of the Indian sovereignty doctrine, the only way for the state to prevail in this litigation is for that doctrine to be, not merely softened, but turned on its head.

No court decision or federal statute authorizes what Rhode Island did here. This includes the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-16 ("Settlement Act"). Even if the language of the Settlement Act is ambiguous on this point--and it is not--the canons of statutory construction (discussed next) necessitate the conclusion that Rhode Island's actions violated the Supremacy Clause by unlawfully invading the federally protected rights of the Narragansett Indian Tribe.

C.

This Court and the First Circuit have applied the canons of statutory construction each time it has interpreted the Settlement Act. These canons are "important to remember." Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94, 97 (D.R.I. 1992), aff'd, 984 F.2d 14 (1st Cir. 1993). The canons require that federal Indian legislation be liberally construed on behalf of the Indians, and ambiguities resolved in their favor. "'Statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being

resolved in favor of the Indians.' Bryan v. Itasca County, 426 U.S. 373, 392 (1976.)" Maynard, 798 F. Supp. at 97. See Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 691 (citing Supreme Court precedent for the rule that "'[d]oubtful expressions are to be resolved in favor of [Indians]'" when construing Indian legislation); Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 n.2 (1st Cir. 1993) (holding that the Settlement Act must "be construed to afford the Tribe the benefit of any ambiguity.") See also Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 n.4 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (recognizing that statutes enacted for the benefit of Indian tribes must be liberally construed in their favor). See generally Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

These canons of construction were initially created to help interpret Indian treaties. See Jones v. Meehan, 175 U.S. 1, 10 (1899); Carpenter v. Shaw, 280 U.S. 363, 367 (1930). They were designed to ensure that Indian tribes--usually the weaker parties in treaty negotiations--will enjoy the full benefit of their bargains, bargains in which they relinquished millions of acres of land in exchange for a guarantee that the federal government would safeguard their remaining reserves free from outside interference. See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174-175 (1973). Today, these canons continue to serve the same purpose: the promotion of tribal self-government and economic independence, free from state interference. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional

notions of sovereignty and with the federal policy of encouraging tribal independence.")

With these three bedrock principles of federal Indian law in mind, we now turn to the legal issues confronting the Court in this litigation. What we will discover is that the state of Rhode Island may not impose its cigarette taxes on the Narragansett Tribe's cigarette sales, may not enter the reservation and confiscate tribal property, and may not compel the Tribe to purchase state licenses to conduct business on the Tribe's reservation.

I.

THE STATE MAY NOT IMPOSE ITS CIGARETTE TAXES ON TRIBAL CIGARETTE SALES

Rhode Island claims that its authority to tax the Narragansett Tribe's cigarette sales is conferred by three different sources. These claims, however, do not withstand scrutiny.

According to Rhode Island, Congress consented to state taxation of the Narragansett Indian Tribe when it enacted § 1708(a) of the Settlement Act. That statute states: "Except as otherwise provided in this subchapter, *the settlement lands* shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." (Emphasis added.)

The plain language of the statute confers jurisdiction over the settlement lands, *not the Tribe*. Nothing in § 1708(a) provides the express authorization--the unmistakably clear consent--Rhode Island must receive before it may exercise this power to destroy the Narragansett Indian Tribe.

This Court has already rejected the state's self-serving construction of § 1708(a). In Maynard v. Narragansett Tribe, 798 F. Supp. 94 (D.R.I. 1992), aff'd on other grounds, 984 F.2d 14 (1st Cir. 1993), the Court agreed with the Narragansett Tribe that the "[j]urisdiction [conferred by § 1708] over tribal lands simply does not confer jurisdiction over the tribe itself." Id., 798 F. Supp. at 97.[1] Nothing in the plain language of the Settlement Act or its legislative history implies--much less makes clear--any intent to authorize Rhode Island to exercise a power that Congress has never given to any state: the power to levy any and all state taxes on a federally-recognized Indian tribe, at the state's discretion.

Maynard was relied upon in Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination, 63 F. Supp.2d 119 (D. Mass. 1999), which interpreted a very similar Settlement Act. In that case, Massachusetts claimed that a federally recognized Indian tribe was subject to state jurisdiction as a result of a Settlement Act that subjected the tribe's "settlement lands . . . to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts." 25 U.S.C. § 1771g. The court rejected that argument, citing Maynard for the principle that "'[j]urisdiction over tribal lands simply does not confer jurisdiction over the tribe itself.'" Id., 63 F. Supp.2d at 124, quoting Maynard, 798 F. Supp.2d at 97. Section 1771g, the court said, "merely provides in general terms that the settlement lands are subject to state and

[1]In Rhode Island v. Narragansett Tribe, 19 F.3d 685, 696 n.10 (1st Cir.), cert. denied, 513 U.S.919 (1994), the First Circuit subsequently rejected a portion of the district court's decision in Maynard, identified as the language appearing at pages 98-99. The First Circuit thus left undisturbed the district court's conclusion found on page 97 that § 1708(a) does *not* consent to state jurisdiction over the Narragansett Tribe.

municipal law and jurisdiction . . . [but] they do not speak to the question of the extent to which Massachusetts may exercise jurisdiction over the Tribe itself." Wampanoag Tribe, at 124.

Given (a) the deeply rooted history of leaving Indian tribes free from state jurisdiction and control, (b) the importance of tribal sovereignty and independence, which would be seriously undermined if Rhode Island may tax the Narragansett Tribe, and (c) the canons of judicial interpretation under which the Settlement Act must be interpreted, then the only appropriate conclusion regarding the construction of § 1708(a) is the one already reached by this Court in Maynard. The state's reliance on § 1708(a) is therefore misplaced.

So, too, is the state's reliance on § 1715(b) of the Settlement Act. That statute allows Rhode Island to tax income-producing activities on settlement lands "*while held by the State Corporation.*" (Emphasis added.) However, there no longer is any such land. After the Narragansett Tribe obtained federal recognition in 1983, the State Corporation transferred all settlement lands to the Indian Corporation--as authorized by § 1707(c) the Act--and in September 1988 "the Tribe deeded the settlement lands to the federal Bureau of Indian Affairs as trustee." Rhode Island v. Narragansett Tribe, 19 F.3d at 689. The State Corporation ceased to exist, and § 1715(b) became an anachronism, bereft of legal effect.

We can speculate as to why Congress chose to allow the Tribe's lands to be taxed by Rhode Island *only* while they remained the property of the State Corporation, but one plausible explanation--and the most likely one--is that

Congress wanted the Tribe, in the event that its application for federal recognition were granted, to then acquire, by transferring its lands to the Indian Corporation, the same tax immunities that every other federally recognized tribe possesses regarding its reservation lands. In any event, the Settlement Act must be interpreted in accordance with its plain language, see Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 702, and the plain language of § 1715(b) permits only one interpretation: Rhode Island acquired limited taxing authority over the Narragansett Tribe, and the state lost *all* of that authority the instant the settlement lands left the portfolio of the State Corporation.

It is also significant to note that Section 1702 of the Act creates two distinct corporations--an Indian Corporation and a State Corporation--each of which is assigned different responsibilities and powers under the Act, but only one of which is subject to taxation under § 1715. As the First Circuit stated in a related context, while construing another portion of the Act: "The omission of the [words 'Indian Corporation' in § 1715] looms particularly large in light of the use of [those words] elsewhere. . . .This phenomenon commands our utmost attention." Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 702. Whenever Congress uses language in one section of a statute and omits that language in another section, "'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' Rodriguez v. United States, 480 U.S. 522, 525 (1987)." Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 702. Thus, we must presume that Congress intentionally and purposely

cabined Rhode Island's taxing authority to the circumstance set forth in § 1715(b), a circumstance that no longer exists.

In 1985, Rhode Island--apparently dissatisfied with the extremely limited authority Congress had given it--took matters into its own hands. It passed a statute, codified in various sections of R.I. Gen. Laws § 37-18, stating that any land transferred from the State Corporation to the Tribe would remain subject to the state's civil and criminal jurisdiction.

Unfortunately for Rhode Island, it lacks the authority to do what it sought to do. Indeed, if a state could confer upon itself such authority--without congressional consent--then the numerous Supreme Court decisions that invalidated state taxation of Indian tribes would have been decided the other way, and the second bedrock principle discussed earlier would be null and void. Yet it is Rhode Island's unilateral action that is null and void. The rule remains as firm today as it ever was that a state is *categorically* barred from taxing an Indian tribe without the express consent of Congress. See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995); Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

Nothing in the Settlement Act, then, consents to the state's taxation of the Tribe's Smoke Shop. Rhode Island, though, has one additional claim regarding its authority to tax the Tribe's cigarette sales, and it is based on the decisions and rationale of Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475-481 (1976), and Washington v. Confederated Tribes of the Colville

Indian Reservation, 447 U.S. 134, 151-52 (1980). In Moe and Colville, the Supreme Court held that even in the absence of congressional consent, a state may require a tribe to collect the state's cigarette and sales taxes when it sells cigarettes to *nonmembers* of the tribe. The Court reached this conclusion based on the fact that the taxes at issue in those cases were "pass-through" (collect and remit) taxes, that is, taxes that were paid *by the buyer* of the goods*;* the seller merely collected them from the buyer and funneled them to the state. These taxes, in other words, were not imposed on the tribal vendor. Consequently, the Court said, the taxes were lawful even in the absence of express approval from Congress.

Rhode Island thus has the *ability* to impose similar taxes on the cigarettes sold by the Smoke Shop to nonmembers of the tribe. Rhode Island, however, has failed to pass appropriate legislation enabling it to implement that ability. See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995). The issue in Chickasaw Nation was whether the state of Oklahoma could require a tribal vendor of motor fuels to collect the state's motor fuel taxes on sales to nonmembers of the tribe. The Court acknowledged at the outset that Oklahoma has the ability to impose such taxes under the rationale of Moe and Colville. The Court then examined the state law in question and found that the legal incidence of the tax fell--not on the buyer--but on the seller, which in this instance was the tribe. The Court therefore applied the familiar "categorical" test--under which state taxation of an Indian tribe is categorically invalid unless expressly authorized by Congress--and held that Oklahoma's tax could not be applied to

these sales. Id., 515 U.S. at 459 (“If the legal incidence of an excise tax rests on a tribe or tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”) As the Court noted, this was not a new principle, but a well settled one. "Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country." Id., 515 U.S. at 458, citing Bryan v. Itasca County, 426 U.S. 373 (1976), and McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973). See also Goodman Oil v. Idaho State Tax Comm’n, 28 P.3d 996 (Idaho 2001), cert. denied, 534 U.S. 1129 (2002) (invalidating a state tax as applied to a tribal vendor under the Chickasaw Nation rationale); Coeur d’Alene Tribe v. Hammond, 224 F. Supp.2d 1264 (D. Idaho 2002) (similar).

Rhode Island's cigarette tax laws, R.I. Gen. Laws §§ 44-10 et seq., have the same infirmity as the Oklahoma legislation in Chickasaw Nation. The Rhode Island laws place the legal incidence of the tax on the *holder* of the cigarettes for sale, not on the consumer. See Daniels Tobacco Co., Inc. v. Norberg, 355 A.2d 636, 638 (R.I. 1975) ("In addition, the mere fact that the ultimate economic burden of a tax is on the consumer does not determine the legal incidence of the tax. . . .Under the statute, the holding of cigarettes for sale in the state triggers the tax.") Therefore, unless Rhode Island amends its cigarette laws to place the legal incidence of the tax on the buyer, it cannot impose its cigarette taxes on *tribal* sales, because the Narragansett Tribe cannot be taxed by the state.

Two related matters should be discussed. First, Rhode Island's cigarette laws do not on their face impose the legal incidence of the tax on the retail holder--rather than on the consumer--of cigarettes. The state supreme court, though, has interpreted the laws in that manner, and this fact disposes of the issue. See Chickasaw Nation, 515 U.S. at 461-62 (noting that Oklahoma's law "does not expressly identify who bears the tax's legal incidence," but a "fair interpretation" of it places the legal incidence on the retailer, not the consumer). The Rhode Island legislature will need to amend its cigarette laws before the state may lawfully require the Narragansetts to collect the state's cigarette taxes.

Second, it should be noted that Rhode Island's *sales* tax may be assessed in these instances. It appears that the legal incidence of this tax falls on the buyer, and hence Rhode Island can expect the Tribe to collect the state's sales tax when it sells cigarettes to nonmembers. See, e.g., Colville, 447 U.S. at 150-51 and n.25.

The power to tax is the power to destroy. Congress has not conferred that power on Rhode Island over the Narragansett Indian Tribe. Accordingly, the state may not impose its cigarette taxes on the Tribe unless it amends the legislation such that the legal incidence of the tax falls on the consumer.

II

THE STATE DID NOT HAVE THE AUTHORITY TO ENTER THE RESERVATION AND SEIZE TRIBAL PROPERTY

Perhaps the most shocking abuse of power that occurred here was the *ex parte* seizure of the Tribe's property by state law enforcement officers. See

Stipulated Facts ¶ 9 (state officers seized the tribe's unstamped cigarettes). This behavior violated two doctrines of federal law.

First, the state's confiscation of tribal property violated the Supremacy Clause. The federal policy of leaving Indian tribes free from state encroachment is deeply rooted in the Nation's history. Yet Rhode Island sent law enforcement officers into tribal territory and seized tribal property without federal approval. If this action does not encroach upon tribal sovereignty, it is difficult to imagine what does. Indeed, no action could be more threatening to, and disruptive of, *any* government's sovereignty than the seizure of its property by outsiders.

If Rhode Island cites its cigarette confiscation law, R.I. Gen. Laws § 44-20-37, as somehow "authorizing" the seizure of the tribe's unstamped cigarettes, then the state needs to be reminded of the second bedrock principle discussed earlier: normally, state law may not be enforced on an Indian reservation without the consent of Congress. "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973) (internal citation omitted). See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (holding that a state may not sue an Indian tribe to collect unpaid cigarette taxes due to the tribe's sovereign immunity from suit).[2]

[2]The long-standing decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, begs the question whether Rhode Island, knowing it cannot sue the Tribe, decided to dispense with that formality and to seize the Tribe's property anyway.

Moreover, whatever "softening" has occurred to the Indian sovereignty doctrine, it has no application to a situation where, as here, the state enters the reservation and seizes tribal property on tribal land. See Nevada v. Hicks, 533 U.S. 353, 362 (2001) ("'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.'" Internal citation omitted.)

Congress has not authorized Rhode Island to seize unstamped cigarettes (or any other property) belonging to the Narragansett Indian Tribe. Therefore, Rhode Island's actions in doing so violated the Supremacy Clause of the Constitution, as well as the sovereign rights of the Tribe.

Moreover, even if Congress had consented to Rhode Island's confiscation of tribal property--and no consent is evident--the seizure that occurred was nonetheless unconstitutional for a wholly separate reason: it violated the Due Process Clause. Indeed, Rhode Island's *ex parte* seizure of tribal property violated the Fourteenth Amendment in two respects. First, the tribe was not given notice and the opportunity for a meaningful hearing *before* the seizure took place, and the state failed to post a bond to cover the Tribe's potential losses in the event the seizure is ultimately shown to be unlawful. Second, *after* the seizure took place, the state failed to provide the Tribe with a prompt and impartial hearing. Thus, both the front-end and the back-end of the state's actions violated the Tribe's right to procedural protection against arbitrary loss.

A. The front-end deprivation

It has been the rule since at least Fuentes v. Shevin, 407 U.S. 67 (1972), that the Due Process Clause of the Fourteenth Amendment requires that a party receive notice and a meaningful opportunity to be heard *prior* to being deprived of property, except in exigent circumstances. "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing." Id., 407 U.S. at 91-92. In order to justify an *ex parte* seizure, the Court said, the creditor must demonstrate, first, that the seizure was "directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, *under the standards of a narrowly drawn statute*, that it was necessary and justified in the particular instance." Fuentes, 407 U.S. at 91-92 (emphasis added).

There is no evidence in the record that any of these circumstances--much less all three of them--existed on July 14, 2003.

It is unnecessary, however, for the Court to determine whether Rhode Island can satisfy all three circumstances. This is because the statute under which the seizure occurred, R.I. Gen. L. § 44-20-37,[3] is unconstitutional for reasons explained in Fuentes and its progeny: it is not a narrowly drawn statute.

[3]Only R.I. Gen. L. § 44-20-37 is cited in the documents that were served on the Tribe on July 14, 2003 as authority for the confiscation.

See, e.g., Mitchell v. W.T. Grant, Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Connecticut v. Doehr, 501 U.S. 1 (1991); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D. R.I. 1972), aff'd, 409 U.S. 1120 (1973); Marcello v. Regan, 574 F.Supp. 586, 588 (D.R.I. 1983); and Shawmut Bank of Rhode Island v. Costello, 643 A.2d 194, 202 (R.I. 1994).

Section 44-20-37 provides:

> **Seizure and sale of unstamped cigarettes. –** Any cigarettes found at any place in this state without stamps affixed as required by this chapter are declared to be contraband goods and may be seized by the administrator, his or her agents, or employees, or by any sheriff, deputy sheriff, or police officer when directed by the administrator to do so, without a warrant; provided, that nothing in this section shall be construed to require the administrator to confiscate unstamped cigarettes when the administrator has reason to believe that the owner of the cigarettes is not willfully or intentionally evading the tax imposed by this chapter. Any cigarettes seized under the provisions of this chapter may, in his or her discretion, be offered by the administrator for sale at public auction to the highest bidder after advertisement, as provided in § 44-20-38. Before delivering any cigarettes so sold to the purchaser, the administrator shall require the purchaser to affix to the packages the amount of stamps required by this chapter. The seizure and sale of any cigarettes under the provisions of this section does not relieve any person from a fine or other penalty for violation of this chapter.

Noticeably absent from § 44-20-37 is a provision requiring (1) that a hearing be provided *prior* to the seizure of cigarettes, unless specified exigent circumstances exist, (2) that the matter be heard by an impartial and detached magistrate, and (3) that the state post a bond to cover the debtor's potential losses in the event the attachment is later deemed unlawful. *Each one of these flaws is fatal*. See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606-608

(1975) (invalidating an attachment statute that contained the same procedural flaws as § 44-20-37); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D. R.I. 1972), aff'd, 409 U.S. 1120 (1973) (declaring Rhode Island's prejudgment attachment statute unconstitutional for containing the same defects present in § 44-20-37); Shawmut Bank of Rhode Island v. Costello, 643 A.2d 194, 202 (R.I. 1994) (declaring another of Rhode Island's attachment statutes unconstitutional for containing the same defects present in § 44-20-37). See also Connecticut v. Doehr, 501 U.S. 1 (1991) (invalidating a statute that authorized the prejudgment attachment of real estate because the statute permitted the same type of summary attachment allowed by § 44-20-37, without any showing of extraordinary situations or the posting of a bond). Accord: Marcello v. Regan, 574 F.Supp. 586, 588 (D.R.I. 1983) (forbidding the federal government from seizing a taxpayer's income tax overpayments and transferring them to the state to offset child support arrearages, without first providing the taxpayer notice and a hearing).

The Rhode Island Supreme Court's analysis in Shawmut, explaining why the state's attachment statute (R.I. Gen. L. § 10-5-5) violated the Due Process Clause, applies with equal force to the state's cigarette confiscation statute, R.I. Gen. L. § 44-20-37:

> Not only does § 10-5-5 not provide for a preattachment hearing but more important for our analysis it is silent regarding a showing of any exigency to justify its *ex parte* proceedings. Section 10-5-5 is not narrowly drawn to meet the unusual conditions related to any exigent circumstances. . . . Additionally, among other deficiencies, it does not require plaintiff to post a bond.

Id., 643 A.2d at 201 (citations omitted). Section 44-20-37 is patently unconstitutional for the same reasons.

B. The back-end deprivations

Even if Rhode Island had provided the Narragansett Indian Tribe with the process that is due *prior* to the prejudgment seizure, its actions would still have violated the Due Process Clause because the state failed to provide the Tribe with the requisite *post-deprivation* procedural protections. In Mitchell v. W.T. Grant, Co., 416 U.S. 600 (1974), the Court upheld a Louisiana garnishment statute under which a creditor seized property without prior notice, explaining: "Under Louisiana procedure . . . the debtor . . . was not left in limbo to await a hearing that might or might not 'eventually' occur, as the debtors were under the statutory schemes before the Court in Fuentes. Louisiana law expressly provides for an immediate [post-deprivation] hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued,'" and for the payment of damages and attorney's fees if issuance of the writ was improper. Id. at 618, internal citation omitted. Moreover, the Louisiana law provided that the matter would be decided by an impartial and detached magistrate. Id. at 616 ("The Louisiana law provides for judicial control of the process from beginning to end.").

Rhode Island law provides none of the procedural protections that saved the Louisiana law in Mitchell. The operative law in question, R.I. Gen. Laws § 44-20-47, provides in pertinent part that any person whose cigarettes have been confiscated by the state "may apply to the [tax] administrator" for a hearing. The

administrator may then take as long as he or she wishes to "notify the applicant of the time and place fixed for the hearing." If the applicant requests a hearing, the matter is determined by the tax administrator, who is hardly a neutral and detached magistrate.[4] Moreover, the statute requires neither the posting of a bond nor provides for the award of attorney's fees if the seizure is determined to be improper.

Clearly, § 44-20-47 is fatally flawed. Every post-deprivation statute containing these defects has been invalidated on due process grounds. See, e.g., Connecticut v. Doehr, 501 U.S. at 8; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Shawmut, 643 A.2d at 201 (noting that even if an attachment statute provided for an immediate hearing, it would nonetheless violate the Due Process Clause unless it also required an adequate pre-deprivation hearing and the posting of a bond).

The *ex parte* seizure of the Tribe's property by the state violated both the Supremacy and Due Process Clauses. The Tribe is entitled to a declaratory judgment to that effect and to the issuance of an injunction prohibiting the state from engaging in such action in the future.

[4]See R.I. Gen. Laws §§ 44-1-1 and 44-1-2, describing the position and duties of the Tax Administrator, the person assigned by § 44-20-47 to determine the sufficiency of confiscation appeals. This agency official hardly qualifies as a neutral and detached magistrate.

III

THE STATE MAY NOT IMPOSE ITS COMMERCIAL LICENSING REQUIREMENTS ON THESE TRIBAL ACTIVITIES

The Narragansett Indian Tribe has the inherent right to engage in commercial activities within its jurisdiction. "An Indian tribe has the inherent right to engage in business activities in the tribe's own name and to create and license corporations distinct from the tribe." Pevar, The Rights of Indians and Tribes at 108. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Turner v. United States, 248 U.S. 354 (1919); Navajo Tribe v. Bank of New Mexico, 700 F.2d 1285 (10th Cir. 1983).

The Narragansett Tribe does not need Rhode Island's permission--and thus need not purchase a state license--to engage in business activities on its own reservation. A quarter-century ago the Supreme Court in Moe rejected the identical argument that Rhode Island resurrects here, and squarely held that a federally recognized Indian tribe need not purchase a state vendor license in order to sell cigarettes on the reservation. Id., 425 U.S. at 480-81.

In Moe, as noted earlier, the Supreme Court held that a state may require a tribe to collect a cigarette tax where the legal incidence of the tax falls on the consumer. Yet the Moe Court also held that the tribe need not purchase a vendor license in order to sell those cigarettes in the first instance. Therefore, even if Rhode Island amends its cigarette laws such that the Narragansett Tribe must begin collecting the state's cigarette taxes, the Tribe still need not purchase

a license from the State in order to sell them. See also Tulee v. Washington, 315 U.S. 681, 685 (1942) (holding that a state may not require tribal members to purchase a state fishing license to engage in federally protected fishing activities). Vendors in Massachusetts who sell cigarettes to citizens of Rhode Island need not purchase a Rhode Island business license in order to do so, and the same rule applies for the same reason to the Narragansett Indian Tribe. Due to the interference that Rhode Island's licensing scheme would exact on tribal sovereignty, the state should be enjoined from enforcing its licensing laws on the Tribe in the absence of express congressional consent.

Respectfully submitted this ____ day of August, 2003.

_____
Lynette Labinger, No. 1645
Roney & Labinger
Cooperating Counsel, Rhode Island Affiliate, American Civil Liberties Union
344 Wickenden Street
Providence, RI 02903
(401) 421-9794
fax: (401) 421-0132

Stephen L. Pevar
American Civil Liberties Union
32 Grand Street
Hartford, Connecticut 06106
(860) 293-1559
fax: (860) 293-1016

ATTORNEYS FOR AMICI

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Amici Curiae was sent by U.S. Mail postage prepaid this ____ day of August, 2003, to Neil F.X. Kelly and James Lee, Assistant Attorneys General, Department of Attorney General, 150 S. Main St., Providence, RI 02903, to John Killoy, Jr., 74 Main St., Wakefield, RI 02879, and to Douglas J. Luckerman, 20 Outlook Dr, Lexington, MA, 02421.

_____