No. 04-1155

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NARRAGANSETT INDIAN TRIBE,
Plaintiff-Appellant,

v.

STATE OF RHODE ISLAND, et al.,
Defendants-Appellee.

Appeal from the United States District Court
for the District of Rhode Island

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE AS *AMICI CURIAE* IN SUPPORT OF NARRAGANSETT INDIAN TRIBE

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CORPORATE DISCLOSURE STATEMENT

No parent corporations exist for and no publicly held corporations own 10% or more of the National Congress of American Indians, the American Civil Liberties Union, or the Rhode Island Affiliate, American Civil Liberties Union. *See* Fed. R. App. P. 26.1(a).

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INTEREST OF *AMICI*

The National Congress of American Indians ("NCAI") is the oldest and largest tribal government organization in the United States, with a membership of over 250 tribes from every region of the country. NCAI's mission is to inform the public and the federal government regarding tribal sovereignty, self-government, treaty rights, and federal policy issues affecting tribal governments. The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality and the defense of federal rights and protections. The Rhode Island Affiliate, ACLU ("RI ACLU") is a state affiliate of the ACLU, sharing its principles and goals. Since the Court ordered rehearing *en banc* specifically to address issues of tribal sovereignty, tribal sovereign immunity, and the rights and protections afforded the Narragansett Tribe under federal law, the NCAI, ACLU, and RI ACLU believe that their participation as *amici curiae* will assist the Court in its consideration of this case. *Amici* have authority to file this brief pursuant to the Court's Order Granting Rehearing En Banc and Fed. R. App. P. 29(a) because all parties have consented to the filing of this brief.

ARGUMENT SUMMARY

The State of Rhode Island ("State") has attempted to enforce its cigarette tax laws against the Narragansett Tribe ("Tribe") by executing a search warrant against the Tribe, arresting Tribal officials, and confiscating tribal documents and other

property. Such enforcement is precluded by the Tribe's sovereign immunity, which has not been waived. In addition, such actions violate the Tribe's retained sovereign authority over its territory. Finally, State enforcement of its cigarette tax laws against the Tribe is preempted because Congress has not authorized the State to exercise jurisdiction over the Tribe. The State remains free to collect its cigarette tax through various other means, however, as recognized by the Supreme Court.

ARGUMENT

I. The State May Not Enforce its Tax Laws against the Tribe because the Tribe Has Not Waived and Congress Has Not Abrogated the Tribe's Sovereign Immunity From Suit.

Indian tribes have long been recognized as possessing the absolute immunity from suit traditionally enjoyed by sovereigns. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of Washington ,* 433 U.S. 165, 172-173 (1977); *United States v. U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 68 (1st Cir. 2005). This sovereign immunity applies to tribal activities regardless of whether on or off the reservation, and regardless of whether the activity is deemed governmental or commercial. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998). Further, the availability of tribal sovereign immunity is not conditioned on continued full exercise of a tribe's sovereign powers. *See Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064-66 (1st Cir. 1979).

While tribal sovereign immunity is subject to tribal waiver and congressional abrogation, Congress has consistently reiterated its approval of the immunity doctrine. *Kiowa,* 523 U.S. at 754, 758. Congress has restricted tribal immunity from suit only in limited circumstances, *id.*, and any limit on tribal sovereign immunity must be unequivocally expressed, *Santa Clara Pueblo,* 436 U.S. at 58. In addition, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa,* 523 U.S. at 755 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* ("*Potawatomi*"), 498 U.S. 505, 514 (1991).

This Court has recognized that the Tribe and its related entities possess sovereign immunity from unconsented lawsuits. *See Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993); *Ninigrit Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29-31 (1st Cir. 2000) (finding waiver of such immunity by tribal housing authority). In particular, nothing in the Settlement Act abrogates the Tribe's immunity from suit because nothing in the Act "even alludes to the concept of tribal sovereign immunity, much less its relinquishment." *Maynard*, 984 F.2d at 16. Therefore, the Tribe's retained sovereign immunity categorically precludes enforcement against the Tribe of the State's cigarette tax laws, notwithstanding the application of those laws to certain reservation sales. *See Potawatomi*, 498 U.S. at 511-14.

II. The State Efforts to Enforce its Tax Laws Against the Tribe Violate the Tribe's Inherent Sovereignty and Are Preempted by Federal Law.

Even if the Tribe's sovereign immunity does not completely bar the State's actions here, two additional jurisdictional bars apply. Inherent tribal sovereignty and federal protection over Indian tribes provide "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Each of these barriers, standing alone, prohibits the State from entering the Narragansett Indian Reservation to enforce state cigarette tax laws against the Tribe. *See id.* at 143.

A. The State's Enforcement of its Tax Laws Against the Tribe Violates the Tribe's Inherent Sovereignty Over its Territory.

The issue here is not whether the State generally has jurisdiction over the Tribe's trust lands but whether the State has jurisdiction to enforce its tax laws against the Tribe. *See Narragansett Indian Tribe v. Rhode Island*, 415 F.3d 134, 135 (1st Cir. 2005) (rehearing order). The Supreme Court has recognized that "'the power to tax involves the power to destroy,'" and consequently has held that absent cession of jurisdiction or other federal statutes permitting it, a state lacks power to tax reservation Indians. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *McCullouch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). Consistent with this basic principle, subordinating the Tribe to state control regarding taxation enforcement would

impermissibly interfere with the Tribe's retained sovereign powers, *see Washington v. Confederated Tribes of Colville Indian Reservation* ("*Colville*"), 447 U.S. 134, 154, 162 (1980), and would essentially destroy the tribal government, *see Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994); *Bryan v. Itasca County*, 426 U.S. 373, 388 & n.14 (1976). The Tribe retains sufficient inherent sovereignty to preclude enforcement of the State's tax laws against the Tribe. The State can no more impose its tax laws on the Tribe than it could impose its laws on surrounding states.

Like other Indian tribes, the Narragansett Tribe retains inherent sovereignty over its lands (the "settlement lands"). "The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic—and it may be altered only by an act of Congress." *Rhode Island*, 19 F.3d at 694 (citations omitted).[1] Congress has not altered the Tribe's inherent sovereignty in any way that would allow the State to enforce its tax laws against the Tribe. In particular, the conferral of state jurisdiction over the settlement lands in the Rhode Island Indian Claims Settlement Act of 1978 ("Settlement Act"), 25 U.S.C. §§ 1701-1716, cannot be construed to subordinate the Tribe to state control regarding taxation. Under the

[1] As a testament to its long-time existence, the Narragansett Tribe recently celebrated its annual green corn thanksgiving, a ceremony that has been recorded in writing for 330 years. *See* G. Wayne Miller, *Narragansetts' August Gathering a Sacred Event for Centuries*, Providence J., Aug. 13, 2005, at A1.

Settlement Act, the State possesses civil regulatory and adjudicatory jurisdiction over the Tribe's settlement lands. *Rhode Island*, 19 F.3d at 696. However, the Settlement Act's grant of authority to the State is non-exclusive and the Tribe retains that portion of jurisdiction it possesses by virtue of its sovereign existence. *Id.* at 702. In addition, the Rhode Island Settlement Act differs markedly from the Maine Settlement Act, so that analysis of the latter is inapplicable here. *See Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997).

The limits on the State's authority under the Settlement Act comport with general principles of Indian law. Indian tribes are domestic dependent nations, with inherent sovereign power over their territories. *United States v. Lara*, 541 U.S. 193, 204 (2004) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), *United States v. Mazurie*, 419 U.S. 544, 557 (1975), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). Inherent tribal sovereignty is not derived from the federal government, but exists on its own. *See Santa Clara Pueblo*, 436 U.S. at 55-56; *Wheeler*, 435 U.S. at 328. "The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived. In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years." *Lara*, 541 U.S. at 210-11 (Stevens, J., concurring).

In addition, tribal sovereignty is subordinate only to the federal government and not to the states. *California v. Cabazon Band of Mission Indians* ("*Cabazon*"), 480 U.S. 202, 207 (1987) (quoting *Colville*, 447 U.S. at 154). Therefore, an Indian tribe's status as a sovereign insulates it from state and local control, and a tribe retains every aspect of its historical sovereignty "'not inconsistent with the overriding interests of the National Government.'" *Aroostook Band*, 404 F.3d at 62 (quoting *New Mexico v. Mescalero Apache Tribe* ("*Mescalero*"), 462 U.S. 324, 332 (1983)). Courts accordingly prohibit application of any state law that infringes on the right of reservation Indians to make their own laws and be governed by them. *See Williams v. Lee*, 358 U.S. 217, 220 (1959). This includes tribal enforcement of laws concerning dealings with non-Indians. *See id.* at 222-23; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Colville*, 447 U.S. at 152-54.

For example, Indian tribes retain the general authority, as sovereigns, to control economic activity within their jurisdictions. *Merrion*, 455 U.S. at 137. This includes the power to tax transactions on trust lands and involving a tribe or its members. *Id.* at 137, 144; *Colville*, 447 U.S. at 152-53. "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137; *see Colville*, 447 U.S. at 152-53.

In light of the above, a state may tax the sale of cigarettes to non-Indians on a reservation when the tax falls on non-Indian purchasers—as in this case—because

such an assertion of state power does not interfere with tribal power. *See Colville*, 447 U.S. at 158-59. In addition, a state may enforce such a tax by seizing unstamped cigarettes in transit to a reservation if a tribe does not cooperate in collecting state taxes, since those cigarettes are not yet tribal property and not yet within a tribe's territorial jurisdiction. *Id.* at 161. For such enforcement of state cigarette taxes, "[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries" and where state policies do not "unnecessarily intrud[e] on core tribal interests." *Id.* at 162. In contrast, state assertions of authority to enter onto reservations to seize stocks of cigarettes intended for sale to nonmembers "obviously is considerably different . . . ." *Id.* (reserving judgment on that issue).[2] The latter situation is precisely the one at issue in this case.

B. The State's Enforcement of its Tax Laws Against the Tribe Within Indian Country is Preempted by Federal Law.

The federal policy of leaving Indian tribes free from state jurisdiction and control is "deeply rooted" in the Nation's history. *Oklahoma Tax Comm'n v. Sac and Fox Nation* ("*Sac and Fox*"), 508 U.S. 114, 123 (1993) (citing *McClanahan v. State*

[2] *Nevada v. Hicks*, 533 U.S. 353 (2001), does not undermine this distinction. *Hicks* addressed tribal jurisdiction over state officials, not the reverse. Also, the state officials there came onto the reservation only to execute process related to off-reservation violations of state law, *id.* at 364, and they did so with the permission of the tribe, *id*. at 356. Moreover, the Court in *Hicks* emphasized that it was not addressing purported violations of state law "'*on a reservation.*'" *Id.* at 365-66.

Tax Comm'n of Arizona, 411 U.S. 164, 168 (1973)). For this reason, state jurisdiction over tribes is preempted by the operation of federal law where the State's actions interfere with and are incompatible with federal and tribal interests reflected in federal law and policy. *See Mescalero*, 462 U.S. at 334. This preemption analysis applies whenever a state seeks to impose its taxation authority over tribal activities within Indian country, as compared to a different analysis that applies when tribal activities are conducted outside of Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

1. The Settlement Lands are Indian Country.

As this Court has stated, "'the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.'" *Narragansett Indian Tribe v. Narragansett Elect. Co.*, 89 F.3d 908, 915 (1st Cir. 1996) (citation omitted). "Indian Country" is defined in federal law to include "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments . . . ." 18 U.S.C. § 1151. "'Indian country' includes formal and informal reservations, dependent Indian communities, and Indian allotments." *Sac and Fox*, 508 U.S. at 123. This definition applies in civil cases as well as criminal, including cases involving state taxation of Indian tribes. *Id.*

The parties have stipulated that the smoke shop at issue in this case is located on the Tribe's settlement lands, *Narragansett Indian Tribe v. Rhode Island*, 296 F. Supp. 2d 153, 157 (D.R.I. 2003), *aff'd in part & rev'd in part*, 407 F.3d 450 (1st. Cir.), *reh'g en banc granted & judgment vacated*, 415 F.3d 134 (1st Cir. 2005), and those lands are held by the United States in trust for the Tribe, *Rhode Island*, 19 F.3d at 689. Contrary to the State's assertions, that is all that is needed for those lands to fall squarely within the definition of Indian country under § 1151(a). Tribal trust lands are "informal reservations" that constitute Indian country under 18 U.S.C. § 1151(a). *United States v. John*, 437 U.S. 634, 648-49 & n.17 (1978); *see Sac and Fox*, 508 U.S. at 123; *see also Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1292-94 (DC Cir. 2000), *cert. denied*, 530 U.S. 970 (2001). Accordingly, land owned by the United States in trust for a tribe constitutes a reservation for an Indian country determination. *Potawatomi*, 498 U.S. at 511 (no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."). It is therefore unnecessary to evaluate dependent Indian community status under § 1151(b), as suggested by the State. *See John*, 437 U.S. at 649 & n.17.

2. Federal Law Preempts Rhode Island From Enforcing its Cigarette Tax Laws Against the Tribe Because Congress has Not Expressly Authorized the State to Take Such Action.

While federal-tribal preemption generally entails a balancing analysis, in the special area of state taxation of Indian tribes, a *per se* rule applies. *Cabazon*, 480

U.S. at 215 n.17. Because federal and tribal interests are the same for both state efforts to tax tribes and state efforts to enforce state tax laws against tribes, the *per se* preemption rule applies here. The Court applies a *per se* rule because the federal policy of Indian immunity from state taxation is very strong and the state interest in taxation within Indian reservations is correspondingly weak, such that it is not necessary to balance those interests in every case. *Id.* Instead, "[a]bsent explicit congressional direction to the contrary, we presume against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of formal or informal reservation . . . ." *Sac and Fox*, 508 U.S. at 128; *see also Cabazon*, 480 U.S. at 215 n.17; *see generally McClanahan*, 411 U.S. 164.

There has been no such congressional direction here, despite the State's attempt to portray the Settlement Act as such. State jurisdiction over Indian tribes may be preempted even where state civil jurisdiction has been extended into Indian country by federal statutes. *See Cabazon*, 480 U.S. at 208; *Bryan*, 426 U.S. at 387-89. Also, notwithstanding the State's contention that it is enforcing criminal tax law, the fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law" for preemption analysis; otherwise, total assimilation of Indian tribes could easily be permitted. *Cabazon*, 480 U.S. at 211. Further, although the Settlement Act conferred on the State concurrent civil jurisdiction over activities on the settlement lands, it did not confer jurisdiction

over the Tribe itself. *See Rhode Island,* 19 F.3d at 702. This interpretation comports with the recognition of the distinction between application of state cigarette tax laws to Indian tribes, which is permitted under federal law, and direct enforcement of those laws against tribes, which is not permitted. *See Potawatomi*, 498 U.S. at 512-14. This interpretation also comports with the Court's consistent holdings against state taxation of tribes and Indians in Indian country. *See Cabazon*, 480 U.S. at 215 n.17.

Finally, the sovereign status of Indian tribes cannot be overcome by asserted state concerns of having a right without a remedy. *Potawatomi*, 498 U.S. at 512-14. Even if states find that they are unable to collect cigarette tax revenues to which they are entitled, the Supreme Court in *Potawatomi* specifically cautioned that "they may of course seek appropriate legislation from Congress." *Id.* at 514. In the fourteen years since that decision, despite numerous opportunities, Congress has refused to enact any statute that expressly authorizes state enforcement actions against Indian tribes for the collection of state cigarette taxes.[3] Such congressional non-action on numerous bills evidences that Congress does not desire to change the current state of the law. *Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983).

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[3] *Cf., e.g.,* S. 1177, 108th Cong. (2003) (would grant states authority to enforce federal tobacco laws in Indian country); H.R. 2824, 108th Cong. (2003) (concerning internet tobacco sales); H.R. 2726, 107th Cong. (2001) (would allow states to request federal enforcement of state tax laws on tribes); H.R. 1814, 106th Cong. (1999) (would remove trust status to permit state tax enforcement); S. 550, 106th Cong. (1999) (would waive tribal sovereign immunity to permit state tax enforcement).

III. The State May Collect its Cigarette Tax Through Alternative Mechanisms, Including a Cooperative Agreement with the Tribe.

Even though Rhode Island may not directly enforce its cigarette tax laws against the Tribe, the State has readily available alternatives for collecting its cigarette tax. *See generally Potawatomi*, 498 U.S. at 514. Among other alternatives noted in *Potawatomi*, the State may enter into an agreement with the Tribe to adopt a mutually satisfactory regime for collecting its cigarette tax. *Id*. Intergovernmental agreements have been deemed "device[s] of necessity" which acknowledge and preserve the sovereignty of each respective government. *See* David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government,* 1 Rev. Const. Stud. 120, 121 (1993). Such agreements provide distinct advantages, including flexibility in accommodating local needs, consensual resolution of ambiguities in overlapping jurisdictional authority, and provision of comprehensive resolution to complex questions of law. In fact, several states have recognized these distinct advantages and have adopted legislation authorizing state agencies to enter into cooperative agreements with Indian tribes. *See Hicks*, 533 U.S. at 393 (O'Connor, J. concurring).

Numerous such agreements have been entered into by other tribes and states regarding cigarette tax collections. In some instances, states forgo taxing reservation tobacco sales as long as the tribe charges a tax equal to the state. *See, e.g.*, Cigarette

Tax Contracts Between State of Washington and the Jamestown S'klallam Indian Tribe, the Saquaxin Island Tribe, the Tulalip Tribes, and the Upper Skagit Indian Tribe, available at http://130.94.214.68 /main/pages/issues/governance/agreements /tax_agreements.asp (visited Sept. 20, 2005) (hereinafter, "NCAI website"); Ariz. Rev. Stat. § 42-3302(C) (2005); Nev. Rev. Stat. § 370.515 (2003). In other instances, states and tribes enter into revenue-sharing agreements for taxes on reservation tobacco sales. *See, e.g.,* Wis. Stat. § 139.805 (2004); Okla. Stat. tit. 68, § 346 (2005); http://www.state. ok.us/~oiac/tobacco.htm (visited Sept. 20, 2005) (Oklahoma Tax Commission website listing such agreements). As a third example, some states and tribes have entered into compacts specifying a set number of tax-free cigarettes to be sold on reservation, based on reservation population. *See, e.g.,* Mont. Code Ann. §§ 16-11-111, 18-11-101 (2005); Or. Rev. Stat. § 190.110 (2003); Or. Dep't of Rev., Gov't-to-Gov't Annual Report 3 (2004), available at http://www.leg.state.or.us/cis/ 2004gov_to_gov/dor.pdf (visited Sept. 20, 2005); Tax Agreement Between Bay Mills Indian Community and the State of Michigan, available at NCAI website, *supra*.

Finally, although the Supreme Court has left open the question of whether individual officers or agents of a tribe may be liable for damages in actions by a state, *see Potawatomi*, 498 U.S. at 514 (citing *Ex Parte Young*, 209 U.S. 123 (1908)), such actions in fact are not authorized. Avoiding tribal sovereign immunity under *Ex Parte Young* requires both a claim for declaratory or injunctive relief and a claim for

violation of federal law. *Aroostook*, 404 F.3d at 65; *see also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). Thus, even if the State were to sue officials of the Tribe regarding this dispute, it could do so only for violation of a federal right, not for enforcement of its own cigarette tax laws, and it could seek only prospective relief, not damages. Accordingly, because Congress at this time has not expressly authorized Rhode Island to directly sue or otherwise enforce state cigarette tax laws against Indian tribes or officials, the State may only use the other avenues for collection expressly laid out by the Supreme Court in *Potawatomi* fourteen years ago.

CONCLUSION

Rhode Island may not enforce its cigarette tax laws against the Narragansett Tribe because such actions violate the Tribe's retained inherent sovereignty, are preempted by federal law, and are precluded by the Tribe's sovereign immunity. The State may use recognized alternatives for collecting its tax. Tribal sovereignty and the substantial federal interests protecting it cannot be abrogated merely because a state chooses not to avail itself of existing mechanisms for tax collections.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of National Congress of American Indians, American Civil Liberties Union, and American Civil Liberties Union, Rhode Island Affiliate as Amici Curiae in Support of Narragansett Indian Tribe were served on counsel for the parties by placing the same in care of the United States Postal Service, first-class postage prepaid and addressed as follows, this ___ day of September 2005.

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