

WRITTEN TESTIMONY ON BEHALF OF
The Mashantucket Pequot Tribal Nation

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**SUBMITTED TO THE PUBLIC HEALTH AND LABOR AND PUBLIC EMPLOYEES
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Introduction

Representatives Porter, Steinberg, Aurora and Petit; Senators Kushner, Abrams, Sampson and Somers; and other distinguished members of the Labor and Public Employees and Public Health Committees, my name is Kaighn Smith, Jr. I respectfully submit this testimony on behalf of our client, the Mashantucket Pequot Tribal Nation, regarding a potential amendment to a bill that seeks to extend Connecticut's ban on smoking in public places to sovereign tribal nations.

My firm, Drummond Woodsum, represents Indian tribes and their enterprises throughout the United States. I have represented tribes and tribal enterprises in the federal, state, and tribal courts for over 25 years. I am currently on partial leave from my firm to serve as the Distinguished Practitioner in Residence at Cornell Law School, where I am teaching a seminar on *Law and Colonization in Indian Country*. I am the author of the treatise, *Labor and Employment Law in Indian Country*, jointly published by the Native American Rights Fund and Drummond Woodsum, and I serve as an Associate Reporter in drafting the *Restatement of the Law of American Indians* for the American Law Institute.

The Mashantucket Pequot Tribal Nation has asked me to place the subject of a potential State bill to ban smoking and its effect upon the sovereign authority of the Nation within the larger context of federal Indian law in general, and for tribal-state relations here in Connecticut, in particular. I will address each in turn, and in so doing describe the tools available for addressing smoking in a manner that preserves the good relations the Nation and the State have enjoyed: tribal-state diplomacy and collective bargaining.

Federal Indian Law Context

Indian tribes are governments “that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)); accord *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.06-1.07, at 2, § 4.01, at 206-08 (N. Newton & R. Anderson eds., 2012) (“COHEN”).

The sovereign authority that Indian tribes possess is “retained” and “inherent;” it is not granted by the federal government. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (stating that “The powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished,’” citing COHEN at 122). Rather, as the Supreme Court has explained, Tribes are “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Tribes retain all attributes of their sovereignty that Congress has not divested. See, e.g., *Bay Mills*, 572 U.S. at 789; *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755–56 (1998); *Wheeler*, 435 U.S. at 323.

Indian tribes, like states, have the inherent power to engage in, and regulate, economic activity within their jurisdictions. This often includes engaging in a variety of economic activities to “raise revenues to pay for the costs of government.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983).

In much the same way that states generate governmental revenues through a variety of enterprises, including liquor stores and lotteries, Indian tribes exercise their sovereign authority to generate such revenues by operating myriad enterprises, including tourism, timber harvesting, and gaming see, e.g. *id.* at 327 (“resort complex” for recreational hunting and fishing); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 139 (1980) (“tribal enterprise that manages, harvests, processes, and sells timber”); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1986) (gaming enterprise).

Pursuant to the United State Constitution, Congress has the power to regulate Indian affairs, U.S. Const., art. I, § 8, cl. 3, and the Supreme Court describes this power as “plenary.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. at 790. The Court has held that Congress can even breach the United States’ treaties with Indian tribes so long as it expresses its intent to do so in clear terms. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462, 2482 (2020). Similarly, Congress can divest Indian tribes of their inherent sovereign powers, but it must likewise clearly express its intent to do so. See *id.* at 2482; *Bay Mills Indian Cmty.*, 572 U.S. at 790.

Congress broadly encourages the enterprises of Indian tribes to flourish. *See, e.g.*, 25 U.S.C. § 1521 (provisions of Indian Financing Act of 1974 establishing Indian business-development grant programs); 25 U.S.C. §§ 4103(22), 4111, 4131 (provisions of the Native American Housing Assistance and Self-Determination Act authorizing funding for tribally designated housing authorities). It does so comprehensively for gaming pursuant to the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721 (2006).

Absent an express grant from Congress, states generally lack authority to regulate Indian tribes within Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 219; *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 388 (1976).

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The great French observer of American democracy, Alex de Tocqueville, wrote in the nineteenth century:

The conduct of the United States Americans toward the natives was inspired by the most chaste affection for legal formalities.

. . .

The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the United States Americans have attained both these results with wonderful ease, quietly, legally, and philanthropically. . . . It is impossible to destroy men with more respect for the laws of humanity.¹

Tocqueville was well-justified in his bluntness. “Federal Indian policy [has been] schizophrenic.” *United States v. Lara*, 541 U.S. 193, 219 (2004). It has shifted from actions to “remove” tribes from their homelands to distant lands, presumed to be of no interest to white settlers; to attempts to end Tribal governments and cultures through “assimilation” and “termination”; to the current “modern era,” from the 1970s to the present, when the federal government has been committed to the promotion of tribal sovereignty and self-government. *See generally* COHEN §§ 1.01-1.07, at 8-108.

Tribal-State Diplomacy

¹ TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1848) (Doubleday Edition 1969) at 339.

Justice Sandra Day O'Connor once wrote that there are “three types of sovereign entities – the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.” Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997). While the Constitution defines the authority, obligations, and limits governing the relationship between states and the federal government, the Constitution treats tribes as—to borrow Justice O'Connor's words—a “third sovereign.” O'Connor, *supra*. Recognition of this reality provides an optimistic counterpoint in the twenty-first century compared to the Tocqueville's views in the nineteenth.

As you likely know, the Mashantucket Pequot Tribal Nation was nearly decimated by disease and genocidal massacres, only to survive with Congress's confirmation of its continued existence in the 1980s. In the “modern era” marked by the federal government's firm commitment to tribal economic development and self-government, the Nation has thrived. That success is in no small measure due to the mutual respect that the Nation and the State of Connecticut share as two of the three sovereigns in this country. The Nation supports thousands of jobs, the vast majority of which are filled by individuals who are citizens of the State of Connecticut, and generates more than \$1 billion annually in economic activity. Even separate from these impacts, the Nation, alongside the Mohegan Tribe, have collectively provided approximately \$8 billion in gaming revenue share to the State over the last 28 years.

As one of the most significant economic forces in the State, the Nation proudly exercises its inherent sovereign authority over its territory through the enactment and implementation of myriad tribal laws governing everything from labor and employment relations, health and safety, to domestic relations.

The Mashantucket Pequot Tribal Nation thrives as a government and an economic success story for the mutual benefit of its citizenry as well as the citizens of Connecticut largely because of the government-to-government respect that exists between the Nation and the State. That is the sound and enduring basis for the good relations these two sovereigns enjoy.

A smoking ban sought to be imposed upon the Nation through the enactment of a state law may seem to be a small thing, but in the scope of the foregoing context and history of federal Indian law and tribal-state relations it is not. The terms of the gaming procedures that the Nation reached with the State in 1993 pursuant to the

Indian Gaming Regulatory Act only apply to the Nation's gaming facilities and bar unilateral action by the State to impose a smoking ban in the gaming facilities. Assertions that enacting new state legislation or threatening liquor license revocation would achieve this goal misconstrue federal Indian law and the gaming procedures. Such unilateral State actions would be ineffective and additionally would likely lead to a protracted dispute that the Nation believes will work to no one's benefit.

Confrontation should be avoided and mutual respect embraced. In 2008 and 2009, the State (through Governor Jodi Rell) and the Nation discussed the issue and, through a respectful process, without confrontation, came to a resolution. Insofar as there are continuing concerns on the part of State officials, these same tools, ones that preserve sound tribal-state relations should once again be employed. Mutual respect and diplomacy between the State and the Nation have worked in the past and there is no reason to believe that they cannot continue to work today.

Collective Bargaining

In the exercise of its inherent sovereign authority, the Mashantucket Pequot Nation has enacted its own public sector labor law, the Mashantucket Pequot Labor Law, codified at 32 M.P.T.L. and available at www.mptnlaw.com. Pursuant to tribal law, the Nation's Gaming Enterprise engages in collective bargaining and resolves asserted prohibited practice charges under this law through tribal forums, see 31 M.P.T.L. the Mashantucket Employment Rights Law ("MERO"). There are four unions representing employees at Foxwoods. United Auto Workers ("UAW") is one such union, representing the dealers.

The terms and conditions of employment at Foxwoods are subject to bargaining between the Gaming Enterprise and the unions recognized under tribal law located at Foxwoods. Workplace smoking rules and policies are a classic issue for such bargaining. In fact, union agreements in the past have addressed this issue and to the extent that MPGE employees would like to see additional changes in this regard, it will be discussed in current negotiations. Diverting the bargaining process by asking the state legislature to impose an inapplicable mandate on tribal lands wholly ignores well-established lines of jurisdiction and the Nation's sovereign status.

Respect for tribal sovereignty over the Nation's labor and employment relations will be ensured by recognizing the Nation's laws and processes. This means respecting the process where the employees, through their union, and the employing Gaming Enterprise, through its management representatives, come to

agreement about working conditions through the time-tested collective bargaining process.

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As a concrete example of the tools of tribal-state diplomacy and collective bargaining at work, Foxwoods conducts air quality testing semi-annually by independent, accredited air quality experts as the Nation agreed with Governor Rell in 2009. This air quality testing also satisfies collective bargaining agreements with the UAW. Testing has shown consistent compliance with Tribal regulations including ANSI/ASHRAE standards (American National Standards Institute/American Society of Heating, Refrigerating and Air-Conditioning Engineers), which include the recognized standards for ventilation system design and acceptable indoor air quality.

Conclusion

Given the context and history of federal Indian law and tribal-state relations in Connecticut, the most effective tools for resolving issues of concern about the health effects of smoking are (a) negotiations that ensure the mutual respect of two sovereigns and/or (b) collective bargaining under tribal law. Both avoid unnecessary confrontation and preserve the respect for tribal self-determination and tribal-state diplomacy, the hallmarks of healthy sovereign relations in the twenty-first century. In light of the State's important commitment to policy reforms to address historical wrongs and promote equity, we believe this legislative effort stands in direct contradiction to that commitment. For it disrespects the sovereignty of Indigenous peoples.