10-3165-cv(L)

10-3191-cv(XAP), 10-3213-cv(XAP)

United States Court of Appeals for the Second Circuit

RED EARTH LLC, DBA SENECA SMOKESHOP,
AARON J. PIERCE, SENECA FREE TRADE ASSOCIATION,
Plaintiffs-Appellees-Cross-Appellants,

vs.

UNITED STATES OF AMERICA, ERIC H. HOLDER, JR., in his Official Capacity as Attorney General of the United States, UNITED STATES DEPARTMENT OF JUSTICE, JOHN E. POTTER, in his Official Capacity as Postmaster General and Chief Executive Officer of the United States Postal Service, UNITED STATES POSTAL SERVICE,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS RED EARTH LLC, DBA SENECA SMOKESHOP and AARON J. PIERCE

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Dated: October 18, 2010

CORPORATE DISCLOSURE STATEMENT

Red Earth LLC does not have a parent corporation, and no publicly-held corporation has a 10% or more ownership interest in it.

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JURISDICTIONAL STATEMENT

The District Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331, as this case involves the constitutionality of the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010) (hereinafter the "PACT Act"). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), as the District Court granted in part and denied in part plaintiffs' motion for a preliminary injunction. All parties appealed the District Court's order. The Government and plaintiff Seneca Free Trade Association ("SFTA") filed their timely notices of appeal on August 6, 2010. Plaintiffs Red Earth, LLC d/b/a Seneca Smokeshop and Aaron J. Pierce (collectively "Red Earth") filed a timely notice of appeal on August 10, 2010.

STATEMENT OF THE ISSUES

In its response to the Government's Appeal, Red Earth presents the following issues:

1. Whether the District Court was correct in holding that Red Earth showed a likelihood of success on the merits of its claim that the PACT Act violates Due Process by subjecting out-of-state sellers of cigarettes to State taxation regardless of whether those sellers have the constitutionally-required minimum contacts with each taxing State.

2. Whether the District Court was correct in finding that the balancing of the equities and the public interest favored the issuance of injunctive relief given that enforcement of the PACT Act will irreparably harm Red Earth and adversely impact the local economy.

In support of its appeal, Red Earth presents the following issues:

1. Whether the District Court erred by holding that Red Earth failed to show a likelihood of success on the merits of its claim that the PACT Act violates the Equal Protection component of the Fifth Amendment where the Act has a disproportionate impact on, and there is evidence of racial animus towards, Native Americans.

2. Whether the District Court erred by holding that Red Earth lacks standing to bring a Tenth Amendment claim where Red Earth asserts that Congress acted beyond its enumerated powers in enacting the PACT Act.

STATEMENT OF THE CASE

This case challenges the constitutionality of the PACT Act. The relevant parts of the PACT Act, which was signed into law on March 31, 2010 and became effective on June 29, 2010, are attached as an addendum to this brief at pages AD-1-16. Among other things, the PACT Act requires so-called delivery sellers, in advance of a sale, to identify, collect, and remit the cigarette excise taxes of the State and local jurisdictions into which their cigarettes are shipped. 15 U.S.C. § 376a(d)(1)(A)-(B) (AD-7). It also requires out-of-state delivery sellers to comply with all destination jurisdiction laws and ordinances that are generally applicable to cigarettes. The PACT Act defines a delivery seller as a seller of cigarettes to a consumer outside of the seller's physical presence at the time of the sale or delivery. 15 U.S.C. § 375(5)-(6) (AD-1). Under the PACT Act's definition, Red Earth is a delivery seller.

In its complaint, Red Earth alleges that the PACT Act violates the lawful sovereign rights of the Seneca Indians under various treaties entered into with the United States, and that it violates the Commerce Clause, the Import-Export Clause, the Fifth Amendment's Due Process Clause, the Equal Protection components of the Fifth Amendment, and the Tenth Amendment to the United States Constitution. *See* Red Earth's Compl. at ¶ 18 (JA 76).

Red Earth's complaint sought an injunction against enforcement of the PACT Act and a declaration that the statute is unconstitutional. *See id.* at §§ 39-40 (JA 83-84).

Along with its complaint, Red Earth filed a motion seeking a temporary restraining order and a preliminary injunction. *See* Motion Seeking Injunctive Relief by Red Earth LLC, *Red Earth v. United States*, No. 10-cv-530 (W.D.N.Y. June 25, 2010) (Dist. Ct. Dkt. 3). The District Court granted Red Earth's application for a temporary restraining order. Temporary Restraining Order, *Red Earth v. United States*, No. 10-cv-530 (W.D.N.Y. July 2, 2010) (Dist. Ct. Dkt. 26). Thereafter, SFTA filed its complaint and a motion for injunctive relief. *See* JA 101, Motion for Preliminary Injunction and Motion Temporary Restraining Order by Seneca Free Trade Association, *Seneca Free Trade Assoc. v. Holder*, No. 10-cv-550 (W.D.N.Y. July 1, 2010) (Dist. Ct. Dkt. 3). Judge Arcara consolidated the Red Earth and SFTA cases, and, on July 30, 2010, granted in part and denied in part Red Earth's and SFTA's motions for a preliminary injunction. *See* JA 4-46.

The District Court correctly held that Red Earth showed a likelihood of success on the merits of its claim that the PACT Act violated the

Fifth Amendment by imposing on out-of-state sellers the obligation of identifying, collecting, and remitting cigarette excise taxes to State and local governments. *See* JA 17-27. It also found that Red Earth and SFTA would be irreparably harmed absent a grant of injunctive relief and that the balancing of the equities and public interest lay in favor of granting such relief. *See* JA 10-11, 42-45. As a consequence, the District Court enjoined the enforcement of 15 U.S.C. §§ 376a(a)(3), (4) and § 376a(d) as against Red Earth and the members of SFTA. JA 43. The Government appealed from this portion of the District Court's preliminary injunction decision and order.

Red Earth appeals from the portion of the District Court's decision and order that erroneously held that Red Earth failed to show a likelihood of success on the merits of its claims that the PACT Act violates the Tenth Amendment as well as the Fifth Amendment's Equal Protection components.

STATEMENT OF FACTS

The PACT Act is not about public health as the Government would have the Court believe. Indeed, if the Government were as concerned about the deleterious effects of smoking as it claims, it would ban cigarettes. Rather, this

statute seeks to place new tax burdens on out-of-state cigarette sellers. Section 376a(a)(3) of the PACT Act provides that when making a sale into any jurisdiction – even one in a far distant State – a delivery seller must comply with "all State, local, tribal and other laws applicable to sales of cigarettes and smokeless tobacco ***as if the delivery sales occurred entirely within the specific State and place*** . . . ." 15 U.S.C. § 376a(a)(3) (AD-6) (emphasis added).

Pursuant to 15 U.S.C. § 376a(d), "no delivery seller may sell or deliver to any consumer, or tender to any common carrier . . . any cigarettes . . . unless, ***in advance of the sale, any cigarette*** . . . ***excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State***." 15 U.S.C. § 376a(d)(1)(A) (AD-7) (emphasis added). The same requirement applies to local government excise taxes on cigarettes, with the delivery seller being required to identify, collect, and remit those taxes to the local government prior to delivery. 15 U.S.C. § 376a(d)(1)(B) (AD-7). The PACT Act's taxing scheme makes no distinction between cigarette sellers that have minimum contacts with the taxing jurisdiction and those that have no measurable contacts whatsoever.

The Government would have the Court believe that the PACT Act merely enhances the Jenkins Act. This is not true. To the extent it has been applied, the Jenkins Act required remote sellers to report their out-of-state sales to the States in which their cigarettes were sold. It did not impose on out-of-state sellers the impossible burden of identifying, collecting, and remitting cigarette excise taxes to thousands of State and local taxing jurisdictions.

According to the Government, the PACT Act was promulgated to remove "unfair competition from illegal sales [that] take[] billions of dollars of sales away from law-abiding retailers throughout the country." Brief on behalf of the Appellant/Cross-Appellee United States of America at 9, *Red Earth v. United States*, No. 10-3165 (2d Cir. Sept. 28, 2010) (Dkt. 227) (hereinafter "Gov't Opening Br."). Contrary to the Government's suggestion, Red Earth is a law-abiding retailer, and there exists no evidence to the contrary.

The Government insinuates that Native Americans commit "illegal sales" and engage in "unfair competition" because they do not identify, collect, and remit local taxes on sales of cigarettes to out-of-state purchasers. The reason for this is simple, and there is nothing illegal about it. Local taxes that may be owed by a cigarette purchaser are not collected and remitted in advance, because an

out-of-state seller lacking minimum contacts with the jurisdiction into which it was selling simply had no legal duty to identify, collect, and remit that distant jurisdiction's excise taxes.

Moreover, the Government's bald assertion that the Jenkins Act may be applied to Indian Country is belied by the fact that the Government exercised no previous enforcement effort against Native Americans in Indian Country in the 61 years since its passage, that the Jenkins Act did not sufficiently represent the assertion of a federal interest to support it as a law of general applicability enforceable against Native Americans on reservations, and that recent decisions raise substantial questions about its enforceability against Native Americans on reservations. Whether the Jenkins Act ever could have been enforced in Indian Country remains an open question, one that Red Earth believes should be answered in the negative. Plainly, Red Earth and other Native American remote sellers are not the illicit criminals that the Government irresponsibly portrays them to be.

Red Earth, LLC is a tobacco retail business owned and operated by plaintiff Aaron J. Pierce. Pierce Aff. at ¶ 3 (JA 95). Mr. Pierce is an enrolled member of the Seneca Nation of Indians, and his business is located on the

Cattaraugus Indian Reservation, a Seneca Nation of Indians Territory. *Id.* at ¶¶ 1, 3 (JA 94-95). Mr. Pierce has operated this tobacco retail business since 2000. *Id.* at ¶ 3 (JA 95). One hundred percent of Red Earth's business is conducted via the Internet, and, at one time, it transacted business in 46 of the 50 States. *Id.* at ¶ 6 (JA 95). Red Earth's customers in New York and in other States included members of the Seneca Nation of Indians and members of other federally-recognized tribes. *Id.* at ¶ 17 (JA-98).

Although it ships cigarettes to customers throughout the United States, Red Earth does not occupy physical property in any State. Red Earth Compl. at ¶ 31 (JA 80). Moreover, Red Earth does not have employees or agents in any State. *Id.* It conducts operations solely from the lands of the Seneca Nation. *Id.* Its only contact with residents of any State is by mail, wire, or common carrier. *Id.*

Prior to the enactment of the PACT Act, Red Earth shipped cigarettes to its customers by way of the United States Postal Service. *Id.* at ¶ 8 (JA 96). The PACT Act now prohibits the shipment of cigarettes in the mail, so Red Earth must use alternate means to deliver its product to customers. Now and in the past, Red Earth always exercised appropriate precautions to ensure that its customers are of legal age to purchase cigarettes. *Id.* at ¶ 9 (JA 96).

The PACT Act places on Red Earth the extraordinary burden of complying with countless State and local laws that are "generally applicable" to cigarettes. 15 U.S.C. § 376a(a)(3) (AD-6). In advance of the sale and in complete disregard of whether minimum contacts exist, the PACT Act requires Red Earth to identify, collect, and remit the cigarettes excise taxes of every taxing jurisdiction into which Red Earth ships cigarettes. 15 U.S.C. § 376a(d)(1) (AD-7). Failure to comply with the impermissible reach of the PACT Act subjects Mr. Pierce and Red Earth to felony prosecution and large civil fines, in addition to civil claims by Big Tobacco. 15 U.S.C. §§ 377(a)-(b), 378(d) (AD-12-16).[1] Red Earth cannot continue to do business if it is forced to navigate the myriad State and local tax laws – and other laws generally applicable to cigarettes – to which the PACT Act would hold it accountable. As a consequence, the District Court properly found that Red Earth would be irreparably harmed by the enforcement of the PACT Act. *See* JA 10-11.

SUMMARY OF THE ARGUMENT

This case concerns the federal government's relationship to the States, and the States' relationships to each other and to their citizens. It is about the

[1] Not only is the scope of the statute unprecedented, but so is the private right of action it provided to Red Earth's direct competitors, namely Big Tobacco. 15 U.S.C. §§ 377(a)-(b), 378(d) (AD-12-16).

constitutionally-infirm, wide reaching implications of a law that would result in the imposition of tax enforcement obligations on out-of-state sellers that receive no benefit from taxing jurisdictions, including the right to vote for representatives who would advocate on their behalf. The statute offends the Constitution by its attempt to forcefully submit the sellers to the reach of remote jurisdictions with which they have no nexus.

The Government would have this Court believe that this case is about public health. It is not. In fact, despite the Government's and Amici's focus on tobacco's effect on public health, public health as a general proposition is not even identified as a purpose of the statute.

A sober look at the PACT Act reveals that the overriding purpose is to raise State revenue. The Government is seeking to raise revenue and is willing to push beyond constitutional bounds to do it. Even during difficult economic times, to permit a State or local government to impose on out-of-state sellers an otherwise impermissible collection burden offends fairness and justice. Cigarettes and Native Americans are convenient scapegoats. Cigarettes are a demonized, albeit legal, product, and Native Americans are a small population of people whose sovereignty often is misunderstood and resented.

The District Court did not err in enjoining provisions of the PACT Act. In fact, there are additional compelling reasons why the Act should be struck. The first is that it is discriminatory in its effect on Native Americans. The animus towards Native Americans that underlies the Act is evident in its text, in legislative history, and is reinforced throughout the Government's and Amici's submissions.

Contrary to the strident urging of the opposition, Native Americans have violated no laws nor have they taken any unfair advantage. The advantage of remote sales, if there is one, rests in the confluence of one of the incidents of federalism and the Due Process protection of minimum contacts as a predicate for jurisdiction. The PACT Act's stated purpose of requiring out-of-state sellers of cigarettes to "comply with the same laws that apply to ***law-abiding*** tobacco retailers" reveals unmistakable animus toward Native Americans, who the Government has admitted comprise the large majority of remote cigarette sellers. *See* JA 286-290.

Another compelling reason why the PACT Act violates the Constitution is because Congress acted beyond its enumerated powers and violated the Tenth Amendment. In attempting to legislate over State taxation, which is a

power reserved to the States, Congress stepped outside of the constitutional restraints that inexorably bind it. It is for this reason that Red Earth has standing to assert its Tenth Amendment claim.

Moreover, while the PACT Act purports to regulate only tobacco products, the law has wide reaching implications for remote sales of all goods. It is prudent to look at the precedential potential of this law beyond mere tobacco products.

STANDARD OF REVIEW

This Court should use an abuse of discretion standard to review those portions of the District Court's preliminary injunction decision and order concerning the merits of the parties' arguments. *See Connecticut Ass'n of Healthcare Facilities, Inc. v. Rell*, No. 10-2237-cv, 2010 U.S. App. LEXIS 20634 at *2 (2d Cir. Oct. 6, 2010). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Id.* (internal citations omitted).

With respect to the District Court's finding that Red Earth lacks standing to assert its Tenth Amendment claim, this Court should review that portion of the decision and order *de novo*. *See Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004).

ARGUMENT IN OPPOSITION TO THE GOVERNMENT'S APPEAL

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS HAVE A LIKELIHOOD OF SUCCESS ON THEIR DUE PROCESS CLAIM.

A. The District Court Correctly Found That The PACT Act Violates Due Process.

Contrary to the Government's argument, the District Court did not question Congress's proper use of commerce power. Instead, the District Court found that the Act completely disregards Due Process constraints on that power. JA 22, 23, 27. It is axiomatic that Congress must exercise its commerce power as limited by the Fifth Amendment. *See, e.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602, 55 S. Ct. 854, 868 (1935) (use of commerce power improper where federal statute violated the Fifth Amendment); *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (Congress's commerce power "may be exercised to its utmost extent, and acknowledges no limitations, ***other than are prescribed in the constitution***") (emphasis added); *Consumer Mail Order Ass'n v. McGrath*,

94 F. Supp. 705, 709 (D. D.C. 1950) (Acts of Congress created under authority of the Commerce Clause are unconstitutional if they violate Due Process).

The Government contends that the District Court erred in failing to uphold Congress's use of commerce power in aid of the States, even though the resulting statute violates Due Process. It may be that States have been unable to create an effective excise tax collection scheme, but neither the States, nor Congress on their behalf, may enforce a scheme to collect those taxes if the scheme offends Due Process. Congress is no less constrained by the Due Process Clause than the States, even when exercising its commerce powers.[2]

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[2] Amicus New York City's argument about tax collection and payment fails to recognize the relevant question, to wit, whether a statute that lacks any minimum-contacts threshold can constitutionally impose a collection and payment burden on an out-of-state seller. It is beyond dispute that as of this action's filing, New York State had no valid and enforceable tax scheme applicable to Native American cigarette sellers. *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 904 N.Y.S.2d 312 (2010). Indeed, even today, New York State's June 2010 cigarette-tax law and emergency regulations directed at Native American cigarette sellers is the subject of ongoing federal court litigation that has resulted in the State law and regulations being enjoined. *Oneida Nation v. Paterson*, No. 10-cv-1071, slip. op. (N.D.N.Y. Oct. 14, 2010) (Dkt. 61); *see also Seneca Nation of Indians v. Paterson*, No. 10-cv-687A, slip. op. (W.D.N.Y. Oct. 14, 2010) (Dkt. 87). Tellingly, these arguments hail from a City whose leader apparently believes that disputes with Native Americans should be resolved via violent State action. *See* Tom Precious, *Mayor Offers Advice on Cigarette Taxes*, BuffaloNews.com (August 13, 2010) (http://www.buffalonews.com/city/article101096.ece) (quoting New York City Mayor Michael Bloomberg's August 13, 2010 radio broadcast where he suggested that Governor David Paterson

In support of its argument, the Government cites federal laws by which Congress used its commerce power to aid State police power. Gov't Opening Br. at 40 (Dkt. 227). Those laws are distinguishable from the PACT Act. For example, 18 U.S.C. § 922(b)(2) and 18 U.S.C. § 842(c) prohibit sales of goods into States that prohibit their citizens from dealing with the same goods. Under those laws, Congress commits the out-of-state sellers to federal commerce power, not to ***State*** power. In comparison, the PACT Act commits sellers to ***State (and local) taxing jurisdiction***, rather than federal taxing jurisdiction, because State and local – not federal – tax laws are being imposed.[3] Moreover, not one of those statutes or the pre-amendment Jenkins Act delegates to

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should get himself "a cowboy hat and a shotgun" to force Native Americans to submit to New York State's tax collection scheme).

[3] The PACT Act seeks to effect this result by irrebuttably presuming that the cigarette sale occurs in the place of delivery. 15 U.S.C. § 375(9)(B). This presumption obviously contradicts the universally-applied rules of sale set out in the Uniform Commercial Code, which has been codified in some version by every State. In contrast to the PACT Act's presumption that the sale occurs at the place of delivery, under New York's Uniform Commercial Code, unless the parties contract otherwise, a sale is complete when the seller places the goods into the delivery stream. N.Y. U.C.C. § 2-401(2) (McKinney's 2010). Among other things, this rule prevents the precise extra-territorial exercise of power the District Court enjoined in this case. *See, e.g.*, *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999) (invalidating a Wisconsin statute that attempted to regulate the price of milk sold to a Wisconsin purchaser by an Illinois seller, because title to the milk passed in Illinois; consequently, Wisconsin had no tax jurisdiction over the Illinois seller).

States and to direct competitors enforcement authority the way that the PACT Act does. *See* 15 U.S.C. § 378(c)-(d).

The Government suggests that enjoining the PACT Act requires overruling *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, 57 S. Ct. 277 (1937) and *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S. Ct. 180 (1917). Gov't Opening Br. at 27-28 (Dkt. 227). First, it was recognized by the dissent in *Granholm v. Heald*, 544 U.S. 460, 125 S. Ct. 1885 (2005) that the vitality of those decisions, together with the enforceability of the Webb-Kenyon Act, is doubtful. Second, whereas those cases concerned statutes that aided State police power, this case concerns a statute that forces on out-of-state actors a requirement that they submit to State legislative and taxing jurisdiction. The statutes in those cases, unlike the PACT Act, did not require out-of-state sellers to submit to State laws.

The Government also relies on the Contraband Cigarette Trafficking Act ("CCTA"). It too is distinguishable. Unlike the PACT Act, the CCTA applies equally to in-state and out-of-state sellers and does not require collection and pre-payment of a tax before cigarettes are shipped into a State, nor does it require that the seller comply with all other laws in the taxing jurisdiction that may be

generally applicable to tobacco sales. *See* 18 U.S.C. § 2342(a). Likewise, the pre-amendment Jenkins Act is distinguishable. It imposed a ***federal*** reporting scheme, not a requirement that sellers comply with individual ***State*** reporting schemes, and did not delegate authority to States or to a seller's direct competitors to enforce the Act. *See* 15 U.S.C. §§ 375-378 (1955).

None of the statutes and cases the Government cites supports the position that Congress's use of commerce power to aid States is valid when the use of that power offends Due Process.

B. The District Court Correctly Analyzed Minimum Contacts in Terms of State Taxing and Legislative Jurisdiction.

The Government alleges that the PACT Act subjects out-of-state sellers to federal, not State, jurisdiction, because the Act is a federal law. Gov't Opening Br. at 26-28 (Dkt. 227). The Government contends, therefore, that the District Court erred in applying *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S. Ct. 1904 (1992), because that case involved a State, rather than federal, law. Gov't Opening Br. at 27 (Dkt. 227). This contention mistakenly assumes that plaintiffs' sole challenge is to Congress's ***legislative*** jurisdiction over interstate commerce and conveniently ignores that the PACT Act presumptively subjects

out-of-state sellers to the taxing and legislative jurisdiction of the ***States***, leaving them no recourse but to comply or face felony charges regardless of whether their contacts with a State legitimizes the assertion of that State's legislative jurisdiction.[4]

For purposes of this appeal, Red Earth is not challenging Congress's power to ***legislate*** in the field of interstate commerce, and the District Court's injunction did not rest on Congress's Commerce Clause authority. Instead, implicit in the District Court's decision is a finding that a ***State's taxing and legislative jurisdiction*** over out-of-state sellers is constrained by Due Process.[5]

The PACT Act concerns separate actors exercising distinct types of jurisdiction: the legislative jurisdiction of the federal government on the one hand,

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[4] Violation of the PACT Act results in criminal penalties. 15 U.S.C. § 377(a)(1) ("Whoever knowingly violates this Act shall be imprisoned for not more than 3 years, fined under title 18, United States Code, or both"). Because the Act makes no exception for out-of-state sellers with insufficient minimum contacts, those sellers believing they have insufficient contacts first would have to risk prosecution before a determination of the Act's applicability would be made. As a result, the PACT Act violates Due Process because it fails to clearly identify what conduct is prohibited. *See City of Chicago v. Morales*, 527 U.S. 41, 58-59, 119 S. Ct. 1849, 1860 (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.).

[5] The Government's argument that the District Court improperly analyzed the issues in terms of State taxing jurisdiction might be valid if we were dealing with a ***federal*** tax, but we are not.

and the taxing and legislative jurisdiction of the States and their local governments on the other hand. The Government's contention to the contrary is inconsistent with several post-*Quill* Congressional use-tax bills, the terms of which demonstrate Congress's understanding that even ***federal*** legislation governing State taxing authority over out-of-state sellers must include consideration of the contacts between the affected sellers ***and the States*** themselves. For example, the "Tax Fairness for Main Street Business Act of 1994," S. 1825, 103rd Cong. (1994), and "The Independence for Families Act," H.R. 4414, 103rd Cong. (1994), both proposed after *Quill*, exempted from the use-tax collection requirement any seller not subject to personal jurisdiction in the State and whose one-year gross receipts were less than three million dollars in the United States or $100,000 in the State.[6] Similarly, the "New Economy Tax Simplification Act," S. 2401, 106th Cong. (2000), was introduced for the specific purpose of ensuring that out-of-state sellers had requisite nexus with ***States*** before those States could impose tax obligations, including use-tax collection obligations.

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[6] In addition, both of these post-*Quill* legislative actions, unlike the PACT Act, included provisions that would prevent States from using the nexus created by the use-tax provisions to assert nexus for other State-law purposes. *See* H.R. 4414, 103rd Cong., § 748(b) (1994); S. 1825, 103d Cong., § 7(b) (1994).

Like the sponsors of those bills, the District Court here recognized that a legitimate exercise of extra-territorial taxing power requires minimum contacts with the taxing jurisdiction, which, in this case, is the jurisdiction of States and localities. Thus, the District Court correctly analyzed the minimum contacts requirement in terms of State taxing jurisdiction, rather than federal legislative jurisdiction, and its reliance on *Quill's* Due Process minimum contacts test was proper.[7]

C. The Injunction Properly Protects All SFTA-Member Remote Sellers of Cigarettes and Smokeless Tobacco.

The Government argues that the District Court's injunction is too broad because it applies to ***all*** SFTA-member remote sellers of cigarettes and smokeless tobacco, even though, in the Government's view, some plaintiffs have

[7] The Government contends that because the PACT Act is a federal law, the relevant question is whether the seller has contacts with the United States as a whole, rather than with any particular State. Gov't Opening Br. at 26-27 (Dkt. 227). The Government did not raise this argument prior to the District Court issuing the injunction, and as a result, it waived its right to raise this argument on appeal. *See, e.g., Paese v. Hartford Life & Acc. Ins. Co.,* 449 F.3d 435, 446 (2d Cir. 2006). Even if the Government had properly raised this argument below, the cases it cites are inapposite, as they address the application of general jurisdiction, not taxing jurisdiction, or rely solely on application of Rule 4(k)(2) of the Federal Rules of Civil Procedure which governs jurisdiction over international litigants and "was specifically designed to 'correct[] a gap' in the enforcement of federal law in ***international*** cases." *Porina v. Marward Shipping Co.*, 521 F.2d 122, 126 (2d Cir. 2008) (emphasis added) (quoting Fed. R. Civ. P. 4 Advisory Committee's Note, 1993 Amendments).

sufficient contacts with taxing jurisdictions to satisfy Due Process concerns. Gov't Opening Br. at 29-34 (Dkt. 227). Specifically, the Government contends that Due Process is satisfied as to all remote sellers because they all take advantage of State and local economic markets, and even if the economic theory of minimum contacts is inapplicable, some plaintiffs' activities create sufficient nexus, showing that the Act is applicable in at least some circumstances. Finally, the Government argues that because the Act is applicable in some circumstances, under the *Salerno* standard[8] of facial review, the District Court erred in enjoining the Act on its face. Each of these arguments should fail, as the injunction appropriately protects all SFTA-member remote sellers of cigarettes and smokeless tobacco.

1. Availing Oneself of An Economic Market Does Not Create Minimum Contacts.

The Government contends that the Court erred in enjoining the PACT Act because there is "no doubt that remote sellers of cigarettes and smokeless tobacco purposefully avail themselves of the benefits of the ***economic markets*** of the taxing states." Gov't Opening Br. at 29 (emphasis added) (Dkt. 227). More specifically, the Government contends that by "undermin[ing] a state's tobacco control program by distributing untaxed cigarettes in the state, the seller purposefully avails itself of the benefits of the state's

[8] *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987).

economic market and the requirement of 'minimum contacts' is met." *Id*. at 30. But the Government cites no authority supporting its position that simply using a State's economic market, without more, qualifies as sufficient minimum contacts to satisfy Due Process concerns, and it appears that no court ever has agreed with this argument. In fact, the United States Supreme Court considered and rejected this theory of nexus. *See National Bellas Hess v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967) (where the majority of the Court considered and rejected the dissent's economic exploitation theory of nexus).

Moreover, the Government's description of the plaintiffs' business model is misleading. The Government contends that "the business model of remote sellers is predicated on selling discount tobacco products to customers nationwide ***who otherwise would pay state excise taxes at the point of sale***." Gov't Opening Br. at 29 (emphasis added) (Dkt. 227). The only way the customers would pay the excise tax ***at the point of sale*** is if an unconstitutional statute, such as the PACT Act, forced out-of-state sellers to do what the States should be doing – collecting the excise taxes from their citizens over whom they have valid taxing and legislative jurisdiction. It follows, then, that remote sellers are not undermining the States' tobacco control programs; rather, what undermines

the State's programs is their own failure to craft ***and enforce*** a constitutionally-valid method of collecting excise taxes from their citizens.

Putting aside the Government's self-serving mischaracterization of the plaintiffs' business model, the fact remains that without sufficient minimum contacts, forcing out-of-state sellers to identify, collect, and remit State and local government taxes – and to comply with all other generally-applicable laws and ordinances – offends principles of justice and fairness that are the foundation of the Due Process Clause.

2. There Is No Minimum Contacts Test That The District Court Could Have Employed to Save The PACT Act.

The Government contends that the District Court should have limited the injunction to those remote sellers having no minimum contacts with the taxing jurisdictions. Gov't Opening Br. at 30-34 (Dkt. 227). In the first place, this would have required the District Court to perform the task that Congress should have done, which is to create a statutory exception for remote sellers that lack sufficient Due Process contacts with a taxing jurisdiction. Instead, Congress blithely "legislate[d] the due process requirement out of the equation." JA 20.

The Government's contention that the District Court could have found minimum contacts as to those plaintiffs that make a single sale via the Internet into any of the myriad State and/or local taxing jurisdictions also is flawed. Gov't Opening Br. at 32-33 (Dkt. 227) (citing *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010) and *Illinois v. Hemi Group LLC*, No. 09-1407, 2010 U.S. App. LEXIS 19126 (7th Cir. Sept. 14, 2010)). First, even if those cases had been decided prior to issuance of the injunction, the District Court could not properly have relied on *Chloe* and *Hemi Group*, because those cases are adjudicative jurisdiction cases.[9] The factors a court must weigh to determine whether it may constitutionally exercise adjudicative jurisdiction over a defendant are not the same factors used to determine whether a State may constitutionally exercise legislative or tax jurisdiction over an out-of-state seller. As the Seventh Circuit Court of Appeals noted in *Hemi*, the concept of "fair play and substantial justice" set forth in *International Shoe v. Washington*, 326 U.S. 310, 315, 66 S. Ct. 154, 159 (1945), contemplates consideration of

> [t]he burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the [underlying dispute], and the shared

[9] The term *adjudicative jurisdiction* is synonymous with personal jurisdiction and refers to a State's authority to serve process and render valid judgments against out-of-state parties.

> interest of the several States in furthering fundamental substantive social policies.

Hemi Group, 2010 U.S. App. LEXIS 19126, *13-14 (quoting *Purdue Research Fdn. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 781 (7th Cir. 2003)). These adjudicative jurisdiction factors are not transferable to the separate realm of taxing jurisdiction and are of questionable utility with regard to a determination of whether the exercise of taxing jurisdiction meets Due Process requirements.[10] For example, the court in *Chloe* was determining whether the New York long-arm statute permitted adjudicative jurisdiction over an out-of-state party committing a trademark infringement tort in another State. *Chloe,* 616 F.3d at 158. The court could not have used the same factors to determine whether New York has taxing jurisdiction over the same party.

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[10] For a detailed discussion of jurisprudence distinguishing taxing jurisdiction from adjudicative jurisdiction, see Maryann B. Gall, et. al., *Limitations on States' Jurisdiction to Impose Sales and Use Taxes*, 1420:0017-0020, Tax Management Inc. Multistate Tax Portfolios (2010). Gall cites, as an example, *Kulick v. Dept. of Revenue*, 290 Or. 507, 624 P.2d 93 (Or. 1991), *appeal dismissed*, 454 U.S. 803 (1981), in which the Oregon Supreme Court noted that "[t]he case before us does not present the issue of the state's ability to collect the challenged taxes by means of enforceable judgments against the nonresident plaintiffs . . . . The cases on state court jurisdiction from which plaintiffs quote are therefore of doubtful relevance. The only issue here is the validity of the tax itself, when assessed directly against nonresident shareholders . . . . Although 'nexus' and 'contacts' may be verbally synonymous, however, it need not follow that they are functionally identical in defining the conditions under which a state may tax and those under which it may adjudicate."

Moreover, the Government's contention that the District Court could have relied on *Hemi Group* to support a finding of sufficient contacts between some plaintiffs and some taxing jurisdictions ignores the fact that the Seventh Circuit Court of Appeals specifically qualified its holding as fact-specific:

> We note the concern that '[p]remising personal jurisdiction on the maintenance of a website without requiring some level of 'interactivity' between the defendant and consumers in the forum State, would create almost universal personal jurisdiction because of the virtually unlimited accessibility of websites across the country.' ***Courts should be careful in resolving questions about personal jurisdiction involving online contacts*** to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum State, ***even if that site is 'interactive.'*** Here, we affirm the district court's conclusion that Hemi is subject to personal jurisdiction in Illinois, not merely because it operated several 'interactive' websites, but because Hemi had sufficient voluntary contacts with the State of Illinois. We make no comment on whether Hemi may be subject to personal jurisdiction in any other State.

Hemi Group, 2010 U.S. App. LEXIS 19126, *15-16 (internal citations omitted) (emphasis added). Moreover, the court in *Hemi Group*, while noting that several jurisdictions have accepted the sliding-scale Internet-jurisdiction analysis set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), "expressly declined to do so." *Id.* at *10-11.

Neither *Hemi Group* nor any other adjudicative-jurisdiction case is dispositive on the issue of whether a remote seller has contacts with every cigarette-taxing jurisdiction to legitimize imposition of their tax-collection burdens, because determinations of adjudicative jurisdiction are, and must be, fact-specific. It follows, then, that there is no bright line test the District Court could have employed. Instead, the District Court would have had to engage in an arduous, fact-intensive analysis, which, given the number of plaintiffs compounded by the number of taxing jurisdictions, it was not required to perform at the preliminary injunction stage. *See International Molders' & Allied Workers' Local Union v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986) ("[A]n evidentiary hearing should not be held [at the preliminary injunction stage] when the magnitude of the inquiry would make it impractical."); *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. 1953). As a consequence, this Court should conclude that the District Court did not err in crafting an injunction that protects the plaintiffs from the injustice of Congress's failure to consider Due Process minimum contacts.

3. The District Court Correctly Analyzed the PACT Act on Its Face.

Contrary to the Government's repeated assertion that the District Court's conclusion rested on a finding that plaintiffs did not meet the

minimum contacts threshold set forth in *Quill*, the District Court actually concluded that the Due Process minimum contacts test set out in *Quill* could not be applied to the PACT Act because the Act creates the "unique problem" of requiring "remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes on cigarettes and smokeless tobacco ***regardless of whether their existing contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations***." JA 20 (emphasis added). As a result, the District Court's determination rested on the ***complete absence*** of any consideration or assessment of minimum contacts, not on the absence of minimum contacts between a particular seller and a taxing jurisdiction.[11]

In any case, based on its flawed conclusion that the court could have determined that some plaintiffs have sufficient contacts with some taxing jurisdictions to satisfy Due Process, the Government contends that the District Court erred in determining that the Act is facially invalid. Gov't Opening Br. at 34 (Dkt. 227). The Government argues that a statute can be struck on a facial challenge only if it is "unconstitutional in all of its applications," a standard set forth in *United States v. Salerno,* 481 U.S. at 751, 107 S. Ct. at 2103, or has no

[11] Insofar as no discovery yet has been conducted, such an assessment would be mere speculation.

"plainly legitimate sweep," a standard reiterated in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450, 128 S. Ct. 1184, 1190 (2008). Gov't Opening Br. at 34.

The applicability of the *Salerno* standard in this case is questionable. *See Washington State Grange*, 552 U.S. at 449-450 (noting that "some Members of the Court have criticized the *Salerno* formulation"). In fact, several Justices have questioned whether the *Salerno* standard can validly apply in any case. *See Washington v. Glucksberg*, 521 U.S. 702, 739-40, 117 S. Ct. 2258 n. 6-7 (1997) (Stevens, J., concurring in judgments); *Morales*, 527 U.S. at 55, 119 S. Ct. at 1858 n.22 (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court").

Facial challenges derive from the principle that "no one may be judged by an unconstitutional rule of law." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238 (1994). From that premise evolves the notion that courts can efficiently address constitutional concerns without engaging in a long and arduous process of case-by-case analyses. *See id.*

at 277; *see also* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1352-53 (2005). Thus, facial challenges are justified when as-applied adjudication would be "inadequate to protect constitutional norms." *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (quoting Gans, 85 B.U. L. Rev. at 1337). This is especially true where a statute such as the PACT Act will unfairly and unjustly ensnare out-of-state sellers having insufficient contacts with some jurisdictions.

Unless the PACT Act is struck on its face, district courts will be left to repeatedly sort out the legitimate from the illegitimate enforcement of the Act. In such circumstances, facial, rather than as-applied, review is most effective. *See*, *e.g.*, *Morales*, 527 U.S. at 55, 119 S. Ct. at 1861 ("The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large'") (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). Clearly, Congress's failure to employ a minimum-contacts threshold gives the Act an unconstitutionally broad sweep that is not plainly legitimate. As a result, even if the PACT Act could be constitutionally applied to one out-of-state seller, the District Court did not err in enjoining the Act as to all of the plaintiffs.

D. The District Court Correctly Enjoined the Vague and Sweeping "All Laws Generally Applicable" Provision of the PACT Act.

Contrary to the Government's argument, the District Court's injunction prohibiting enforcement of 15 U.S.C. § 376a(a)(3) and (4) and § 376a(d) was not overly broad, and the court gave sufficient reason for the scope of its injunction.[12] The District Court's order enjoins enforcement of § 376a(a)(3) and (4) and § 376a(d). Judge Arcara provided a compelling rationale for the injunction, explaining that:

> the PACT Act automatically subjects a remote seller to "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco" of the forum where those products are delivered, ***notwithstanding the presence or absence of any other contacts with that forum***. This means that plaintiffs will now be subject to the taxing jurisdiction of every state, municipality, village, town and school district that imposes taxes on sales of cigarettes and smokeless tobacco. ***By failing to require any minimum contacts before subjecting the out-of-state retailer*** to "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco," Congress is broadening the jurisdictional reach of each state and locality ***without regard to the constraints imposed by the Due Process Clause***. ***That it cannot do. It would***

[12] Like several other arguments, the Government failed to raise this issue before the District Court; thus, the issue is not properly before this Court. Even if the issue were properly before this Court, the injunction was narrowly drawn. In fact, given the court's reasoning, Red Earth believes the injunction is too narrow and should have included the reporting requirements set out in section 376a(a)(2).

> ***appear that the PACT Act seeks to legislate the due process requirement out of the equation. To the extent that it does and that doing so is beyond Congressional authority, plaintiffs have established a clear likelihood of success on the merits of their due process claim.***

JA 20 (emphasis added) (footnote omitted).

Judge Arcara's detailed analysis sufficiently explains the rationale underlying the injunction he ordered. Indeed, the District Court's injunction has not prevented the federal government from enforcing many of the provisions of the PACT Act. For example, even though the injunction prevents enforcement of ***State*** sales-to-minors laws, the provisions creating a ***federal*** regulation of sales to minors remain enforceable.[13] The District Court's order enjoins only those provisions of the PACT Act that expand and change State laws so that they apply directly to out-of-state sellers without regard for whether the sellers have sufficient contacts to support a constitutional exercise of extra-territorial State or local power.

Finally, the Government contends that because the States have an interest in enforcing some of the laws that have been enjoined, the court should not have included those laws in its order. Gov't Opening Br. at 29, 35-39 (Dkt. 227).

[13] Moreover, the District Court had before it unrebutted facts demonstrating that the plaintiffs have in place a strong policy and procedure to prevent sales to minors. *See*, *e.g.*, JA 96; JA 119-121.

In this respect, the Government's argument completely misses the purpose of Due Process protections. Early in the Nation's history, the Supreme Court noted that the Due Process Clause was included in the Constitution to protect citizens against the very type of violation present here – a government's attempt to assert power outside the constraints of the Constitution. *See*, *e.g.*, *Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 276-277 (1856) ("It is manifest that it was not left to the legislative power to enact any process which might be devised. The [Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will"). Regardless of the States' interests, Congress cannot exercise commerce power to enact a law, such as the PACT Act, that violates the Due Process Clause of the United States Constitution.

POINT II

THE DISTRICT COURT PROPERLY ADDRESSED THE PUBLIC INTEREST AND CORRECTLY FOUND THAT THE EQUITIES BALANCE IN FAVOR OF RED EARTH GIVEN THE IRREPARABLE HARM CAUSED BY ENFORCEMENT OF THE ACT.

The Court reviews the grant of a preliminary injunction for abuse of discretion. *Rell*, No. 10-2237, 2010 U.S. App. LEXIS 20634, *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010). Judge Arcara did not

abuse his discretion when he concluded that a balancing of the equities weighed decidedly in favor of plaintiffs, because he did not premise his decision on a clearly erroneous finding of fact. *Metro. Taxicab*, 615 F.3d 152.

Where the life of a litigant's business or enterprise is threatened, the calculus tips in favor of granting injunctive relief. *Random House, Inc. v. Rosetta Books, LLC*, 283 F.3d 490 (2d Cir. 2002); *see also Doran v. Salem Inn, Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561, 2568 (1975) (unrebutted allegation that litigants will suffer "substantial loss of business and perhaps even bankruptcy" supports preliminary injunction "for otherwise a favorable final judgment might well be useless"); *Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401 (2d Cir. 1994). Judge Arcara properly found that Red Earth's business would be destroyed if the enjoined provisions are enforced. JA 43. Judge Arcara also found that other retailers would be put out of business, and the local economy would suffer. *Id.* For that reason, Judge Arcara correctly held that the equities and public interest weighed in favor of granting injunctive relief.

Without providing any authority, the Government contends that "compliance with the laws of different jurisdictions is an administrative burden that is commonly borne by a businesses [*sic*] that choose to engage in nationwide

commerce, and cannot suffice to establish irreparable harm." Gov't Opening Br. at 40 (Dkt. 227). Regardless of what other businesses do, Red Earth sufficiently demonstrated that it will be forced out of business, and its employees no longer will be employed if the Act is enforced. This is irreparable harm. *Acquaire*, 24 F.3d at 412.

Rather than disputing Red Earth's evidence of irreparable harm, the cases on which the Government relies simply stand for the proposition that States have the right to compel Native American cigarette retailers located within their borders to identify, collect, and remit cigarette excise taxes on behalf of the States. It is revealing that the Government's authority is limited to the States' authority to compel Native Americans ***within their borders*** to collect and remit cigarette excises taxes on the States' behalf. Red Earth has not raised that as an issue in this lawsuit. Instead, Red Earth contends that Congress cannot force out-of-state sellers to identify, collect, and remit State and local cigarette excise taxes when those sellers do not have sufficient minimum contacts with the taxing jurisdiction.

Moreover, deprivation of a constitutional right is presumptively recognized as irreparable harm. *See* JA 10; *see also Johnson v. Miles*, 355 Fed. Appx. 188, 196 (2d Cir. 2009) ("because an alleged violation of a

constitutional right 'triggers a finding of irreparable harm,' [plaintiff] necessarily satisfied the requirement that a party applying for a preliminary injunction show irreparable harm.") (*citing Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)); *Ward v. New York,* 291 F. Supp. 2d 188, 196 (W.D.N.Y. 2003).

In balancing the public interest, the District Court was mindful of this violation of Due Process rights. It also was mindful of the far-reaching consequences of the PACT Act and what that might mean to the public:

> if Congress possesses the authority to subject out-of-state retailers to *every* state and local taxing jurisdiction into which their products are delivered, then it has authority to do so for *all commercial products*, not just cigarettes. Certainly, the public interest favors staying enforcement of a sweeping and unprecedented congressional mandate pending opportunity by this Court and others to fully consider the positions of all parties . . . .

JA 44-45. The Amici States fault the District Court for failing to thoroughly weigh the public interest. They argue that "***congressional purpose 'is in itself a declaration of the public interest***'." Brief on behalf of New York and other States at 9, *Red Earth v. United States*, No. 10-3165 (2d Cir. Oct. 5, 2010) (Dkt. 247) (citing *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 57 S. Ct. 592 (1937)) (emphasis added). Their insistence that the District Court failed to give consideration to the public interest underlying the PACT Act is fatally undermined by Judge Arcara's assurance that he was "***mindful that an act of Congress***

represents the collective will of a majority of our nation's democratically-elected representatives and that plaintiffs who seek to enjoin a federal statute face a heavy burden." JA 42 (emphasis added).

Judge Arcara conducted a lengthy and thorough hearing, the transcripts from which demonstrate that he not only considered, but in fact analyzed and understood, Congress's findings. During the July 2, 2010 hearing, specifically in reference to balancing the equities and the harm to the public, the District Court asked SFTA's counsel "[w]asn't the intent [of the statute] to protect, I guess, the public minors?" Transcript of Oral Argument at 19, *Seneca Free Trade Ass'n v. Holder*, No. 10-cv-550 (W.D.N.Y. July 2, 2010) (AD-18). The District Court continued to question SFTA's counsel about Congress's findings: "[a]nd I guess also the fact that some of this money on the base of hearings was being used by terrorists?" *Id.* The District Court persisted, asking about the evidence before Congress indicating that terrorists were profiting from illegal cigarette sales. Transcript of Oral Argument at 20, *Seneca Free Trade Ass'n v. Holder*, No. 10-cv-550 (W.D.N.Y. July 2, 2010) (AD-20).

Later in the hearing, the District Court returned to Congress's concern about minors obtaining cigarettes:

> Let me ask you this, by excluding Hawaii and Alaska, does that mean that Congress wasn't concerned about minors smoking in those two states?
>
> ***
>
> If the concern is terrorists and the concern is minors, what about the minors in Hawaii and Alaska?

Transcript of Oral Argument at 21, *Seneca Free Trade Ass'n v. Holder*, No. 10-cv-550 (W.D.N.Y. July 2, 2010) (AD-21). The District Court's inquiries about underage smoking and the allegations that Internet cigarette sales fund terrorist organizations indicate that it thoroughly considered the public interests underlying the PACT Act.

In its decision and order, the District Court made it clear that it was granting injunctive relief, in part, because of the public interest in doing so. JA 42-45. In coming to this conclusion, the court set forth the findings of fact it found persuasive. For instance, the court found that remote cigarette retailers will be put out of business and " severe economic consequences [are] likely to befall . . . members of the Western New York community" in the absence of an injunction. JA 43.

Assuming for the sake of argument that the PACT Act is constitutional, the only harm to the Government is delayed enforcement of the Act

against plaintiffs. The Government and Amici States tout public health as a major concern underlying the PACT Act and one that weighs in favor of reversing the grant of injunctive relief. But the Government has not and, indeed, cannot, prove that public health will be harmed ***as a result of*** the plaintiffs being able to sell cigarettes via the Internet during the pendency of this litigation without first having to identify, collect, and remit State and local cigarette excise taxes.[14] Accordingly, the harm to the Government, if any, is monetary damage capable of calculation, rather than the imminent and irreparable harm necessary to tip the equities in the Government's favor. *See, e.g., Rodriguez v. DeBuono*, 175 F.3d 227 (2d Cir. 1998). Plainly, the District Court did not fail to consider the public harm that results from enjoining the PACT Act. Any argument to the contrary should summarily be rejected by the Court.

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[14] Despite the Government's insistence that the PACT Act will benefit public health, the general public's health is not one of the Act's underlying purposes. This may be because deterring cigarette consumption is inconsistent with the desire to increase tax revenue from the sale of cigarettes. *See, e.g., Oneida Nation v. Paterson*, No. 10-cv-1071, slip. op. at 21, n.6 (N.D.N.Y. Oct. 14, 2010) (Dkt. 61).

ARGUMENT IN SUPPORT OF RED EARTH'S APPEAL

POINT I

RED EARTH DEMONSTRATED THAT IT LIKELY WILL SUCCEED ON THE MERITS OF ITS EQUAL PROTECTION CLAIM.

The PACT Act violates the Equal Protection guarantees of the Fifth Amendment, because it will have a racially disproportionate impact as applied, and discriminatory intent was a motivating factor behind its passage. As a consequence, Red Earth demonstrated that it likely will succeed on the merits of its Equal Protection claim.

Red Earth recognizes that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Village of Arlington Hts. v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S. Ct. 555, 563 (1977) (internal citations omitted). However, the District Court failed to address two critical aspects that hew closely to this general principle, aspects that when considered warrant a finding that Red Earth is likely to succeed on the merits of its Equal Protection claim.

First, the District Court neglected to consider that although racially disproportionate impact is not the "sole touchstone of an invidious racial

discrimination claim," it is not wholly irrelevant to an Equal Protection analysis. *Id.* Rather it is "an important starting point" for the analysis. *Arlington Hts.*, 429 U.S. at 266, 97 S. Ct. at 564. Second, in pursuing an Equal Protection challenge under an invidious discrimination theory, a plaintiff is not required to prove that the challenged action rested solely on racially-discriminatory purposes. *Arlington Hts*, 429 U.S. at 265, 97 S. Ct. at 563. Red Earth need show only that discriminatory intent was ***one factor*** in the passage of the PACT Act, not the sole factor. When these considerations are analyzed, it becomes clear that Red Earth is likely to succeed on the merits of its Equal Protection claim.

Determining whether invidious discrimination was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Hts.*, 429 U.S. at 266, 97 S. Ct. 564. Indeed, "[b]ecause discriminatory intent is rarely susceptible to direct proof, litigants may make a sensitive inquiry into such circumstantial and direct evidence." *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (internal citations omitted). Recognizing the reality that direct evidence of animus often will not be found in the text of challenged legislation, the Supreme Court requires consideration of the "totality of legislative actions." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 280, 99 S. Ct. 2282, 2296 (1979).

Although evidence of discriminatory impact cannot be the defining factor in an invidious discrimination claim, it should not be dismissed out of hand. "[W]hen the adverse consequences of a law upon an identifiable group are [inevitable], a strong inference that the adverse effects were desired can reasonably be drawn." *Feeney*, 442 U.S. at 279, 99 S. Ct. at 2296 n.25.

It is undisputed that the PACT Act will have a disproportionate effect on Native Americans. JA 286-290. The Government admitted that "the vast majority of retailers selling cigarettes and smokeless tobacco remotely are Native Americans" and even estimated that "at least 80 percent or more of cigarette and smokeless tobacco delivery sellers are Native American." JA 34. Moreover, as the District Court correctly found, Congress "was keenly aware" that the PACT Act would have this kind of a disproportionate impact on Native Americans. *Id.* Consistent with *Feeney*, then, it is reasonable to infer that the disparate impact on Native Americans was a desired effect of the PACT Act.

In addition to the adverse effect factor, the Supreme Court also has identified a number of other factors that are subjects of proper inquiry in determining whether discriminatory intent existed. Among them is the legislative

history of the challenged action. *Arlington Hts.*, 429 U.S. at 266-267, 97 S. Ct. at 564; *see also United States v. Moore*, 54 F.3d 92 (2d Cir. 1995). The legislative history of the PACT Act reveals that, at a minimum, one motivating factor behind Congress's intent in passing the legislation was to discriminately affect Native American sellers of cigarettes.

During the PACT Act public hearing, the Act's sponsor, Representative Anthony Weiner, testified that:

> [a]s you have rising taxes that are disparate from State to State, you are going to have an incentive for people to become ***scofflaws*** to try to evade the tax. You have it in the ***most extreme case in places that have no tax, meaning Indian reservations*** . . . .

PACT Act of 2007: Hearing Before Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary at 7, 110th Cong. 7 (May 1, 2008) (AD-22) (emphasis added). Referring to Native Americans as intentional law breakers was not sufficient for Rep. Weiner, however. He went on to declare that "[t]he States have to figure out how to deal with the Native American tribes . . . ." AD-23. Rep. Weiner undoubtedly meant that the PACT Act ***was the way*** for Congress to "deal with the Native American tribes."

Beyond Rep. Weiner's direct attack on Native Americans, the hearing was replete with incidents that – when taken together – demonstrate that a motivating factor behind the Act was to discriminate against Native Americans. For example, Steven Rosenthal from the New York State Association of Wholesale Marketers declared during the hearing that "the largest single source of counterfeit contraband cigarettes throughout the United States is New York State's Indian stores," and the Subcommittee accepted his proffered submission entitled "*Dissecting Cigarette Smuggling in NYC: Profits per Carton at each Level of Operation*." Interestingly, Mr. Rosenthal's submission referred ***only*** to Native American cigarette sellers. AD-24-25. As the hearing continued, Rep. Weiner noted that "[b]asically, what we are seeing overwhelmingly, the smuggling that is going on, is a handful of Web sites ***that are Native American tribes***. . . ." AD-27 (emphasis added).

What had been thinly-veiled discrimination boiled over into direct evidence of animus when Representative Louie Gohmert introduced a letter from the Seneca Nation of Indians during the hearing. The level of deference and respect shown to other submissions was noticeably absent when this letter from the Seneca Nation was submitted. When requesting that the letter be received, Rep. Gohmert stated that he would not vouch for the contents of the letter. In

response, Chairman Robert C. Scott noted that the letter "would be received with the spirit with which it [was] introduced," a statement that was followed by laughter among those present. AD-26. Clearly the Native Americans' concerns were not seriously being considered by Congress.

Not only was the disparate impact of the PACT Act recognized and embraced by Congress, but the legislative history demonstrates that the end result of the legislation – to discriminate against Native Americans – was intended. As a consequence, Red Earth demonstrated that it is likely to succeed on the merits of its Equal Protection challenge. The District Court erred to the extent it found otherwise.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT RED EARTH LACKS STANDING TO BRING ITS TENTH AMENDMENT CLAIM.

By attempting to levy State and local taxes, Congress is acting outside the scope of its enumerated powers and legislating over matters reserved to the States in violation of the Tenth Amendment. In deciding Red Earth's Tenth Amendment claim, the District Court did not address the merits, holding instead that Red Earth lacked standing, as a private party, to bring such a claim.

The Government has argued elsewhere that there are two types of Tenth Amendment challenges to an act of Congress. *See* Brief for United States on Petition for Writ of Certiorari, *Bond v. United States*, No. 09-1227 (July, 2010) (AD-38, 42). The first type of claim is based on Congress's intrusion on a State's sovereignty and is not, according to the Government, a claim that can be asserted by a private litigant. *See id*. Such claims, the Government contends, object to Congress's attempt to compel the States to act or object to Congress's commandeering of State laws. *See* AD-42-43

The second type of claim results from Congress acting outside of its enumerated powers and, in doing so, violating the Tenth Amendment by usurping a power reserved to the States. *See id.* The Government pointed out that the Supreme Court often has decided Tenth Amendment "enumerated-powers claims analogous to petitioner's on the merits, without any suggestion that the absence of a state litigant undermined standing." AD-43. The Government insists that a private litigant has standing to bring a claim based on this second type of challenge. *Id.*

In support of its argument, the Government cited *United States v. Comstock*, 130 S. Ct. 1949 (2010), *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) as examples of Supreme Court jurisprudence allowing private petitioners to assert Tenth Amendment claims. As did the Government in *Bond*, Red Earth cited *Morrison* and *Lopez* before the District Court in support of its argument that it had standing to assert a claim under the Tenth Amendment. The Government must agree, then, that the District Court erred in deciding that Red Earth lacked standing to bring a Tenth Amendment claim challenging Congress's power to legislate over State taxes.[15]

Red Earth contends that it has standing to bring a Tenth Amendment claim based either on Congress's intrusion on State sovereignty or because Congress acted outside the scope of its enumerated powers. Red Earth argues that the PACT Act violates the Tenth Amendment both because it infringes on a State's sovereign right to enact laws governing State taxation and because Congress lacks power to enact statutes that alter existing State tax laws. Indeed, "it is upon taxation that the several States chiefly rely to obtain the means to carry on their

[15] The United States Supreme Court recently granted certiorari in *Bond* to determine whether petitioner has standing to assert her Tenth Amendment claim. *Bond v. United States,* No. 09-1227, _ S. Ct. _, 2010 U.S. LEXIS 7989 (Oct. 12, 2010).

respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330 (2010) (internal citations omitted).

Nonetheless, the Amici States seek leave to inform this Court that they approve of the PACT Act.[16] This is not surprising as the PACT Act seeks to legislate away the constitutional constraints that restrict States from taxing out-of-state sellers. Regardless of whether these particular States support Congress's efforts, the Constitution limits Congress by requiring that it act only within its enumerated powers. The States cannot authorize Congress to use powers reserved to them. Indeed, as the United States Supreme Court noted:

> [t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments ***for the protection of individuals***. State sovereignty is not just an end in itself: Rather, ***federalism secures to citizens*** the liberties that derive from the diffusion of sovereign power.

[16] Although numerous States joined the New York Attorney General's Office in seeking amicus status, Alabama, Colorado, Kentucky, Mississippi, New Jersey, Oregon, Texas, Virginia, and Wisconsin did not.

New York v. United States, 505 U.S. 144, 181, 112 S. Ct. 2408, 2431 (1992) (emphasis added) (internal citations omitted).

Pursuant to its Article I powers, Congress may impose taxes uniformly across the Nation. *See* U.S. Const. art. I, § 8, cl. 1. There is, however, no enumerated power under which Congress may expand the scope and reach of State tax legislation. Because Red Earth's claim is based on Congress's overreaching, it has standing under the Tenth Amendment to challenge the PACT Act. Accordingly, Judge Arcara's ruling to the contrary should be reversed, and the issue should be remanded to the District Court for consideration on the merits.

CONCLUSION

Red Earth respectfully requests that this Court affirm that portion of the District Court's decision and order which held that (1) Red Earth showed a likelihood of success on the merits of its Due Process claim and (2) the balancing of the equities and public interest favored the grant of injunctive relief.

Red Earth also requests that this Court reverse that portion of the District Court's decision and order which held that (1) Red Earth failed to show a

likelihood of success on the merits of its Equal Protection claim and (2) Red Earth lacked standing to assert its Tenth Amendment claim.

Finally, Red Earth respectfully requests such other and further relief as the Court deems just and proper.

Dated: October 18, 2010

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CERTIFICATE OF COMPLIANCE WITH RULES 28(e)(2)(B)(i) AND 32(a)(7)(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to the Federal Rules of Appellate Procedure Rules 28.1(e)(3) and 32(a)(7)(c) that, according to the count of Microsoft Office Word 2003, the foregoing brief satisfies the type-volume limitations set forth in the Federal Rules of Appellate Procedure Rule 28.1(e)(2)(B)(i) because the brief contains 11,206 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(i). This brief satisfies the type-face requirements of the Federal Rules of Appellate Procedure Rule 32(a)(5) and the type-style requirements of the Federal Rules of Appellate Procedure Rule 32(a)(6), because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

s/ Lisa A. Coppola
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CERTIFICATE OF SERVICE

Docket Numbers 10-3165, 10-3213

I, Lisa A. Coppola, Esq., hereby certify under penalty of perjury that on October 18, 2010, I served a copy of Appellee/Cross-Appellant Red Earth's Brief via the CM/ECF Case Filing System. All counsel of record are registered CM/ECF users. In addition, I mailed six copies of Appellee/Cross-Appellant Red Earth's Brief by first-class mail to the Clerk of the Court.

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