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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LIL' BROWN SMOKE SHACK,	)	
	)	
Plaintiff,	)	**Case No. 2:09-cv-00044-N-EJL**
	)	
vs.	)	
	)	
LAWRENCE G. WASDEN, Attorney General of the State of Idaho; OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF IDAHO; RICHARD ARMSTRONG, Director of the Idaho Department of Health and Welfare; IDAHO DEPARTMENT OF HEALTH AND WELFARE; and DOES 1-10,	)	**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**
	)	
Defendants.	)	

INTRODUCTION

Defendants Lawrence G. Wasden, Attorney General of the State of Idaho, the Office of the Attorney General, Richard Armstrong, Director of the Idaho Department of Health and Welfare, and the Idaho Department of Health and Welfare (collectively "Defendants"), have asked this Court to dismiss Plaintiff Lil' Brown Smoke Shack's ("Plaintiff") complaint for the

following reasons:

1. The Eleventh Amendment deprives this Court of jurisdiction over the Office of the Attorney General and the Idaho Department of Health and Welfare ("Department"); and

2. This Court should abstain from exercising jurisdiction over the individual Defendants in accordance with Younger v. Harris, 401 U.S. 37 (1971).

Plaintiff concedes Defendants' Eleventh Amendment arguments. *See* Doc. No. 19 at 2 n.1. However, it opposes Younger abstention and dismissal on four grounds: (1) Because Plaintiff filed its complaint two days earlier than the State filed its state-court complaint, Younger does not apply; (2) the State does not have a "legitimate" interest in its state-court lawsuit; (3) Younger abstention is not appropriate here because authority over relations between Indians and the states is an item of federal responsibility; and (4) Younger abstention is not appropriate here because the State's lawsuit is based upon a state law that is "'flagrantly and patently violative of express constitutional prohibitions,'" *quoting* Younger, 401 U.S. at 53-54. Doc. No. 19 at 3-4. None of Plaintiff's grounds has merit.

ARGUMENT

As discussed in Defendants' opening brief, Younger requires dismissal where: (1) there is an ongoing state judicial proceeding; (2) the state proceeding implicates important state interests; and (3) there is an adequate opportunity in the state proceeding to raise the federal claims. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982); H.C. *ex rel* Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000). This doctrine further dictates that the federal matter be dismissed rather than stayed, as may be appropriate under some other forms of

abstention, such as the Pullman doctrine. Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gilbertson v. Albright, 381 F.3d 965, 981 (9th Cir. 2004) (*en banc*); *See* Doc. No. 8-2 at 5-11.

I. THE STATE-COURT MINORS' ACCESS ACT ENFORCEMENT SUIT, FILED TWO DAYS AFTER PLAINTIFF FILED THIS ACTION, IS AN ONGOING JUDICIAL PROCEEDING FOR YOUNGER PURPOSES

The first condition for Younger abstention—that there is an ongoing state judicial matter—is satisfied. The State of Idaho filed its action against Plaintiff in the Fourth Judicial District, Ada County, on February 9, 2009, for violations of the Minors' Access Act. The State served Plaintiff on March 16, 2009. Doc. No. 23-2 at ¶ 26. Under the Idaho Rules of Civil Procedure, Plaintiff has until April 6, 2009 to respond to the State's complaint. Plaintiff's response to these undisputed facts is two-fold: (1) the crucial date for determining whether there is an ongoing state judicial proceeding is the date the federal action was filed and since Plaintiff filed prior to the State, Younger does not apply; and (2) even if the State's lawsuit is considered ongoing, it has no such legitimacy. Doc. No. 19 at 8-11. Neither argument is well taken.

In Plaintiff's view, the ongoing-state-court-proceedings element of Younger is simply a race to the courthouse. This view, in the words of the Supreme Court, "trivialize[s] the principles of Younger v. Harris." Hicks v. Miranda, 422 U.S. 332, 350 (1975), *overruled on other grounds*, Mandel v. Bradley, 432 U.S. 173 (1977) (*per curiam).* As the Ninth Circuit has observed further, '[t]here is no doubt that **interference** with state proceedings is at the core of the comity concern that animates Younger." Gilbertson, 381 F.3d at 976 (emphasis supplied). How rushing to the federal courthouse and filing first addresses the concern with interference and the attendant federalism concerns, Plaintiff does not explain.

Indeed, the Supreme Court has rejected precisely what Plaintiff advocates: i.e., Younger abstention is "in full force" even when the state proceedings are begun after the federal

complaint is filed, as long as no proceedings of substance on the merits having taken place in federal court. Hicks, 422 U.S. at 349. As noted in Defendants' opening brief, the Ninth Circuit is in line with Hicks. *See* M & A Gabee v. Cmty Redev. Agency, 419 F.3d 1036, 1041 (9th Cir. 2005). Doc. No. 8-2 at 6 n.4. Other circuits similarly construe Hicks. *See, e.g.*, Stroman Realty, Inc. v. Martinez, 505 F.3d 658, 662 (7th Cir. 2007); Ford Motor Co. v. Insurance Comm'r, 874 F.2d 926, 931 n.8 (3rd Cir. 1989). It thus comes as no surprise that none of the decisions in Plaintiff's eleven-case string cite, Doc. No. 19 at 8-10, warrants a different conclusion. All but one held that Younger applies. In the exception, Schmidt v. Fidelity National Title Insurance, 2008 WL 5082860 (D.Hawai'i 2008), two state actions were at issue. The first was no longer "ongoing," the only remaining issue being the formal entry of a deficiency judgment. *Id.* at *9. As to the other state action, it was filed ten months after the federal action and "a significant amount of judicial resources" had already been expended by the federal court in adjudicating the federal action. *Id.* In other words, the state action was filed after proceedings of substance on the merits had taken place in the federal action. Plaintiff's filing two days earlier than the State does not render Younger inapplicable here.

II. YOUNGER APPLIES EVEN WHEN THE STATE ACTION IS CHALLENGED ON PREEMPTION GROUNDS, INCLUDING WHEN INDIAN LAW-BASED PREEMPTION IS CLAIMED

A. Plaintiff's next objection is broken up into two parts. First, concerning Idaho's ongoing state court matter, Idaho allegedly does not seek to advance a "legitimate" interest in its state-court lawsuit, given Plaintiff's preemption challenge to the Minors' Access Act. Doc. No. 19 at 10-11. Plaintiff identifies no case employing a "legitimacy" standard connected to Younger's ongoing judicial proceeding requirement, and none exists. While Younger does have a second requirement that there be important state interests implicated, that test and the analysis

of the state interest does not rise or fall on the "legitimacy" of the state court proceeding. As noted previously in the Defendants' opening brief, the fact is that the state interest is applied broadly, especially to matters "that the Constitution and our traditions assign primarily to the states," Harper v. Pub. Serv. Comm'n, 396 F.3d 348, 352 (4th Cir. 2005), such as the public health. *See* Brach's Meat Market, Inc. v. Abrams, 668 F.Supp. 275 (S.D.N.Y. 1987); Doc. No. 8-2 at 7 - 9. In addition to the State's substantive interests in reducing youth access to tobacco products, the Ninth Circuit has also noted the importance of a State's interest in instances where it is the State itself, as is the case here, which has brought the state court action. Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353, 1360 n.8 (9th Cir 1986) ("The state's interest in a civil proceeding "'is readily apparent when . . . the state through one of its agencies acts essentially as a prosecutor.'") (*quoting* DeSpain v. Johnston, 731 F.2d 1171, 1177 (5th Cir. 1984)).

The second basis for Plaintiff's objection is that the State does not have a valid state interest—focusing now on Younger's second requirement—because, in Plaintiff's view, its attempt to enforce the Minors' Access Act is preempted by federal law. First, challenging a matter on federal preemption grounds does not mean that there is no valid state interest. The Supreme Court has emphasized that federal courts should not weigh the importance of any federal interests, such as federal preemption or the state law's possible constitutional infirmities, in determining the relevant state interest and applying Younger. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 364-66 (1989) ("NOPSI"). In NOPSI, the petitioner argued that abstention was not appropriate where a federal court is presented with a "substantial claim" that federal law preempts the challenged state action. The Supreme Court disagreed, stating "the mere assertion of a substantial constitutional challenge to state action will not alone

compel the exercise of federal jurisdiction." *Id*. at 365. Thus, when inquiring into whether abstention is required, the Court explained that "we do not look narrowly to [the State's] interest in the **outcome** of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome Rather, what we look to is the importance of the generic proceedings to the State." *Id.* (emphasis in original); *accord* Cal. County Superintendents Sch. Educ. Ass'n v. Marzion, No. C 08-04806 CW, 2009 WL 513742 at *4 (N.D. Ca. Mar. 2, 2009).

As for preemption claims, the Court, citing to an observation in Younger that abstention would not be appropriate where the state action is "'flagrantly and patently violative of express constitutional prohibitions,'" NOPSI, 491 U.S. at 366-67, left open the possibility that while a "substantial" claim of preemption is not enough to bypass Younger, perhaps a "facially conclusive" claim is. *Id.* at 367.[1] Thus, under the language of NOPSI, with the focus of the State's interest properly fixed on its generic interest in seeing that its Minors' Access Act is complied with and obeyed, it cannot be denied that Idaho has a valid interest.[2]

[1] Because the Supreme Court in NOPSI ultimately ruled that the state administrative proceeding at issue was not judicial in nature and Younger abstention therefore did not apply, 491 U.S. at 368, its discussion of the proper standard to be used in determining whether a claim of preemption may be used to defeat Younger applicability is technically dicta but nevertheless entitled to deference. *See* Barapind v. Enomoto, 400 F.3d 744, 751 n. 8 (9th Cir. 2005) (*en banc*) ("we need not go back very far to find an en banc court—the body charged with "maintain[ing] uniformity of the court's decisions," . . . –announcing a binding legal principle for three-judge panels and district courts to follow even though the principle was technically unnecessary to the court's disposition of the case before it").

[2] At a different point in its brief, Plaintiff concedes that Idaho's "expressed interest in preventing minors' access to tobacco . . . is a legitimate state interest." Doc. No. 19 at 12. Plaintiff nevertheless contends that the State does not explain "how" the permitting requirements of the Minors' Access Act further that interest as it relates to Plaintiff. *Id.* Putting aside the error in focusing too narrowly on the State's interests under the Act, those requirements contribute to the State's efforts at controlling the ability of minors to obtain tobacco by ensuring that the Department has a central repository of all businesses retailing tobacco to Idaho residents with a uniform set of data which facilitates compliance monitoring and, where necessary, enforcement actions. Indeed, it is from its list of permitees that the Department monitors Internet tobacco sales to ensure that these products are not being sold to children. Doc. No. 23-2 at ¶¶ 4-5. It is for this reason that the Idaho Legislature has stated that the retail sale or distribution of tobacco products without a permit is to be considered "an effort to subvert the state's public purpose to prevent minor's access to tobacco products." Idaho Code § 39-5709. The Legislature need not exclude from its permit requirements those vendors which, when it suits their business model, adopt internal procedures happening to coincide with some or all of the Act's substantive requirements.

B. Plaintiff continues its argument of no state interest, however, by contending that the federal interest in this case outweighs the State's interest and cites to three 1994 Ninth Circuit cases in support of its proposition. *See* Fort Belknap Indian Cmty. v. Mazurek, 43 F.3d 428 (9th Cir. 1994); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994); and Confederated Salish and Kootenai Tribes v. Simonich, 29 F.3d 1398 (9th Cir 1994). Doc. No. 19 at 13. Given the proper context, the cases are distinguishable and do not support Plaintiff.

By way of background, in Champion International Corp. v. Brown, 731 F.2d 1406, 1408-09 (9th Cir. 1984), the Ninth Circuit held that Montana did not have a substantial interest in enforcing its state age discrimination law because it was preempted by ERISA. Accordingly, the court ruled that Younger abstention was not appropriate. Two years later, in Fresh, 805 F.2d at 1361, the court provided more context to Champion's ruling, holding that merely raising a preemption claim is not enough to negate Younger. Rather, what is necessary to defeat Younger abstention is preemption "readily apparent" on the record. *Id.* More recently, in Woodfeathers, Inc. v. Washington County, Or., 180 F.3d 1017, 1021 (9th Cir. 1999), the court cited to Champion and Fresh for the principle that Younger abstention is not applicable in those circumstance where preemption is "readily apparent," such as where the Supreme Court has "previously decided the issue," or the state law at issue "fell under an express preemption clause" of a federal law.

Given this context, Plaintiff neither can nor does establish some bright-line standard categorically excluding Indian law-based preemption challenges from the Younger doctrine. In Sycuan, the court ruled that California did not have an interest in prosecuting violations of certain state gambling laws, but only because a federal law—18 U.S.C. § 1166(d)—grants the United States exclusive jurisdiction to enforce state gambling laws on Indian land. 54 F.3d at

541. Thus, Section 1166(d)'s preemptive effect is readily apparent. There is no such law here preempting the State from enforcing its Minors' Access Act in state court.[3] Sycuan is inapposite.

Fort Belknap addresses a fact pattern not applicable here. In Fort Belknap, a tribe sought declaratory relief that Montana could not enforce its liquor laws by prosecuting tribal members for **on-reservation** offenses—a matter of first impression. 43 F.3d at 431 ("[a]lthough there is no question that Montana has a legitimate interest in the enforcement of its liquor laws through criminal prosecution, the primary issue here is whether the state has jurisdiction to prosecute Indians who violate Montana liquor law on an Indian reservation"). The issue of whether Montana could exercise jurisdiction over a tribal member under these circumstances stands in stark contrast to that which Idaho seeks to do here, which is enforce the Minors' Access Act with respect to Plaintiff's **off-reservation** introduction of tobacco products into Idaho. This off-reservation triggering event is crucial and serves to distinguish this case from Fort Belknap. *See id.* at 432 ("[t]he state undoubtedly has an interest in enforcing its liquor laws, but only if federal law gives it jurisdiction to do so for violations that occur on an Indian reservation").

In instances where a State attempts to regulate the on-reservation activities of the resident tribe or its members (outside the context of taxation), an "exceptional circumstances" standard has been applied. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983). This heightened standard applies because "[when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980). Where,

[3] Indeed, relevant federal law—specifically 42 U.S.C. § 300x-26—encourages states to adopt laws that prohibit sales of tobacco products to persons under the age of 18 by providing grants from the Department of Health and Human Services. Congress thus has affirmatively approved regulatory schemes like the Minors' Access Act.

however, as here, the State attempts to regulate off-reservation activity or property of a tribe or its members, such nondiscriminatory state enforcement is upheld absent express federal law to the contrary. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). The latter rule is settled and has never been revisited by the Supreme Court. *See* Wagnon v. Prairie Band Potawatomi Indians, 546 U.S. 95, 113 (2005).

In short, on-reservation regulation of tribes or their members creates a strong presumption of no state regulation, whereas off-reservation regulation establishes exactly the opposite presumption—that state regulation applies. Thus, in instances such as Fort Belknap, where the activity at issue is on-reservation, it is easier to understand a finding of no Younger applicability because it is readily apparent that such conduct is subject to federal interests and rule. On the other hand, for off-reservation activity, it is far from readily apparent that federal interests are implicated and trump state authority to enforce their laws. Indeed, if anything is readily apparent, it is that state law does apply. *See* Doc. No. 23-1 at 17-23.

Confederated Salish's relevance is even less apparent. Indeed, it is not even a "readily apparent" preemption case at all. There, the Ninth Circuit ruled under the procedural framework before it that it did not have jurisdiction to hear the appeal of the district court's order denying Younger abstention. It did note that in the context of a writ of mandamus requested by Montana, ordering the district court to abstain, it could not rule that the lower court **clearly** erred by refusing to abstain. The Court of Appeals reached this conclusion, in part, because what the plaintiffs were doing in the federal case was not to stay any state proceeding or invalidate any state law—a necessary element for Younger (Gilbertson, 381 F.3d at 968-69)—but instead to reserve, pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), their rights in the federal court matter while matters before the state court were litigated.

29 F.3d at 1405-06. Thus, for the Ninth Circuit, Younger's applicability was "unclear." *Id.* at 1406. Plaintiff seeks here not only to stay the State's state-court proceeding but also to litigate before this Court a challenge to the Minors' Access Act that otherwise would be asserted as a defense before Idaho courts.

III. THE MINORS' ACCESS ACT IS NOT FLAGRANTLY AND PATENTLY VIOLATIVE OF EXPRESS CONSTITUTIONAL PROVISIONS

Plaintiff's last argument is that the Minors' Access Act flagrantly and patently violates the Constitution. Plaintiff makes this assertion because such violations were singled out in Younger itself as an exception to the otherwise mandatory abstention requirement. Younger, 401 U.S. at 53-54. Given the immediately preceding analysis, the argument falls flat.

Plaintiff's constitutional claims are rooted in the Commerce Clause and federal preemption. Defendants, in their memorandum in opposition to Plaintiff's motion for a preliminary injunction, establish that the Minors' Access Act does not violate the Commerce Clause and is not preempted by federal law. *See* Doc. No. 23-1 at 8 - 17. The short response to Plaintiff's argument on this point, then, is that Younger's exception for flagrant and patently unconstitutional laws has no application here.

CONCLUSION

The Court should grant Defendants' motion to dismiss.

DATED this 30th day of March, 2009.

LAWRENCE G. WASDEN
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By /s/ Brett T. DeLange
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2009, I electronically filed the foregoing document. with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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