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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' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**
	)	
Defendants.	)	

INTRODUCTION

Defendants Lawrence G. Wasden, Attorney General of the State of Idaho ("Attorney General"), the Office of the Attorney General of the State of Idaho, Richard Armstrong, Director of the Idaho Department of Health and Welfare, and the Idaho Department of Health and Welfare (collectively "Defendants"), oppose Plaintiff Lil' Brown Smoke Shack's ("Plaintiff")

motion for a preliminary injunction. The motion should be denied because:

Plaintiff does not meet the standards necessary for the granting of a preliminary injunction. Specifically, Plaintiff has failed its burden of establishing a likelihood of success on the merits because

a. the Eleventh Amendment mandates dismissal of Plaintiff's complaint against the Office of the Attorney General and the Idaho Department of Health and Welfare;
b. the abstention doctrine announced in Younger v. Harris, 401 U.S. 37 (1971) mandates dismissal of Plaintiff's complaint;
c. Plaintiff's Commerce Clause and Indian law claims are not well founded and are not likely to succeed on the merits; and
d. Plaintiff fails to identify any irreparable harm if the State's ongoing state court action is not enjoined.

STATEMENT OF FACTS & COURSE OF PROCEEDINGS[1]

In 2008, the Attorney General became aware of Plaintiff's Internet retail sale and shipment of tobacco products to Idaho consumers. Because these sales violate the Idaho Prevention of Minors' Access to Tobacco Act ("Minors' Access Act"), codified at Title 39, Chapter 57, Idaho Code, the Attorney General wrote Plaintiff. *See* Doc 1, Ex. C. Counsel for Plaintiff responded, *id,* Ex. D, rejecting the Attorney General's request that Plaintiff comply with the Minors' Access Act. Additional letters and a telephone call were exchanged, *id.*, Exs. E and F, but amicable resolution was not reached.

On February 5, 2009, Plaintiff filed its complaint here. Two business days later, the State of Idaho filed its lawsuit in the Fourth Judicial District, Ada County, against Plaintiff for

[1] On February 9, 2009, Defendants filed a motion to dismiss Plaintiff's Complaint and a memorandum in support thereof. Many of the facts stated herein were first reported in that memorandum.

violations of the Minors' Access Act.[2] Defendants promptly moved to dismiss Plaintiff's Complaint here; that motion is pending. Doc. 8. Plaintiff now asks this Court to stop the State's state court action against Plaintiff for its violations of Idaho tobacco sales law.

STANDARD OF REVIEW

The Supreme Court recently reversed a district court's preliminary injunction, after its affirmance by the Ninth Circuit, and reiterated the standards that govern presently:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. . . . [¶] Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374-76 (2008) (citations omitted), rev'g 518 F.3d 658 (9th Cir. 2008); *accord* American Trucking Ass'n v. City of Los Angeles et al,. 2009 WL 723993, *4 (9th Cir March 20, 2009).

"[F]ederal courts," moreover, "must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Rizzo v. Goode, 423 U.S. 362, 378 (1976) (*quoting* Stefanelli v. Minard, 342 U.S. 117, 120 (1951)). Thus, "[w]hen a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Id.* at 378-79 (internal citations omitted). And "[w]hen the frame of reference moves

[2] A copy of this complaint is attached to the Defendants' memorandum in support of their motion to dismiss. *See* Doc. 8-3.

from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Id.*

While axiomatic, it is worth noting that Rule 65, Fed.R.Civ.P., does not confer the Court with jurisdiction to enter a preliminary injunction. F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1109 (9th Cir. 1982); Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 470 (5th Cir. 1985) ("As we stated long ago in reviewing the injunctive power of the district court: '[T]he question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion. The question whether a court abused its discretion necessarily involves the question whether a court had any discretion to abuse.'") (*quoting* Eighth Reg'l War Labor Bd. v. Humble Oil & Ref. Co., 145 F.2d 462, 464 (5th Cir. 1944)). Thus, for example, where the Eleventh Amendment applies, "a federal court has no power to order a state officer exercising delegated authority to comply with duties imposed by state law." Grand River Enterps. Six Nations, Ltd. v. Beebe, 467 F.3d 698, 701-02 (8th Cir. 2006). Similarly, where Younger abstention is raised, "whether to abstain is the *first* question, and an affirmative answer brings the case to an end." Greening v. Moran, 953 F.2d 301, 304 (7th Cir. 1992) (emphasis in original). And where Younger abstention does control, a preliminary injunction may not issue. Blount v. Redmond, 649 F. Supp. 319, 323 (D. Me. 1986).

ARGUMENT

Plaintiff cannot meet its burden for establishing the propriety of issuing a preliminary injunction in this case. Specifically, Plaintiff does not have a likelihood of success on the merits because this case is subject to dismissal on Eleventh Amendment and Younger abstention

grounds. Furthermore, even were this Court to consider the substance of Plaintiff's claims, Plaintiff cannot establish a "**clear** showing that the plaintiff is entitled to such relief," Winter, 129 S. Ct at 376 (emphasis added), with due regard given to applicable federalism concerns.

I. THE ELEVENTH AMENDMENT BARS PLAINTIFF'S CLAIMS AGAINST THE OFFICE OF THE ATTORNEY GENERAL AND THE IDAHO DEPARTMENT OF HEALTH AND WELFARE

The Eleventh Amendment of the United States Constitution prohibits, which Plaintiff now concedes,[3] Plaintiff's lawsuit against the Office of the Attorney General and the Idaho Department of Health and Welfare (Department). There being no likelihood of success on Plaintiff's claims against these two state agencies, Plaintiff has failed its burden for the issuance of a preliminary injunction, at least with respect to these two parties.[4]

II. THE YOUNGER ABSTENTION DOCTRINE MANDATES THE DISMISSAL OF PLAINTIFF'S COMPLAINT

Separate from the Eleventh Amendment, the Court should dismiss Plaintiff's Complaint based on the abstention principles first articulated in Younger. The Younger doctrine holds that abstention is required where: (1) there is an ongoing state judicial proceeding; (2) the state judicial proceeding implicates important state interests; and (3) there is an adequate opportunity in the state judicial 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" abstention doctrine. Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gilbertson v. Albright, 381

[3] Plaintiff's Opposition to Defendants' Motion to Dismiss, Doc. No. 19,at 2, n. 1.

[4] On February 9, 2009, Defendants filed a motion to dismiss Plaintiff's Complaint and a memorandum in support thereof, arguing, in part, the Eleventh Amendment. Doc. 8-2. Given Plaintiff's concession as to the Eleventh Amendment's applicability, there is no need to review those arguments anew here.

F.3d 965, 981 (9th Cir. 2004) (*en banc*). As set forth in the Defendants' memorandum in support of their motion to dismiss, Doc. 8-2, at. 5 - 11, the Younger conditions apply here.[5] There therefore being no likelihood of success on Plaintiff's claims, Plaintiff has failed its burden for the issuance of a preliminary injunction.

III. THERE IS NO LIKELIHOOD THAT PLAINTIFF'S COMMERCE CLAUSE CLAIM WILL SUCCEED

Plaintiff claims that application of the Minors' Access Act violates the Commerce Clause. Doc. No. 19, at 11-19. Plaintiff's contentions are incorrect for several reasons.

A. Idaho Has a Strong Interest in Protecting its Youth from Tobacco Products

By way of background, there is no question that the State of Idaho has a vital public health interest in regulating tobacco and in protecting its youth from tobacco products and usage. In 1999, the Idaho Legislature found that cigarette smoking presents serious public health concerns to the State of Idaho and to Idaho citizens. Idaho Code § 39-7801(a). Indeed, the Legislature has determined that "[t]obacco is the number one killer in Idaho causing more deaths by far than alcohol, illegal drugs, car crashes, homicides, suicides, fires and AIDS combined," and that tobacco usage is "the single most preventable cause of death and disability in Idaho." Idaho Code § 39-5701. Noting that the Surgeon General has also determined that smoking causes lung cancer, heart disease and other serious diseases, the Legislature found that cigarette smoking presents serious financial concerns for the State of Idaho. Idaho Code § 39-7801(b).

The Idaho Legislature has also determined that youth access to tobacco is a matter of State concern, declaring in Idaho Code Section 39-5701 that "the prevention of youth access to tobacco products . . . to be a state goal to promote the general health and welfare of Idaho's

[5] Defendant's Younger arguments were first reported in their memorandum in support of their motion to dismiss. In the interests of space, Defendants adopt and incorporate those arguments here.

young people." To address the serious health consequences of youth tobacco access and usage, the Legislature passed the Minors' Access Act, designed to prevent youth access to tobacco within Idaho.

One way the State has implemented its goal of addressing youth tobacco usage and sales is through Section 39-5704 of the Minors' Access Act. That section prohibits the sale, distribution, or offering of tobacco products at retail without a tobacco permit having first been granted by the Department. Concerning this permit requirement, Section 39-5709 of the Act declares that the retail sale or distribution of tobacco products without a permit is "considered by the state of Idaho as an effort to subvert the state's public purpose to prevent minor's access to tobacco products."

Since its initial enactment, the Idaho Legislature expanded the scope of the Minors' Access Act expressly to include coverage of tobacco product sales over the Internet. *See* 2003 Idaho Sess. Laws. Ch. 273. Such sales are defined as "delivery sales" by Section 39-5702(2) of the Act. The Legislature made clear that Internet tobacco retailers are to comply with all regulation of tobacco sales that exist for the more traditional ways in which tobacco products are sold and used. *See* Idaho Code § 39-5714.

Idaho's interest in regulating youth access to tobacco is significant and relevant. The Supreme Court recognizes that "the Constitution . . . never intended to cut the States off from legislating on all subjects related to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960) (internal quotations marks omitted). Without this recognition, given the changes in commerce in our country "a very large area [would] be fenced

off in which the States [would] be practically helpless to protect their citizens." Commonwealth v. McHugh, 93 N.E.2d 751, 762 (Mass. 1950).

B. The Minors' Access Act Does Not Violate the Commerce Clause

While the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant Commerce Clause limits the States' ability to enact legislation that adversely affects interstate commerce. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) ("[T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well"). State legislation may violate the dormant Commerce Clause if it either: (1) facially discriminates in favor of intrastate interests or (2) although facially neutral, has the "practical effect" of directly controlling "commerce occurring wholly outside the State's borders." Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

1. The Minors' Access Act Does Not Facially Discriminate in Favor of Intrastate Interests

As explained in greater detail below, the Minors' Access Act grants no advantage to any intrastate seller and is completely neutral in its application. This is relevant, because state regulation that is evenhanded passes constitutional muster even if it imposes an incidental burden on interstate commerce, unless it can be shown that the regulation's burden on interstate commerce is "clearly excessive" when compared to the regulation's local benefits. Oregon Waste Sys., Inc. v. Dep't of Envt'l. Quality, 511 U.S. 93, 99 (1994).

In Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2nd Cir. 2004), several cigarette importers argued that New York's tobacco laws (termed "Contraband Statutes" by the court) violated, among other things, the dormant Commerce Clause. *Id.* at 209. In reviewing New York's laws and rejecting the plaintiffs' Commerce Clause claim, the court declared:

> Appellants cannot and do not identify any in-state commercial interest that is favored, directly or indirectly, by the Contraband Statutes at the expense of out-of-state competitors. [The statutes] *apply equally* to the products of in-state and out-of-state manufacturers, and to products sold by and to in-state and out-of-state wholesalers, tax agents, and importers.

Id. at 218 (internal citations and quotations omitted; emphasis added). The court thus affirmed the dismissal of the plaintiffs' dormant Commerce Clause claim. *Id.* at 235.

This reasoning obtains here. The Minors' Access Act is facially neutral between interstate and intrastate commerce because it does not discriminate against Plaintiff in favor of intrastate retailers and does not impose additional burdens on Plaintiff as an out-of-state retailer. Under the Minors' Access Act, no matter where a tobacco retailer resides (1) the retailer must obtain a permit to sell tobacco products to consumers in Idaho; (2) Idaho consumers can obtain the retailer's products; and (3) the retailer can sell and ship tobacco products to Idaho consumers. The Act requires only that before a retailer sells tobacco products to an Idaho consumer, the retailer obtain a cost-free tobacco permit from the Department. The burden of complying with this requirement, *de minimis* as it is, is no greater on out-of-state retailers than it is on in-state retailers. Local tobacco retailers receive no preferential treatment under the Minors' Access Act thereby making it facially neutral. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997).

2. The Minors' Access Act Does Not Have the Practical Effect of Directly Controlling Commerce Occurring Wholly Outside of Idaho

Because the Minors' Access Act does not discriminate in favor of intrastate interests, the next step is to evaluate whether the Minors' Access Act has the "practical effect" of directly controlling "commerce occurring **wholly outside** the State's borders." Healy, 491 U.S. at 336 (emphasis added). The short answer is that the Act does not directly control commerce occurring **wholly outside** Idaho's border. The Act applies and seeks to regulate only the retail sale of tobacco products that are purchased by and shipped to consumers in Idaho. While the stream of

commerce flows back and forth between Plaintiff's Washington retail operation and Idaho consumers, such commerce occurs as much, if not more, inside Idaho's borders. In short, Healy's concerns are satisfied.[6]

Similar to the outcome of Freedom Holdings, other challenges to statutes regulating out-of-state tobacco sales have failed to establish a violation of the dormant Commerce Clause. For example, in Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2nd Cir. 2003), the court of appeals reviewed a New York statute prohibiting cigarette sellers from shipping cigarettes directly to New York consumers. The district court had determined that the statute violated the dormant Commerce Clause because the only way an out-of-state Internet seller could sell cigarettes to New York consumers was by establishing a store physically located in New York and this would be cost prohibitive for the seller. *Id.* at 212. In the district court's view, the New York statute effectively eliminated out-of-state direct sales retailers from the New York market by requiring face-to-face, in-state retail sales only. *Id.*

The Second Circuit reversed, finding that, even if the only way an out-of-state direct shipper could sell retail cigarettes to New Yorkers was to establish a retail outlet in New York, in-state direct shippers suffered the same burden as out-of-state direct shippers and, thus, the statute did not discriminate against out-of-state direct shippers. *Id.* Relying on Exxon Corporation v. Governor of Maryland, 437 U.S. 117, 127 (1978), the Second Circuit further

[6] The circumstances in Healy contrast neatly with those here. There, an association of brewers and importers of beer sued Connecticut seeking a declaration that provisions of that state's Liquor Control Act violated the Commerce Clause. The Supreme Court held that the Act did violate the Commerce Clause, because in various ways the Act's pricing provisions operated to control prices of various alcoholic products in states outside Connecticut. 491 U.S. at 337-40. The Court stated that a State may not "deprive business and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." *Id.* at 339 (*quoting* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 580 (1986)). Plaintiff's grievances fall short of this standard, because the Minors' Access Act does not impede, control, or deprive Plaintiff of business opportunities with regards to its sales and commerce with consumers in States outside Idaho. The Act is concerned solely with sales to consumers in Idaho regardless of where the vendor is located.

determined that although the out-of-state direct shippers may be priced out of the New York retail cigarette market, no discriminatory effect was established. Simply because consumers may shift from one supplier to another does not subject interstate commerce to an impermissible burden. *Id.* at 213. Noting that the Commerce Clause does not protect the particular structure or methods of operation in a retail market, the court determined that the New York law "merely prohibits one manner in which cigarettes could otherwise be sold to New York consumers, namely through direct shipments." *Id.*

Brown & Williamson supports Defendants here. If New York can prohibit, consistent with the Commerce Clause, the direct shipment of cigarettes to consumers in New York, then surely Idaho can require a seller to obtain a cost-free permit before allowing it to sell and ship tobacco products to Idaho consumers. Idaho's permit requirement is beyond cavil a lesser burden than New York's requirements.

Arkansas Tobacco Control Board v. Santa Fe Natural Tobacco Co., 199 S.W.3d 656 (Ark. 2004) is another case that undercuts Plaintiff. In this case, Arkansas law requires a physical location in the State for the retail sale of cigarettes. The tobacco retailer contended that this requirement violates the Commerce Clause. Arkansas's Supreme Court disagreed, stating:

> While it is true that out-of-state retailers like Santa Fe who previously did not have a physical location will now be forced to set up such a location, the same is true of any Arkansas retailer who does not have a physical location. . . . The statute does not have a disparate impact on out-of-state retailers but affects *all* retailers who do not currently maintain a physical location, regardless of their classification as in-state or out-of-state. We therefore hold that the statute does not discriminate in its effects.
>
> 199 S.W.3d at 662.

The court said that the statute related rationally to the state's legitimate goal of reducing the sale of cigarettes to minors and that any burden on interstate commerce was not "sufficient to outweigh the State's significant interest in limiting the sale of cigarettes to minors." *Id.*, at 666.

The same rationale undermines Plaintiff's claims. Idaho's "burden" of requiring a tobacco retail permit is the same whether the retailer is located within or outside the State and it is minimal. It certainly is substantially less than requiring a seller to construct a physical location within the State as Arkansas requires. This minimal burden withstands a dormant Commerce Clause challenge and must be upheld.

C. Case Law Does Not Support Plaintiff's Commerce Clause Arguments

Plaintiff predicates its decisional-based analysis in large measure on several Internet child pornography cases—PSINet, Inc. v. Chapman 362 F.3d 227 (4th Cir. 2004); American Booksellers Foundation v. Dean, 342 F.3d 96 (2nd Cir. 2003); and American Civil Liberties Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999)—which it contends stand for the broad proposition that the Commerce Clause precludes States from regulating activities over the Internet. Doc 11, at 13-16. These cases, however, involved state legislation that sought to regulate the Internet itself. The Minors' Access Act does no such thing; it only regulates retail tobacco sales to consumers in Idaho, including those sales consummated over the Internet.

Whatever merit Plaintiff's cases may have in their own contexts, they do not mean that the State cannot regulate matters simply because they may employ the Internet as the means of commerce. The fact is that various courts have upheld state regulation of Internet-related activities in a wide variety of instances. In addition to the cases already cited above, courts have upheld state laws addressing Internet sales in a variety of contexts. *See, e.g.*, Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493 (5th Cir. 2001) (upholding Texas law that made it illegal to sell used vehicles via a website); Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006) (rejecting Commerce Clause challenge to application of California disabilities law to commercial website); Washington v. Heckel, 24 P.3d 404 (Wash. 2001) (upholding law

that prohibited dissemination of false or misleading e-mail solicitations). These cases recognize the proper role state laws can play in addressing sales over the Internet.

The decision in People v. PuriTec, 64 Cal.Rptr.3d 270 (Cal. Ct. App. 2007), is particularly instructive. In PuriTec, California sued a Nevada company, which sold water treatment devices to California consumers, for violating state law as a result of making health related claims that were not certified by the California Department of Health Services. PuriTec's defense, in part, was that the claims at issue were posted on its website and that the suit was an effort to force it to conform its website to California law. *Id.* at 274-76. The court disagreed, stating that the statutes at issue

> directly regulate website advertising that is targeted at California consumers. If sellers of water treatment devices decide to conform all of their website advertising to California law, that is a voluntary business decision, not a mandatory legal one. As the trial court factually found . . . 'technology exists to separate [a] California website from the ROW [rest-of-the-world] website established by a company such as PuriTec could and can easily structure its websites to inform California customers at the point of sale (the 'check out' page of the website) that its devices are not certified by the State of California, and that no health or safety claims relative to drinking water can be made under California law about PuriTec's devices. All this can be accomplished without interfering with PuriTec's sales of its devices to non-California customers.' Any interference with out-of-state sales can also be eliminated, the State suggests, by a simple footnote on the PuriTec website that the device has not been submitted for certification in California, as required by California law, to make health or safety claims to California consumers.

Id. at 276; *accord* Target Corp., 452 F. Supp. 2d at 961-62; *see generally* Jack Goldsmith & Jack Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 811 (2001) ("[m]any firms already use geographical technologies, both to tailor content by geography and to comply with various territorial laws").

That reasoning applies equally here. Plaintiff could easily modify its website to separate out its Idaho website from its rest-of-the-world website and easily structure its website to inform Idaho consumers at the point of sale the notices Idaho law requires it to provide. *See* PuriTec, 64

Cal. Rptr. 3d at 280-81. Indeed, this happens today frequently with, for example, some Internet tobacco retailers opting not to sell their products to Idaho consumers and some Internet alcohol retailers opting to sell wine only to various locations within Idaho. Other examples include an Internet fireworks retailer that displays state-specific regulations on its website, and an Internet plant retailer that has structured its website to restrict delivery of individual plants on a state-by-state basis. Kittelmann Affidavit at ¶¶ 15 - 22. As a matter of fact, today, Plaintiff's website indicates that it does not allow sales to Oregon and Montana consumers. *Id.* at 14.

D. Plaintiff's Specific Objections Do Not Indicate Commerce Clause Violations

Plaintiff's discrete objections to the Minors' Access Act are no more persuasive. At the end of the day, they derive wholly from Plaintiff's myopic focus on geography: in Plaintiff's view, because Plaintiff is located in Washington, the Act cannot constitutionally reach it with regard to selling and shipping tobacco products to consumers in Idaho. There is irony in what Plaintiff seeks to do here. It wants to enjoy all the benefits of doing business in the global markets of the twenty-first century, but preclude the State from responding to the regulatory challenges resulting from a sea-change in the mode of conducting interstate commerce. Its legal analysis, unsurprisingly, does not support this otherwise counterintuitive result.

- Plaintiff objects that the Minors' Access Act requires a permit for each location from which tobacco products are sold to Idaho consumers. Doc. 11, at 11. There is nothing discriminatory about this requirement; both in-state and out-of-state retailers operate under the same legal duty. Furthermore, this requirement only applies to those locations that sell tobacco products to Idaho consumers. It does not apply to Plaintiff's locations, if any, that sell tobacco products only to Washington (or any other States') consumers. It certainly does not impede, refer, or rely upon Plaintiff's tobacco sales to Washington (or any other States') consumers.

- Plaintiff similarly objects that the Minors' Access Act places an obligation upon tobacco permitees to educate employees concerning the provisions of the Act. Doc No. 11, at 12. Once more, the requirement is non-discriminatory; it is imposed on all tobacco retailers, regardless of their location. And, again, because it only applies to employees who sell tobacco products to Idaho consumers, it does not regulate commerce wholly outside of the State.

- Plaintiff objects that the Minors' Access Act requires Internet sellers of tobacco products to Idaho consumers to keep records of and report its Idaho consumer sales to the State. Doc No. 11, at 13. The objection falls short. There is nothing discriminatory about this requirement; both in-state and out-of-state retailers operate under the same legal duty and only with respect to sales to Idaho consumers.

- Plaintiff complains that the Minors' Access Act requires it to obey other Idaho tobacco laws. Doc. No. 11, at 12-13. Singled out for particular criticism is its perceived tax collection obligations imposed by Idaho state law. Plaintiff misreads Idaho law. Idaho taxes "tobacco products" (various tobacco products except cigarettes, *see* Idaho Code Section 63-2551(1)), at a collective rate of 40 percent of the wholesale value of the tobacco products. *Id.* §§ 63-2552 and 63-2552A. The tax is imposed upon distributors, who are divided into three categories: (1) those located in the State, *id*. §§ 63-2551(3)(a) and 63-2552(1)(a); (2) those who manufacture the tobacco products, *id.* §§ 63-2551(3)(b) and 63-2552(1)(b); and (3) those located outside of the State and who ship or transport the tobacco products to a **retailer** in the State, *id.* §§ 63-2551(3)(c) and 63-2552(1)(c). Because Plaintiff is located outside the State, the only possible tax obligation is if it falls under the third category. Plaintiff's Minors' Access Act permit obligation, however, is not for tobacco sales to retailers in Idaho but, instead, to actual Idaho consumers, and for those sales Plaintiff has no tax obligation.

- Plaintiff claims that if every state adopted its own version of the Minors' Access Act, it would create a conflicting regulatory burden "impossible to comply with." Doc. No. 11, at. 18. Plaintiff does not cite to another State's law in conflict with the Minors' Access Act or which makes it difficult to comply with Idaho's law. This is important because "it is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states." National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 112 (2nd Cir. 2001). Moreover, the fact that there might be other states regulating Internet tobacco sales is not a basis to judge Idaho's law, which only concerns itself with sales to consumers in Idaho. As the Supreme Court has stated

> As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states.

Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72 (1954).

- Finally, Plaintiff complains that the Minors' Access Act mandates that Idaho law enforcement agencies will go to Washington and physically inspect Plaintiff's physical place of business. Doc No. 11, at 17-18. The fact that Idaho tobacco permitees are inspected, of course, is not grounds for finding a Commerce Clause violation. That said, Plaintiff's description of the State's inspection process is in error. Indeed, with respect to Internet tobacco retailers the Department conducts its inspections by having a minor, from Idaho, visit the retailer's website and attempt to purchase tobacco online. Pappin Affidavit at ¶ 4. The inspection is thus limited to the tobacco permittee's sales as they relate and are directed to Idaho consumers. *Id.* at ¶ 5.

In short, relevant Commerce Clause jurisprudence does not support Plaintiff and the arguments Plaintiff puts forward are not persuasive. Thus, plaintiff fails to state a claim under

the dormant Commerce Clause. There being no likelihood of success on Plaintiff's Commerce Clause claims, Plaintiff has failed its burden for the issuance of a preliminary injunction.

IV. THERE IS NO LIKELIHOOD THAT PLAINTIFF'S INDIAN LAW CLAIMS WILL SUCCEED

Plaintiff argues, citing to Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), and White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), that because it is owned by a Native American and located on a tribal reservation, Defendants are preempted from enforcing or applying the Minors' Access Act to its tobacco sales to consumers in Idaho. Plaintiff errs.

In Mescalero Apache Tribe v. Jones, the Supreme Court was asked to prohibit New Mexico from imposing a gross receipts tax on revenue generated from a tribal ski resort and a use tax on materials employed in constructing the resort's lifts. The resort was located just outside the tribe's reservation on land leased from the United States Forest Service. *Id.* at 146. The resort's location was critical because "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Id.* at 148. "[T]ribal activities conducted outside the reservation present different considerations[,]" however, and in that situation "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

With that principle in mind, the Court found the gross receipts tax permissible, given the resort's location, but deemed the use tax preempted by virtue of a provision in the Indian Reorganization Act, 25 U.S.C. § 465, which proscribes taxation of land taken into trust for a tribe or tribal member. On the latter point, it reasoned that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by §

465," 411 U.S. at 155 n.11, since the ski lifts had been permanently attached to the land and "[t]he jurisdictional basis for use taxes is the use of the **property** in the State." *Id.* at 158 (emphasis supplied). The differing result with regard to the use tax thus derived from the combination of an explicit congressional directive satisfying the "express federal law to the contrary" exception to the general rule and the nature of the conduct that triggered the tax obligation as a matter of state law.

The Supreme Court applied Mescalero Apache more recently in Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005), where it upheld imposition of a state fuel tax on an off-reservation distributor with respect to purchases by a tribal retailer for on-reservation sale. The Court rejected the proposition that the tax's validity must be assessed under the interest-balancing test governing on-reservation transactions prescribed in Bracker, the other case relied upon by Plaintiff and discussed further below, because "[w]e have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country." *Id.*. at 112. That "altogether different course" was Mescalero Apache which controlled in light of the off-reservation "where" of the Kansas fuel tax—*i.e.*, the fact that the tax accrued upon receipt of the fuel by the distributor at its off-reservation place of business. The Court reasoned, "the 'use, sale or delivery' that **triggers** tax liability is the sale or delivery of the fuel to the distributor." *Id.* at 107 (emphasis added).

Mescalero Apache and Wagnon establish the fundamental framework against which Plaintiff's Indian law-based preemption claim must be measured. The requirements of the Minors' Access Act are "trigger[ed]" for present purposes by Plaintiff's **introduction** of tobacco into this State through its remote dealings with Idaho residents and causing its tobacco products to be delivered to them at their place of residence. The triggering "where" of the transaction is

thus Idaho, not Plaintiff's Washington place of business. Plaintiff is treated no differently than other remote vendors, and the fact that it is located on a reservation is thus irrelevant to this case.

In sum, Plaintiff's liability for violating the Minors' Access Act stems from failure to obtain a tobacco permit for those retail tobacco sales to Idaho consumers. This violation does not depend upon where Plaintiff does business; *i.e.*, the "trigger[ing]" event for statutory coverage is the fact that Plaintiff causes cigarettes to be introduced into this State—and off-reservation activity. Mescalero Apache Tribe accordingly does not assist Plaintiff. Instead, it militates directly against its Indian law-based preemption claim as the Maine Supreme Court held recently in Department of Health and Human Services v. Maybee, 2009 ME 15, 2009 WL 307474 (Feb. 10, 2009), where it enforced that state's retail tobacco vendor license requirements against a tribal member and online retailer located on a New York reservation. It reasoned in relevant part that the Bracker interest-balancing test (relied upon by Plaintiff) did not apply because the online retailer's "interactions with consumers in Maine extend beyond the boundaries of the reservation." 2009 WL 307474, at *3. The court held instead that "[a]ctivity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states" and cited to Nevada v. Hicks, 533 U.S. 353, 362-66 (2001) as holding that, in the absence of federal legislation to the contrary, the state has the authority to execute a search warrant on a reservation against a tribal member suspected of violating state law outside the reservation. 2009 WL 307474, at *3.[7]

[7] The Hicks court, 533 U.S. at 362, made clear that States can regulate off-reservation conduct of tribal members:

> "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in [Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)]. In that case, Indians were selling cigarettes on their

Plaintiff's reliance on Bracker also does not help Plaintiff. Bracker involved the question whether Arizona could impose motor carrier license and use fuel taxes on a nontribal firm with respect to on-reservation timber hauling undertaken pursuant to a contract with the resident tribe and sets forth the following test for when a State may regulate commercial transactions between tribes and nonmembers that occur on reservation:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.
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> 448 U.S. at 144-45.

Because Bracker deals with on-reservation conduct of persons who are not Native Americans it is not applicable here, because Plaintiff's interactions with consumers in Idaho extend beyond the boundaries of Plaintiff's reservation. In any event, even were Bracker's balancing test applicable, it does not support Plaintiff's case.

The most detailed application of the Bracker test in the tobacco context by a lower court is Ward v. New York, 291 F. Supp.2d 188 (W.D.N.Y. 2003). The controversy there involved enforcement of a New York statute (the same one reviewed by the Second Circuit in Brown & Williamson and upheld on Commerce Clause grounds) prohibiting the direct shipment of cigarettes to consumers, with a limited exception not applicable here. *Id.* at 194 n.3. Assuming, without deciding, that the transactions at issue occurred on reservation land, the court there

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> reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could 'impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax[.]" It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) (some citations omitted).

considered a preemption challenge to the statute in several scenarios, including direct shipment from an on-reservation tribal business to a nonmember. It declined in that context to grant a preliminary injunction and determined, in relevant part, that a line of Supreme Court cases—Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976),[8] and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)[9]—upholding state authority to regulate on reservation transactions between tribal members and non-tribal members dictated that the New York delivery statute would not be enjoined. 291 F. Supp. 2d at 203-05.

As for the Bracker interest balancing test itself, the court focused on the fact that "the federal government has been generally **supportive of state regulation of cigarette sales**," *Id.* at 204 (emphasis added), and that New York has an interest in mitigating the "'pernicious effects of cigarette smoking' by reducing adult consumption and restricting minors' access to cigarettes." *Id.* at 205. It further rejected the contention that "the Statute completely destroys the business of reservation cigarette retailers" since "[t]he Statute does not ban the sale of cigarettes" but merely "restricts the direct shipment of cigarettes to New York consumers." *Id.*

Here, even though the Bracker test is not applicable here because Plaintiff's interactions with consumers in Idaho extend beyond the boundaries of Plaintiff's reservation, Ward's analysis

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[8] Moe involved a challenge to Montana's method for assessment and collection of personal property taxes as applied to reservation Indians. Moe contains four holdings, one of which is of relevance here and which is that Montana could require tribal retailers to collect and remit cigarette taxes imposed on non-Indians with respect to reservation sales. 425 U.S. at 480-81, 483. As to this holding, the Supreme Court stated that requiring an Indian tribal seller to collect a tax validly imposed on a non-member of the Tribe is a minimal burden that does not frustrate tribal self-government and is not prohibited by congressional enactment. *Id.* at 483.

[9] In Colville, the Supreme Court upheld Washington's authority to impose robust regulatory obligations on tribal retailers with respect to nonmember cigarette sales—*i.e.*, maintaining "detailed records of exempt and nonexempt sales in addition to simply precollecting the tax." *Id.* at 151. It reasoned that "[t]he simple collection burden imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in Moe." *Id* Since Moe and Colville, the Supreme Court has not retreated from its "minimal burden" holdings. *See, e.g.*, Dep't of Revenue & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 76 (1994).

shows that even were Bracker balancing done, Plaintiff's claims are not sustainable. Taking the federal interest first, 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. For interest balancing purposes, therefore, the federal interest militates strongly toward the Act's enforceability in all situations except those where Congress has spoken to the contrary. Plaintiff identifies no contrary congressional directive with respect to Idaho's tobacco permit requirement.

Concerning the State's interest, Idaho's interest in preventing minors from smoking is, as discussed above, obvious and singularly compelling. *See* N.H. Motor Transp. Ass'n v. Rowe, 377 F. Supp. 2d 197, 206 (D. Me. 2005) ("Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its children, Congress would vote to prohibit what Maine is trying to do"), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 128 S. Ct. 989 (2008). As the Second Circuit Court of Appeals has stated "the State has a legitimate interest in 'reduc[ing] minors' access to cigarettes through direct sales channels.'" Brown & Williamson, 320 F.3d at 217 (*quoting* Santa Fe Natural Tobacco Co., Inc. v. Spitzer, 2001 WL 636441, at *29 (S.D.N.Y. 2001)).

The permit requirement of the Minors' Access Act contributes 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 marketing tobacco to Idaho residents with a uniform set of data which facilitates compliance monitoring and, where necessary, enforcement actions. Indeed, the

Legislature states 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 final consideration—the relevant tribal interest—is not helpful to Plaintiff. To characterize the burden on Plaintiff of submitting annually a no-charge permit application for its operations as "minimal," if anything, overstates the impact; the burden is virtually non-existent. The permit obligation is easily discharged. Indeed, it is far less intrusive on Plaintiff's time and resources than the record-keeping and tax collection duties approved in Moe and Colville or those cases' later application. *See, e.g.*, Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 890-92 (6th Cir. 2007).

In short, weighed against the federal and state interests strongly favoring the overall objectives of the Minors' Access Act, Plaintiff's Indian law objections to securing a permit are meritless. Interest-balancing analysis supports the permit requirement's validity and indicates that Plaintiff does not have a likelihood of success on the merits. Therefore, on this issue, too, Plaintiff has failed its burden for the issuance of a preliminary injunction.

V. PLAINTIFF WILL SUFFER NO IRREPARABLE HARM IF THE STATE COURT PROCEEDING IS NOT ENJOINED, AND FEDERALISM INTERESTS WOULD BE COMPROMISED BY SUCH RELIEF

Plaintiff's motion seeks principally to enjoin Defendants from taking judicial enforcement actions to enforce the permit requirement of the Minors' Access Act. Doc. 11 at 3. It thus takes square aim at the state court suit forming the predicate for Defendants' motion to dismiss under Younger.[10] Plaintiff, however, makes no showing of irreparable harm with respect to allowing

[10] To the extent that Plaintiff seeks to enjoin non-judicial efforts by Defendants to enforce the Minors' Access Act, it points to no such threat. The Attorney General consistently has sought only to enforce the Act's permit obligation and, in view of Plaintiff's refusal, to do so through a judicial proceeding. Under

that proceeding to continue, choosing instead to rely on several cases from the Tenth Circuit and one of its district courts for the proposition injury to tribal sovereignty is irreparable "because 'it [can] not be adequately compensated for in the form of monetary damages.'" Doc. 11 at 9 (*quoting* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1235, 1251 (10th Cir. 2001)).

As the Supreme Court in Winter emphasized, "[a] preliminary injunction is an extraordinary remedy never awarded as a matter of right" and requires a court to "'balance the competing claims of injury and . . . [to] consider the effect on each party of the granting or withholding of the requested relief.'" 129 S. Ct. at 376. Here, allowing the state court action to proceed without federal court interference works no irreparable injury on Plaintiff, since it will have the opportunity to raise and litigate as defenses the substantive claims for relief that it urges upon this Court. Plaintiff neither contends, nor could contend, that the state court is not fully competent to resolve those defenses. *E.g.*, Taflin v. Levitt, 493 U.S. 455, 458 (1990) ("[u]nder [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"). Indeed, as a general matter, this Court lacks jurisdiction to enjoin state court proceedings. 28 U.S.C. § 2283. The Anti-Injunction Act, whose origins date back over 200 years, embodies the same core federalism principles informing the Younger doctrine.

Defendants recognize that the Ninth Circuit has staked out a possible exception to Section 2283's jurisdictional limitation where Indian law-based preemption is asserted by "a tribe or with some entity that enjoys some other form of immunity from suit in state court." White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301, 1306 (9th Cir. 1988). However, nothing in that jurisprudence requires this Court to exercise its equitable discretion to enjoin

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these circumstances, Plaintiff has failed to show any likelihood of injury *pendente lite* from either on-site inspections or interference with tobacco shipments.

preliminarily a state court proceeding merely because a defendant there chooses to litigate a federal law-based defense to the enforcement of a state-law obligation in the form of an affirmative claim for relief in federal court. Any other result would sanction an end-run around the ordinary removal limitations under 28 U.S.C. § 1441. *See* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989) (*per curium*) ("it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law"). Instantly, the mere fact that Plaintiff will be obligated to litigate in two forums if Defendants' motion to dismiss is denied does not constitute irreparable harm; it instead derives from a litigation strategy that was designed to invite precisely that result.

CONCLUSION

The Court should deny Plaintiff's motion for a preliminary injunction. Plaintiff cannot show a likelihood of success on the merits. Indeed, Plaintiff's Complaint ought to be dismissed pursuant to Defendants' motion to dismiss. Its substantive claims pursuant to the Commerce Clause and Indian law are also not well taken.

DATED this 27th day of March, 2009.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

By /s/ Brett T. DeLange
BRETT T. DeLANGE
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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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