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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LIL' BROWN SMOKE SHACK, Plaintiff, v. 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.	Case No. 2:09-cv-00044 - CWD REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION ***ORAL ARGUMENT REQUESTED***

I. INTRODUCTION

Plaintiff Lil' Brown Smoke Shack (LBSS) established that its rights guaranteed under federal law would be eviscerated if the Minors' Access Act's (MAA) permitting provisions were enforced against it and nothing in Defendants' response shows otherwise.

First, dismissal of this federal court action is not warranted under the *Younger v. Harris*

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Abstention Doctrine.[1] Second, LBSS is likely to succeed on the merits of its Dormant Commerce Clause and Indian law claims. Third, given that LBSS has established violations of the Dormant Commerce Clause and tribal sovereignty rights protected by the Constitution, irreparable harm is presumed. Finally, this Court has power to enjoin the state court action notwithstanding the federal Anti-Injunction Act.

II. LEGAL ARGUMENT

A. Because of the Paramount Federal Interest in Regulation of State-Indian Relations, The *Younger* Abstention Doctrine Does Not Warrant Dismissal of this Action.

Defendants do not contest this Court's original jurisdiction to decide LBSS's federal claims. Rather, they seek to avoid the injunction by arguing that the federal claims should be dismissed under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). As set forth fully in LBSS's Opposition to Defendants' motion to dismiss, which is incorporated herein by reference, Defendants cannot meet the requirements of *Younger* to establish an exception to this Court's "unflagging" duty to exercise federal jurisdiction in this case. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989).

In particular, the federal interest in regulation of relations between Indians and States, as here, is paramount and outweighs an otherwise legitimate state interest in enforcement of the MAA. Therefore, *Younger* does not apply. *See Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 431 (9th Cir. 1994); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994) *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 712 (10th Cir. Okla. 1989); *Confederated Salish v. Simonich*, 29 F.3d 1398, 1406 (9th Cir. 1994). The courts in the foregoing cases clearly weighed the federal interest at issue in those disputes and determined that *Younger* did not apply where the State attempts to regulate Indians in Indian Country. These holdings apply here. Application of the MAA is not limited to regulating LBSS's off-reservation

[1] LBSS has agreed to the dismissal of its complaint against the Office of the Attorney General and the Idaho Department of Health and Welfare on Eleventh Amendment grounds, but opposes the dismissal of the action against the remaining Defendants.

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introduction of tobacco products into Idaho, as Defendants repeatedly assert. Enforcing the permit requirements of the MAA against LBSS necessarily involves regulation of on-Reservation conduct.[2] Thus, this federal court should decide whether the State may enforce the MAA against LBSS. *See Fort Belknap Indian Community*, 43 F.3d at 431. *Younger* does not apply and it certainly does not bar the entry of a preliminary injunction against a state law that unambiguously seeks to regulate on-Reservation conduct.

B. LBSS is Likely to Succeed on its Dormant Commerce Clause Claim Because the Minors' Access Act Regulates Conduct Wholly Outside the State.

The MAA is invalid *per se* because it has the practical effect of controlling commerce entirely outside the boundaries of the state. *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993). Defendants ignore that the MAA requires LBSS to do much more - outside the State of Idaho - than obtain a "cost-free permit" to sell to Idaho consumers. *Id.* at 11. Moreover, all of the authorities cited by Defendants have no applicability here.

1. Defendants Ignore Several Provisions of the Minors' Access Act That Purport to Regulate Conduct Outside Idaho's Borders.

Defendants commence their opposition to LBSS's Dormant Commerce Clause claim with a red herring, devoting an entire section of their brief to an argument that the MAA does not facially discriminate in favor of intrastate interests. LBSS does not claim that the MAA is facially discriminatory. Rather the Commerce Clause claim focuses on the MAA's extraterritorial effect.

For instance, the MAA requires that LBSS obtain and keep a permit for its physical place

[2] Application of the MAA would entail 1) forcing LBSS to obtain a tobacco permit for its place of business on the Yakama Reservation, 2) forcing LBSS to implement a "training program" for its employees who work at LBSS's place of business on the Reservation, 3) dictate to LBSS what employees can handle what types of products at LBSS's place of business on the Reservation, 4) entering upon LBSS's premises to conduct "random unannounced inspections" to ensure compliance with the MAA, and 5) enforcing civil and criminal penalties against LBSS for its alleged failure to obtain a tobacco permit. *See* I.C. §§ 39-5701 *et. seq.*

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of business and be subject to civil and criminal penalties for violation of this requirement. I.C. §§ 39-5704; 39-5709(1)-(2); 39-5708; IDAPA § 16.06.14.021.01-02. Defendants ignore this aspect of the statute. LBSS also would be required to train its employees (all of whom are located on the Yakama Reservation) in a manner dictated by the State of Idaho. I.C. § 39-5704(7). Defendants argue that only locations that sell to Idaho consumers must maintain the permit and only employees who sell tobacco products to Idaho consumers must be trained. Opp., p. 15. But this overlooks that LBSS's *physical location* is outside Idaho and all of its employees work outside Idaho.[3] Defendants fail to cite any authority that permits it to regulate extraterritorial conduct in this manner. In fact, there is none because such a regulatory sweep is prohibited by the Dormant Commerce Clause. *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

Furthermore, LBSS would be required to submit invoices and reports to the State of Idaho. I.C. § 39-5718. Defendants argue only that these requirements are not discriminatory as they apply to both in-state and out-of-state businesses. Opp., p. 15. Defendants miss the point. Regardless of whether the MAA is discriminatory, the MAA violates the Dormant Commerce Clause because, as applied to LBSS, it has the practical effect of regulating conduct occurring wholly outside the State of Idaho. *See Grand River Enter. Six Nations, Ltd.*, 425 F.3d at 168.

Defendants also ignore the extraterritorial effects of another provision of the MAA's permitting scheme: the requirement that LBSS subject itself to random, unannounced inspections by Idaho officials at LBSS's physical location outside the State of Idaho. I.C. § 39-5710. Defendants effectively concede that such inspections violate the Commerce Clause by asserting solely that there is no risk this provision will be enforced because the inspections occur over the internet. *See* Opp., p. 16 (citing Pappin Affidavit at ¶¶ 4, 5). This concession cannot save an invalid statute. As noted in *Ward v. New York*, 291 F. Supp. 2d 188 (W.D.N.Y. 2003) (a case

[3] *See* Declaration of Judy Hunter, submitted in support of LBSS's Motion for Preliminary Injunction, ¶ 2.

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relied upon by Defendants) a plaintiff faces a realistic danger of direct injury where nothing in the plain language of the statute prevents the State from enforcing its provisions against the plaintiff. *Id.* at 199. Affidavits indicating that the State does not plan to enforce certain provisions of the statute do not dispel this risk of enforcement. *Id.* As in *Ward*, there is no indication here "that the affidavits are legally binding or that the affiants have the authority to restrict the State's ability to enforce the Statute." *Id.* The plain terms of the MAA purport to authorize much more invasive enforcement measures across state lines than those outlined in the Pappin affidavit. *See* I.C. § 39-5710. Idaho's institution of the state court action to enforce the MAA against LBSS renders this case ripe for injunctive relief against such measures. *See Ward*, 291 F. Supp. 2d at 198-99 (even a "credible threat of prosecution" under the statute is sufficient).

On the whole, the MAA violates the Dormant Commerce Clause because it has the practical effect of regulating several instances of LBSS's conduct occurring entirely outside Idaho's borders.

2. Defendants' Cited Authorities Do Not Rescue the Minors' Access Act from a Dormant Commerce Clause Violation.

The MAA's regulation of conduct occurring wholly outside the State of Idaho distinguishes each of Defendants' cited cases. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) involved a challenge to a New York statute that prohibited direct shipment of cigarettes to New York consumers, which the court found only incidentally affected interstate commerce by prohibiting one method for selling cigarettes to New York consumers. *Id.* at 203, 217. *Arkansas Tobacco Control Bd. v. Santa Fe Natural Tobacco Co.*, 360 Ark. 32 (2004) involved a challenge to an Arkansas statute that required a physical retail location within the State for the sale of cigarettes to Arkansas consumers. *Id.* at 37, 41. Thus, both *Brown & Williamson* and *Santa Fe* addressed the State's regulatory power to prohibit or require certain conduct *within* its borders. Neither case involved a claim, as here, that the State was attempting to regulate conduct occurring entirely outside its borders.

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The Court should also reject Defendants' contention that the MAA only seeks to regulate LBSS's Internet sales to Idaho consumers. Defendants contend that LBSS could simply modify its website to separate out its Idaho website from its rest-of-the world website and "easily structure its website to inform consumers at the point of sale the notices Idaho law requires it to provide." Opp., pp. 13-14. But Defendants ignore that providing point of sale notices is not all that the MAA requires LBSS to do. This distinguishes Defendants' other cited authorities.

National Elec. Mfrs. v. Sorrell, 272 F.3d 104 (2d Cir. 2001) involved a challenge to a statute requiring certain labeling for mercury-containing light bulbs shipped to Vermont consumers. *Id.* at 107. The court held that distributors could modify their distribution systems to differentiate between Vermont-bound shipments and other shipments to comply with the statute. *Id.* at 110. In *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006), the court held that Target could comply with the state law at issue (requiring that the website be accessible to the blind) simply by establishing a separate California website. *People v. Puritec*, 153 Cal.App.4th 1524, 1536 (2007), the court held that Puritec could comply with state law (requiring certain disclosures about the products offered for sale) by founding a separate California website with requisite disclosures to California residents. Here, in contrast, the MAA does not solely affect products distributed to Idaho, as in *Sorrell*, or merely require certain disclosures on its website to Idaho consumers, as in *Target* and *Puritec*. The MAA contains several other requirements, including permit, employee training, reporting, and inspection requirements, which affect LBSS's entire operations occurring wholly outside Idaho. [4]

For these reasons, LBSS is likely to succeed on its Dormant Commerce Clause claim.

[4] Defendants' other cited cases are equally inapposite. *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001) (statute prohibited auto manufacturers from retailing autos to Texas customers; no allegation that statute regulated conduct occurring wholly outside the state); *Washington v. Heckel*, 143 Wn.2d 824, 836 (2001) ("the only burden the Act places on spammers is the requirement of truthfulness [in e-mail communications], a requirement that does not burden commerce at all but actually facilitates it by eliminating fraud and deception;" spammers "incur no costs in complying with the Act") (internal quotation omitted).

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C. LBSS Is Likely to Succeed on Its Tribal Sovereignty Claim Because the Minors' Access Act Infringes Powers and Rights of the Yakama Nation Enjoyed by LBSS.

Defendants assert that LBSS's liability for violating the MAA "stems from failure to obtain a tobacco permit for those retail tobacco sales to Idaho consumers," but ignore that LBSS is subject to numerous other MAA requirements that infringe the tribal sovereignty enjoyed by LBSS – which is wholly owned by a member of the Yakama Nation. These include the Yakama Nation's power to govern its own internal employment practices on reservation (*See NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1285 (10th Cir. 2000)), power to establish its own set of business regulations, including requiring a Yakama Nation tobacco permit, which would be prohibited under the MAA (*see White Mountain Apache Tribe v. Bracker*, 448 U.S. at 136; I.C. § 39-5713), and its right to exclude unauthorized persons from reservation lands,[5] a right vitiated by Idaho officials' annual, unannounced inspections required under the MAA.

Defendants argue the MAA does not infringe tribal sovereignty because it applies only to LBSS's interactions with consumers extending beyond the boundaries of the reservation. *See* Opp., pp. 19-20. Defendants' cited authorities, however, do not support this proposition. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) involved the State's taxation of the sale and delivery of fuel *off-reservation*. By contrast, the MAA reaches not only the delivery of tobacco products to Idaho consumers outside the reservation, but also purports to control employment and business practices occurring wholly within the reservation. Thus, the State of Idaho does not have free reign to regulate LBSS in the manner the Attorney General purports to do under the MAA. *See Bracker*, 448 U.S. at 142 (state laws may not unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them).

Neither of the statutes at issue in *Maybee* and *Ward*, also cited by Defendants, imposed employee training requirements, subjected tobacco retailers to random unannounced inspections, or prohibited a tribal government from requiring a tribal license or permit, as here. *See DHHS v.*

[5] *See* Declaration of J. Michael Keyes, Ex. J (Chapter 35.010.01 of the Yakama Nation Code) and Ex. L (Treaty Minutes of 18555 Treaty, pp. 80-83, 100-102).

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Maybee, 965 A.2d 55, 56 (Me. 2009) (22 M.R.S. 1555-C required tobacco retail licenses before selling to Maine consumers); *Ward*, 291 F. Supp. 2d at 205 (N.Y. Pub. Health Law § 1399-II restricted direct shipment of cigarettes to New York consumers). In short, the statutes in *Maybee* and *Ward* did not infringe tribal sovereignty in the manner that the MAA does.

Defendants argue that the MAA's infringements on tribal sovereignty are nevertheless permissible because they further the State's interest in reducing minors' access to 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." Opp., p. 22. First, this assertion is entirely unsubstantiated by evidence. Second, Defendants fail to explain how all of the MAA's requirements, including employee training and random unannounced inspections on reservation land, contribute to the alleged "central repository" of data on tobacco businesses. These conclusory and unsupported assertions do not justify the State's interest in enforcement of the MAA. Moreover, Defendants cannot reduce the burden on LBSS solely to applying annually for a "no-charge permit." Opp., p. 23. As set forth throughout LBSS's briefing, the MAA imposes a much greater burden, including LBSS's surrender of important tribal rights it currently enjoys.

On balance, the interests at stake establish that the exercise of State authority under the MAA would violate federal law. *Bracker*, 448 U.S. at 144-45. Accordingly, LBSS is likely to succeed on its Indian law claims.

D. <u>A Commerce Clause Violation and Infringement of Tribal Sovereignty are Each Sufficient on Their Own to Establish Irreparable Harm.</u>

As held in *Ward*, a case on which Defendants rely, "irreparable injury is presumed where, as here, there is an alleged violation of constitutional rights." *Ward*, 291 F. Supp. 2d at 196 (citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)). This extends to alleged violations of Indian sovereignty, as well violations of rights under the Commerce Clause. *See id.* (tribal sovereignty claim); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th

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Cir. 2001) (infringement of tribal sovereignty constitutes irreparable injury); *C & A Carbone, Inc. v. Town of Carkstown*, 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (local law caused irreparable injury to the plaintiffs' rights under the Commerce Clause); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167-68 (S.D.N.Y. 1997) (Commerce Clause claim).

Thus, the irreparable harm element is satisfied. Defendants' arguments to the contrary are without merit. Indeed, LBSS has already suffered irreparable harm by the institution of the state court proceedings by which the State is enforcing the MAA against LBSS, and LBSS will continue to suffer irreparable harm as the State prosecutes that action. *See Ward*, 291 F. Supp. 2d at 198 (statute is applied directly to plaintiff where prosecution action is instituted; even a "credible threat of prosecution" under statute is basis to seek injunctive relief).

E. This Court Must Enjoin the State Court Action Because the State Lacks Jurisdiction to Regulate Conduct of LBSS Occurring on the Yakama Reservation.

The Anti-Injunction Act in 28 U.S.C. § 2883 does not prohibit this Court from enjoining the state court proceeding. Several courts recognize an exception to the Anti-Injunction Act and have permitted injunctions against state court proceedings where the threshold question is whether the state court has jurisdiction over the subject matter of the dispute. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994) (injunction against state court action to enforce gambling laws against Indian tribe necessary to preserve federal court's exclusive jurisdiction over Indian gaming); *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1304 (9th Cir. 1988) (injunction against a state proceeding that might have affected Indian property survived Anti-Injunction Act because the "district court has jurisdiction to preserve the integrity of tribal claims."); *Bowen v. Doyle*, 880 F. Supp. 99, 130-31 (W.D.N.Y. 1995) ("well-established rules protecting Indian tribes' interests in their sovereignty and property, and the primacy of federal authority in Indian affairs" permitted federal court injunction of state court proceedings); *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1028 (D. Ariz. 1993) ("Courts have consistently determined that the interpretation of Indian law

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is a matter of federal law. Accordingly, there is no bar of this action pursuant to the Anti-Injunction Statute, 28 U.S.C. § 2283.").[6]

That is precisely the threshold issue here. As set forth fully in LBSS's opening brief, the State does not have jurisdiction to enforce the MAA against LBSS – whether by the pending state court action or otherwise. I.C. § 67-5101, Idaho's adoption of Public Law 280, makes clear that the State of Idaho's jurisdiction over Indians in Indian Country is limited to Indian Country "located within this state." As explained earlier, enforcing the MAA against LBSS would necessarily regulate conduct of LBSS occurring in Indian Country located wholly outside Idaho. Thus, the State of Idaho's jurisdiction does not reach that conduct. In fact, LBSS has moved to dismiss the State of Idaho's state court action on that ground, among others. *See* Declaration of J. Michael Keyes in Support of Reply In Support of Plaintiff's Motion for Preliminary Injunction, Exhs. A and B. Defendants concede this issue by failing to address it in their Opposition. Instead, they suggest that LBSS could simply litigate its federal claims as defenses in state court. *See* Opp. pp. 24-25. But Defendants overlook the critical point. "If the state court lacks jurisdiction, this court ***must*** enjoin the state court action in order to preserve tribal sovereignty." *Tohono O'Odham Nation*, 837 F. Supp. at 1029 (emphasis added) (citing *White Mountain Apache*, 856 F.2d at 1304-1306).

IV. CONCLUSION

For the foregoing reasons, the Court should grant the preliminary injunctive relief requested in LBSS's opening brief.

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[6] A federal injunction is also warranted under another exception to the Anti-Injunction Act – it is necessary to "preserve the judgments" of this Court. *See* 28 U.S.C. 2283; *Bowen*, 880 F. Supp. at 131. Without federal injunctive relief, the State's assumption of jurisdiction over this dispute will directly and irreparably undermine this Court's authority to resolve this dispute. For example, the state court may permit enforcement of the MAA against LBSS and thereby constrain this Court's decisions on LBSS's Commerce Clause and Indian law claims. "The Anti-Injunction Act has no application where an injunction against a state court is necessary to defend a federal court's judgments from inconsistent state directives." *Bowen*, 880 F. Supp. at 131.

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DATED this 13th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 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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