UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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RED EARTH LLC d/b/a
SENECA SMOKESHOP and
AARON J. PIERCE,

Plaintiffs,

v. Civil Action No.

UNITED STATES OF AMERICA and
ERIC H. HOLDER, JR., in his Official
Capacity as Attorney General of the United States,

Defendants.

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# MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

## PRELIMINARY STATEMENT

This memorandum of law is submitted by plaintiffs, Red Earth LLC d/b/a/ Seneca Smokeshop ("Red Earth") and Aaron J. Pierce (collectively "Red Earth"), in support of their motion pursuant to FRCP 65 and Local Rule 65(a)(2) and (b) seeking a temporary restraining order and preliminary injunction against the defendants, enjoining and restraining their enforcement of the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010), pending the final determination of this action.

## STATEMENT OF FACTS

The relevant facts are set forth in the complaint, supporting affirmation of Lisa A. Coppola, Esq., sworn to June 25, 2010 with exhibits, and the affidavit of Aaron J. Pierce, sworn to on June 25, 2010 ("Pierce Aff.") to which this Court respectfully is referred. For the sake of brevity, the facts are not repeated at length herein.

For the reasons that follow, the Court should grant Red Earth's motion in its entirety and issue a temporary restraining order and preliminary injunction against the defendants, enjoining and restraining their enforcement of the PACT Act pending the final determination of this action. The bases for this application are set forth in detail below.

## ARGUMENT

It is within this Court's wide discretion to grant a request for a temporary restraining order and/or a preliminary injunction. *See Grand River Ent. Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007). Generally, in order to warrant a court's intervention in the form of injunctive relief, a plaintiff must demonstrate (1) the possibility of irreparable harm and either (2) a likelihood of success on the merits of the causes of action forming the basis for the request or (3) a sufficiently serious question going to the merits of those causes of action combined with a balance of hardships tipping in favor of the moving party. *See Citibank v. Citytrust,* 756 F.2d 273 (2d Cir. 1985). However, in cases "where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous ['serious questions'] standard and should not

grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (*citing Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)); *Ward v. State of New York*, 291 F. Supp.2d 188, 196 (W.D.N.Y. 2003).

Here, Red Earth can demonstrate a likelihood of success on the merits as well as irreparable harm. "[A] showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction . . . ." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted); *see also Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005).

In the Second Circuit, there is a question as to whether, in addition to (1) irreparable harm, (2) a likelihood of success on the merits, and (3) a balancing of the equities in its favor, a movant also must show that granting a preliminary injunction is in the public interest. *See Monserrate v. New York State Senate*, 599 F.3d 148, 154 n.3 (2d Cir. 2010) (*citing Winter v. Natural Resources Defense Council, Inc.* 129 S. Ct. 365, 374 (Nov. 12, 2008)). As will be shown below, plaintiffs readily meet even the more rigorous four-part standard for the imposition of injunctive relief.

# POINT I

## RED EARTH LIKELY WILL SUCCEED ON THE MERITS OF ITS COMMERCE CLAUSE CLAIM.

### A. THE PACT ACT IS UNCONSTITUTIONAL BECAUSE IT ALTERS THE APPLICABILITY OF STATE AND LOCAL CIGARETTE LAWS, VIOLATING THE COMMERCE CLAUSE.

"The Commerce Clause of the Constitution grants Congress the power 'to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes'." *Maine v. Taylor*, 477 U.S. 131, 137, 106 S. Ct. 2440, 2446-47 (1986) (*citing* U.S. Const. art. I, § 8, cl. 3). The Commerce Clause both grants power to Congress to regulate interstate commerce and limits the power of the States to do the same. *Id.*

A State tax will be sustained under the Commerce Clause when "the tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S. Ct. 1904, 1912 (1992) (internal citations omitted).

In *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 87 S. Ct. 1389 (1967), and again in *Quill*, the Supreme Court held that a State use tax imposed on an out-of-state retailer with no physical connection to the State violated the Commerce Clause. *Bellas Hess*, 386 U.S. at 759-60, 87 S. Ct. at 1393; *Quill*, 504 U.S. at 301-02, 112 S. Ct. at 1907. In *Bellas Hess*, and as reiterated in *Quill*, the Court concluded that a vendor whose only

contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause. *Bellas Hess*, 386 U.S. at 758, 87 S. Ct. at 1392; *Quill*, 504 U.S. at 311, 112 S. Ct. at 1912. Indeed, "*Bellas Hess* . . . created a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail'. . . such vendors are free from state-imposed duties to collect sales and use tax." *Quill* at 315, 112 S. Ct. at 1914.

In *Bellas Hess*, the appellant, National Bellas Hess, was a mail-order house with its principal place of business in Missouri. *Bellas Hess*, 386 U.S. at 753-54, 87 S. Ct. at 1389. It had no physical presence or sales representatives in Illinois, yet it was required to collect and pay the use taxes imposed by Illinois tax laws even though its only contacts with Illinois were through United States mail or common carriers. *Id.* at 754, 87 S. Ct. at 1390. As a result, National Bellas Hess argued that the Illinois tax statute violated the Commerce Clause.

Analyzing the dispute, the Court recognized that "the Constitution requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 756, 87 S. Ct. at 1391 (internal citations omitted). The constitutional requirement was not satisfied there, because National Bellas Hess' only contacts with Illinois were by common carrier or United States mail. In reaching its conclusion, the Court acknowledged the impermissible burden a contrary holding would place on National Bellas Hess' business:

> [I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of

> its interstate business would be neither imaginary or remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. ***The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations*** . . . .

*Bellas Hess*, 389 U.S. at 759-60, 87 S. Ct. 1392-93 (emphasis added).

Fifteen years later, North Dakota attempted to require an out-of-state mail-order house with no physical presence in that State to collect and pay a use tax on goods purchased by consumers for use within that State. *Quill* at 301, 112 S. Ct. at 1907. The North Dakota Supreme Court declined to follow *Bellas Hess* and instead held that the Commerce Clause did not mandate a physical presence nexus between the taxing State and the entity collecting and paying the tax. *Id.* at 304, 112 S. Ct. at 1908.

By reversing the State court decision, the United States Supreme Court reaffirmed its holding in *Bellas Hess,* concluding that the substantial nexus requirement of the Constitution is meant to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313, 112 S. Ct. at 1913. *Bellas Hess'* bright-line rule "in the area of sales and use taxes . . . encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Id.* at 316, 112 S. Ct. at 1915. The *Quill* Court upheld *Bellas Hess*' safe harbor for out-of-state retailers with no physical presence in the taxing State.

Against this historical backdrop, it is plain to see that the PACT Act runs afoul of the Commerce Clause in its regulation of the sale of cigarettes and smokeless tobacco by, among other things, placing new tax burdens on so-called delivery sellers. By definition, a delivery seller sells cigarettes to a consumer not in the physical presence of the delivery seller at the time of the sale or delivery. PACT Act, Pub. L. No. 111-154 at § 2(a)(5)-(6), 124 Stat. 1087, 1088-89. Section 2A(c)(3) of the PACT Act provides that when making a sale into a specific jurisdiction, a delivery seller must comply with "all State, local, tribal and other laws applicable to sales of cigarettes and smokeless tobacco ***as if the delivery sales occurred entirely within the specific State*** and place . . . ." *Id.* at § 2A(c)(3), 124 Stat. at 1091 (emphasis added). Pursuant to § 2A(d), "no delivery seller may sell or deliver to any consumer, or tender to any common carrier . . . any cigarettes . . . unless, ***in advance of the sale, any cigarette . . . excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State***." *Id.* at § 2A(d)(1)(A), 124 Stat. at 1093 (emphasis added). The same requirement applies to local government excise taxes on cigarettes, with the delivery seller being required to identify and pay those taxes prior to delivery. *Id.* at § 2A(d)(1)(B), 124 Stat. at 1093. The PACT Act's taxing scheme makes no distinction between cigarette purveyors that have a physical presence in the taxing jurisdiction and those that have no physical presence.

The statute therefore places the burden of identifying, collecting, and remitting taxes to each and every jurisdiction – including thousands of State and local tax jurisdictions – squarely on the out-of-state purveyor.[1] Although the PACT Act itself does not impose a tax on

[1] In *Quill*, the Supreme Court noted that there are 6,000-plus taxing jurisdictions. *See Quill*, 504

out-of-state cigarette retailers, it transfers Congress' power to tax interstate commerce to State and local governments. As a result, States and local governments will impose taxes on Internet and mail-order cigarette retailers that have no physical presence within that State and therefore no nexus – substantial or otherwise – with the State.

Red Earth is a cigarette retailer located on the Seneca Indian Reservation in New York. Pierce Aff. at ¶ 3. As a retailer that sells cigarettes to consumers via telephone, Internet, and mail orders, it falls squarely within the PACT Act's definition of "delivery seller." Traditionally, its sales of cigarettes to customers in 46 out of the 50 States have been accomplished via the United States Postal Service. *Id.* at ¶ 6. It reminds its customers that the obligation to pay excises taxes, where imposed, is theirs. *Id.* at ¶ 12. In addition, it takes precautions to ensure that its customers are of the legal age to purchase tobacco products. *Id.* at ¶ 9. Red Earth is a lawful purveyor of tobacco products. It is not the terrorist threat with which the PACT Act seemingly is concerned.[2]

The PACT Act will require Red Earth to identify, collect, and pay the excise tax,

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U.S. at 314 n.6, 112 S. Ct. at 1914. The Tax Foundation now estimates the number of taxing jurisdictions at 8,000. Joseph Henchman and Justin Burrows, *"Amazon Tax" Unconstitutional and Unwise*, Sept. 15, 2009, http://www.taxfoundation.org/news/show/25120.html.

[2] In his comments on the PACT Act of 2007, Representative Anthony D. Weiner commented that "[t]he infamous Lackawanna Seven received funding from an individual named Aref Ahmed for their travel from Buffalo, New York to Afghanistan to attend an Al Qaeda training camp. Ahmed was convicted in 2004 on charges of conspiracy to commit money laundering and smuggling contraband cigarettes." PACT Act of 2007 and The Smuggled Tobacco Prevention Act of 2008: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, 110th Cong. 110-147 (2008) (statement of Rep. Anthony D. Weiner).

prior to delivery, in the 46 States into which it ships cigarettes. PACT Act, Pub. L. No. 111-154, § 2A(d)(1)(A), 124 Stat. at 1093. The PACT Act also will require Red Earth to identify, collect, and pay any excise tax in the thousands of local taxing jurisdictions into which it ships cigarettes. *Id.* at § 2A(d)(1)(B), 124 Stat. at 1093. Besides that, Red Earth will be responsible for complying with "all State, local, tribal, and other laws generally applicable to the sale of cigarettes . . . as if the delivery sales occurred entirely within the specific State and place . . . ." *Id.* at § 2A(a)(3), 124 Stat. at 1091. The punishment for non-compliance with the thousands of State and local laws "generally applicable to the sale of cigarettes" includes imprisonment for up to three years. *Id.* at § 3 (Penalties), 124 Stat. 1100. As a result, the PACT Act is, in effect, a prohibition on the sale of cigarettes, a legal product, to any remote purchaser, as it would be impossible for Red Earth and similarly-situated retailers to comply with this law.
Pierce Aff. at ¶¶ 18-19.

Red Earth recognizes that, even though it is a Native American-owned business, it can be required to shoulder minimum tax burdens imposed by the State it which it conducts its business. In *Washington v. Confederated Tribes of the Coleville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069 (1980), the Supreme Court held that taxing non-Native American customers of Native American retailers doing business on a Reservation is permissible only if it imposes a "minimal burden" on the Indian retailers to aid in enforcing and collecting the tax on behalf of the State. In that case, the State of Washington had levied an excise tax on the sale of cigarettes within the State. Various Native American tribes within the State of Washington commenced a declaratory judgment action arguing that the tax could not lawfully be applied to sales by

on-reservation tobacco outlets. *Id.* at 139, 100 S. Ct. at 2074. The "minimum burden" in that case was "[t]he simple collection burden . . . requir[ing] the tribal smoke shops to affix stamps purchased from the State to individual packages of cigarettes prior to the time of sale to non-members of the tribe." *Id.* at 159, 100 S. Ct. at 2084. Under those circumstances, the Court held that the tax did not place an undue burden on commerce on the reservations. *Id.* at 157, 100 S. Ct. at 2083; *see also Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483, 96 S. Ct. 1634, 1646 (1976).

Unlike Washington's tax-stamp scheme, the PACT Act's burden on purveyors is ***not*** a minimal burden; rather it is an extraordinary burden. In contrast to requiring a retailer to collect a tax from a consumer who is physically in the retailer's presence, on behalf of the State in which the retailer is located, the PACT Act requires purveyors to comply with thousands of State and local tax statutes, regulations, and rules as well as any other cigarette legislation across the country which, given the Commerce Clause, have no application to them. It follows, then, that this is the exact burden that the *Bellas Hess* and *Quill* courts warned against, amounting to an undue and unconstitutional burden on interstate commerce.

### B. CONGRESS FAILED TO CLEARLY AUTHORIZE THIS VIOLATION OF THE COMMERCE CLAUSE.

Red Earth recognizes that Congress may authorize a State tax that violates the Commerce Clause, but in order to do so, Congress must evince a clear intent to provide such authorization. *See Wyoming v. Oklahoma*, 502 U.S. 437, 457, 112 S. Ct. 789, 802 (1992). Here, the PACT Act extends the reach of State and local tax and other cigarette-related laws, and

makes each and every statute, regulation, and rule applicable beyond the borders of the home State. Specifically, the PACT Act requires out-of-state purveyors without a physical presence in or even a substantial nexus to the taxing State to comply with the State's laws; otherwise, the purveyor is subject to felony criminal prosecution. In so extending the reach of these myriad State and local laws, Congress failed to examine them and to evince its intent to ratify each of them.

Congress' failure to evince such intent renders the PACT Act unconstitutional. For example, in *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 123 S. Ct. 2142 (2003), California passed an amendment to its State law regulating the minimum prices paid by California milk processors to California dairy farmers. The out-of-state dairy farmers challenged that amendment under the Commerce Clause. In response, California argued that the Federal Agriculture Improvement and Reform Act ("FAIRA") exempted the State law from scrutiny under the Commerce Clause. The relevant portion of that statute provided:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise ***limit the authority of the State of California***, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

*Id.* at 65, 123 S. Ct. at 2146 (internal citations omitted) (emphasis added).

The United States Supreme Court recognized that "Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, but we will not assume that it has done so ***unless such an intent is clearly expressed***. While § 144 unambiguously expresses such an intent with respect to California's compositional and labeling laws, that expression does not encompass the pricing . . . laws." *Id.* at 66, 123 S. Ct. at 2147 (emphasis added).

Just like § 144 of FAIRA, the PACT Act does not clearly authorize each State and local government's excise tax on cigarettes. It recognizes that the State and local governments have excise taxes which they impose on cigarettes, and it purports to "help the States enforce their laws that target online sales of certain tobacco products." PACT Act, Pub. L. No. 111-154 at § 8, 124 Stat. at 1111. This is done not by examining and authorizing each State and local government's law, but simply by decreeing that a purveyor of cigarettes now is responsible for collecting each State and local excise tax on its sales of cigarettes prior to their delivery into that jurisdiction. By demanding that cigarette purveyors pay thousands of different excise taxes imposed by State and local governments in locations in which the purveyor has no physical presence, Congress impermissibly delegated its Commerce Clause powers to the States. As a result, "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements [will] entangle [the purveyor's] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Bellas Hess,* 386 U.S. at 759-60, 87 S. Ct. at 1393. The virtual welter of complicated obligations is not limited solely to the payment of taxes, for the PACT Act also requires purveyor to abide by every cigarette law in any

State and local jurisdiction in which it delivers the product. This, too, is decreed without any examination – and without the necessary ratification – of such laws. The broad and unbound sanction of an unlimited variety of State and local tobacco regulations, including, perhaps, prohibition, demonstrated not Congressional intent, but an appalling lack of diligence and indeed, elements of both malice and neglect. It surely could not be the intent of Congress to permit every conceivable tax regulation and prohibition of cigarettes and smokeless tobacco, including those it never examined, reviewed, or even considered.

### C. THE PACT ACT IS UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY DELEGATES CONGRESS' ENUMERATED COMMERCE CLAUSE POWERS TO THE STATES.

#### 1. Congress Cannot Delegate Its Legislative Power to the States.

The PACT Act also should be declared unconstitutional because it impermissibly delegates Congress' legislative powers to State and local governments across the country. The effect of this impermissible delegation is that even if they did not do so before the PACT Act's effective date, these taxes now violate the Commerce Clause by placing an undue burden on interstate commerce.

Pursuant to the non-delegation doctrine, "[t]he Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S. Ct. 241, 248 (1935). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our

tripartite system of Government. The Constitution provides that 'all legislative Powers herein granted shall be vested in a Congress of the United States'." *Mistretta v. United States*, 488 U.S.\ 361, 371, 109 S. Ct. 647, 654 (1989) (*citing* U.S. Const. art. I, § 1).

"Congress cannot transfer its legislative power to the states – by nature this is nondelegable." *In re Pontius*, 421 B.R. 814, 819 (Bankr. Ct. W.D. Mich. 2009) (*citing Knickerboxer Ice Co. v. Stewart*, 253 U.S. 149, 164, 40 S. Ct. 438, 441 (1920), *superseded by statute on other grds*). In *Knickerboxer*, the Court examined whether Congress impermissibly delegated its maritime law powers to the States when it enacted a statute guaranteeing injured maritime employees "rights and remedies under the workmen's compensation law of any State." *Knickerboxer*, at 156, 40 S. Ct. at 439 (internal citations omitted). By this statute, the Court held, Congress sought to "authorize and sanction action by the State in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work." *Id.* at 163-64, 40 S. Ct. at 441. As construed, "the enactment is beyond the power of Congress . . . the subject was intrusted [sic] [by the Constitution] to [Congress] to be dealt with according to its discretion—not for delegation to others." *Id.* at 164, 40 S. Ct. at 441.

Like its unique power to govern maritime or admiralty law matters, Commerce Clause powers belong solely to Congress, as it alone may legislate over interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. Red Earth recognizes that Congress has the power to impose

federal taxes on cigarettes being transported in interstate commerce, as it has done in the past. *See, e.g.*, 29 U.S.C. § 5701 (2010). But Congress may not delegate its power to tax and regulate interstate commerce to the States. Simply put, Congress cannot abdicate the power given to it via the Commerce Clause.

**2. Delegation In The Absence of Clear Guidelines and Limitations Is Unconstitutional.**

Even if Congress can delegate its legislative power to tax and otherwise regulate interstate commerce to the States, it cannot do so in violation of the non-delegation doctrine. In determining whether an act of Congress is a lawful delegation of power, the Supreme Court examines "whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the [delegatee's] action; [and] whether the Congress has required any finding by the [delegatee] in the exercise of [its] authority to enact the prohibition." *Panama Refining Co. v. Ryan*, 293 U.S. at 415, 55 S. Ct. at 246. In *Panama Refining*, via the National Industrial Relations Act, Congress attempted to authorize the President to pass laws prohibiting the transportation in interstate commerce of petroleum that was produced or withdrawn from storage in excess of the amount permitted by State authority.[3] *Id.*

[3] After it decided *Panama Refining*, the Court again held that the National Industrial Relations Act violated the non-delegation doctrine. In *A.L.A. Schechter Poultry, Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837 (1935) the court held that § 3 of the National Industrial Recovery Act constituted an unlawful delegation of legislative power to the President. The Act purported to enable the President to create codes of fair competition to regulate industry. The Court examined "the statute to see ***whether Congress*** . . . in authorizing 'codes of fair competition' ***has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others***." *Id.* at 531, 55 S. Ct. at 843 (emphasis added). It concluded that Congress cannot delegate legislative power to the President "to exercise unfettered discretion to make whatever

In holding that Congress impermissibly delegated its power, the Court found that the relevant section of the statute:

> Does not attempt to control the production of petroleum and petroleum products within a State. It does not seek to lay down rules for the guidance of state legislatures or state officers. It leaves to the States and to their constituted authorities the determination of what production shall be permitted. It does not qualify the president's authority. . . . And disobedience to his order is made a crime punishable by fine and imprisonment.

*Id.* Section 2A(d) of the PACT Act requiring purveyors to pay State and local excise taxes prior to shipment suffers from the identical infirmity. It does not limit or guide State and local lawmakers in any way as to what rates of tax may be permitted, what record-keeping requirements might accompany these taxes, or whether there may be any allowable exemptions from the tax. And, like the National Recovery Act, the PACT Act makes disobedience with State or local tax laws a crime punishable by imprisonment and/or fines.

Faced with this impermissible delegation, the *Panama Refining* Court went on to examine the context of § 9 of the National Industrial Recovery Act to see if it "impl[ied] what is not there expressed." *Id.* at 416, 55 S. Ct. at 246. It examined other provisions of the statute but found no grounds for implying a limitation on § 9's broad grant of authority. The Court examined Congress' declarations of policy but again found "nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited." *Id.*

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laws he thinks may be needed or advisable . . . ." *Id.* at 537-37, 55 S. Ct. at 846. The Court found that the authority Congress granted to the President was too broad, because Congress did not create standards by which the authority it granted was to be governed. Thus, it was an unconstitutional delegation of legislative power. *Id.* at 542, 55 S. Ct. at 848.

at 417, 55 S. Ct. at 247. As a result, the Court reversed the judgment of the lower courts. *Id.* at 433, 55 S. Ct. at 254.

There is nothing within the PACT Act or its legislative history that provides appropriate guidance to the States on how they might impose cigarette excise taxes on purveyors, as the PACT Act authorizes them to do, without violating the Commerce Clause and placing an undue burden on interstate commerce. Section 1(c)(5) of the PACT Act states that one of its purposes is to "increase collection of Federal, State, and other local excise taxes on cigarettes and smokeless tobacco . . . ." PACT Act, Pub. L. No. 111-154, § 1(c)(5), 124 Stat. at 1088. Certainly no limit on the States' new ability to tax out-of-state cigarette retailers can be inferred from this broad purpose.

Moreover, as the plain language and legislative history of the statute provide, the PACT Act makes it a federal offense for purveyors to fail to comply with State excise taxes. *See, e.g.,* 155 Cong. Rec. E. 1260 (May 21, 2009) (speech of Rep. Jackson-Lee). The PACT Act "empowers" the States to enforce its requirements. *Id.* Indeed, the House of Representatives' report accompanying the then-H.R. 1676 on its trip through Congress states that the PACT Act "would benefit State, local, and tribal governments by ***expanding their authority to collect cigarette taxes*** . . . ." H.R. Rep. No. 111-117, at 23 (2009). The House Report heralds the States' new powers, but it does not guide them on how to use these powers within the permissible bounds of the United States Constitution.

Congress is allowed to delegate if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform . . . ." *Mistretta v. United States*, 488 U.S. 361, 372, 109 S. Ct. 647, 654 (1989). It failed to do so here. Indeed, there is nothing in the PACT Act that can be implied as limiting or instructing the State and local governments on the circumstances or conditions under which this new obligation of remote sellers to collect State and local excise taxes on tobacco products should be imposed. As applied, given the broad grant of power contained in the PACT Act, the many State and local excise taxes on cigarettes violate the Commerce Clause precisely because Congress failed to decree standards and guidelines that the State and local governments must follow.[4]

## POINT II

## RED EARTH LIKELY WILL SUCCEED ON THE MERITS OF ITS TENTH AMENDMENT CLAIM.

By attempting to levy State and local taxes, Congress is acting outside the scope of its enumerated powers. Although Red Earth contends that the PACT Act is an impermissible delegation of power to the States, assuming for the sake of argument that Congress is legislating over interstate commerce, it is doing so in violation of the Tenth Amendment. For this reason as

[4] In other areas of the PACT Act, Congress properly delegates authority to the Postmaster General. *See* PACT Act, Pub. L. No. 111-154 § 3(b)(3)(B) (Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter), 124 Stat. at 1103. This proper delegation stands in stark contrast to § 2A(c)(3) and § 2A(d) which enforce "all State, local, tribal and other laws applicable to sales of cigarettes and smokeless tobacco as if the delivery sales occurred entirely within the specific State and place . . ." and declare that delivery sellers must pay all State and local taxes prior to delivery but provide no further guidance. *Id.* at Pub. L. No. 111-154 §§ 2A(c)(3), (d), 124 Stat. at 1091, 93.

well, injunctive relief should lie. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162, 112 S. Ct. 2408, 2420 (1992). Simply put, "state legislatures are not subject to federal direction." *Printz v. United States*, 521 U.S. 898, 912, 117 S. Ct. 2365, 2373 (1997).

States have the inherent power to lay taxes for the support of their government. *See, e.g., American Trucking Ass'ns., Inc. v. Michigan Pub. Serv. Comm'n.*, 545 U.S. 429, 434, 125 S. Ct. 2419, 2423 (2005). Here, the PACT Act attempts to expand, not the goods, but the tax laws themselves. That is, the PACT Act has imposed additional breadth to existing State and local laws by its requirement that a remote seller collect State and local excise taxes on cigarettes prior to delivering them into the taxing jurisdiction. By seeking to change State tax laws, Congress is subjecting State legislatures and local legislative bodies to federal direction in violation of the Tenth Amendment.

While the Constitution grants Congress the power to tax the nation as a whole, when Congress does tax, it must do so uniformly. *See* U.S. Const. art. I, § 8, cl.1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"). Assuming

Congress is legislating instead of delegating, it is easy to see that the tax burden the PACT Act places on purveyor is not a uniform tax imposed by Congress. Rather, it is an improper appropriation and alteration of thousands of different State and local taxes on cigarettes. It usurps State legislative powers and subjects purveyor to the impossible burden of identifying, tracking, and complying with myriad State and local taxing schemes in the absence of any geographic uniformity.

It is axiomatic that States have the power to tax within their own borders, and Congress has the power to tax the nation as a whole. The dormant Commerce Clause restrict the States from imposing taxes that impermissibly burden or discriminate against interstate commerce, and Congress also has the power to authorize a State statute that otherwise violates the Commerce Clause (provided it expresses its clear intent to do so). Nevertheless, the Commerce Clause does not give Congress the power expand the scope and reach of State tax legislation. It has bootstrapped State and local excise tax laws on cigarettes and expanded those laws beyond the State borders. This obviously exceeds the powers granted to Congress under the Commerce Clause and, accordingly, the PACT Act should be declared unconstitutional.

## POINT III

## RED EARTH WILL SUCEED ON THE MERITS OF ITS DUE PROCESS CLAIM.

### A. THE PACT ACT VIOLATES DUE PROCESS BY REQUIRING RED EARTH TO COLLECT AND REMIT FOREIGN STATE TAXES IN THE ABSENCE OF THE REQUISITE NEXUS WITH THE STATE.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. In the context of State taxation, the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill,* 504 U.S. at 306, 112 S. Ct. at 1909 (*quoting Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345, 74 S. Ct. 535, 539 (1954)). In derogation of this rule, the PACT Act forces out-of-state retailers such as Red Earth to identify, collect, and remit State sales and use taxes under threat of civil and criminal penalties regardless of whether the remote retailers have a substantial nexus with the State. In this manner, the PACT Act violates the Due Process clause of the United States Constitution.

In *Quill*, the Supreme Court clarified that the "physical presence" standard previously applied to State tax due process analysis was not in accord with the more "evolved" due process jurisprudence. As a result, the Court held that the due process inquiry set forth in the seminal *International Shoe* case was to be applied to State tax collection issues. *Quill*, 504 U.S. at 307, 112 S. Ct. at 1910 (*citing International Shoe Co v. Washington*, 326 U.S. 310,

66 S. Ct. 154 (1945)).

The North Dakota statute in *Quill* defined the term retailer to include "every person who engages in regular or systematic solicitation of consumer market in the state." *Quill*, 504 U.S. at 303, 112 S. Ct. at 1908 (*quoting* N. D. Cent. Code § 57-40.2-01(6) (Supp. 1991)). The State regulations defined "regular or systematic solicitation" to mean three or more advertisements within a 12-month period. *Id.* (*quoting* N. D. Admin. Code. § 81-04.1-01-01.1 (1988)). Quill Corporation was a Delaware corporation with no employees or tangible property in North Dakota, but it directed its retail office supply business into the State through the distribution of mail-order catalogs and flyers, advertisements in national periodicals, and telephone calls. It also delivered all of its merchandize to its North Dakota customers by mail or common carrier from out-of-state locations.

When Quill took the position that North Dakota did not have the power to compel it to collect a use tax from its North Dakota customers, North Dakota filed an action to compel Quill to collect taxes. Quill argued that the statute's requirement violated both the Due Process Clause and the Commerce Clause. The trial court ruled in Quill's favor on the issue of due process, but the State's highest court reversed.

Applying the standard set forth in *International Shoe*, the North Dakota Supreme Court found that Quill had "purposefully availed" itself of the benefits of North Dakota's economic market by directing sufficient activities at North Dakota's residents to

satisfy due process minimum contacts. Specifically, the court concluded that "North Dakota ha[d] created 'an economic climate that foster[ed] demand for' Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year." *Quill*, 504 U.S. at 304, 112 S. Ct. at 1909 (*quoting North Dakota v. Quill Corp.*, 470 N.W.2d 203, 218-219 (1991)). In reversing the finding below, the United States Supreme Court found that there was "no question that Quill had purposefully directed its activities at North Dakota residents, that the magnitude of those contacts [was] more than sufficient for due process purposes, and that the use tax [was] related to the benefits Quill receive[d] from access to the State. *Quill*, 504 U.S. at 308, 112 S. Ct. at 1911.

Following the logic in *Quill*, if a retailer's contacts with a foreign State are sufficient for exercise of personal jurisdiction, then they are sufficient to require a corporation to collect taxes on shipments made to a foreign State. As a result, the case law addressing due process implications of foreign jurisdiction over Internet retailers will inform the issue of whether Red Earth has sufficient contacts with various States such that it constitutionally can be required to collect foreign State taxes.

A significant majority of cases that have addressed whether a website can provide sufficient contacts to invoke specific jurisdiction have adopted the analytical framework of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Examining the few cases that had previously addressed the issue of whether a website could provide sufficient contacts for personal jurisdiction, the court in *Zippo* applied the traditional

personal jurisdiction analysis, noting that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet." 952 F. Supp. at 1124. To measure the nature and quality of the commercial activity, the court created a sliding scale to determine the likelihood of personal jurisdiction. The court noted:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

*Id.* (citations omitted).

The prevailing judicial consensus is that maintenance of a public Internet website alone is insufficient to justify long-arm jurisdiction. *See, e.g., Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010) (maintenance of a public Internet website is insufficient, without more, to establish general jurisdiction); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (the fact that defendant maintained an Internet website was insufficient to justify general jurisdiction); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp.2d 376, 383 (S.D.N.Y. 2002) (ownership and operation of a website within the

district, without more, is not enough to satisfy the "solicitation plus" standard for doing business pursuant to N.Y. CPLR § 301); *Loudon Plastics, Inc. v. Brenner Tool & Die. Inc.*, 74 F. Supp.2d 182, 185-86 (N.D.N.Y. 1999) (maintenance of a web site alone, without more, did not rise to the level of purposeful availment of New York's laws); *Meteoro Amusement Corp. v. Six Flags, Inc.*, 267 F. Supp.2d 263, 269 (N.D.N.Y 2003) (whether the website is passive or active, courts in the Second Circuit repeatedly find that a website within the district, without more, is not enough to satisfy the solicitation plus standard for doing business pursuant to N.Y. CPLR § 301); *see also Nelson v. Mass. Gen. Hosp.*, 2007 U.S. Dist. LEXIS 70455, *65-66 (S.D.N.Y. Sept. 20, 2007) (jurisdiction predicated solely on "operation of an interactive website that has generated a small amount of activity and a *de minimis* amount of revenue in the forum State violates due process because, "[w]ere it otherwise, every entity or individual that ran a highly interactive website from anywhere in the world could be sued for any reason in New York").

Applying the law of those cases here, the PACT Act's requirement that Red Earth collect and remit taxes for the States where its products are delivered violates due process because Red Earth's only contact with States other than New York is through Internet and e-mail advertisements and communications to current customers, and telephone, Internet, and mail purchases with delivery primarily through the United States Postal Service. Pierce Aff. at ¶ 19.

Red Earth has no jurisdictionally-sufficient economic contacts with any State other than New York. Red Earth does not own, lease, or otherwise occupy any physical property

in any State other than New York. None of its employees work for Red Earth outside of New York. Red Earth has no representatives outside of New York soliciting sales on its behalf. Red Earth sends no mail order catalogs into any State. The only consistent advertising for the sale of Red Earth's cigarettes is made on Red Earth's website and periodically by e-mail and other communications to current customers. Red Earth's only contact with purchasers outside of New York is by Internet, e-mail, or, when they purchase, common carrier. Pierce Aff. at ¶ 19.

Nonetheless, under the PACT Act, Red Earth will become subject to criminal and civil penalties for failing to collect and remit cigarette sales and use taxes for all States and localities into to which it delivers cigarettes. *See* PACT Act, Pub. L. No. 111-154, § 3, 124 Stat. 1087.

Section 2A of the PACT Act requires Red Earth to follow, "all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing – (A) excise taxes; (B) licensing and tax stamping requirements; . . . and (D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco. . . ." PACT Act, Pub. L. No. 111-154, § 2A, 124 Stat. at 1091 (2010). Section 2A also requires Red Earth to comply with "all tax collection requirements set forth in subsection (d)." *Id.*

Clearly, the PACT Act is intended to permit States to impose tax-collection obligations on both in-state and out-of-state Internet retailers of cigarettes regardless of whether a retailer has any nexus with the State. In that respect, the PACT Act completely disregards the "substantial nexus" requirement of the Due Process Clause of the United States Constitution as defined in *Quill*. There is, therefore, a likelihood that Red Earth will succeed on its claim that the PACT Act violates the Due Process Clause by requiring Red Earth to collect and remit cigarette taxes for States to which it has no nexus.

### B. THE PACT ACT IS UNCONSTITUTIONALLY VAGUE AND THUS OFFENDS FUNDAMENTAL NOTIONS OF DUE PROCESS.

The PACT Act is unconstitutionally vague such that it is impossible for Red Earth to discern its compliance requirements. Yet, non-compliance will result in severe criminal penalties. This vagueness offends fundamental notions of due process and is, therefore, unconstitutional.

A statute is impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983); *see also City of Chicago v. Morales,* 527 U.S. 41, 55, 119 S. Ct. 1849, 1858 (1999); *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-404, 86 S. Ct. 518, 520 (1966); *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926). This is because "[n]o one may be required at peril of life, liberty or property to speculate as to the

meaning" of a statute that criminalizes conduct. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 619 (1939).

**1. The Act is Vague Because the Compliance Provisions are Inconsistent with Native American Rights.**

The PACT Act is unconstitutionally vague in that it appears to make unlawful that which is lawful. Under federal law and by virtue of Native-American sovereign rights,[5] Red Earth is not required to collect State taxes on tobacco sales to other Natives. *See, e.g., Moe*, 425 U.S. 463, 96 S. Ct. 1634; *United Sates v. Morrison*, No. 04-CR-699 (DHR)(S-2), 2010 U.S. Dist. LEXIS 37699 at *8 (E.D.N.Y. Apr. 16, 2010); *Cayuga Nation v. Gould*, No. 2010-13, 2010 N.Y. LEXIS 981 at **30 (May 11, 2010). To be sure, there are provisions in the PACT Act that pay lip service to Red Earth's sovereign rights, but there also exist provisions that would subject Red Earth to criminal penalties if it exercises those rights. This inconsistency will result in a chilling effect on Red Earth's exercise of its sovereign rights and may lead to arbitrary enforcement of the Act. As a result, the Act is unconstitutionally vague.

[5] For nearly two centuries the Supreme Court has recognized Indian tribes as "distinct, independent political communities," qualified to exercise many of the powers and prerogatives of self-government. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008) (citing *Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S. Ct. 1079, 1085 (1978). Supreme Court cases are replete with recognition of the role Native American sovereignty plays in restricting State encroachments upon Native American rights. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717 (1975) ("[I]ndian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are 'separate people' possessing 'the power of regulating their internal and social relations . . .'.") (*quoting United States v. Kagama*, 118 U.S. 375, 381-382, 6 S. Ct. 1109, 1113 (1886)); *McClanahan*, 411 U.S. at 173, 93 S. Ct. at 1263.

The Supreme Court has said that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 667 (1978), (*citing North Carolina v. Pearce*, 395 U.S. 711, 738-739, 89 S. Ct. 2072, 2083 (1969), *overruled in part on other grds.*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201 (1989) (finding that the enactment of two inconsistent statutes, one legalizing conduct and the other criminalizing the same conduct creates "doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of the first principles of due process"); *see also Wright v. Georgia*, 373 U.S. 284, 292, 83 S. Ct. 1240, 1245 (1963) ("a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute").

It is unclear whether the PACT Act creates a blanket requirement that Red Earth pay taxes related to cigarettes regardless of whether those cigarettes are sold on or off a Native American reservation and regardless of whether the purchaser is Native American or non-Native. On the one hand, § 2A requires plaintiffs to comply with ***all*** laws generally applicable to the sale of cigarettes or smokeless tobacco in delivery states. On the other hand, there are certain provisions of the Act that conflict with this blanket requirement. For example, Section 5(a) provides:

> EXCLUSIONS REGARDING INDIAN TRIBES AND TRIBAL MATTERS.
>
> (a) In General.--Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect—
>
> (1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe (as that term is defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) relating to the collection of taxes on cigarettes or smokeless tobacco sold in Indian country;
>
> (2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on cigarettes or smokeless tobacco sold in Indian country;
>
> (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
>
> (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes; or
>
> (5) any State or local government authority to bring enforcement actions against persons located in Indian country.

PACT Act, Pub. L. No. 111-154, § 5, 124 Stat. at 1109-1110.

Given the scope of plaintiffs' sovereign immunity with regard to sales of cigarettes, it is reasonable to assume that § 5 carves out an exception to the tax requirements as they apply to the sale of cigarettes on Native American reservations. Yet if Congress actually intended to carve out an exception recognizing Native American sovereign rights, its intent is not

clear from the text. This vagueness will have an impermissibly chilling effect on Red Earth's cigarette sales. Unless Red Earth is willing to risk criminal penalties, it now will need to cease otherwise lawful sales of cigarettes. In addition, the conflict between these provisions creates a real possibility that the statute will be arbitrarily and inconsistently applied to Red Earth. For these reasons, the Act, as applied to Red Earth and other similarly-situated Native American retailers, is unconstitutionally vague.

**2. The PACT Act is Unconstitutionally Vague in That it Fails to Define the Criminal Offense with Sufficient Definiteness.**

The PACT Act also is impermissibly vague in that it fails to define with precision the laws with which Red Earth must comply to avoid severe criminal penalties. Specifically, § 2A of the Act requires Red Earth to comply with, "***all*** State, local, tribal, ***and other*** laws ***generally applicable*** to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, ***including*** laws imposing . . . ***other payment obligations or legal requirements*** relating to the sale, distribution, or delivery or cigarettes or smokeless tobacco . . . . PACT Act, Pub. L. No. 111-154, § 2A, 124 Stat. at 1091.

Violation of the Act will result in severe criminal penalties. *See id.* at § 3 (Penalties), 124 Stat. at 1100. Specifically, the Act provides that "whoever knowingly violates this Act shall be imprisoned for not more than 3 years, fined under title 18, United States Code, or both." *Id.*

It is well settled that a statute is impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 358, 103 S. Ct. at 1858 (1983); *see also City of Chicago v. Morales,* 527 U.S. 41, 55, 119 S. Ct. 1849, 1858 (1999); *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-404, 86 S. Ct. 518, 520 (1966); *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926). "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357, 103 S. Ct. at 1858. To that end, a criminal statute must clearly define the conduct it proscribes. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1983); *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 2498 (2000). This is because "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning" of a statute that criminalizes conduct. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 619 (1939).[6]

It will be impossible, for any cigarette purveyor subject to the PACT Act to determine the scope of the Act's requirements. In the first place, the phrase "generally applicable" is inherently vague. In addition, in 1992 there were at least 6,000-plus taxing

[6] These very principles were discussed in the Supreme Court's June 24, 2010 decision in *Skilling v. United States.* In *Skilling*, a former Enron chief executive was charged with cheating investors, lying to auditors, and insider trading. Justice Ruth Bader Ginsburg said prosecutors should not have charged Skilling with "honest services fraud," since he did not set out to cheat Enron itself. *Skilling*, No. 08-1394, slip op. at 47 (U.S. June 24, 2010). The justices agreed that the "honest services" fraud law was anything but clear. *Id.* In his concurring opinion, Justice Scalia stated "I would therefore reverse Skilling's conviction under § 1346 on the ground that it fails to define the conduct it prohibits." *Id.* at 9 (Scalia, J., concurring).

jurisdictions. *See Quill*, 504 U.S. at 314 n.6, 112 S. Ct. at 1914. By 2009, the number of taxing jurisdictions reached at least 8,000. *See* Henchman and Burrows, *"Amazon Tax" Unconstitutional and Unwise*, http://www.taxfoundation.org/news/show/25120.html (Sept. 15, 2009). It is likely that each of those jurisdictions have numerous laws that may be "generally applicable" to cigarette sellers. In addition, the scope of those laws is ever-changing.[7] The Court in *Bellas Hess* recognized this impossible burden when describing the Illinois statute at issue in that case. Specifically, the Court noted:

> [I]f Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. ***The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations*** . . . .

*Bellas Hess*, 389 U.S. at 759-60, 87 S. Ct. 1392-93 (emphasis added).

In this case, the PACT Act does not clearly define the criminal offense in a manner in which Red Earth, or any other cigarette purveyor could comprehend. As a result, the statute will result in arbitrary and discriminatory enforcement and subject Red Earth to serious criminal penalties. For these reasons, the Act deprives Red Earth of its constitutional right to Due Process.

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[7] For example, there currently is before the City of Buffalo, New York Common Council a new law that has been described as "[o]ne of the nation's toughest sets of laws regulating the sale and advertisement of tobacco products." Brian Meyer, *City May Tighten Rules on Tobacco; New Regulations would Target Ads, Sales*, Buffalo News (June 21, 2010), available at http://www.buffalonews.com/2010/06/21/1089068/city-may-tighten-rules-on-tobacco.html. The proposed law, titled the "Responsible Tobacco Retailing Act," contains a number of new requirements for tobacco purveyors that will apply in addition to those required by New York State. *Id.*

## POINT IV

## RED EARTH WILL SUCCEED ON THE MERITS OF ITS EQUAL PROTECTION CLAIM.

The PACT Act violates Red Earth's equal protection rights both on its face and as applied. The Fifth Amendment Due Process Clause is interpreted to bar the Federal Government from making any classification that would be a violation of the Equal Protection Clause if done by a State. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694 (1954). It provides that "no state shall make or enforce any law which shall ... deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. The PACT Act denies Red Earth equal protection of the law in that the Act (1) will have an unconstitutionally disparate impact on Native American cigarette retailers based on their race and economic status and (2) is motivated by animus toward remote cigarette retailers.

### A. THE UNEQUAL APPLICATION OF THE PACT ACT VIOLATES RED EARTH'S EQUAL PROTECTION RIGHTS.

The PACT Act will apply discriminately to plaintiff, Aaron Pierce, by virtue of his status as a Native American and will apply discriminately to plaintiff, Red Earth, by virtue of its status as a remote seller of cigarettes. Neither discriminatory affect can be justified by the ends to be met by the purported objectives of the Act.

#### 1. The PACT Act Unconstitutionally Discriminates Against Native-American Cigarette Sellers.

The PACT Act violates Red Earth's equal protection rights by failing to recognize Native American sovereignty. Regardless of whether Congress intended to single out Natives,

the Act will have that effect. Unlike a non-Native retailer, by virtue of their sovereign rights, Native retailers can sell cigarettes to other Natives without collecting State sales and use taxes. Yet, under the PACT Act, Red Earth faces the peril of civil and criminal penalties if it continues to exercise those sovereign rights. As a result, the Act applies more forcefully against Native retailers than it does against non-Native retailers. This inequality stems from Native American sovereign rights and, as such, targets Native cigarette retailers based on race. The Act, therefore, must be suitably tailored to a compelling government interest to pass constitutional muster. *Loving v. Virginia*, 388 U.S. 1, 11-12, 87 S. Ct. 1817, 1823 (1967).

The PACT Act's inequality rests in the race of the affected plaintiff; that is, by virtue of the fact that Mr. Pierce, is a member of the Native American race, he is subject to disproportionately-exacting enforcement under the Act. As a result, the constitutional validity of the statute must be reviewed with strict scrutiny. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S. Ct. 283, 288 (1964) (laws affecting the equal rights among races are subjected to strict scrutiny and will be sustained only if they are "suitably tailored to serve a compelling state interest"), *see also Loving*, 388 U.S. at 11-12, 87 S. Ct. at 1823.

Addressing a criminal statute that created a racial classification, the *McLaughlin* Court held that:

> where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons '***to***

> ***like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other***.'

*McLaughlin*, 379 U.S. at 192 (citations omitted; emphasis added). The Supreme Court has "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Loving*, 388 U.S. at 11-12.

The PACT Act directly violates the principles set out in *McLaughlin* and *Loving* in that individuals who are similarly situated will be subject to different enforcement of the same law based solely on their status as members of the Native American race. The purposes of the Act, whether compelling or not,[8] are not proportionately related to the negative and unequal effect of the Act as applied to the plaintiffs. Those purported purposes are to:

> (1) require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers;
>
> (2) create strong disincentives to illegal smuggling of tobacco products;
>
> (3) provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling;
>
> (4) make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities;
>
> (5) increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco; and

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[8] Congress' clear animus toward all remote sellers of cigarettes is evident from the purported purpose to have "remote sellers comply with the same laws that apply to ***law-abiding*** tobacco retailers." PACT Act, 111 P.L. 154, § 1 (emphasis added). This language reveals an explicit and unfounded presumption that all remote sellers of cigarettes are criminals. This animus raises a serious question regarding the legitimacy of Congress' purpose.

> (6) prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales.

PACT Act, 111 Pub. L. No. 154, § 1, 111 Stat. at 1088.

Even if these purposes are compelling, the method by which Congress is attempting to effectuate them is not proportionally applied to Native Americans. Specifically, as applied to Native purveyors the Act criminalizes the Natives' exercise of their well-established right to sell cigarettes to Native tribal members without collecting State sales and use taxes. The irrational method by which Congress is attempting to carry out its purpose effectively renders the PACT Act violative of plaintiffs' equal protection rights.

### 2. The PACT Act Also Discriminates Against Remote Sellers of Cigarettes.

Even assuming that the PACT Act's disparate treatment of Native Americans is not primarily related to race, the Act also violates the plaintiffs' equal protection rights because it will disparately affect Native economic interests. While the equal protection clause "imposes no iron rule of equality" on a State's exercise of taxing power, "there is a point beyond which the State cannot go without violating the Equal Protection Clause." *Allied Stores of Ohio, Inc. v. Bower*, 358 U.S. 522, 527-528, 79 S. Ct. 437, 440-441 (1959).[9] The Court in *Allied Stores* stated that "[t]he State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. . . the classification 'must rest upon some ground of difference having

[9] Although *Allied Stores* involved analysis of a State tax law, its application to a federal policy is appropriate in this case because the PACT Act is a congressional dictate of State taxing authority. Whether Congress' actions are constitutional in this regard is highly questionable and also a subject of the present suit.

a fair and substantial relation to the object of legislation'." *Id.* at 528 (citations omitted).

In this case, the purposes of the PACT Act, whether legitimate or not, are in no way furthered by imposing an unequal burden on Native businesses versus non-Native businesses. The Act effectively will destroy Red Earth's cigarette retail business. Unlike non-Native businesses, the viability of Red Earth's business is directly connected to the company's ability to exercise sovereign rights related to cigarette sales. Faced with the peril of criminal liability for exercising those rights, Red Earth will cease the operations that are vital to its business. There can be no application of the PACT Act to Red Earth that will eliminate this unequal enforcement. As a result, the PACT Act is an unconstitutional violation of the plaintiffs' equal protection rights.

### B. THE PACT ACT VIOLATES PLAINTIFFS' EQUAL PROTECTION RIGHTS BECAUSE IT IS MOTIVATED BY ANIMUS.

The PACT Act violates plaintiffs' equal protection rights because it is predicated on the invidious purpose of burdening remote cigarette purveyors to such an extent that the cost of doing business will be prohibitive. As such, the Act is facially invalid.

When the Supreme Court has examined legislation that it found to have been motivated by animus toward a politically-unpopular group, it has been willing to strike down such legislation under a "mere rationality" test. In so doing, the Court has used one or both of the following rationales: (1) that the desire to harm an unpopular group cannot be a legitimate

governmental objective or (2) that, to the extent some legitimate State objective is cited by the statute's defenders, the statute is so poorly linked to achievement of the objective that not even a rational relation between the means and end is present. *See, e.g., Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676 (1985); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S. Ct. 3249 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973).

The PACT Act must be struck down as unconstitutional if "the varying treatment" of remote sellers from point-of-sale sellers "is so unrelated to the achievement of any combination of legitimate purposes" that the only conclusion to be drawn is that Congress's actions were irrational. *Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 943 (1979).

In *Romer v. Evans*, the Supreme Court noted that "even in the ordinary equal protection case calling for the most deferential of standards," the Court "insist(s) on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632-633, 116 S. Ct. at 1627. The Court went on to state:

> The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

*Id.*

There is no rational correlation between Congress's decision to limit the PACT Act to "Internet and other remote sellers of cigarettes and smokeless tobacco." *See* PACT Act, Pub. L. No. 111-154, § 1, 124 Stat. 1087. Based on the Act's purported purposes, the Act could justifiably target both point-of-sale cigarette sellers and remote sellers. For example, the Act purports to make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities. *Id.* The Act would equally meet this purpose if it were applied to both remote and point-of-sale cigarette sellers. There is no evidence that tobacco traffickers more often obtain their cigarettes through remote retailers than through point-of-sale retailers. A trafficker could just as easily walk into a store and purchase as it could order the cigarettes from a remote seller. Thus, favoring point-of-sale sellers over remote sellers creates a gap through which trafficking may continue to occur. In fact, it is possible that the Act will push traffickers to purchase at the point of sale rather than through remote sellers.

Another purported purpose is to "prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco. . . ." *Id.* This purpose also would be equally served by including point-of-sale cigarette sellers within the Act's reach. There is nothing in the Act that will prevent youth from traveling to a lower-tax State and purchasing cigarettes from a point-of-sale seller for use in a higher tax State.

The fact that the Act's purposes would equally be served by including the entire class of cigarette retailers, rather than just remote retailers, reveals that that the classification is made for the purpose of disadvantaging remote sellers of cigarettes. Such purpose violates equal protection. *Cf. Romer*, 517 U.S. at 116.

Moreover, Congress has devised, in bad faith, a constitutionally-suspect statute that will force remote retailers of cigarettes to collect and remit State taxes regardless of whether the retailers have the requisite nexus with each State. Setting forth its purposes, Congress reveals that the Act is premised on at least two illogical presumptions. First, Congress presumes that ***all*** Internet and other remote sellers of tobacco are not law abiding by the very virtue of being remote sellers, and, second, Congress presumes that cigarette traffickers have a greater propensity to purchase from remote sellers than point-of-sale sellers. *See* PACT Act, Pub. L. No. 111-154, § 1, 124 Stat. 1087.

There is no rational reason to assume that ***all*** remote sellers of cigarettes and loose tobacco violate State laws relating to the sale, delivery, and taxation of those products. And, while the increase of taxes on cigarettes undoubtedly has created a profitable black market for the product, cigarettes are as equally available from point-of-sale sellers as they are from remote sellers. Yet, the Act specifically targets and irrationally burdens only the remote sellers of cigarettes. The apparent animus toward remote sellers reveals its discriminatory purpose and renders it an unconstitutional violation of the plaintiffs' equal protection rights as expressed in the Fifth Amendment.

## POINT V

## IN THE ABSENCE OF INJUNCTIVE RELIEF, RED EARTH WILL SUFFER IRREPARABLE HARM.

Courts have long recognized that "[t]o satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent . . . ." *See Grand River*, 481 F.3d at 66 (internal citations omitted). Plaintiffs easily meet this standard.

### A. THE LOSS OF RED EARTH'S BUSINESS CONSTITUTES IRREPARABLE HARM AS A MATTER OF LAW.

"In this circuit it is firmly settled that the loss or destruction of a going business constitutes irreparable harm, whether viewed as an injury not compensable in monetary terms, or as one which cannot be reduced to monetary value with sufficient accuracy to make damages an adequate substitute for injunctive relief." *Janmort Leasing, Inc. v. Econo-Car Int'l., Inc.*, 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979) (internal quotations and citations omitted). Thus, the loss of a business or even a line of business – whether it has been in existence for two or twenty years – constitutes irreparable harm. *See Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (11 years); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (20 years); *Travellers Int'l AG v. Trans World Airlines, Inc.*, 684 F. Supp. 1206 (S.D.N.Y. 1988) (three years); *Janmort Leasing*, 475 F. Supp. 1282 (two years).

Aaron J. Pierce, an enrolled Seneca, began selling tobacco products in 2000. *See* Pierce Aff. at ¶ 1, 3. He formed Red Earth LLC and is its sole owner. *See id.* at ¶ 3. It sells its tobacco products to customers in 46 of the 50 States. *Id.* at ¶ 6. On June 29, 2010, Red Earth must halt its business operations or Aaron Pierce will be subject to criminal sanctions. That is, under the extraordinarily-expansive reach of the PACT Act, Red Earth cannot ensure compliance with the countless State and local laws that are "generally applicable" to cigarettes. Yet, this is what the PACT Act requires of it. Where, as here, Red Earth would lose its 10-year-old business, irreparable harm should be presumed.

### B. THE THREAT OF CRIMINAL PROSECUTION ALSO CONSTITUTES IRREPARABLE HARM.

"To require [Red Earth] to challenge [the PACT Act] only as a defense to an action brought by the Government might harm [it] severely and unnecessarily." *Abbott Labs. v. Gardner*, 387 U.S. 136, 153, 87 S. Ct. 1507, 1518 (1967), *superseded by statute on other grds.*, *Lubrizol Corp. v. Train*, 547 F.2d 310, 315 n.22 (6th Cir. 1976). The threat of prosecution for engaging in one or more constitutionally-protected acts is sufficient to demonstrate irreparable harm. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974); *Gary D. Peake Excavating, Inc. v. Town Bd. of the Town of Hancock*, 93 F.3d 68, 72 (2d Cir.1996); *Ward*, 291 F. Supp.2d at 198. In *Steffel*, the Supreme Court "did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution." *Id.* at 458-460, 94 S. Ct. 1209; *see also 414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) (affirming grant of preliminary injunction to business, restraining

enforcement of a city license ordinance while it challenged the ordinance's constitutionality). In another instance, where owners of massage parlors were threatened with criminal prosecution, injunctive relief was proper. *Joseph v. Blair*, 482 F.2d 575, 579 (4th Cir. 1973), *cert. denied*, 416 U.S. 955, 94 S. Ct. 1968 (1974) ("[t]he threat to plaintiffs' continued livelihood and freedom from prosecution was real.").

Similarly, where individuals who had been convicted of sex offenses sought to invalidate a statute prohibiting them from living within 2000 feet of schools and child-care centers, the court noted that the threat of criminal prosecution was sufficient to justify preliminary injunctive relief. *Doe v. Miller*, 216 F.R.D. 462, 471 (S.D. Iowa 2003) (seeking to invalidate the law on constitutional grounds, "[c]lass members will face criminal prosecutions for exercising what they believe is their constitutional right to live in privacy with their families as they so choose"). Thus, "[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril." *Edgar v. Mite Corp.*, 457 U.S. 624, 651, 102 S. Ct. 2629, 2645 (1982) (Stevens, J., concurring).

Here, the PACT Act makes it a felony for Red Earth to sell cigarettes without complying with the complex and constitutionally-infirm requirements of the statute. Even Red Earth's obviously-protected conduct of selling cigarettes to other Seneca Nation enrollees would subject it to criminal sanction. *See* PACT Act, Pub. L. No. 111-154, § 3 (Penalties), 124 Stat. at 1100. Thus, Red Earth has demonstrated a second, wholly distinct reason why in the

absence of injunctive relief it will suffer irreparable harm. As a result, the injunctive relief should be granted.

### C. THE DEPRIVATION OF A CONSTITUTIONAL RIGHT CONSTITUTES IRREPARABLE HARM.

Deprivation of a constitutional right is presumptively recognized as irreparable harm. *See Johnson v. Miles*, 355 Fed. Appx. 188, 196 (2d Cir. 2009) ("because an alleged violation of a constitutional right 'triggers a finding of irreparable harm,' [plaintiff] necessarily satisfied the requirement that a party applying for a preliminary injunction show irreparable harm.") (*citing Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Ward*, 291 F. Supp. 2d at 196. This principle of law does not apply exclusively to violations of a movant's First Amendment rights. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2000) (Fourteenth Amendment); *Jolly*, 76 F.3d at 482 (Eighth Amendment); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment); *Ward*, 291 F. Supp. 2d at 196 (rights granted to Native Americans under the Constitution).

As set forth above, if the PACT Act is enforced, plaintiffs would be deprived of their right to due process of law under the Fifth Amendment and their rights secured by the Equal Protection principles of the Constitution. Plaintiffs risk criminal prosecution for violations of this vague statute in derogation of their constitutional rights. Accordingly, plaintiffs have shown a third way why, without the grant of a preliminary injunction, they will suffer irreparable harm.

## POINT VI

## A BALANCING OF THE EQUITIES FAVORS RED EARTH AND SHOULD RESULT IN THE ISSUANCE OF INJUNCTIVE RELIEF.

Where the life of a litigant's business or enterprise is threatened, courts have recognized that those hardships tip in favor of the party requesting injunctive relief. *See Random House v. Rosetta Books, LLC*, 283 F.3d 490 (2d Cir. 2002). As set forth above and in the accompanying affidavit of Mr. Pierce, Red Earth's current business will be destroyed if the provisions of the PACT Act are enforced. It will have to close its doors and cease its current business operations.

In addition, if Red Earth no longer is able to conduct its business operations, the people who depend on it for their jobs also will be harmed. Red Earth will not have enough business to operate, let alone provide work for the people who currently run its day-to-day operations. On the other hand, if plaintiffs' request for a preliminary injunction is granted, and, assuming, for the sake of argument, that the statute is constitutional, the only harm to defendants is they will be delayed in enforcing the statute. Because of the profound harm that will befall Red Earth if the PACT Act is enforced, *i.e.*, it will cease to exist, and the slight harm, if any, to the defendants, the balancing of the equities tip in plaintiffs' favor.

## POINT VII

## INJUNCTIVE RELIEF SERVES THE PUBLIC INTEREST.

Red Earth is not the only business subject to the PACT Act. With the enforcement of the PACT Act, the irreparable harm outlined above will befall every remote cigarette retailer across the nation that sells its cigarettes via telephone, Internet, and mail as opposed to in-person sales. This unprecedented burden on interstate commerce opens the door for Congress to enact other laws of a similar nature targeting other products. As stated above, this statute is a veritable prohibition of cigarettes, a legal product, because it makes their sale via any means other than in-person nearly impossible. If it is allowed to be enforced, there is no limit on the products Congress may abolish and what other businesses it may destroy. Particularly in Indian Country, the PACT Act will have detrimental effects on the local economy and job market. The fears of the *Bellas Hess* Court will be realized in that interstate businesses will be entangled in "a virtual welter of complicated obligations to local jurisdictions . . . ." *Bellas Hess*, 386 U.S. at 760, 87 S. Ct. at 1393. As the Supreme Court cautioned, "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id.*

In addition, granting injunctive relief serves the public interest by ensuring that the principles of federalism at issue in this case will be fully examined prior to the enforcement of this statute. "There is a substantial public interest in resolving matters implicating federalism and state law questions." *Texas Midstream Gas Servs. LLC v. City of Grand Prairie*,

No. 08-11200, 2010 U.S. App. LEXIS 11108 at *10 (5th Cir. June 1, 2010). While Red Earth acknowledges that Congress' and the States' taxing power is concurrent, there simply is no predicate for Congress' expanding State (and local) taxing schemes as it has done here. "While the federal government has many powers, it remains a government of limited jurisdiction." *Sklarski v. Niagara Falls Bridge Comm'n*, 2010 U.S. Dist. LEXIS 29035, at *9 (W.D.N.Y. Mar. 26, 2010). As set forth above, Congress is not empowered to either abridge or, as it attempts to do here, expand, the reach of the States' taxing schemes. To permit it to do so runs afoul of principles of comity and federalism. "The allocation of power contained in the Commerce Clause. . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. 144, 166, 112 S. Ct. 2408, 2421 (1992). Indeed, "[t]he purpose of this design is to preserve the balance of power between the States and the Federal Government . . . [that] protect[s] our fundamental liberties." *United States v. Comstock*, 2010 U.S. LEXIS 3879, at **92-93 (May 17, 2010) (Thomas, J., dissenting), (*citing Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 572, 105 S. Ct. 1005 (1985) (Powell, J., dissenting)); *New York v. United States*, 505 U.S. at 181, 112 S. Ct. at 2421 (internal quotations omitted). Thus there is a considerable public interest that underlies plaintiff's application for injunctive relief.

## CONCLUSION

For these reasons, as well as those outlined in the supporting papers and other evidence tendered, it respectfully is requested that the Court grant plaintiffs' motion for a preliminary injunction and enjoin defendants from enforcing the PACT Act pending the outcome of this litigation, together with granting to plaintiffs such other and further relief as the Court deems just and proper.

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Buffalo, New York

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