UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

10-CV-530A

SENECA FREE TRADE ASSOCIATION,

Plaintiff,

v.

ERIC H. HOLDER, JR., in his official Capacity as Attorney General of the United States;
UNITED STATES DEPARTMENT OF JUSTICE;
JOHN E. POTTER, in his official capacity as Postmaster General and Chief Executive Officer
of the United States Postal Service;
and UNITED STATES POSTAL SERVICE,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

I. INTRODUCTION

On July 30, 2010, this Court entered a preliminary injunction that bars the federal government from enforcing against plaintiffs an Act of Congress that regulates interstate commerce in cigarettes and smokeless tobacco products. *See* No, 10-530, Dkt. No. 45 ("Op."), at 43. The enjoined provisions of

the Prevent All Cigarette Trafficking ("PACT") Act require that Internet and other remote sellers of tobacco products comply with the state and local laws that apply in the areas where their products are delivered, including state and local laws that prevent sales to children and require payment of excise taxes. *See* 15 U.S.C. § 376a(a)(3), (4) & 376a(d). For the following reasons, defendants hereby request that the Court stay this preliminary injunction pending appeal.

II. ARGUMENT

A. The Preliminary Injunction Rests On An Error Of Law.

We respectfully submit that the preliminary injunction rests on an error of law. This Court held that the Due Process Clause of the Constitution does not permit Congress to require that interstate tobacco retailers comply with the laws of the states and localities into which their products are physically delivered. Op. 14-24. But Congress has plenary power to regulate interstate commerce and, in the exercise of that power, Congress routinely requires that regulated entities comply with applicable state and local law.

For example, firearms distributors may not deliver a firearm "to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale,

delivery or other disposition." 18 U.S.C. § 922(b)(2). An online pharmacy must "comply with the requirements of State law concerning the licensure of pharmacies in each State from which it, and in each State to which it, delivers, distributes, or dispenses or offers to deliver, distribute, or dispense controlled substances by means of the Internet, pursuant to applicable licensure requirements, as determined by each such State." 21 U.S.C. § 831(b). A farmer may not deliver agricultural seeds in interstate commerce without "compliance with the seed laws of the State into which the seed is transported." 7 U.S.C. §§ 1571, 1573. Explosive dealers may not distribute explosives to any person who intends to transport the materials into "into a State where the purchase, possession, or use of explosive materials is prohibited." 18 U.S.C. § 842(c). It is unlawful to accept an online bet or wager if "such bet or wager is unlawful under any applicable ... State law in the State ... in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).

Interstate businesses are subject to the legislative jurisdiction of Congress, which is free to require compliance with state and local law. Even before passage of the 21st Amendment, Congress prohibited the shipment of alcoholic beverages "when liquor is intended to be used in violation of the

law of the state." James Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 324-25 (1917) (discussing the Webb-Kenyon Act). The Supreme Court expressly rejected the contention that this federal statute exceeded Congress's power to regulate interstate commerce "because it submitted liquors to the control of the states." Id. at 326. The Court explained that the "argument as to delegation to the states rests upon a mere misconception": "It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but *the will which causes the prohibitions to be applicable is that of Congress*, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." Ibid. (emphasis added).

Here, too, "the will which causes" state and local tobacco-product regulations to apply to interstate shipments is that of Congress. The PACT Act embodies Congress's determination that remote sellers must comply with the state and local laws that are generally applicable to sales of cigarettes and smokeless tobacco, including excise taxes, licensing and tax-stamping requirements, restrictions on sales to minors, and other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco. 15 U.S.C. § 376a(a)(3) & (d).

There is no basis to enjoin these federal requirements. The line of due process cases on which this Court relied (Op. 14-24) does not restrict Congress's power to require that interstate deliveries comport with state and local law. None of the cited cases involved an Act of Congress. The case on which the Court principally relied, Quill Corp. v. North Dakota, 504 U.S. 298 (1992), addressed a North Dakota law that required out-of-state retailers to collect an excise tax on products delivered into the state. The Supreme Court held that the North Dakota law violated the dormant commerce clause and invalidated the state statute on that basis. The Court found no due process violation, and, in the course of its discussion it distinguished the concerns raised by state and federal enactments. While Congress may not authorize a due process violation, the Court stressed that "Congress is ... free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." Id. at 318.

The federal requirements at issue here do not offend any "traditional notions of fair play and substantial justice" that are the touchstone of due process. *Id*. at 307 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Congress's authority to regulate interstate commerce is plenary, and it is hardly "unjust" for Congress to require that tobacco

retailers conduct their business in accordance with state and local laws that protect their residents from the harms caused by tobacco use.

Indeed, before 2009, no federal agency had comprehensive authority to regulate tobacco products, and responsibility to address the public health crisis caused by tobacco use fell primarily to state and local governments. State and local governments relied on excise taxes to curb demand for tobacco products, *see* Institute of Medicine, "Ending the Tobacco Problem: A Blueprint for the Nation," at 120, 182 (2007), as well on laws designed to prevent sales to minors. For example, the New York statute upheld in Brown & Williamson Tobacco Co. v. Pataki, 320 F.3d 200 (2d Cir. 2003), prohibits direct shipment of cigarettes to state residents and bans carriers from transporting such shipments. The PACT Act represents Congress's judgment that compliance with state and local laws, including tax laws, is an appropriate means of regulating interstate commerce in cigarettes and smokeless tobacco. That judgment lies well within Congress's authority.

Moreover, this Court's due process analysis would be incorrect even if state taxes were examined independently, apart from the federal statute. This Court correctly recognized that

state law satisfies due process if there is "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" Op. 14 (quoting Meadwestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008)). That connection plainly exists when excise taxes curb in-state demand for a dangerous and addictive product.

Quill itself rejected a due process challenge to North Dakota's requirement that out-of-state corporations collect and remit state use taxes, explaining that where a "foreign corporation purposefully avails itself of the benefits of an economic market in the forum State," the "requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." Quill, 504 U.S. 307-08. It is not controverted that plaintiffs purposefully direct their activities toward the economic markets of the states to which they ship their cigarettes and smokeless tobacco. Indeed, their business model is predicated on selling tobacco products across state lines to customers who otherwise would have to pay state excise taxes. Plaintiffs' complaint states that plaintiffs "acquire cigarettes free of New York excise taxes" and "resell [them] to customers and other end users in New York and other States free of such taxes." *See* Red Earth Compl. ¶ 21 (Dkt. No.1); see also Pierce Affidavit ¶ 6 (Dkt. No. 6) (one hundred

percent of Red Earth's tobacco sales are remote delivery transactions). A state's excise tax regime is thus itself an integral part of plaintiffs' operations. As the Supreme Court observed in rejecting a challenge to a cigarette excise tax imposed by the State of Washington, "[w]hat the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) (holding that principles of federal Indian law do not "authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere").

Contrary to this Court's understanding (Op. 23), whether a state excise tax may constitutionally be applied to an out-of-state seller does not turn on the extent to which the seller actively solicits business in the state. Although Quill noted that the seller had sent catalogues into North Dakota, 504 U.S. at 308, it did not suggest that such solicitation was a constitutional minimum. Instead, the Supreme Court declared that Quill's contacts with North Dakota were "more than sufficient for due process purposes." Ibid.

In any event, even assuming *arguendo* that this Court's due process analysis was correct, it would provide no basis for

holding that the PACT Act's delivery sales provision invalid as applied to all 140 members of plaintiff Seneca Free Trade Association. This Court enjoined enforcement of the PACT Act's delivery sales provision against any of these entities, *without regard to a particular retailer's contacts with a particular state* – in effect, invalidating the PACT Act requirement on its face. (emphasis added). But facial challenges are "disfavored" and cannot succeed unless the challenging party shows that "the law is unconstitutional in all of its applications" or has no "plainly legitimate sweep." Wash. State Grange v. Wash. State Repub. Party, 552 U.S. 442, 449-450 (2008). The possibility that *some* retailers may not have an Internet presence or other contacts with the states in which their products are distributed, Op. 20, would not provide a basis for a broad injunction barring enforcement of the federal statute against all of the retailers that plaintiffs represent.

The plaintiffs have not provided evidence about the extent of their contacts with the 49 other States. The majority of them have websites advertising their services, *see* SFTA Compl. ¶ 48 (No. 10-550, Dkt. No. 1); Red Earth Compl. ¶ 6 (No. 10-530, Dkt. No. 1), and plaintiffs assert that their tobacco-sale businesses keep "thousands" of people employed. *See* SFTA Comp. ¶¶ 6, 51. Plaintiffs do not contend that none of their members has

constitutionally adequate contacts with any of the States to which they ship. That should dispose of their facial challenge, and the burden should be on plaintiffs to identify any applications of the statute that allegedly offend due process.

B. The Balance Of Harms And The Public Interest Strongly Support A Stay.

The balance of harms and the public interest overwhelmingly support a stay. Although plaintiffs object to Congress's requirement that they pre-pay state and local excise taxes, plaintiffs have no right to undercut their brick-and-mortar competitors by selling tobacco products tax-free.

An injunction that blocks an Act of Congress is itself a form of irreparable injury. New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). And here, the federal statute that has been enjoined is designed to advance a government interest of the highest order — curbing the demand for tobacco products and, in particular, underage tobacco use. "[T]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 134-135 (2000) (citation omitted). Congress expressly found that remote sales make it "cheaper and easier for children to obtain tobacco products," and that "the majority of Internet

and other remote sales of cigarettes . . . are being made without adequate precautions to protect against sales to children" and "without the payment of applicable taxes." 15 U.S.C. § 375 Note, Findings 4 & 5.

In enacting the PACT Act, Congress found that "the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made without adequate precautions to protect against sales to children" and "without the payment of applicable taxes." Id. Finding 5. The Jenkins Act, which Congress enacted in 1949, was intended to facilitate the collection of state and local taxes on interstate sales by requiring "out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents." Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 987 (2010). However, Congress found that the effectiveness of this requirement is limited because many retailers fail to comply with "registration and reporting requirements in existing Federal law." 15 U.S.C. § 375 Note, Finding 5. Congress found that rising state and local tobacco tax rates have increased "the incentives for illegal sale of cigarettes and smokeless tobacco," "with Internet sales alone accounting for billions of dollars of lost Federal, State, and local tobacco tax revenue each year,"

and that illegal cigarette trafficking is linked to terrorism and other criminal activity. Id. Findings 1 & 7. Congress thus required that delivery sellers pay applicable taxes in advance and comply with the laws of the destination jurisdictions. Id. § 376(a), (d).

Congress crafted the PACT Act to confront the special problems presented by remote tobacco product sales, by requiring that remote sellers comply with the laws of their destination jurisdictions. An injunction that blocks enforcement of this federal statute is manifestly against the public interest. Accordingly, defendants respectfully request that this Court stay the preliminary injunction pending appeal.

III. CONCLUSION

For the foregoing reasons, the Court should grant a stay pending appeal of the preliminary injunction issued July 30, 2010.

DATED: August 6, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2010 I electronically filed the foregoing Defendants' Memorandum of Law in Support of Emergency Motion to Stay Preliminary Injunction Pending Appeal with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant(s) on this case:

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