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' OPPOSITION TO THE SENECA FREE TRADE ASSOCIATION'S REQUEST FOR AN INJUNCTION PENDING APPEAL

I. INTRODUCTION

The Seneca Free Trade Association ("SFTA") seeks an injunction pending appeal that would block enforcement of the PACT Act in its entirety. Thus, approximately 140 cigarette and smokeless tobacco retailers that SFTA represents seek license to

disregard the PACT's Act new federal registration, reporting, labeling, and shipping requirements; to violate Congress's ban on the distribution of cigarettes and smokeless tobacco through the U.S. mails; and to ignore the state and local laws that are designed to prevent youth access and curb demand for tobacco products through the imposition of taxes.

The motion should be denied. SFTA has no likelihood of success on the merits. Congress has plenary power over the U.S. mails, and plaintiffs' assertion that it was irrational for Congress to except intrastate mailings within Alaska and Hawaii fails for the reasons discussed by this Court and its decision issued on July 30, 2010.[1] (Dkt. #45). SFTA has not even attempted to challenge various PACT Act requirements including the new registration, reporting, labeling, and shipping provisions. See, e.g., 15 U.S.C. §376 (enhanced reporting requirements); 15 U.S.C. § 376a(b) (shipping and packaging requirements); id. § 376a(c) (record retention); id. § 376a(e) (assigning new responsibilities to the Attorney General); id. § 377. Its assertion that none of the PACT Act's provisions is severable ignores the Act's express severability provision and settled principles that govern judicial review of an Act of

[1] References to the District Court decision will be noted as "Op. ___".

Congress.

Nor does SFTA have any legitimate claim to equitable relief. SFTA waited three months to bring this suit, and, by its own account, its members have failed in the four months since the legislation was signed to make alternative delivery arrangements with private couriers that would comport with federal law. SFTA's members cannot now manufacture irreparable injury through inaction and delay and then demand extraordinary equitable relief to avert an "emergency" that is of their own making.

The harm that an injunction would cause is evident. The PACT Act was passed with overwhelming bipartisan support and embodies the judgment of the political branches that strong measures were needed to address the problems presented by remote sales of cigarettes and smokeless tobacco. Congress found that billions of dollars of Federal, state and local tax revenues are lost each year as a result of unlawful cigarette sales and smokeless tobacco sales. It found that remote sales facilitate illicit trafficking and undermine measures that are used to curb demand for tobacco products, including taxes. An injunction that would block enforcement of a federal law designed to combat the "single most significant threat to public health in the United States," FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120,

161 (2000), is clearly against the public interest.

II. LEGAL ARGUMENT

A. SFTA Has No Likelihood Of Success On The Merits.

SFTA's motion fails at the outset because SFTA has no likelihood of success on the merits. As the Second Circuit recently reaffirmed: "[W]here 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 Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 n.4 (2d Cir. 2010); accord Monserrate v. New York State Senate, 599 F.3d 148, 154 (2d Cir. 2010).

Although SFTA seeks an injunction that would bar enforcement of the PACT Act in its entirety, SFTA makes no attempt to show that the Act's new registration, reporting, and labeling requirements are unconstitutional. See, e.g., 15 U.S.C. §376 (enhanced reporting requirements); 15 U.S.C. § 376a(b) (shipping and packaging requirements); id. § 376a(c) (record retention); id. § 376a(e) (assigning new responsibilities to the Attorney

General); id. § 377 (enhanced federal penalties). The only constitutional claim that SFTA discusses in its motion is its challenge to 18 U.S.C. § 1716E(b) – the provision that exempts intrastate mailings within Alaska and Hawaii from the Act's general prohibition on sending cigarettes or smokeless tobacco through the U.S. mails, id. § 1716E(a).

This constitutional claim is baseless for the reasons set out by this Court. Congress's power to ban the transmission of cigarettes and smokeless tobacco through the mails is "beyond dispute." Op. 37. Congress has plenary authority over the postal system, *see* United States v. Barry, 888 F.2d 1092, 1095 (6th Cir. 1989), and Congress has long provided that specified items are "nonmailable" including firearms, poisons, inflammable materials, motor vehicle master keys, locksmithing devices, and plant pests. *See* 18 U.S.C. §§ 1715-1717; 39 U.S.C. §§ 3001-3018. To that list of nonmailable items, the PACT Act adds cigarettes and smokeless tobacco, 18 U.S.C. § 1716E(a).

SFTA does not contest Congress's power to make cigarettes and smokeless tobacco nonmailable, and it does not challenge the general prohibition set out in Section 1716E(a). Instead, SFTA contends that the limited geographic exception set out in

Section 1716E(b) lacks any rational basis. Pl. Mot. 1.[2]

As this Court explained, it was hardly irrational for Congress to exempt intrastate mailings that occur within the States of Alaska and Hawaii. Because of the unique geography of these two States, "without such an exception, some citizens in Alaska and Hawaii would not be able to obtain those products at all." Op. 37. Congress has repeatedly taken such geographic considerations into account, crafting exceptions for Alaska and Hawaii under a wide range of federal programs and policies.[3] Constitutional challenges to such exceptions have consistently been rejected. See, e.g., Matsuo v. United States, 586 F.3d 1180, 1185 n.8 (9th Cir. 2009) (rejecting challenge to statutory exemption of federal employees in Alaska and Hawaii from locality

[2] References to the SFTA's Motion for an Injunction Pending Appeal will be noted as Pl. Mot. ___.

[3] See, e.g., 5 U.S.C. §§ 5701(6), 5721(3), 5921(5) (federal employee pay); 7 U.S.C. § 1638a(a)(2)(A)(ii) (agricultural labeling); 7 U.S.C. § 2012(u) (Supplemental Nutrition Assistance Program); 7 U.S.C. § 2014(b) (national food assistance); 12 U.S.C. § 1713(c)(2) (rental housing insurance); 12 U.S.C. § 1717(b)(1)-(2) (mortgages); 15 U.S.C. § 1175(c) (gambling devices); 23 U.S.C. § 133(d)(3)(c) (highway funding); 26 U.S.C. § 4261(c)(3) (transportation taxes); 26 U.S.C. § 4462(b) (Harbor Maintenance Tax); 37 U.S.C. § 404a(a)(2) (subsistence expenses); 42 U.S.C. § 1395m(10) (Social Security payments); 42 U.S.C. § 1760(f) (federal school lunch program); 42 U.S.C. § 4013(b)(1)(A)(iii) (national flood insurance program); 42 U.S.C. § 4955(b)(2) (antipoverty program); 42 U.S.C. § 7545(i)(4) (Clean Air Act); 49 U.S.C. § 13102(17) (surface transportation); 49 U.S.C. § 47107(j) (federal highway funds).

pay adjustments); Kahawaiolaa v. Norton, 386 F.3d 1271, 1279-83 (9th Cir. 2004) (rejecting challenge to regulations excluding native Hawaiians from tribal recognition process that governed in other 49 States); see also United States v. Ptasynski, 462 U.S. 74, 85 (1983) (sustaining exemption of Alaskan crude oil from federal windfall profits tax given the "unique" and "disproportionate costs and difficulties" of drilling and transportation in Alaska).

It is settled that an equal protection claim cannot succeed if it "rest[s] solely on a statute's lack of uniform geographic impact." Hodel v. Indiana, 452 U.S. 314, 332 (1981). Rather, "'Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions.'" Ibid. (quotation marks and citation omitted). Because Congress has the "power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems," Regional Rail Reorganization Act Cases, 419 U.S. 102, 159 (1974), "[t]he equal protection clause . . . is not violated when a geographic area is singled out for different treatment," Columbia River Gorge United-Protecting People and Property v. Yeutter, 960 F.2d 110, 115 (9th Cir. 1992).

SFTA cites no case ever to have invalidated a geographic distinction drawn by Congress, and the cases that SFTA does cite (Pl. Mot. 8) are inapposite on their face. See, e.g., Williams v. Vermont, 472 U.S. 14, 27 (1985) (Court's "quite narrow" decision invalidated a Vermont use-tax provision because there was "no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere"). SFTA's suggestion that the line drawn by Congress is underinclusive (Pl. Mot. 8-9) would be irrelevant even if it were substantiated. Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993). Defining legislative classes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." Id. at 315-16. Thus, even if a classification is "to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." Vance v. Bradley, 440 U.S. 93, 108 (1979); see also

Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) ("[E]very line drawn by a legislature leaves some out that might well have been included. [FNS] That exercise of discretion, however, is a legislative, not a judicial, function.").

B. There is No Basis to Enjoin the PACT Act in its Entirety

In any event, even assuming *arguendo* that Congress had no rational basis to exempt intrastate mailings in Alaska and Hawaii, that would provide no basis to enjoin any *other* PACT Act provision apart from the purportedly irrational exception set out in Section 1716E(b). Although plaintiffs declare that none of the PACT Act provisions is severable, Pl. Mot. 9, Congress included an express severability provision, which states that "if any provision of this Act . . . is held invalid, the remainder of the Act and the application of the Act to any other person or circumstance shall not be affected thereby." Pub. L. 111-154, § 7, 124 Stat. 1111. "The Supreme Court has held that such a clause creates a presumption in favor of severability." Federal Election Comm'n v. Survival Education Fund, Inc., 65 F.3d 285, 297 (2d Cir. 1995) (citing Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987)). As this Court correctly observed, it is the "duty" of the Court to "maintain the act in so far as it is valid." Op. 42 (quoting Alaska Airlines, 480 U.S. at 684). Thus, if the exceptions for intrastate mailings in Alaska and

Hawaii were irrational, the only result would be that the exception set out in 18 U.S.C. § 1716E(b)(2) would be invalidated in a suit brought by a party that is injured by that exception. Plaintiffs have not shown that they are injured by the exception for intrastate mailings in Alaska and Hawaii and thus have no standing to challenge the exception. See Lamar Advertising of Penn, LLC v. Town of Orchard Park, New York, 356 F.3d 365, 375 & n.13 (2d Cir. 2004) (noting the relationship between severability and standing).

In short, plaintiffs have no likelihood of success on appeal, and their motion must therefore be denied. Plaintiffs provide no basis whatsoever for an order that would direct thousands of Postal Service employees to disregard the clear prohibition on cigarette and smokeless tobacco mailings established by Congress – the branch of the United States Government that is vested with express constitutional authority over the Postal Service. See U.S. Const., Art. I, sec. 8, cl. 7.

C. The Balance Of Harms And The Public Interest Preclude An Injunction.

Even apart from the failure of its challenge on the merits, SFTA has no legitimate claim to equitable relief. Although the PACT Act was signed into law on March 31, 2010, SFTA waited three months to bring this suit. That delay is itself reason to deny

the extraordinary relief of an injunction, as the District Court for the District of Columbia held in an indistinguishable PACT Act case. See Gordon v. Holder, No. 10-1092-HHK (D.D.C.), 6/29/2010 Order (Dtk. No. 6), *appeal pending*, No. 10-5227 (D.C. Cir.). It is a venerable maxim that "equity aids the vigilant, not those who sleep on their rights." Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998). Accordingly, "injunctive relief" is "properly denied" if the claimant "was dilatory in making his application." Mallory S.S. Co. v. Thalheim, 277 F. 196, 200 (2d Cir. 1921); see also Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1026 (D.C. Cir. 1998).

Compounding its three-month delay in filing suit, SFTA now declares that its members have failed in the four months since the PACT Act was passed to make alternative delivery arrangements with private couriers that would comport with federal law. Pl. Mot. 2. Plaintiffs cannot manufacture irreparable injury in this way. SFTA's members were free to challenge the federal statute well in advance of its effective date, or to come into compliance and then litigate at leisure. They are *not* free to let months go by and then demand relief from an "emergency" that is of their own making.

The harm that an injunction would cause cannot be questioned. "[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 161. Congress has confronted the crisis caused by tobacco use through comprehensive legislation. The Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776, vests the Food and Drug Administration with authority to regulate tobacco products and imposes requirements and restraints on the marketing of tobacco products. The PACT Act targets the particular problems presented by Internet retailers and other remote sellers of cigarettes and smokeless tobacco.

In legislative findings set out in the statute, Congress determined 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, without the payment of applicable taxes, and without complying with the registration and reporting requirements of the Jenkins Act. Congress found that remote sales facilitate tax evasion and illicit trafficking by terrorists and other criminals, and that billions of dollars in federal, state and local taxes are lost each year. These taxes are not only revenue-raising but also

regulatory: taxation is one of the principal means used to curb demand for tobacco products. See Institute of Medicine, "Ending the Tobacco Problem: A Blueprint for the Nation," at 120 (2007). "It is well established that an increase in the price of cigarettes decreases their use and that raising tobacco excise taxes is one of the most effective policies for reducing the use of tobacco." Id. at 182.

Based on its findings, Congress imposed new and enhanced federal registration, reporting, and labeling, and shipping requirements; required that remote sellers pre-pay applicable taxes; and barred the distribution of cigarettes through the U.S. mails. An injunction that would negate the impact of this Act of Congress is manifestly against the public interest. Where, as here, "the full play of the democratic process involving both the legislative and executive branches has produced a policy in the name of the public interest embodied in a statute," a court may not "substitute its own determination of the public interest for that arrived at by the political branches[.]" Able v. United States, 44 F.3d 128, 131-32 (2d Cir. 1995).

III. CONCLUSION

For the foregoing reasons plaintiffs' motion for an injunction pending appeal should be denied.

DATED: August 9, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010 I electronically filed the foregoing Defendants' Opposition to the Seneca Free Trade Association's Request for an 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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