

# 10-3165-cv(L), 10-3191-cv(XAP), 10-3123-cv(XAP)

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## United States Court of Appeals *for the* Second Circuit

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RED EARTH LLC, d/b/a SENECA SMOKESHOP, AARON J. PIERCE,  
SENECA FREE TRADE ASSOCIATION,

*Plaintiffs-Appellees,*

— v. —

UNITED STATES OF AMERICA, 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, UNITED STATES POSTAL SERVICE,

*Defendants-Appellants,*

NEW YORK ASSOCIATION OF CONVENIENCE STORES,

*Defendant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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### **BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CONVENIENCE STORES AND NEW YORK ASSOCIATION OF CONVENIENCE STORES**

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HARRIS BEACH PLLC  
*Attorneys for Amici Curiae National  
Association of Convenience Stores and New  
York Association of Convenience Stores*  
726 Exchange Street, Suite 1000  
Buffalo, New York 14210  
(716) 200-5050

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### **DISCLOSURE STATEMENT**

Neither *amicus* National Association of Convenience Stores (“NACS”) nor *amicus* New York Association of Convenience Stores (“NYACS”) is owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in either *amicus*.<sup>1</sup>

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<sup>1</sup> Pursuant to Circuit Rule 29.1, *Amici* state that no party contributed money intended to fund the preparation or submission of this brief, and the parties’ counsel did not author any portion of this brief. In preparing the brief, *Amici*’s counsel consulted with and received assistance from counsel for Altria Client Services, Inc., a wholly owned subsidiary of publicly-held Altria Group, Inc., on behalf of Philip Morris USA Inc. The Court’s official caption appears to list NACS and NYACS as defendants, but in fact they are *Amici* supporting the defendants.

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### **IDENTITY AND INTERESTS OF *AMICI***

*Amicus* National Association of Convenience Stores (“NACS”) is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. *Amicus* New York Association of Convenience Stores is a private, not-for-profit trade association representing the convenience store industry of New York State. NYACS’ retail membership consists of 250 companies that operate convenience stores, with retail members ranging in size from one store to over 300. Cigarettes and other tobacco products are a significant component of *Amici*’s members’ sales.

As retail businesses that sell tobacco products in compliance with Federal, State, and local laws, NACS and NYACS members have a strong interest in this litigation. They have suffered billions of dollars in injury due to unfair competition from companies, like Red Earth, LLC and the Internet cigarette vendors of the Seneca Free Trade Association (the “SFTA”), that sell cigarettes over the Internet at enormous discounts made possible by their complete disregard for State and local taxes and other rules governing cigarette sales. *See* 15 U.S.C. § 375, Note, Finding 6 (finding that “unfair competition from illegal sales of cigarettes and smokeless tobacco is taking billions of dollars of sales away from law-abiding retailers throughout the United States”).

*Amici* file this brief pursuant to their Motion for Leave to file a Brief *Amici Curiae* filed on September 27, 2010.

## **INTRODUCTION AND BACKGROUND**

The district court committed plain error in enjoining the provisions of the PACT Act that require vendors selling cigarettes over the Internet in interstate commerce to comply with the laws of the markets into which they make their sales. The “minimum contacts” analysis of *Quill v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992)—the district court’s sole legal basis for its injunction—applies only in cases where *states* seek to assert their tax jurisdiction over out-of-state vendors. The PACT Act is an exercise of *Congress*’ authority to set the conditions under which a company may trade in interstate commerce. When Congress is legislating, the Due Process Clause requires only that the affected party have minimum contacts with the United States as a whole.

The district court’s injunction was an abuse of discretion even if the PACT Act was subject to review under the *Quill* minimum contacts analysis. And, in any event, the PACT Act easily meets the requirements set forth in *Quill*. The district court erred in failing to recognize that an Internet vendor establishes minimum contacts with a foreign state when it deliberately offers to sell cigarettes into the foreign state via its website, accepts an order from a customer located in that state, and then fulfills the order by packaging and sending cigarettes into the foreign

state. *See, e.g., Illinois v. Hemi Grp. LLC*, 2010 WL 3547647, at \*4 (7th Cir. Sept. 14, 2010).

On the other hand, the trial court was exactly correct in rejecting the SFTA's equal protection challenge to the PACT Act's ban on using the United States Postal Service ("USPS") to deliver cigarettes. Congress had ample reason to impose the mailing ban, and acted reasonably and within its legislative discretion in allowing a limited exception for intra-state cigarette deliveries in Hawaii and Alaska based on the remote nature of those States.

#### **A. Internet Sales of Untaxed Cigarettes**

Cigarettes are among the most highly taxed and regulated products. Convenience stores in New York City charge over \$11.00 for a single pack,<sup>2</sup> with more than *half* that amount attributable to State and local taxes.<sup>3</sup> Brick-and-mortar retailers (*Amici's* members) collect and pay those taxes, as well as complying with a host of other regulations governing cigarette sales.<sup>4</sup>

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<sup>2</sup> Nicholas Confessore, *Cigarette Tax Increased to Keep State Running*, New York Times, June 21, 2010, *available at* <http://www.nytimes.com/2010/06/22/nyregion/22budget.html> (last visited Sept. 19, 2010).

<sup>3</sup> N.Y. TAX LAW § 471(1) (excise tax is \$4.35 per pack); New York City Adm. Code, Title 11, ch.13, § 11-1302 (city excise tax is additional \$1.50 per pack, for a total state and local excise tax of \$5.85 per pack).

<sup>4</sup> In addition to tax laws, there are a host of other laws that cigarette retailers must take care to follow. In New York, for example, these include laws requiring extensive licensing and registration requirements, which often include payment of fees to the State; the maintenance and filing of reports with the State; restrictions

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The high taxes and other regulations applicable to cigarettes have encouraged a growing “black market” of Internet cigarette vendors who offer customers highly “discounted” cigarettes, with the discounts reflecting the fact that these vendors ignore federal, state and local tax obligations and other cigarette laws.<sup>5</sup> Some of these are foreign vendors who buy European cigarettes and resell them into the United States without paying State and local taxes.<sup>6</sup> Others are

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on where and how tobacco products can be displayed in a store; and, of course, laws that strictly require age verification of the purchaser to ensure that minors do not have access to tobacco products. *See, e.g.* N.Y. TAX LAW § 470 (definition); N.Y. TAX LAW § 471(1) (taxation and stamping); N.Y. TAX LAW § 473 (stamping and reporting requirements); N.Y. PUB. HEALTH LAW § 1399-ll(1) (licensing); N.Y. TAX LAW § 480(1) (licensing); N.Y. TAX LAW § 480-a (registration); N.Y. TAX LAW § 483 (minimum pricing); N.Y. PUB. HEALTH LAW § 1399-cc (age restrictions). New York also has fire safety laws that require vendors to sell only cigarettes that will self-extinguish if not smoked within a specified time period. *See* N.Y. EXEC. LAW § 156-c.

<sup>5</sup> “The incentive to profit by evading payment of taxes rises with each tax rate hike imposed by federal, state and local governments.” U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Bureau of Alcohol, Tobacco, Firearms and Explosives’ Efforts to Prevent the Diversion of Tobacco,” at ii (Sept. 2009) (*available at* [www.justice.gov/oig/reports/ATF/e0905.pdf](http://www.justice.gov/oig/reports/ATF/e0905.pdf) (last visited Sept. 19, 2010) (Exhibit B to the “Brief of *Amici Curiae* National Association of Convenience Stores and New York Association of Convenience Stores in Oppositions to Motions for Preliminary Injunctive Relief” (filed July 6, 2010 in the district court proceedings) (“*Amici’s Mem.*”).

<sup>6</sup> *See* Government Accountability Office, GAO-02-743, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement, at 27-52 (2002) (“2002 GAO Report”) (listing many foreign websites); *see also, e.g.*, <http://savontobacco.com/> (offering “Cheap Tax-Free Cigarettes and NO Purchase Reporting”) (last visited Sept. 19, 2010) (Exhibit C to *Amici’s Mem.*).

Native American vendors who enjoy special rights to sell tax-free cigarettes to tribal members on their own reservations for their personal use, but in fact divert those cigarettes for “discount” sales to non-tribal members across the country.<sup>7</sup>

By 2005, there were at least 500 cigarette-selling websites. 15 U.S.C. § 375, Note, Finding 9. One study estimated that losses in state tax revenue as a result of cigarette tax evasion (including Internet sales) increased from less than \$170 million in 1990 to more than \$550 million by 2000.<sup>8</sup>

#### **B. Internet Cigarette Sales By Seneca Nation Vendors**

Seneca cigarette vendors can purchase tax-free cigarettes for their fellow tribal members’ personal consumption.<sup>9</sup> But they massively and illegally divert those tax-free cigarettes for sale to non-tribal members across the United States.

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<sup>7</sup> See 2002 GAO Report, at 29-51; see also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (“It is painfully apparent that the value marketed by the smokeshops to persons coming from the outside is . . . solely an exemption from state taxation”).

<sup>8</sup> See, e.g. K. Davis, M. Farrelly, Q. Li, and A. Hyland, *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, at 3 (March 2006) (prepared for the New York Department of Health and available at [http://www.health.state.ny.us/prevention/tobacco\\_control/docs/cigarettes\\_purchasing\\_patterns.pdf](http://www.health.state.ny.us/prevention/tobacco_control/docs/cigarettes_purchasing_patterns.pdf), at 3 (“*Cigarette Purchasing Patterns*”) (last visited Sept 19, 2010).

<sup>9</sup> *Dep’t of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 72-76 (1994)

The 8,000 members of the Seneca Nation<sup>10</sup> thus operate some 140 businesses selling cigarettes for remote delivery (by mail or private courier) to non-tribal customers across the United States. *See Red Earth LLC v. United States*, 2010 WL 3061103, at \*1(W.D.N.Y. July 30, 2010) (Joint Appendix (“JA”), at 6). These vendors promise customers that they will save money through a variety of false and misleading claims, such as the assertion by one website that as a “Sovereign Nation we do not pay state taxes on cigarettes and tobacco products, we then pass this savings on to all of our customers nationwide. . . .”<sup>11</sup>

Of course, the Seneca sales are based on their unlawful diversion of tax-free cigarettes intended for tribal members’ personal use to sales across the country. That is, these vendors do exactly what the Supreme Court has repeatedly instructed they may not: they “market an exemption from state taxation” to non-tribal members.”<sup>12</sup>

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<sup>10</sup> See JA117, ¶ 7.

<sup>11</sup> AllOfOurButts.Com, *Discount Premium & Generic Cigarettes, Domestic Cigars and Fresh Chewing & Rolling Tobacco*, [www.allofourbutts.com](http://www.allofourbutts.com) (visited September 19, 2010).

<sup>12</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980); *see also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.6, 482-83 (1976); *Washington*, 447 U.S. at 151-62; *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11-12 (1985) (*per curiam*); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-14 (1991); *Attea*, 512 U.S. at 72-76 .

But the offer of tax-free (and thus heavily discounted) cigarettes is the keystone of the Seneca cigarette economy. As the owner of plaintiff Red Earth LLC candidly admitted in the court below:

My business model is predicated upon soliciting sales and engaging in transactions for the purchase of cigarettes *free of New York State sales taxes* by utilizing the Internet, telephone, and mail \* \* \* My business model affords me a competitive advantage over traditional brick and mortar retail establishments, both on and off the Cattaraugus Indian Reservation, that do not engage in mail, telephone, or Internet sales.

(JA95 at ¶ 5, 96 at ¶ 11).

The Seneca vendors' disregard of the law goes beyond taxes. For over sixty years, the Jenkins Act has required vendors selling cigarettes into a foreign state to report to the destination state's tax administrators the names and addresses of their customers and the quantity of cigarettes they purchased. *See* 15 U.S.C. §§ 375-78. This information assists state efforts to collect cigarette taxes directly from the purchasing customers. *See Hemi Grp., LLC v. City of N.Y.*, 130 S. Ct. 983, 987 (2010). But Native American Internet vendors generally ignore their Jenkins Act obligations altogether, making it virtually impossible for states to collect their cigarette taxes on the flood of out-of states sales coming from Seneca and other Native American vendors.<sup>13</sup>

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<sup>13</sup> *See* 15 U.S.C. § 375 Note, Finding 5 (Congressional finding that "the majority of Internet and other remote sales of cigarettes and smokeless tobacco are

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### C. The Harms of Internet Cigarette Sales That Congress Sought to Cure In the PACT Act

The growth of Internet cigarette vendors created severe problems that Congress sought to address in enacting the PACT Act. *First*, the vendors' disregard of the tax laws deprives state and local governments of billions of dollars in tax revenues. *See* 15 U.S.C. § 375, Note, Finding 1 ("the sale of illegal cigarettes and smokeless tobacco products significantly reduces Federal, State, and local government revenues, with Internet sales alone accounting for billions of dollars of lost Federal, State, and local tobacco tax revenue each year"); 2002 GAO Report at 1 (citing studies that annual State tax losses could be as high as \$1.4 billion).

*Second*, Internet cigarette businesses' weak age verification practices result in increased risk of cigarettes being sold to minors over the Internet. *See* 15 U.S.C. § 375, Note, Findings 4, 5 ("the majority of Internet and other remote sales of cigarettes . . . are being made without adequate precautions to protect against sales to children").<sup>14</sup>

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being made . . . without complying with the nominal registration and reporting requirements in existing Federal law"); 2002 GAO Report, at 4-5.

<sup>14</sup> *See, e.g.*, Testimony of Matthew L. Myers, President, Campaign for Tobacco- Free Kids Hearing Before the Subcommittee on Crime, Terrorism, and

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**Finally**, as *Amici*'s brick-and-mortar retail members know all too well, law-abiding retailers and other cigarette businesses lose significant amounts of business to websites which, by virtue of their tax avoidance, sell cigarettes at an unlawfully low price. *See* 15 U.S.C. § 375, Note, Finding 6. They pay the state and local taxes imposed on cigarette sales, but face unfair competition from the flood of out-of-state and untaxed cigarettes sold by Seneca and other Internet vendors.

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Homeland Security, United States House of Representatives, Hearing on H.R. 4081, the "Prevent All Cigarette Trafficking Act of 2007" and H.R. 5689, the "Smuggled Tobacco Prevention Act of 2008," at 2 *et seq.* (May 1, 2008) (Exhibit D to *Amici's Mem.* and available at <http://judiciary.house.gov/hearings/pdf/Myers080501.pdf>) (last visited Sept. 19, 2010) ("The vast majority of Internet tobacco product sellers do not do any age or ID verification. . . . [A] New York study found that in 2004 and 2005, more than 5 percent of the 9th graders (14 and 15 year olds) had bought cigarettes online"); *see also* Kurt M. Ribisl, Annice Kim & Rebecca S. Williams, *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 92(6) *Am. J. Pub. Health* 940, 940 (June 2002) ("most Internet cigarette vendors use inadequate procedures for age verification"); *see also* the Campaign for Tobacco-Free Kids' testimony before the House Judiciary Committee: "There are currently about 200 U.S. websites and 200 foreign-based websites that sell cigarettes to U.S. smokers. Effective safeguards against kids being able to purchase cigarettes via the Internet are almost non-existent. While many Internet websites post notices that sales to persons under 18 are illegal or not allowed, very few do anything at all to make sure such sales do not occur." *Youth Smoking Prevention & State Revenue Enforcement Act, Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary of the United States House of Representatives on H.R. 1839*, 108th Cong., at 30 (May 1, 2003) (available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f:86786.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:86786.pdf)) (last visited Sept. 19, 2010).

## ARGUMENT

This Court reviews the grant or denial of preliminary injunctive relief for abuse of discretion. *See Acorn v. United States*, \_\_\_ F.3d \_\_\_, 2010 WL 3191442, at \*5 (2d Cir. Aug. 13, 2010); *CFTC v. Walsh*, \_\_\_ F.3d \_\_\_, 2010 WL 3191456 (2d Cir. 2010). A district court abuses its discretion “when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” *Acorn*, 2010 WL 3191442, at \*5, *quoting Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 209 (2d Cir. 2009). The Court reviews questions of law *de novo*. *Id.*

The party moving for injunctive relief must demonstrate (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor, and (3) that the public's interest weighs in favor of granting an injunction. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, \_\_\_ F.3d \_\_\_, 2010 WL 2902501 (2d Cir. July 27, 2010). “When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more

rigorous likelihood-of-success standard.” *Id.*, quoting *Cnty. of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008).

**I. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRELIMINARILY ENJOINING THE PACT ACT PROVISIONS REQUIRING COMPLIANCE WITH STATE TAX AND OTHER LAWS**

The district court committed plain error in enjoining the provisions of the PACT Act that require Internet cigarette vendors selling across state lines to comply with the tax and other laws of the jurisdictions into which they sell. *Red Earth LLC*, 2010 WL 3061103, at \*18 (JA46) (enjoining enforcement of 15 U.S.C. §§ 376a(a)(3), 76a(a)(4), and 376a(e)).

**A. The District Court Applied the Wrong Due Process Standard to Evaluate Federal (As Opposed to State) Legislation**

In finding that Congress cannot require Internet vendors to comply with the laws of the States and localities into which they sell cigarettes, the district court relied exclusively on the “minimum contacts” analysis of *Quill v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992). *See Red Earth LLC*, 2010 WL 3061103, at \*6-10 (JA. 17-24). But *Quill* involved a *state*’s efforts to impose its taxes on an out-of-state vendor.

This case, in contrast, involves the *Federal Government* exercising its broad authority to impose restrictions on a cigarette vendors’ right to engage in interstate commerce. Neither the district court nor plaintiffs have identified a single

precedent applying *Quill* minimum contacts analysis to *federal* legislation imposing conditions on companies who want to do business in interstate commerce.

Congress has authority to impose restrictions on interstate commerce entirely without regard to the affected parties' contacts with any particular state. *See, e.g., James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (1917) (Congress has authority under the Commerce Clause to require those shipping liquor in interstate commerce to comply with the laws of the States into which they ship). As in *Clark Distilling*, Congress in the PACT Act simply exercised its Commerce Clause authority to provide that any company wishing to exercise the privilege of shipping cigarettes across state lines would be required to comply with the laws of the destination states.

As *Quill* itself explained, due process analysis is concerned with whether allowing a sovereign to assert jurisdiction would offend “traditional notions of fair play and substantial justice.” *Quill*, 504 U.S. at 307, *quoting Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Where the federal government is legislating—as opposed to the state legislation at issue in *Quill*—“it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States.” *Busch v. Buchman, Buchman & O’Brien Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994).

It is settled law, for example, that Congress may impose personal jurisdiction even in districts where the defendant has had *no* “minimum contacts,” so long as the defendant has sufficient contacts with the United States as a whole. *See, e.g. SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004) (“the requirement of ‘minimum contacts’ with a forum state is inapplicable where the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process . . . . In such circumstances, minimum contacts with the United States suffice”) (citation omitted); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368-69 (3d Cir. 2002) (same); *SEC v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997) (same).<sup>15</sup>

These cases demonstrate the breadth of Congress’ authority to legislate without regard to minimum contacts with any particular state. If the Due Process Clause permits Congress to impose personal jurisdiction over a defendant anywhere in the United States without regard to minimum contacts, it surely allows

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<sup>15</sup> *See also Wiwa v. Shell Petroleum Dev. Co. of Nigeria, Ltd.*, 335 F. App’x 81, 83 (2d Cir. 2009) (in suit under the federal Alien Tort Claims Act, the question was whether the case was properly dismissed for “failure to allege the requisite minimum contacts with the United States”) (citation omitted); *Porina v. Marward Shipping Co.*, 521 F.3d 122, 129 (2d Cir. 2008) (in suit under federal maritime statutes, question was whether defendant had sufficient “contacts with the United States”) (citation omitted); *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003) (in suit under federal antitrust laws, question was whether defendant “ha[d] sufficient minimum contacts with the United States to satisfy due process”).

Congress (as it did in *James Clark Distilling*) to condition the privilege of selling highly-regulated commodities in interstate commerce on vendors' compliance with the tax and other laws of the jurisdictions into which they sell.

The district court abused its discretion, therefore, in imposing the inapplicable *Quill* standard to the Congressionally-enacted PACT Act. The only due process question applicable to federal legislation is whether the subjects have minimum contacts with the United States as a whole. It is undisputed that the Seneca cigarette vendors have such contacts.

**B. The District Court Applied an Incorrect Standard for Judging the Minimum Contacts of Internet Vendors**

Even if it were necessary that plaintiffs have minimum contacts with each state and locality into which they sell cigarettes (which as explained above it is not) the district court applied an incorrect legal standard in holding that an Internet vendor who deliberately accepts and fulfills a single out-of-state order for cigarettes lacks minimum contacts with the state into which it makes the sale. *See Red Earth LLC*, 2010 WL 3061103, at \*9 (JA24-27). Of course, most Internet vendors—including the Seneca members of the SFTA—transact many sales with consumers in most, if not all, states.

The portions of the PACT Act that the district court enjoined do not require an Internet vendor to comply with a foreign state's tax and other laws until it deliberately accepts an order of cigarettes from that state, packages and addresses

the order, and delivers the cigarettes into the foreign state. *See, e.g.*, 15 U.S.C. § 376a(a)(3) (requiring compliance with state law only “with respect to delivery sales into a specific State and place”). Even under the *International Shoe* analysis adopted by *Quill* (504 U.S. at 307), this deliberate completion of a sale constitutes minimum contacts.

A vendor has minimum contacts with a State if it “purposefully direct[s]” its activities into the State by delivering “its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State . . . .” *Burger King v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (citation omitted); *see also Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (“Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. . . . Different results should not be reached simply because business is conducted over the Internet.”) (citations omitted).

In *Illinois v. Hemi Group LLC*, 2010 WL 3547647, at \*4 (7th Cir. Sept. 14, 2010), for example, the Seventh Circuit affirmed Illinois personal jurisdiction over an Internet vendor that “is not a resident of Illinois. It is not incorporated or organized under Illinois law, it is not registered to do business in Illinois, it does not have any offices or employees in Illinois, it does not bank in Illinois, and it has not advertised in print media in Illinois.” *Id.* at \*1. The Seventh Circuit found

*International Shoe* minimum contacts based solely on the defendants' Internet cigarette sales into Illinois:

Hemi created several commercial, interactive websites through which customers could purchase cigarettes from Hemi. Hemi held itself out as open to do business with every state (including Illinois) except New York. After the customers made their purchases online, Hemi shipped the cigarettes to their various destinations. It is Hemi reaching out to residents of Illinois, and not the residents reaching back, that creates the sufficient minimum contacts with Illinois that justify exercising personal jurisdiction over Hemi in Illinois.

*Id.* at \*4. *See also Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 471-72 (S.D.N.Y. 2008) (finding personal jurisdiction based on sales of \$160 in merchandise into New York); *More Cupcakes, LLC v. Lovemore LLC*, 2009 WL 3152458, at \*4 (N.D. Ill. Sept. 24, 2009) (“Defendants in this case have used their website to conduct business with Illinois customers on two occasions. Defendants thus purposefully availed themselves of doing business in Illinois by selling their t-shirts with the alleged infringing marks to Illinois consumers”).

Even if the *Quill* minimum contacts analysis were pertinent to the PACT Act—and as explained above it is not—the PACT Act would satisfy due process standards. It requires a vendor to comply with foreign state tax and other laws only if the vendor accepts a cigarette order from, and deliberately ships cigarettes into, the foreign state. By definition, therefore the vendor must have *Quill* “minimum contacts” with the state before being required to comply with its laws.



**C. The District Court Abused Its Discretion in Enjoining the PACT Act Provisions As to All Vendors and All States Without Even Considering The Extent of Vendors' Contacts With Any Given State**

Finally, the district court abused its discretion by allowing plaintiffs to secure preliminary injunctive relief on a “facial challenge” basis, without presenting evidence of their specific sales volumes into the states. *See Red Earth LLC*, 2010 WL 3061103, at \*9-10 (JA 24-27). As this Court cautioned in *Dickerson v. Napolitano*, 604 F.3d 732, 741, 743 (2d Cir. 2010), facial challenges “are generally disfavored” and it is “unsettled” whether they even may be asserted outside the First Amendment context.

This case demonstrates the problem with this type of facial challenge. The district court injunction rests entirely on the *assumption* that some Seneca Internet vendors lack minimum contacts with some of the states into which they sell cigarettes. *See Red Earth LLC*, 2010 WL 3061103, at \*6-10 (JA17-27). But even if minimum contacts analysis applied here, the district court injunction applies to *all* Seneca cigarette vendors, even those with enormous contacts with the various states.

Plaintiff Red Earth LLC operates a substantial Internet cigarette business, selling cigarettes into 46 of the 50 states.<sup>16</sup> Many other Seneca Internet vendors

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<sup>16</sup> Pierce Affidavit, ¶ 6.

have substantial sales into most, if not all, states. Although these vendors surely have “minimum contacts” with the states even under the *Quill* standard, the district court injunction fully shields them from application of the enjoined PACT Act provisions.

This is an abuse of discretion. “Preliminary injunctions are . . . required to be ‘narrowly tailored to fit specific legal violations and to avoid unnecessary burdens on lawful commercial activity.’” *Empresas Cablevision S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 2010 WL 2540177, at \*1 (2d Cir. June 23, 2010), quoting *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 119 (2d Cir. 2009). The district court’s preliminary injunction undeniably was not “narrowly tailored” to apply only to Internet vendors lacking minimum contacts with a particular state.

## **II. THE DISTRICT COURT CORRECTLY REFUSED TO ENJOIN THE PACT ACT’S BAN ON USING THE U.S. MAIL TO DELIVER CIGARETTES**

The district court ruled that plaintiffs were not likely to succeed in their equal protection challenge to Congress’s decision to: (a) generally ban the use of the United States mails to deliver cigarettes; but (b) provide a limited exception to this ban allowing intrastate mailings of cigarettes in Hawaii and in Alaska. As the district court found, “Congress determined that . . . [it] could achieve the PACT Act’s purposes of preventing illicit trafficking and evading state taxes while at the

same time making those products available to citizens located in remote areas of those states who rely exclusively on the mails to obtain their consumables.” *Red Earth LLC*, 2010 WL 3061103, at \*16 (JA41).<sup>17</sup>

The Postal Clause of the Constitution, Art. I, § 8, cl. 7 “grants Congress plenary authority over the postal system.” *United States v. Barry*, 888 F.2d 1092, 1093 (6th Cir. 1989). For over 100 years, it has been settled that this includes Congressional power to “designate what may be carried in the mail and what may be excluded.” *Ex Parte Rapier*, 143 U.S. 110, 133(1892) (citing *Ex Parte Jackson*, 96 U.S. 727 (1877)). Indeed, no party challenges Congress’ exercise of this authority in the PACT Act to ban the mailing of cigarettes and smokeless tobacco products.

As the district court quite correctly acknowledged, when “there are ‘plausible reasons’ for governmental action, th[e] Court’s inquiry must cease.” Opinion, at 38 (citing *United States RR Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). “[R]ational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’ Nor does it authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect

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<sup>17</sup> SFTA and Red Earth, LLC raised numerous other challenges to the PACT Act in the proceedings below, all of which are without merit for the reasons set forth in the district court’s opinion.

fundamental rights nor proceed along suspect lines.’ For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319-20 (1993) (citations omitted).

There is unquestionably a rational basis for Congress’s decision to allow intrastate mailings within Hawaii and Alaska. As the legislative history explains, Congress included this exception “to allow mailings of cigarettes and smokeless tobacco to persons located in remote areas of Hawaii or Alaska, where individuals are forced to rely exclusively on the mails to obtain groceries and other consumables.” S. Rep. 110-153, at 14 (2007).<sup>18</sup>

Congress thus did no more than follow its long-standing — and repeatedly upheld — practice of acknowledging the special circumstances of the nation’s only non-contiguous states. *Matsuo v. United States*, 586 F.3d 1180, 1185 n.8 (9th Cir.

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<sup>18</sup> This problem is so acute that Congress created the “intra-Alaska bypass mail system” so as to provide “hundreds of rural and isolated communities within the State” with an “affordable means of delivering food and everyday necessities to these rural and isolated communities.” Pub. L. 107-206, Title III, § 3002(b), 116 Stat. 820, 911 (Aug. 2, 2002); *see generally* 39 U.S.C. § 5402 (contracts for transportation of mail within Alaska by air). The archipelago of Hawaii obviously presents similar delivery challenges unlike those of any other State in the continental 48 States. Hawaii is our only island State, consisting of “an archipelago of over nineteen distinct volcanic islands” and a 1,500-mile chain of over 100 additional, smaller islands. *See* <http://wikitravel.org/en/Hawaii> (last visited Aug. 9, 2010). “Because Hawaii is an archipelago, air travel is, for the most part, compulsory for traveling within the state. ... [C]rossing the channels between islands can be extremely rough going.” *Id.*

2009) (statutory exemption of federal employees in Alaska and Hawaii from “locality pay” adjustments “*clearly satisfies rational-basis scrutiny*”) (emphasis added), *cert. denied*, No. 09-949, 2010 WL 545421 (June 21, 2010); *Alaskan Cent. Express Inc. v. United States*, 145 F. App’x 211, 212 (9th Cir. 2005) (special benefits and subsidies for U.S. mail customers in Alaska served legitimate ends, employed rational means, and thus did not violate equal protection); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279-83 (9th Cir. 2004) (rejecting equal protection challenge to Department of Interior regulations excluding native Hawaiians from tribal recognition process that governed in other 49 States); *United States v. Pollard*, 326 F.3d 397, 409-10 n.12 (3d Cir. 2003) (“Just as Congress and the Executive may attack a perceived problem in piece-meal fashion without running afoul of equal protection guarantees, . . . [they] may attack the problem . . . in different ways in different jurisdictions”) (citations omitted); *see also United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (upholding constitutionality of exemption of Alaskan crude oil from federal windfall profits tax given the “unique” and “disproportionate costs and difficulties” of drilling and transportation in Alaska); *Thompson Multimedia, Inc. v. United States*, 340 F.3d 1355, 1365 (Fed. Cir. 2003) (Congress may “craft[] a narrow exemption to alleviate a disproportionate

incidence of the [federal Harbor Maintenance Tax] on Alaska and Hawaii as a result of their heavy reliance on domestic shipping”).<sup>19</sup>

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<sup>19</sup> For additional Congressional classifications treating Alaska and/or Hawaii differently from other States, see, *e.g.*, 5 U.S.C. §§ 5701(6), 5721(3), 5921(5) (restricting various federal employee pay and allowance provisions to “continental United States,” which “does not include Alaska or Hawaii”); 7 U.S.C. § 1638a(a)(2)(A)(ii) (special rules for Alaska and Hawaii *re* “country of origin” labeling requirements for agricultural products); 7 U.S.C. § 2012(u)(2) (special rules for cost adjustments in Supplemental Nutrition Assistance Program “for Hawaii and the urban and rural parts of Alaska”); 7 U.S.C. § 2014(b) (exempting Alaska and Hawaii from “uniform national standards of eligibility” for food assistance); 12 U.S.C. § 1713(c)(2) (imposing different eligibility requirements for rental housing insurance in Alaska); 12 U.S.C. § 1717(b)(1)-(2) (special rules for mortgages covering property in Alaska and Hawaii); 15 U.S.C. § 1175(c) (“Exception for Alaska” from certain prohibitions *re* gambling devices); 23 U.S.C. § 133(3)(c) (“[n]oncontiguous States exemption” for Alaska and Hawaii from certain highway funding rules); 26 U.S.C. § 4261(c)(3) (“Special rule for Alaska and Hawaii” *re* certain transportation taxes); 26 U.S.C. § 4462(a)(5)(b) (“Special rule for Alaska, Hawaii, and possessions” *re* Harbor Maintenance Tax); 37 U.S.C. § 404a(a)(2) (exempting Alaska and Hawaii from provisions governing subsistence expenses); 42 U.S.C. § 1395m(a)(10)(A) (requiring “exceptions” to certain Social Security provisions for “[a]reas outside continental United States ... to take into account the unique circumstances of covered items furnished in Alaska, Hawaii, or Puerto Rico”); 42 U.S.C. § 1760(f) (special “adjustments” in federal school lunch program for Alaska and Hawaii); 42 U.S.C. § 4013(b)(1)(A)(iii) (special provisions in national flood insurance program for Alaska and Hawaii); 42 U.S.C. § 4955(b)(2) (special provisions in federal antipoverty program for Alaska and Hawaii); 42 U.S.C. § 7545(i)(4) (“The States of Alaska and Hawaii may be exempted from the requirements of” certain Clean Air Act provisions); 49 U.S.C. § 13102(17) (special provisions in Surface Transportation Act for “noncontiguous domestic trade,” defined as “traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States”); 49 U.S.C. § 47107(j) (special provisions *re* use of federal highway funds in Hawaii).

## CONCLUSION

This Court should vacate the district court's preliminary injunction as to 15 U.S.C. §§ 376a(a)(3), 736a(a)(4), and 736a(d). The Court should affirm the district court's refusal to enjoin all other provisions of the PACT Act, including its ban on interstate mailings of cigarettes.

Dated: September 28, 2010

Respectfully submitted,

/s/ Richard T. Sullivan  
Richard T. Sullivan  
Harris Beach PLLC  
Larkin at Exchange  
726 Exchange Street, Ste. 1000  
Buffalo, New York 14210  
Phone: (716) 200-5050  
Fax: (716) 200-5201

*Attorneys for Amici Curiae National  
Association of Convenience Stores and  
New York Association of Convenience  
Stores*

**CERTIFICATE OF COMPLIANCE**

The undersigned respectfully certifies that:

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2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Richard T. Sullivan

Richard T. Sullivan  
Harris Beach PLLC

*Attorney for Amici Curiae National  
Association of Convenience Stores  
and New York Association of  
Convenience Stores*



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                                      )  
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CM/ECF SERVICE**

I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

**On September 28, 2010**

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No. 01MA6204360  
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**Job # 232469**

**SERVICE LIST:**

**Allison M. Zieve  
Gregory Andrew Beck  
Public Citizen Litigation Group  
1600 20<sup>th</sup> Street, NW  
Washington, DC 20009**

**Lisa A. Coppola  
Rupp, Baase, Pfalzgraf, Cuningham & Coppola LLC  
424 Main Street  
Buffalo, New York 14202  
(716) 854-3400**

**Daniel B. Moar  
Goldberg Segalla LLP  
665 Main Street, Suite 400  
Buffalo, New York 14203  
(716) 566-5400**

**Howard Marc Radzely  
Morgan, Lewis & Bockius, LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 739-5996**

**Michael P. Abate  
Alisa B. Klein  
United States Department of Justice  
950 Pennsylvania Avenue, N.W., 7318  
Washington, DC 20530  
(202) 616-8200**

**Joseph J. Karaszewski  
United States Attorney's Office, Western District of New York  
138 Delaware Avenue  
Buffalo, New York 14202  
(716) 843-5837**