10-3165-cv
10-3191-cv
10-3213-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RED EARTH LLC, d/b/a SENECA SMOKESHOP,
ARRON J. PIERCE, and SENECA FREE TRADE ASSOCIATION,
Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, ERIC H. HOLDER, 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/Cross-Appellees.

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

APPELLEE/CROSS-APPELLANT SENECA FREE TRADE ASSOCIATION'S PRINCIPAL AND RESPONSE BRIEF

[Counsel Listed On Following Page]

COUNSEL FOR PLAINTIFF-APPELLEE/CROSS-APPELLANT
SENECA FREE TRADE ASSOCIATION

Howard M. Radzely
R. Edward Cruz
Russell R. Bruch
Leni D. Battaglia
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 739-3000
Fax: (202) 739-3001

Daniel B. Moar
GOLDBERG SEGALLA LLP
665 Main Street; Suite 400
Buffalo, NY 14203
Telephone: (716) 844-3416
Fax: (716) 566-5401

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STATEMENT OF JURISDICTION

The district court's jurisdiction arises under 28 U.S.C. § 1331. The district court granted in part and denied in part Plaintiffs' motion for a preliminary injunction on July 30, 2010. The Government filed a timely notice of appeal on August 6, 2010. *See* JA 400. Plaintiff Seneca Free Trade Association's ("SFTA") and Plaintiff Red Earth respectively filed timely notices of cross-appeal on August 6, 2010 and August 10, 2010. *See* JA 305, 309. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

This case concerns SFTA's constitutional challenge to the Prevent All Cigarette Trafficking Act ("PACT Act"), Pub. L. 111-154, 124 Stat. 1087 (2010). The district court enjoined, in part, the enforcement of the Act.

SFTA's cross-appeal presents two additional questions:

1. Whether the district court abused its discretion in finding that SFTA failed to show a likelihood of success on its claim that the PACT Act violates the Tenth Amendment by commandeering states and local governments to adopt particular tax collection schemes.

2. Whether the district court abused its discretion in finding that SFTA failed to show a likelihood of success on the merits of its claim that the PACT Act's exception of residents of Alaska and Hawaii from the prohibition on mailing

cigarettes to consumers violates the Equal Protection component of the Fifth Amendment.

STATEMENT OF THE CASE

SFTA members are licensed businesses operating on Seneca Territory who ship cigarettes to adult customers throughout the United States. For centuries, the Seneca Nation of Indians has depended heavily on its tobacco economy. Moll Decl. ¶¶ 6, 27 (JA 117, 121). The PACT Act severely restricts the manner in which cigarettes and smokeless tobacco products can be shipped to adult consumers by "remote sellers" like SFTA members. The Seneca Nation authorized the SFTA to file the instant action for preliminary and permanent relief because the PACT Act violates numerous constitutional rights of Seneca-licensed businesses and will have a devastating impact on the Seneca Nation and the greater Western New York community. Although Congress has the authority to regulate interstate commerce, that authority is limited by the other provisions of the Constitution, including Due Process, Equal Protection and the Tenth Amendment.

In particular, the PACT Act violates the Due Process Clause because it attempts to override Due Process protections by permitting States to tax remote transactions without first inquiring whether the remote seller has the necessary minimum contacts to subject the seller to the taxing jurisdiction of the particular State or locality. This unprecedented elimination of the minimum-contacts inquiry

violates the Due Process Clause and is in square conflict with Supreme Court precedent. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992).

Moreover, in contravention of the Tenth Amendment, the PACT Act imposes criminal and civil penalties for the shipment of cigarettes unless, among numerous requirements, the state and local excise taxes have been paid by remote sellers like SFTA's members, *in advance*, to the State or locality. Under the PACT Act, these taxes must be paid in advance to these jurisdictions regardless of whether the State or locality actually imposes the excise tax on the seller or requires the prepayment of the excise taxes. Consequently, Congress is attempting to force States to adopt specified tax collection procedures. It is beyond Congress's powers to impose such a requirement on the States.

In addition, the PACT Act deems all cigarettes to be categorically non-mailable to consumers through the United States Postal Service ("USPS"), but creates an exception that permits residents of Alaska and Hawaii to mail cigarettes intrastate. The PACT Act does not provide similarly situated residents of other States with an equivalent benefit. This arbitrary geographic distinction along state lines lacks a rational basis and thus violates the Equal Protection Clause.

Enforcement of the PACT Act will cause the businesses represented by the SFTA to suffer irreparable harm, not only because their constitutional rights are violated, but also because enforcement of the Act's unconstitutional provisions will

force many SFTA members out of business. Consequently, after exhausting all other means of working with the federal government to find an amicable resolution to the issues presented by the PACT Act, SFTA moved for injunctive relief to prevent the enforcement of the PACT Act against its members.

On July 2, 2010, Judge Richard Arcara granted SFTA a temporary restraining order enjoining the PACT Act. *See* JA 57, 65. On July 30, 2010, the district court issued its opinion granting in part SFTA's motion for a Preliminary Injunction. *Red Earth LLC v. United States*, __ F. Supp. __, 2010 WL 3061103 (W.D.N.Y. July 30, 2010). *See* JA 4-47 (hereinafter "PI Order"). In granting SFTA's Motion in part, the district court determined that: (i) SFTA member businesses will suffer irreparable harm if the PACT Act is enforced because their businesses will be forced to close; and (ii) injunctive relief is in the public interest "[i]n light of the severe economic consequences likely to befall those members of the Western New York community." JA 5, 11, 43-44. And, given the PACT Act's "unprecedented" expansion of state and local taxing authority, the district court also found that SFTA demonstrated "a clear likelihood of success on the merits of their due process claim." JA 5, 17-27. The district court also concluded that SFTA was unlikely to succeed on the merits of its Equal Protection challenge and did not, as a private party, have standing to bring its Tenth Amendment claim. JA 37-41. Consequently, after discussing severability of constitutionally infirm

provisions, JA 45, the court preliminarily enjoined enforcement of certain limited parts of the delivery-seller provisions of the PACT Act pending a full trial on the merits. JA 46.

STATEMENT OF FACTS

I. THE SENECA NATION'S LONG HISTORY CULTIVATING AND SELLING TOBACCO

The private-sector economy of the Seneca People has been built for many centuries upon tobacco trading on and from Seneca Territory. *See* Moll Decl. ¶ 6 (JA 117). This history of trading tobacco has continued to the present day. The Seneca Nation's tobacco economy remains the predominant source of private-sector economic activity and employment within Seneca Territory. *See id.* at 27 (JA 121). It is also a vital source of economic activity benefiting the neighboring communities in Western New York State. *See id.*; Porter Decl. ¶ 5 (JA 163).

The Seneca Nation's tobacco economy has vastly improved the socioeconomic conditions of the Seneca People. Despite this improvement, the reality is that economic conditions within the Nation are substantially below the economic conditions of its state neighbors – New York, Ohio and Pennsylvania. *See* Moll Decl. ¶ 28 (JA 121-22). Because it is such a geographically remote and poor area, the Seneca people do not have a wide array of employment choices. Remote-sale tobacco businesses are among the few successful enterprises on Seneca Territory. *See id.* ¶ 29 (JA 122).

II. THE SFTA'S ORGANIZATIONAL STRUCTURE AND PURPOSE

The SFTA is a non-profit organization charted by the government of the Seneca Nation. *See id.* ¶ 6 (JA 117). The SFTA's membership consists of hundreds of businesses licensed by the Seneca Nation. *See id.* The SFTA functions as both an economic development agency and a chamber of commerce, with the objectives of creating employment opportunities and jobs, protecting existing trade and commerce, and expanding and diversifying the private sector economy of the Seneca People by supporting free enterprise and entrepreneurship. *See id.* ¶ 8 (JA 117).

III. THE SENECA NATION'S REGULATION OF TOBACCO SALES

The Seneca Nation licenses all Seneca businesses though its Business Licensing Ordinance. All businesses selling tobacco products over the Internet, telephone, or facsimile from within the Seneca Nation must obtain a business license. *See id.* ¶ 14 (JA 118). In addition, the Seneca Nation has its own Import-Export Law. This law includes a comprehensive regulatory, law enforcement, and tracking scheme that governs the importation, exportation, stamping, and sale of all cigarettes and other tobacco products within and from Seneca Territory to ensure that the Nation's tobacco economy plays no role in organized crime or funding terrorist organizations. *See id.* ¶ 15 (JA 118-19); Porter Decl. ¶¶ 6-7 (JA 163-64).

The government of the Seneca Nation, along with the SFTA, strongly discourages underage smoking as a matter of policy. *See* Moll Decl. ¶¶ 21-23 (JA 120). The Seneca Nation also prohibits the sale of tobacco to minors. *See id.* ¶¶ 22-23 (JA 120). In 2004, the Seneca Nation adopted regulations specifically addressing the sale of tobacco products by Seneca retailers. The regulations require all tobacco retailers to comply with strict age-verification procedures. *See id.* ¶ 22 (JA 120).

In addition, Seneca remote tobacco retailers do not, and will not, sell cigarettes by the pack. In fact, these retailers sell only by the carton and usually sell no fewer than two cartons per transaction. *See id*. This restriction was adopted because the high cost of purchasing two cartons is a strong deterrent to underage sales; minors usually purchase cigarettes one pack at a time. *See id.* ¶ 24 (JA 120-21). This policy is just one step – in addition to stringent age verification – that Seneca retailers take to combat smoking by minors.[1]

The Seneca Nation has also worked cooperatively with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives to prosecute illegal traffickers of cigarettes. And they have jointly investigated individuals who violated the Seneca

[1] The Government conceded at oral argument on the parties' respective motions for a stay pending appeal that it had no evidence of any sales by SFTA's members to any minors during the pendency of the preliminary injunction. *See* Aug. 10, 2010 Trans. at pp. 11-12.

Import-Export Law or the federal Contraband Cigarette Trafficking Act. *See id.* ¶¶ 25-26 (JA 121); Porter Decl. ¶¶ 8-13 (JA 165-67).

IV. THE EFFECT OF THE PACT ACT ON THE SENECA NATION

There are no fewer than 61 licensed Seneca businesses located on Seneca Territory that rely on the USPS to deliver tobacco products to their customers. *See* Moll Decl. ¶ 35 (JA 123). In addition, there are no fewer than 80 other licensed Seneca businesses operating on Seneca Territory that rely predominantly on the USPS to deliver tobacco products to their customers, but also have a small brick-and-mortar presence on Territory selling tobacco directly to consumers in face-to-face transactions. *See id.* (JA 124). All told, approximately 80% of all retail tobacco sales within Seneca Territory are made by licensed Seneca businesses that rely on the USPS for delivery. *See id.* ¶¶ 35, 40 (JA 124-25). These businesses employ both Seneca and non-Seneca employees. *See id.* ¶ 38 (JA 124). On average, most Seneca tobacco businesses employ between 12-20 people. *See id.* ¶ 39 (JA 125).

The Seneca Nation strongly opposed passage of the PACT Act and, after the Act's passage, the Seneca Nation engaged in meetings with the federal government in an effort to find an amicable resolution concerning the implementation and enforcement of the Act. *See* Porter Decl. ¶¶ 15-19 (JA 167-69). The SFTA filed

the instant litigation only as a last resort, after it was clear an amicable resolution would not be reached. JA 294.

Enforcement of the PACT Act would devastate the tobacco commerce of the Seneca Nation. *See* Moll Decl. ¶ 30 (JA 122); PI Order, JA 11. The Seneca Nation's private-sector tobacco economy has been anchored by licensed Seneca businesses that deliver tobacco products via the USPS to consumers located across the United States. *See* Moll Decl. ¶ 31 (JA 122). The USPS has been the exclusive delivery method for many of these businesses, in part because of the geographical remoteness of Seneca Territory. *See id.* ¶¶ 31-32 (JA 122-23). A federally mandated ban on mailing cigarettes through the USPS, as well as the enforcement of the unconstitutional requirements in the delivery-seller provisions of the PACT Act that severely restrict the sale and shipment tobacco products by common carrier or private delivery service, would devastate the Seneca Nation's economy. *See id.* ¶¶ 33-34 (JA 123).

In addition to destroying the Seneca businesses that rely on remote sales for all or the vast majority of their tobacco sales, the PACT Act would also severely impact Seneca wholesalers, distributors, and stamping agents. These businesses would face crushing decline in retail consumption caused by the PACT Act. *See id.* at ¶ 40 (JA 125). The reality is that many – perhaps most – licensed Seneca

retailers, wholesalers, distributors, and stamping agents also would be forced to close their doors. *See id.* ¶ 41 (JA 125).

Based on the above scenario, thousands of workers would lose their jobs and, given the Seneca Nation's economy and the economy in Western New York State, many would have no viable alternative employment. *See id.* ¶¶ 43-44 (JA 126). If the PACT Act goes into effect, 3,000 or more jobs in the Seneca Nation will be lost as a direct result of the unconstitutional remote-seller provisions and the Act's prohibition on using the USPS to mail cigarettes and smokeless tobacco products to adult consumers. *See id.*

In addition, indirect job losses will result from the virtual collapse of the Seneca Nation's cigarette and tobacco economy. For example, the overall impact will be felt by countless non-Indian businesses that provide services to Seneca tobacco businesses. *See id.* ¶ 45 (JA 126-27). This will have a significant adverse impact on the economy of the entire Western New York community. *See* PI Order, JA 43.

Finally, the Seneca Nation receives an administrative fee of $0.75 cents per carton of cigarettes sold which the Nation uses to fund its social welfare programs. *See* Moll Decl. ¶ 17 (JA 119). These fees are the predominant source of revenue for the Seneca Nation's social welfare programs. *See id.* ¶ 45 (JA 127). The PACT Act's effects on the Seneca Nation's social welfare programs, such as

healthcare and education, would be devastating and have widespread impact among the Enrolled Members of the Seneca Nation. The effects would be particularly acute given the average Seneca Indian earns just $14,492 per year. *See id.* ¶ 28 (JA 121-22). Thus, at the very moment the government of the Seneca Nation will most desperately need the additional revenue to respond to high unemployment in the Nation, its predominant revenue stream would simultaneously run dry due to the unconstitutional provisions of the PACT Act. *See id.* ¶¶ 44-45 (JA 126-27).

SUMMARY OF ARGUMENT

Before a State may impose a tax on a remote sale, "the Due Process Clause 'requires some definite link, some minimum connection, between a state and person, property or transaction is seeks to tax,' and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."'" *Quill Corp.*, 504 U.S. at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954) and *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)). *Quill*, the seminal taxing jurisdiction case, laid out a three-part test that must be met before a State can exercise taxing jurisdiction over a seller with no physical presence in the State.

In the PACT Act, Congress attempted to override these Due Process requirements by requiring that all State and local taxes must be prepaid before any

remote seller may sell or deliver cigarettes and smokeless tobacco. The PACT Act violates the Due Process Clause because it allows States – and even localities within those States – to have taxing jurisdiction over SFTA member businesses regardless of whether the State has the requisite minimum contacts with a remote seller. Applying *Quill*, the district court properly concluded that Congress, in the PACT Act, impermissibly attempted to "legislate the due process requirement out of the equation." PI Order, JA 27.

In the face of Supreme Court precedent directly on point, the Government primarily contends that the district court abused its discretion because Congress has broad power to regulate interstate commerce. However, as the Supreme Court squarely held in *Quill*, "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause*." 504 U.S. at 305 (emphasis added; citation omitted).

The Government also contends – in an argument not raised below – that a remote seller's contacts with the United States satisfies Due Process. Under well settled precedent, the Court should not consider this argument which was not presented to the district court. In any event, the Government cites no authority to support its contention that whether an individual *State* can impose a tax depends on

a seller's overall contacts with the United States. Such a conclusion would also require this Court to overrule the Supreme Court's decision in *Quill*.

The Government's reliance on two recent cases involving Internet sales, including this Court's decision in *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010), is misplaced. Among other things, the cases cited by the Government involve the distinct doctrine of personal jurisdiction, not taxing jurisdiction. And, both cases make clear that the Due Process Clause requires an individualized inquiry into whether a remote seller has sufficient contacts to establish jurisdiction. With the PACT Act, Congress unconstitutionally eliminated any Due Process inquiry before a State tax can be imposed.

The Government also contends that the district court improperly permitted a facial Due Process challenge to the PACT Act. This argument is likewise waived because it was not raised before the district court entered its preliminary injunction. It is also wholly without merit. Courts frequently consider facial challenges outside the First Amendment context. Moreover, the PACT Act facially violates the Due Process Clause because it attempts to automatically subject individual sellers to the taxing authority of all 50 States and every locality with no demonstration of minimum contacts with those States and localities.

The SFTA also easily satisfied the remaining factors for a preliminary injunction. The Government does not seriously challenge the district court's

finding, based on the record below, that SFTA's members "will likely go out of business if the PACT Act is permitted to take effect." JA 10. Moreover, it is well-settled, as the district court held, that "[w]hen an alleged deprivation of a constitutional right is involved . . . no further showing of irreparable injury is necessary." JA 10 (quoting *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)).

Regarding the public interest, the Government does not contest the district court's finding that the Seneca Nation and the greater Western New York community will suffer severe economic consequences absent a preliminary injunction. *See* JA 43. Instead, the Government contends that Congress's findings concerning the harm the PACT Act was designed to prevent necessarily demonstrates where the public interest lies. However, it is also well-settled that the public interest lies in not having potentially unconstitutional laws enforced. Moreover, were the Government correct, no preliminary injunction could ever issue against an unconstitutional statute because Congress will have always previously have deemed the statute to be in the public interest. That, of course, is not the law. Moreover, the Government's contention that the preliminary injunction will harm the public by facilitating cigarette sales to minors and illegal trafficking is contradicted by the record below. The record demonstrates that the Seneca and the SFTA have strict laws and procedures in place to prevent sales to

minors and there is no evidence that the SFTA's members sell to minors or that they engaged in any illegal trafficking.

In short, that the district court properly applied the legal standard for a preliminary injunction and did not abuse its discretion in granting a preliminary injunction of limited provisions of the PACT Act for which SFTA demonstrated a likelihood of success on its Due Process claim. The preliminary injunction should be upheld.

Although the Court should reject the Government's appeal, the district court did commit legal error in determining that SFTA lacked standing to bring a Tenth Amendment claim. The PACT Act violates the Tenth Amendment because it requires States – many of whom have tax collection schemes different from those required by the PACT Act – to amend or create new processes by which they collect cigarette taxes from delivery sellers in advance of a sale. The district court was unable to reach the merits of this claim, however, because it believed that it was bound by this Court's holding in *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 234 (2d Cir. 2006), that "private parties lack standing to bring" a Tenth Amendment claim. *See* PI Order, JA 42. That case is distinguishable and was wrongly decided. Indeed, just last week the Supreme Court granted certiorari, at the Government's request, to address whether private parties have standing to raise Tenth Amendment claims. In seeking certiorari, the

government conceded that in at least some cases private parties do have standing. The Government's attempt to create effectively two types of Tenth Amendment claims – one for which private parties have standing and one for which they lack standing – is untenable and contrary to cases such as *New York v. United States*, 505 U.S. 144 (1992).

Finally, the district court also erred in finding that SFTA did not establish a likelihood of success on its Equal Protection claim. The exemption in the Act's non-mailability provisions for intrastate shipments within Alaska and Hawaii is not an example of permissible line drawing by Congress. Instead, Congress impermissibly differentiated people based *solely* on geographic distinction. Moreover, Congress' favored treatment of residents of Alaska and Hawaii does not advance the purposes of the PACT Act at all, let alone in a piecemeal fashion. Accordingly, the Court should expand the district court's injunction to encompass the non-mailability provisions which violate Equal Protection.

ARGUMENT

I. STANDARD OF REVIEW

"The district court has wide discretion in determining whether to grant a preliminary injunction, and this Court reviews the district court's determination only for abuse of discretion." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quoting *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409

F.3d 506, 511 (2d Cir. 2005)); *see also, e.g.*, *Mental Hygiene Legal Servs. v. Paterson*, No. 07-5548, 2009 WL 579445, at *1 (2d Cir. Mar. 4, 2009). Under Second Circuit precedent, "*the single most important prerequisite*" to an injunction is a showing of irreparable harm. *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (emphasis added). "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *Metro. Taxicab Bd. of Trade v. New York*, 615 F.3d 152, 156 (2d Cir. 2010) (internal quotation omitted). Notably, as the Supreme Court has held, "[i]f the underlying constitutional question is close, therefore, [a court] should uphold the injunction and remand for trial on the merits." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65 (2004)).[2]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT SFTA ESTABLISHED A CLEAR LIKELIHOOD OF SUCCESS ON ITS DUE PROCESS CLAIM

As the district court correctly determined, the SFTA has more than satisfied its burden of demonstrating a likelihood of success on its claim that the PACT Act violates the Due Process Clause. The PACT Act prohibits remote sales of cigarettes and smokeless tobacco unless the remote seller prepays all local and state taxes in advance of any sale. *See* 15 U.S.C. § 376a(a)(3), 376a(a)(4),

[2] There is no dispute that the district court applied the correct legal standard in evaluating SFTA's request for a preliminary injunction. PI Order, JA 9.

376(a)(d). The PACT Act thus impermissibly attempts to confer state taxing jurisdiction, and even local taxing jurisdiction, over all cigarette and smokeless tobacco remote-sellers regardless of whether those retailers have the requisite minimum contacts with the taxing jurisdiction. And, the PACT Act subjects a retailer who fails to collect and remit such taxes to felony criminal prosecution and civil penalties. *See* 15 U.S.C. § 337(a)(1); PI Order, JA 20.

As the district court explained, the Supreme Court in *Quill* recognized that "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause*." *Quill*, 504 U.S. at 305 (emphasis added). With the PACT Act, Congress impermissibly attempted to authorize violations of the Due Process Clause by eliminating the requisite inquiry into whether "'some minimum connection, between a state and the person, property or transaction it seeks to tax'" is present. *Meadwestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 24 (2008) (quoting *Quill*, 504 U.S. at 306). Accordingly, the delivery sales provisions of the PACT Act violate Due Process, and the district court correctly held that SFTA has established a likelihood – indeed a "clear likelihood" – that those provisions of the PACT Act are unconstitutional. JA 27.

A. The PACT Act Violates Due Process Because Application Of State Taxing Schemes Requires Consideration Of Whether Imposing The Tax Is Consistent With The Due Process Clause.

Less than twenty years ago, a State could not impose a tax on a remote seller at all – for years, the Supreme Court had held that Due Process required a seller to have an actual physical presence in the State before a tax could be imposed. *See Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753, 758 (1967). That changed with *Quill*. Although *Quill* overruled *Bellas Hess* on this point, and expanded taxing jurisdiction to permit a State some ability to tax a remote seller with no physical presence in the State, the Supreme Court in *Quill* nonetheless held that the Due Process Clause requires that the entity or transaction a State seeks to tax must have the requisite "minimum contacts" with the taxing State. *Quill*, 504 U.S. at 304. *Quill* explained that the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Id.* at 306 (internal quotations omitted); *see also Meadwestvaco Corp.*, 553 U.S. at 24.

As with the instant matter, *Quill* concerned the boundaries of "taxing

jurisdiction."[3] In determining whether a State could impose a tax on an out-of-state seller consistent with Due Process, the *Quill* Court applied what amounts to a three-part test: (i) the remote seller must "purposefully direct[] its activities at" the State; (ii) "the magnitude of those contacts" must be such as to permit imposition of the tax, *and* (iii) the tax must be "related to the benefits [the remote seller receives] from access to the State." 504 U.S. at 308. The Supreme Court held that Quill had met this test because that it was "engaged in continuous and widespread solicitation of business within [the] State," including nearly one million dollars in sales to customers in the State and mailing some 24 tons of catalogues into the State that, in turn, had to be physically disposed of by the State. *Id*. at 302, 304, 308 (noting that the Quill Corporation was the State's s*ixth largest vendor* of office supplies and had approximately *3,000 customers* in the State).[4]

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[3] This is not a dispute over where a suit can be brought or whether an individual is subject to a regulation, but rather a dispute over whether Congress, via the PACT Act, can allow a State to apply a tax on an out-of-state seller without regard to the requisite minimal contacts with that State. *See generally Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (noting differences between the standards for legislative, adjudicative and taxing jurisdiction, and citing *Quill* as the standard for evaluating whether a State's attempt to tax was consistent with the Due Process Clause).

[4] Here, by contrast, SFTA's members engage in no such similar conduct. *See* Moll Decl. ¶¶ 46-47 (JA 127). Indeed, many of the SFTA's members *only* contact with many of the States is limited to individual phone calls from consumers and limited shipments of cigarettes to adult consumers in the State. *See id.* Many, if not most, SFTA members do not even have interactive websites and target no advertising or solicitations at particular States. *See id.* ¶ 47 (JA 127); PI Order, JA 22 n.5 (noting that "it is undisputed that none of the plaintiffs advertise outside of New York

The Supreme Court's decision over fifty years ago in *Miller Brothers*, a case relied on by the *Quill* Court, further demonstrates that the PACT Act's elimination of the Due Process inquiry is unconstitutional – and that the district court did not abuse its discretion in finding that the SFTA demonstrated a clear likelihood of success on this issue. In *Miller Brothers*, Maryland attempted to impose an excise tax on a furniture company that sold all of its goods directly from its Delaware store (it took no phone orders), had general advertising in Delaware newspapers which had some circulation in Maryland, sent mailings four times per year to all customers – including those in Maryland – and used common carrier and company trucks to ship orders to customers in Maryland. 347 U.S. at 341 & n.4. Despite these contacts, the Supreme Court found that the requisite "link" or "minimum connection" between the taxing jurisdiction and retailer was lacking. Specifically, the Supreme Court noted that:

> There is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here there was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market.

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state, send catalogs to other states, or send mailings to other states"). SFTA businesses generally have no physical presence outside Seneca Territory, do not have employees performing work in other States, and do not have company vehicles that deliver cigarettes. *See* Moll Decl. ¶ 46 (JA 127).

347 U.S. at 346-47. Thus, in *Miller Brothers*, the Supreme Court held that the Due Process Clause precluded Maryland from taxing the seller despite its contacts with the State – including shipments on company trucks – because the seller lacked sufficient contacts with the taxing jurisdiction. *Id.* at 347.

It is undisputed that SFTA members have, at most, a limited number of contacts with many States. *See supra* 21 n.4. A limited number of phone calls from a State – even in response to an Internet site – and a limited number of mail shipments to a State, falls far short of *Quill's* (and *Miller Brothers'*) requirement that the "magnitude of the contacts" be such as to permit imposition of the tax.[5]

More importantly, the fundamental problem with the PACT Act is that it attempts to permit States – and even localities within those States – to have per se jurisdiction over SFTA member businesses without considering whether the individual State has the requisite minimum contacts with a remote seller. Due

[5] Indeed, *Quill's* detailed analysis of the extensive seller contacts and its express finding that in that case the "magnitude of [the] contacts [was] more than sufficient for due process purposes" would have been wholly unnecessary if even a limited number of shipments – or, as the Government must argue to sustain the PACT Act, a single shipment – into a State were sufficient, in and of itself, to satisfy Due Process. As the district court correctly observed: "Indeed, if a single sale into a foreign jurisdiction were sufficient to automatically impose a duty-to-collect taxes, the Supreme Court in *Quill* likely would have rested its due process discussion on that ground." JA 26. Of course, *Quill*'s reliance on *Miller Brothers* confirms that limited sales – even with general advertising, mailing into a State, and company trucks shipping products into a state – are not sufficient to support taxing jurisdiction.

Process is violated because no minimum contacts with a State are required before a tax can be imposed. Consequently, because the PACT Act eliminates the minimum contacts requirement, the district court did not abuse its discretion in finding that SFTA established a likelihood of success on the merits of its Due Process claim. *See* JA 27.

B. The Government's Assertion That The District Court Erred In Assessing SFTA's Due Process Claim Is Without Merit.

In asserting that the district court abused its discretion in finding that SFTA established a clear likelihood of success on the merits of its Due Process claim, the Government and its amici raise a series of arguments, many of which are waived because they were not raised before the district court entered its preliminary injunction and, in any event, all of which are without merit.

1. Despite Congress's broad power to regulate interstate commerce, Congress cannot override Due Process.

The Government first contends that the district court's Due Process analysis is flawed because the court did not properly account for Congress's power "in regulating interstate commerce, to require interstate businesses to comply with state and local law." Gov't Br. 23. However, SFTA never questioned Congress's authority to exercise its powers under the Commerce Clause. Rather, as the district court properly recognized, and as the Supreme Court has squarely held: "'[W]hile Congress has plenary power to regulate commerce among the States and thus may

authorize state actions that burden interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause*.'" JA 21 (quoting *Quill*, 504 U.S. at 305). Accordingly, the examples of federal statutes the Government cites requiring compliance with state and local laws enacted under Congress' authority to regulate interstate commerce (Gov't Br. 23-24) are inapposite because they do not address due process challenges nor are they examples of Congress creating, by legislative fiat, taxing jurisdiction for States without first establishing sufficient contacts with out-of-state sellers to support taxing jurisdiction.[6]

In support of its novel position that Congress can override the Constitution's Due Process protections, the Government and its amici rely on *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). As the Government itself acknowledges, however, in *Clark Distilling*, "[t]the Supreme Court rejected the contention that this federal statute exceeded Congress's power to regulate *interstate commerce*." Gov't Br. 25 (emphasis added). Moreover, *Clark Distilling* predates by several decades both *Quill* and *Miller Brothers*, and does not

[6] The Government's repeated references to "legislative due process" in its brief misses the point of SFTA's Due Process claim. SFTA is not asserting that it is beyond Congress's authority to impose regulations on the sale of cigarettes. Rather, SFTA's position is that it is beyond Congress' authority to attempt to legislate the Due Process Clause out of the equation by permitting individual States to tax transactions without regard to the Due Process Clause.

address the issue of "minimum contacts" or whether a State can exercise *taxing jurisdiction* over out-of-state businesses. Unlike *Clark Distilling*, this is a case where SFTA members are challenging Congress's attempt to override their constitutional right not to be subject to a State's taxing jurisdiction without first addressing whether the minimal contacts requirement of the Due Process Clause has been satisfied.

Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 299 U.S. 334 (1937), likewise does not support the Government's position because it does not address whether Congress can grant a State the power to tax a sale the State would be otherwise powerless to tax. Indeed, *Kentucky Whip* supports the preliminary injunction here because the Court held that Congress's plenary power under the Commerce Clause "is subject to no limitation *other than that which is found in the Constitution itself.*" *Id.* at 352 (emphasis added). As such, *Kentucky Whip* highlights that Congress's Commerce Clause power is circumscribed by the other provisions of the Constitution.

Additionally, the Government misplaces reliance on *Consumer Mail Order Ass'n of America v. McGrath*, 94 F. Supp. 705, 707 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951), which upheld the Jenkins Act, which required remote sellers to

provide certain reports to State taxing authorities.[7] The *McGrath* court had no occasion to address the issues relevant to the instant matter because the Jenkins Act did not contain *any* requirements that a remote seller prepay State taxes. Moreover, if relevant at all, the *McGrath* case supports the district court's determination as "it is beyond dispute that the exercise of the commerce power by Congress is subject to the requirements of the Fifth Amendment." *Id.* at 711; *see also id.* at 709 (noting that even if valid under the Commerce Clause, acts of Congress are only constitutional if they do not suffer a "constitutional defect such as arbitrariness, with consequent invalidity under the Due Process Clause"). This is precisely the same observation later echoed by the Supreme Court in *Quill*. 504 U.S. at 305.

In short, neither the statutes nor cases the Government cites concerning Commerce Clause power provide authority to support Congress's unprecedented broadening of States' taxing jurisdiction through the PACT Act.

2. A retailer's contacts with the United States do not provide an independent basis for a State to tax the retailer.

In an attempt to shift the focus away from PACT Act's impermissible elimination of the Due Process analysis of whether a remote retailer has sufficient contacts with a State for taxing jurisdiction to apply, the Government argues that

[7] The applicability of the Jenkins Act to the Seneca Nation has never been decided by a court and is not presently before this Court.

Due Process is satisfied because SFTA members have minimum contacts with the United States. *See* Gov't Br. 26. Neither the Government nor its amici raised this argument prior to the district court issuing the preliminary injunction. As a result, the Government has waived it right to bring this argument. *See, e.g.*, *Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 446 (2d Cir. 2006).

In *Paese*, this Court stated that "'[t]he law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal."' *Id.* at 446 (quoting *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977)). "'While this bar to raising new issues on appeal is not absolute, . . . it may be overcome only when necessary to avoid manifest injustice.'" *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 527 (2d Cir. 1990) (quoting *Schmidt v. Polish People's Republic*, 742 F.2d 67, 70 (2d Cir. 1984)). Here, there is no manifest injustice from waiting to consider the Government's newfound argument until *after* the district court has had the opportunity to review it during the full proceedings on whether to enter a permanent injunction of the PACT Act. *See, e.g.*, *Ellipso, Inc., v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) ("The district court clearly did not err in failing to consider arguments that Mann Tech failed to present."); *Winkelman v. Parma City Sch. Dist.*, 166 F. App'x. 807, 811 (6th Cir. 2006) ("In resolving an

emergency motion for preliminary relief, a district court cannot fairly be accused of abusing its discretion in rejecting an argument that was never made.").

In any event, even if the Court finds the Government did not waive this argument, its contention is meritless. The Government and its amici cite no authority that the relevant forum for whether an individual State or locality may constitutionally tax an individual is the United States as a whole.[8] And, were the Government correct, the Supreme Court's holding in *Quill*, 504 U.S. at 305, that the Commerce Clause and the Due Process clause "differ fundamentally" and that Congress has "plenary power to regulate commerce" but "does not similarly have the power to authorize violations of the Due Process Clause" would make no sense because, under the Government's theory, all congressional actions would be immune from Due Process inquiry so long as the sellers had some minimum contacts with the United States as a whole.

[8] The cases on which the Government and its amici rely (*see, e.g.*, Gov't Br. 27) are inapposite because they involve both questions of personal jurisdiction and wholly federal schemes such as the Securities and Exchange Act of 1934, the Alien Tort Claim Act, the Clayton Act, and maritime jurisdiction. *See, e.g., In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003). None concerns taxing jurisdiction or the incorporation into a federal statute of a requirement concerning a State's ability to collect *State taxes*. Moreover, this is not a dispute about where a suit can be brought, but rather a dispute over whether Congress, via the PACT Act, can allow a State to impose a tax on an out-of-state seller without regard to whether the seller has the requisite minimal contacts with that State. These cited cases provide no support for the Government's contention that Congress may authorize a State to enforce its tax laws in a manner that violates the restrictions on State action under the Due Process Clause.

The district court did not err in declining to consider an argument not raised below, and, even if it had considered the argument, it surely would have rejected it as contrary to Supreme Court precedent.

The Government next contends that the district court misapplied *Quill*. The Government first argues that *Quill* addressed a state law and not an Act of Congress. *See* Gov't Br. 27; *id.* at 22 (criticizing the district court's order for analyzing taxing jurisdiction as if "it had been imposed by a state, acting unilaterally"). This distinction is immaterial because *Quill* explicitly stated that *Congress* cannot override the Due Process Clause. *See* 504 U.S. at 305 ("[W]hile Congress has plenary power to regulate commerce . . . , *it does not similarly have the power to authorize violations of the Due Process Clause*") (emphasis added; internal citations omitted)).

Additionally, the Government's assertion that no court has ever invoked *Quill* – the seminal Supreme Court case on taxing jurisdiction – as a basis for invalidating an Act of Congress (Gov't Br. 28), is a red herring because, prior to the PACT Act, Congress has never attempted to make sellers liable for state and local taxes nationwide, irrespective of minimum contacts with each State. *See* JA 44. ("[T]he court believes that this is the first time" a statute has been enacted subjecting a seller to State and local taxes without regard to whether the seller has

the "minimum contacts required by the Due Process Clause."); JA 44 n.14 (citing academic literature).

The Government also contends that the district court misconstrued *Quill* as holding that the constitutionality of a State tax depends on whether "a seller sends mail-order catalogs into the state" or actively solicits out-of-state business. *See* Gov't Br. 30-31. This is an incorrect description of the district court's reasoning. As the district court properly framed the issue:

> The unique problem presented in this case is that the PACT Act requires remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes on cigarettes and smokeless tobacco *regardless of whether their existing minimum contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations.*

JA 20 (emphasis in original); *see also* JA 26 (page cited in Gov't Br.) ("According to the [Supreme] Court, due process was not offended based upon the 'magnitude' of Quill's contacts with the forum State.").

Unlike the plaintiff in *Quill*, which the Supreme Court found had substantial and regular contacts with the forum State, SFTA members have little to no contacts with most States. *See* Moll Decl. ¶¶ 46-47 (JA 127). Although the Government argued that merely having an Internet website establishes minimum contacts with

any jurisdiction in which that website can be viewed,[9] the district court declined "to adopt such a sweeping prescription which appears to lack support under existing caselaw." JA at 23.[10] And, in any event, the constitutional infirmity here is Congress's attempt to eliminate the Due Process inquiry before a State can impose a tax on a remote seller.

In an attempt to revive its argument regarding Internet-based sales, the Government cites two recent appellate decisions, decided after the district court entered the preliminary injunction, concerning personal jurisdiction based on Internet sales. *See Illinois v. Hemi Grp. LLC*, ___ F.3d ___, No. 09-1407, 2010

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[9] The websites that some SFTA members have is similar to the "general advertising" of the seller in *Miller Brothers*, which the Supreme Court found insufficient, even in connection with numerous other contacts with the State, to support taxing jurisdiction. 347 U.S. at 342, 347.

[10] As the district court noted, and contrary to claims of the Government and its amici, courts have struggled to define when Internet contacts are sufficient to create *personal* jurisdiction, let alone *taxing* jurisdiction. *See* JA 23 n.7; *see also, e.g.*, *Eagle Coffee Co. Inc., v. Eagle Coffee Int'l Inc.*, No. L-09-2585, 2010 WL 481201, at *3 (D. Md. Feb. 4, 2010); *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 810-11 (D. Md. 2004) ("Other courts have rejected the idea that a company operating a website is subject to the jurisdiction of any forum whose citizens have purchased the company's goods via the Internet."); *Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120, 1127 (M.D. Fla. 2006); *Machulsky v. Hall*, 210 F. Supp. 2d 531, 539 (D.N.J. 2002) ("[D]ecisions in this area of law indicate that commercial activity via the Internet must be substantially more regular and pervasive to constitute 'purposeful availment of doing business' within a given state." (citation omitted)). Moreover, neither the Government nor its amici cite a single case holding that an Internet site and limited sales – let alone a single sale – is sufficient to establish taxing jurisdiction. Such an argument is facially inconsistent with *Quill* and *Miller Brothers*.

WL 3547647 (7th Cir. Sept. 14, 2010); *Chloe*. Both of these cases are distinguishable and do not undermine the district court's reasoning that the SFTA established a likelihood of success that PACT Act offends Due Process.

Hemi concerned Illinois' attempt to exercise personal jurisdiction over a remote seller of cigarettes for failure to report sales in violation of the Jenkins Act. As an initial matter, *Hemi* is inapposite because it concerns personal, not taxing jurisdiction. 2010 WL 3547647, at *1. Indeed, taxation was not an issue in *Hemi* because, in contrast to the PACT Act, "Illinois law *leaves it to the buyers* to pay the applicable state tax on cigarettes [on remote sales]." *Id.* (emphasis added). *Hemi* also is distinguishable from the instant situation because there the seller engaged in significant and repeated sales to the forum in question, *i.e.* three hundred packs of cigarettes were sold to one Illinois customer over a two-year period, and, unlike most of SFTA's members, *Hemi* also operated an interactive website that allowed customers to enter their zip code to determine shipping costs. *Id.*

Although the facts and issues in *Hemi* are distinguishable from the instant matter, *Hemi* nonetheless supports the conclusion that the PACT Act's attempt to eliminate the Due Process inquiry on taxing remote sales is constitutionally infirm. In *Hemi*, the Seventh Circuit noted the importance of conducting a due process analysis when it stated:

> [W]e affirm the district court's conclusion that Hemi is subject to personal jurisdiction in Illinois, not merely because it operated several 'interactive' websites, *but because Hemi had sufficient voluntary contacts with the state of Illinois*.

Id. at *6 (emphasis added).

This Court's recent decision in *Chloe* likewise does not establish that the district court abused its decision. Similar to *Hemi*, personal, not taxing, jurisdiction was at issue. *Chloe*, 616 F.3d at 163. Furthermore, the retailer in that case, unlike the majority of SFTA members, had significant and repeated sales into the forum State, *i.e.*, a sale of at least one Chloe handbag for $1200 and at least fifty-two sales of non-Chloe merchandise. *See id*. at 162-63, 171 (noting the seller "developed and served a market" for its products in New York). Most significant to the instant matter, however, is that this Court in *Chloe* conducted a Due Process inquiry, and *only after conducting this inquiry*, did it find that Due Process was satisfied because the defendant "has purposefully availed himself of the privilege of conducting activities within the forum state." *Id.* at 171 (internal quotations and citation omitted). Thus, this Court's recognition in *Chloe* of the need to examine minimum contacts *before* concluding that Due Process is satisfied confirms that the district court did not err in finding that SFTA is likely to succeed on the merits of its Due Process claim because the PACT Act allows States to impose taxes on

remote sellers "notwithstanding the presence or absence" of sufficient contacts with that State. JA 26-27.[11]

[11] Amicus New York City contends that because the PACT Act uses the "passive voice" it "eliminates the requirement that a remote seller itself collect or pay any tax." *See* Doc. 224 at 2, 5. As an initial matter, this argument was not raised below and is thus waived. *See supra* 27. Moreover, it is wrong. *First*, the Government, which enforces the PACT Act under pain of criminal penalty, has not adopted this argument. *Second*, 15 U.S.C. § 376a(a)(4), one of the provisions preliminarily enjoined by the district court, makes clear that "each *delivery seller shall comply* with— . . . the tax collection requirements set forth in subsection (d)." (emphasis added). Thus it is clear that it is the delivery sellers, like SFTA's members, that have the affirmative obligation to comply. *Third*, Congress itself noted in a "Sense of Congress" provision what the PACT Act statutory text makes clear – that the Act requires remote sellers to pay the tax: "This Act is in no way meant to create a precedent regarding the collection of State sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State entities that do not have a physical presence within the taxing State." PACT Act § 8. *Fourth*, regardless of passive or active voice, it is plain that the remote seller must make certain the tax is paid "in advance of the sale, delivery, or tender." 15 U.S.C. § 376a(d). Of course, the only entity that can pay the tax – directly or indirectly – is the delivery seller itself, who then must collect the tax back from the buyer after the fact. Even if the remote seller pre-purchased state tax-stamped cigarettes, as City suggests, the remote seller is still paying the tax and then collecting it from the buyer. As *Quill* makes plain, and as the district court properly held, the Constitution does not permit the imposition of such a requirement on a remote seller – whether it collects from the buyer and then pays or prepays and then collects from the buyer – without first analyzing whether Due Process is satisfied. *Finally*, the City's argument depends on a factual inquiry of the differing taxing and collection procedures of all States and localities, which the City concedes, can differ, Doc. 224 at 11, and for which there was no evidence before the district court.

3. It is not an abuse of discretion to grant a preliminary injunction without a full factual record.

The Government also asserts that the district court erred in holding that the SFTA was likely to succeed on the merits of its Due Process claim without first specifically analyzing the contact each SFTA member has with each State. Gov't Br. 34. This argument has several failings. To start, neither the Government nor its amici cite any cases supporting its assertion that the district court abused its discretion in not requiring a more detailed factual record before granting a *preliminary* injunction. To the contrary, as the Supreme Court has noted:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Univ. of Tex. v. Camenish, 451 U.S. 390, 395 (1981); *see also, e.g., Griffin v. Box*, 910 F.2d 255, 263 (5th Cir. 1990).

Furthermore, to the extent relevant, the factual record before the district court strongly supports the court's decision to grant a preliminary injunction. Specifically, the factual record before the court was that SFTA member businesses have limited contacts with a great many of the fifty States. *See* Moll Decl. ¶¶ 46-47 (JA 127). Indeed, the record was *undisputed* that many SFTA members have

virtually no contacts – other than sporadic mail-order sales – with a great many States.

In any event, the district court's decision to apply the preliminary injunction to all SFTA members was not an abuse of discretion considering that the PACT Act impermissibly attempts "to legislate the due process requirement out of the equation." JA 27. Thus, the Government's and amici's assertion that facial challenges are disfavored both misses the point and is incorrect in this case.[12]

As an initial matter, the Government's argument misconstrues the difference between facial and as-applied challenges. On its face, the PACT Act violates Due Process because it attempts to subject individual sellers to the taxing and regulatory authority of all 50 States and untold localities, with no demonstration of minimum contacts with those States. Stated another way, the PACT Act violates Due Process on its face because the Act holds that remote sellers have the requisite contacts to impose taxing jurisdiction with each and every State, prior to each seller making even the first sale to a State. It is a 100 percent certainty that eliminating any need for engaging in due process analysis before a State tax can be

[12] Not only is this argument concerning facial challenges meritless, neither the Government nor supporting amicus presented this argument to the district court before the court issued the preliminary injunction. (This argument was first raised in its motion for a stay pending appeal.) Consequently, the Government has waived this argument for purposes of this appeal. *See supra* 27. Additionally, had the Government raised the argument in a timely fashion, SFTA could have put on evidence at the hearing on this issue to rebut the argument.

imposed will be unconstitutional. To be sure, there may be individual sellers who have minimum contacts with specific (and varying) States, and that is why the Due Process Clause requires a State-by-State analysis. The PACT Act does not require such an analysis – instead it adopts a blanket rule making all sellers subject to the taxing authority of all States and localities – and so it is facially unconstitutional.

Additionally, the sole case cited the Government with regard to a facial challenge, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), is easily distinguishable. Among other distinctions, *Washington State Grange* involved a permanent injunction and not a preliminary injunction. Moreover, in that case, the claim of facial invalidity was based on "speculation" and a "mere possibility of voter confusion" from a ballot that had not yet been designed and could be designed in a way that complied with the statute and avoided voter confusion. *Id.* at 450, 455. In sharp contrast to the facts at issue in *Washington State Grange*, here it is undisputed (1) that a great many SFTA members have virtually no contacts with many States, and (2) that the PACT Act attempts to eliminate any need to inquire as to minimum contacts, by making every seller *per se* subject to the taxing authority of all 50 States. Those facts are not speculative – they are undisputed – and they demonstrate a facial violation of Due Process.

Furthermore, courts frequently consider – and uphold – facial challenges outside the First Amendment context. For example, in *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance,* 505 U.S. 71, 82 (1992), the Supreme Court upheld a facial challenge that an Iowa tax violated the foreign commerce clause even though there were possible situations in which the tax did not violate the clause. *See also, e.g., Conoco, Inc. v. Taxation & Revenue Dep't of NM*, 931 P.2d 730, 738 (N.M. 1996) (finding tax facially violated the Foreign Commerce Clause and noting that plaintiff was not required to prove that there was no set of circumstances under which the tax was constitutional in order to prevail on a facial challenge); *U.S. v. Smedly*, 611 F. Supp. 2d 971, 976 (E.D. Mo. 2009). Similarly, in *Redmond v. Moore*, 91 P.3d 875, 882 (Wash. 2004), the Washington Supreme Court upheld a facial challenge on due process grounds, overturning a statute permitting suspension of a driver's license without a hearing. *See also, e.g., Dickerson v. Napolitano*, 604 F.3d 732, 744 (2d Cir. 2010) (noting that the Supreme Court "does suggest that facial challenges are permissible outside the First Amendment context").

Thus, the district court did not abuse its discretion in finding that SFTA established a likelihood of success on its facial due process challenge because Congress disregarded Due Process protections when it enacted a statute requiring all delivery sellers pay sales taxes in advance of every sale in every State. This

requirement facially violates the Due Process Clause. Accordingly, granting injunctive relief to all SFTA-member businesses based on its facial and as applied Due Process claims was entirely appropriate at this preliminary stage of the litigation. *See, e.g.*, *Mental Hygiene Legal Servs.*, 2009 WL 579445, at *2 (affirming district court's grant of a preliminary injunction on plaintiff's facial challenge and finding that "[o]ur conclusion, like any ruling on a preliminary injunction, does not preclude a different resolution of plaintiff's facial challenge on a more fully developed record").

4. The district court did not abuse its discretion in limiting its injunction on Due Process grounds to certain limited provisions of the PACT Act.

The district court crafted a very narrow preliminary injunction, enjoining only Sections 376a(a)(3) and (4) and 376a(d) of the PACT Act – the three provisions that include requirements addressing State and local taxation. The Government now argues that the district court abused its discretion in not further blue penciling within these limited provisions that it enjoined. This argument is both waived and wholly without merit.

Before modifying a statute, a court should ascertain congressional intent because "severance is inappropriate when the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature never intended." *Nat'l Adver. Co. v. Town of Niagara*, 942

F.2d 145, 148 (2d Cir. 1991); *see also, e.g.*, *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.").

As an initial matter, the Government misreads the scope of the injunction entered. The Government erroneously contends – as it did in its request for a stay of the preliminary injunction before the district court – that the district court enjoined enforcement of the PACT Act's restrictions on sales to minors. *See* Gov't Br. 35. To the contrary, the district court's preliminary injunction expressly preserved the PACT Act's restriction on sales to minors. As the district court noted in rejecting the Government's request for a stay pending this appeal, "nothing about this Court's injunction makes it lawful to sell cigarettes to minors. In fact, this Court crafted its injunction to leave in place the age verification provisions of the Act, set forth in 15 U.S.C. § 3[76]a(b)(4)." JA 52. Thus, the Government's implicit assertion that the scope of the injunction will facilitate minors purchasing cigarettes is unfounded.

Moreover, this argument is waived – the Government did not make any such argument in its briefing below. The closest the Government came to an argument concerning severability was a short footnote in its supplemental response addressing SFTA's Equal Protection argument and a discussion about severing the

non-mailability and reporting provisions of the PACT Act at the July 2, 2010 TRO hearing. The Government contended, without analysis, that Section 7 of PACT Act contains a severance provision and that "there are numerous *provisions* of the PACT Act that are not being challenged by the [SFTA]." Case No. 10-cv-550 550, Dkt. No. 24 at p. 22 n. 4 (emphasis added). The Government presented no argument to the district court – let alone supporting evidence in the record – regarding potential severance within the specific parts of the delivery seller provisions of the PACT Act that the district court enjoined. Further, the Government never argued that if the district court was inclined to enjoin enforcement of the specific delivery-seller provisions pertaining to taxation, then it should essentially parse and rewrite the provisions, rather than narrowly enjoining only those provisions which contain requirements related to taxation. In light of the Government's failure to present this issue to district court prior to the court issuing the injunction, the argument is waived. *See supra* 27.

Even if the Government had not waived its right to challenge the manner in which the district court severed certain provisions of the PACT Act in narrowly crafting its injunction, the Government provides no support for its position that the district court abused its discretion in declining to parse and rewrite 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d) rather than enjoin each of these provisions.

At the preliminary injunction stage, it is well within a district court's discretion to decline to rule on severability and instead wait until the parties have fully litigated the constitutionality of the statute at issue and then determine whether, and if so how, the unconstitutional provisions should be separated from the constitutional provisions. *See Feed the Children, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 330 F. Supp. 2d 935, 946 n.6 (M.D. Tenn. 2002) (granting a preliminary injunction and declining "Defendants' invitation to 'sever' any unconstitutional provisions of the Charitable Solicitations Ordinance and leave the rest of the ordinance intact"); *Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc. v. St. Johns Cnty.*, No. 01-cv-J-25TJC, 2001 WL 34107041, at *2 (M.D. Fla. May 8, 2001) ("Consequently, because there has been no findings on the merits of this case as of yet, the Court declines to modify the preliminary injunction to state that the severance provision of the sign ordinance has gone into effect.").

In the instant matter, the district court's decision to enjoin only certain provisions of the PACT Act, and not the Act as a whole, was guided by the Supreme Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). *See* JA 45. In *Alaska Airlines*, the Supreme Court stated that unconstitutional *provisions* in a statute should be severed from "unobjectionable *provisions*" in the statute. 480 U.S. at 684 (emphasis added). The Supreme Court did not hold that

courts have an obligation to look within an unconstitutional provision and rewrite the language of that provision – particularly during the hurried context of a preliminary injunction. Neither the Government nor its amici cite a case indicating that such an obligation on the part of the district court exists – particularly where the court was presented with no evidence or argument on how such a rewriting of the statute should be done.[13]

In short, there is no merit to the Government's position that the district court abused its discretion – particularly at this stage of the litigation – in its narrowly crafted order preliminarily enjoining only the three provisions of the PACT Act which address collection and payment of state and local taxes. JA 46 (limiting injunction to 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d)).[14]

[13] *Empresas Cablevison, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, No. 10-794, 2010 WL 2540177 (2d Cir. June 23, 2010), cited by Amici Convenience Stores, is inapposite. It concerned the scope of an injunction in a business dispute, not how a court should sever potentially unconstitutional provisions at the preliminary injunction stage. Moreover, here, the District Court did craft a narrow injunction, enjoining only those provisions addressing, in whole or in part, State taxation.

[14] The preliminary injunction is against federal officials enforcing the unconstitutional provisions of the PACT Act. It does not prohibit State officials from contending that a remote seller may be violating a State law if such an allegation is consistent with Due Process and other applicable authorities and limitations on the application of State law.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT SFTA MEMBERS WILL SUFFER IRREPARABLE HARM AND THAT THE PUBLIC INTEREST FAVORS GRANTING A PRELIMINARY INJUNCTION

A. The District Court Correctly Determined That SFTA Member Businesses Would Suffer Irreparable Harm If Enforcement Of The PACT Act Was Not Enjoined.

In its Order, the district court found that the SFTA had established that "plaintiffs will likely go out of business if the PACT Act is permitted to take effect." JA 10. The district court described in detail the severe irreparable harm that SFTA members will suffer under the PACT Act, noting that "[t]he record reflects that a number of cigarette retailers have begun closing down their businesses in anticipation of the Act taking effect." JA 10-11; *see also* Moll Decl. ¶ 41 (JA 125) ("The reality is that many (perhaps most) licensed Seneca retailers, wholesalers, distributors and stamping agents will be forced to close their doors."). "If the PACT Act is permitted to take effect," SFTA member businesses "will face the Hobson's choice of ceasing what they believe to be lawful business activities, or continuing to engage in those activities while facing the threat of criminal prosecution if they are wrong. Because it is likely that most will choose the former, safer course of ceasing activities to avoid criminal prosecution, *most retailers will be forced to shut down if injunctive relief is denied*." PI Order, JA 43.

As this Court noted, the "loss of . . . an ongoing business representing many years of effort and the livelihood of its . . . owners, constitutes irreparable harm." *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984); *see also, e.g., Tom Doherty Assocs., Inc. v. Saban Entm't. Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) ("We have found irreparable harm where a party is threatened with the loss of a business."); *Emons Indus., Inc v. Liberty Mut. Ins. Co.*, 749 F. Supp. 1289, 1294 (S.D.N.Y. 1990) ("It is firmly established that [a] threat to the continued existence of a business can constitute irreparable injury warranting the issuance of a preliminary injunction." (internal quotations and citation omitted)).[15]

Thus, the record before the district court clearly established that SFTA's members will suffer irreparable harm if the PACT Act is enforced. The Government does not challenge the district court's finding that SFTA's members will cease to exist absent preliminary injunctive relief.

Moreover, as the district court noted, it is well settled that "'[w]hen an alleged deprivation of a constitutional right is involved . . . no further showing of irreparable injury is necessary.'" JA 10 (quoting *Mitchell*, 748 F.2d at 806); *see*

[15] It is undisputed that SFTA businesses cannot recover money damages in this matter because of the Government's sovereign immunity. *See, e.g., Am. Fin. Servs. Ass'n v. Burke*, 169 F. Supp. 2d 62, 70 (D. Conn. 2001) (*citing United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983)); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 572, n.6 (S.D.N.Y. 2009).

also, e.g., *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court therefore properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights. In any event, it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm." (emphasis in original)); *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004) (same). This second, independent basis further supports the district court's preliminary order.

In sum, as the district court correctly held, the SFTA has "easily satisfied their burden of showing a threat of irreparable injury if injunctive relief is not granted." JA 8.

B. As The District Court Correctly Found, The Public Interest Factor Plainly Supports Preliminary Relief In This Case.

The final factor courts examine in determining whether a preliminary injunction is appropriate is whether granting temporary preliminary relief is in the public interest. The record conclusively demonstrates that if the PACT Act were not preliminarily enjoined, "enforcement of the PACT Act would 'devastate the livelihoods of scores of Seneca retailers and thousands of employees in Western New York.'" PI Order, JA 43 (*quoting* Seneca Nation of Indians Brief *Amicus Curiae*, Case No. 10-cv-530, Dkt. 42-3, at 2). As the district court concluded, the record below establishes that because "of the severe economic consequences likely to befall those members of the Western New York community, public interest

favors staying the enforcement pending further litigation of plaintiffs claims." *Id.*; *see also, e.g.*, Moll Decl. ¶ 45 (JA 127) (noting the PACT Act's effects on the social welfare programs of the Seneca Nation). The district court did not abuse its discretion in finding that the public interest weighs in favor of granting a preliminary injunction.

The Government does not dispute the catastrophic economic consequences that will befall the greater Western New York community if the PACT Act is not enjoined. Rather, much of the Government's argument on this point is that: "[w]hereas plaintiffs' assertions of harm are *unsubstantiated*, the important interests served by the PACT Act are reflected in the express legislative findings and supported by the legislative record." Gov't Br. 42.

As an initial matter, the harms were not "unsubstantiated." The district court correctly found that the record amply established that harm that would befall both SFTA's members and the greater Western New York community if the PACT Act were not preliminarily enjoined. *See* JA 10-11, 43. In addition, the Government apparently does not challenge the second, independent basis on which the District Court found the public interest would be served by a temporary injunction:

> Certainly the public interest favors staying enforcement of a sweeping and unprecedented congressional mandate pending opportunity by this Court and others to fully consider the positions of the parties outside of the hurried context of a preliminary injunction motion.

JA 44-45.

The public clearly has a definite interest in not having arguably unconstitutional laws applied. As the Fourth Circuit aptly noted:

> [W]e agree with the district court that a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction. . . . Again, we agree with the district court that upholding constitutional rights surely serves the public interest.

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotations and citations omitted); *see also, e.g.*, *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional ordinance."); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) ("The public interest would best be served by granting the injunction. It is in the public interest not to perpetuate the unconstitutional application of a statute.").[16]

[16] Indeed, much of the Government's and amici's argument is based simply on Congressional findings in the PACT Act. However, if the general public interest of a statutory enactment were itself a sufficient basis to reject a preliminary injunction, it would be virtually impossible to ever get a preliminary injunction of a potentially unconstitutional enactment. Amicus New York City, Doc. 244 at 19, expressly argues as much: "Virtually by definition, a choice contrary to the choice made by Congress cannot be in the 'public interest.'" Neither the Government nor its amici cite a case for such a proposition, perhaps because such a rule would be directly contrary to the holding that an allegation that a statute is unconstitutional is itself sufficient to establish irreparable harm, *see supra* 45-46, and that it is in the

It is, in fact, the Government and its amici who assert numerous "unsubstantiated" and hypothetical harms. The Government and its amici primarily contend that the preliminary injunction will encourage "underage demand" for cigarettes and foster the financing of criminal activities. *See*, *e.g.*, Gov't Br. 42. The specter of sales to minors during the pendency of a preliminary injunction is belied by the record and rebutted by the fact that: (i) the Seneca Nation prohibits sales to minors, *see* Moll Decl. ¶¶ 22-23 (JA 120); (ii) SFTA member businesses have stringent age-verification procedures in place that prevent minors from acquiring cigarettes, *see id.* ¶ 22 (JA 120); and (iii) SFTA members sell cigarettes only by the carton and generally no less than two cartons per transaction, which makes the purchase by minors cost prohibitive, *see id.* ¶ 24 (JA 120-21).[17] Additionally, the Government does not cite a single Internet purchase

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public interest to grant a preliminary injunction of a statute likely to be found unconstitutional, *see supra* 48.

[17] *See generally* Ribisl, K.M., *The Potential of Internet as a Medium to Encourage and Discourage Youth Tobacco Use*, Tob. Control 2003; 12; 48-59 p. i51. **(**"The fact that relatively few youth reported buying cigarettes online is not surprising. First, retail access of tobacco to youth has still not been restricted to the point that they need to turn to the Internet. . . . A second reason is that adolescents are "cash poor" and they generally do not purchase by the carton, which is the most common way cigarettes are sold on the Internet. . . . These minimum order requirements are a substantial deterrent to most youth who purchase cigarettes for their own consumption."). In addition, a recent study by the organization Tobacco Free Kids, who filed an amicus brief in support of the Government, states that only a "small portion" of underage tobacco sales occur online or through the mail. Most minors purchase cigarettes in-person at retail stores. *See*

of cigarettes by a minor from an SFTA member business since the TRO went into effect.

In any event, the district court's preliminary injunction expressly preserved the PACT Act's restriction on sales to minors. As the district court noted in rejecting the Government's request for a stay pending this appeal, "nothing about this Court's injunction makes it lawful to sell cigarettes to minors. In fact, this Court crafted its injunction to leave in place the age verification provisions of the Act, set forth in 15 U.S.C. § 3[76]a(b)(4)." JA 52.

The Government and its amici also contend, without any specificity, that SFTA's members' sales are illegal and that the profits from "illegal sales are also used to finance other criminal activities." Gov't Br. 42. There is no evidence whatsoever in this record that the district court's preliminary injunction has led or will lead to illicit cigarette trafficking. Indeed, the Government made this assertion repeatedly throughout the TRO and preliminary injunction proceedings to no avail. *See, e.g.*, Government's Op. to Plaintiff's Motion for Preliminary Injunction, Case No. 10-cv-530, Dkt. No. 25-1, at 12. In rejecting the Government's Motion for a Stay pending appeal, the district court specifically noted that, "[w]ith regard to curtailment of illegal trafficking, defendants have simply failed to show a

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http://www.tobaccofreekids.org/research/factsheets/pdf/0073.pdf. (Last visited October 14, 2010).

significant threat of illicit cigarette trafficking during the short time the expedited appeal to the Second Circuit will be pending." JA 52.[18]

The Government and its amici next contend that SFTA's members have no right as Native American businesses to market an exemption from taxation. *See, e.g.*, Gov't Br. 11 and 39-40. However, the district court's decision – and SFTA's legal arguments in this case – are in no way based on the fact that SFTA members are Native American businesses that may be entitled to some additional protections under various treaties with the United States. Thus, the Government's citation of cases like *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), which involved questions of Native American sovereignty, is plainly misplaced. The district court's injunction was based on the fact that the PACT Act impermissibly attempts to legislate due process out of the equation for any remote business – Native American or otherwise. *See* JA 44. [19]

[18] Convenience Stores Amici also argue that their members lose significant amounts of business to website sales. However, the preliminary injunction does not deprive members of a source of revenue they had prior to the injunction. Moreover, there is no evidence that they will suffer the same sort of irreparable harm – going out of business – that the SFTA members will suffer or the Western New York community will suffer absent an injunction.

[19] SFTA members inform their customers that they are responsible for determining and complying with all tax-related obligations. An example of such statement regarding taxes is set forth in the materials attached Government's Brief at page 12

The Government and its amici also argue that the preliminary injunction will hamper States' and localities' efforts to collect taxes on cigarette sales. *See, e.g.*, Gov't Br. 42. While there can be no dispute that were it constitutional, Congress' attempt to waive Due Process might aid a State's efforts to collect taxes, the injunction does not permanently deprive States of tax revenue or a means of collection that was not available to them prior to the PACT Act's effective date. States and localities can continue to collect taxes as they have always done, which, in many States and localities is by requiring the purchaser to pay the tax. *See, e.g.*, *Hemi Grp. LLC*, 2010 WL 3547647, at *1 (noting that Illinois law leaves it to the buyers to pay the applicable state taxes on cigarettes purchased over the Internet or by mail); *Hemi Grp. LLC v. City of NY*, 130 S. Ct. 983, 987 (2010) (noting that New York City "is responsible for recovering, directly from the customers, use taxes on cigarettes sold outside of New York"); *see also, e.g.*, Ala. Code § 13A-12-3.7 (2010); Cal. Cig. & Tob. Prod. Tax Regs. Art. 16; Cal Rev. & T. Code § 30101.7; Haw. Rev. Stat. § 245-16 (2010); Ind. Code Ann. § 24-3-5-7 (2010). Hence, the preliminary injunction does not take away a revenue stream State and localities previously maintained, it merely delays the means of using an

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of the Addendum: "It is the responsibility of the Buyer to ascertain and comply with any laws in regard to the purchase and use of any cigarette products."

unconstitutional collection scheme until merits of this matter are fully resolved.[20] *See* JA 51 ("The practical effect of this Court's injunction is to put off the time period when plaintiffs are to pay state and local taxes pending further assessment of the merits of plaintiffs Due Process claim.").[21]

In sum, after considering all the arguments and information before it, the district court did not abuse its discretion in finding that the public interest weighs in favor of granting a limited preliminary injunction of the provisions the district court found SFTA had established are likely unconstitutional. *See, e.g.*, *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30,

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[20] Additionally, with regard to the argument that enjoining the PACT Act will hinder the curtailment of lawful adult smoking, as the district court noted, the PACT Act does not ban smoking or discourage cigarette sales, "it simply alters how [cigarettes] are purchased and delivered." JA 52. Indeed, although Congress included in the PACT Act ten "Findings" and five "Purposes," none was directed at reducing lawful consumption of cigarettes by adult consumers – which a statute aimed at the public health issue surely would do. *See* 15 U.S.C. § 375 Note (Findings & Purposes). The Government seems to concede this point as well by explaining to the Court that the PACT Act is not designed to reduce smoking, but rather "addresses particular problems presented by Internet and other remote sales (also known as 'delivery sales') of cigarettes and smokeless tobacco." Gov't Br. 7.

[21] The Government also asserts that the district court's findings on the public interest were influenced by the "administrative burden" on SFTA members. *See* Gov't Br. 40. However, the page the Government cites, JA 29, concerned SFTA's vagueness argument, which the court ultimately rejected. JA 29-30. As such, the Government's assertion that the district court was unduly concerned with administrative burden in weighing the public harm misreads the district court's opinion. And, regardless of any "burden," the district court's finding of the severe harm to the Seneca Nation and Western New York, and the PACT Act's unprecedented expansion of State taxing jurisdiction are essentially unchallenged.

40 (2d. Cir. 2010) (holding that the district court did not abuse its discretion in balancing the hardships where the record reflected it considered the prospective hardships of all parties).

* * * * *

As the Supreme Court has often noted, "while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (citing *Brown v. Chote*, 411 U.S. 452, 457 (1973)). The district court thoroughly analyzed the preliminary injunction facts, carefully analyzed Congress's novel attempt – in contravention of Supreme Court holdings – to create State taxing jurisdiction without regard to Due Process and determined that SFTA had a "clear likelihood" of success.[22] The Government failed to demonstrate in its appeal that the district court's narrow preliminary injunction of limited provisions of this "unprecedented Congressional mandate," which will cause many SFTA members

[22] Congress itself recognized the unprecedented nature of its action. In its "Sense of Congress" provision at the end of the PACT Act, it stated that: "This Act is in no way meant to create a precedent regarding the collection of State sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State entities that do not have a physical presence within the taxing State." PACT Act § 8.

to lose their businesses and will cause severe harm to Seneca Nation and the greater Western New York community, was an abuse of discretion. Accordingly, this Court should deny the Government's request to vacate the preliminary injunction.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN HOLDING THAT SFTA DOES NOT HAVE A LIKELIHOOD OF SUCCESS ON ITS TENTH AMENDMENT CLAIM

Although Congress has broad power under the Commerce Clause, this power is not unlimited. *See, e.g.*, *New York*, 505 U.S. at 162 ("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."); *Printz v. United States*, 521 U.S. 898, 912 (1997). Here, Congress overstepped its power because the PACT Act impermissibly obligates States to amend or create new processes by which they collect cigarette taxes from delivery sellers in advance of a sale.

Section 2A(d) of the PACT Act states that no delivery seller may "sell," "deliver," or "tender to any common carrier or other delivery service" cigarettes unless "in advance of the sale, delivery, or tender . . . any cigarette tax that is imposed by" the State or locality "has been paid." 15 U.S.C. § 376a(d); *id.* §§ 376a(a)(3), 376a(a)(4). These provisions of the PACT Act mandate that a delivery

seller, like SFTA's members, cannot make a sale or a shipment of cigarettes unless, among other things, it *prepays* "any" excise taxes imposed by a state or locality, regardless of whether the state or locality requires such prepayment or requires the delivery seller to pay the tax. Similarly, the PACT Act mandates that State and local governments create a means to provide out-of-state delivery sellers with "required stamps or other indicia that the excise tax has been paid." *Id.* § 376a(d). Thus, Congress, through the PACT Act, is reaching beyond its enumerated powers by forcing States to collect taxes on shipment of cigarettes in a certain manner, *i.e.*, in must be done up front and payment made by the delivery seller.[23] Simply put, Congress's Commerce Clause power does *not* authorize Congress to require States to rewrite their tax laws. *New York*, 505 U.S. at 166; *Printz*, 821 U.S. at 928-29.

[23]The PACT Act's requirement on how taxes pertaining to the sale of cigarettes are to be paid and collected differs from the taxing schemes in place in many States and localities, including New York City. *See, e.g.*, *Hemi Grp*, 2010 WL 3547647 at *1 (noting that Illinois law leaves it to the buyers to pay the applicable state taxes on cigarettes purchased over the Internet or by mail); *City of NY*, 130 S. Ct. at 987 (noting that "the City is responsible for recovering, directly from the customers, use taxes on cigarettes sold outside of New York"); *supra* at 52 (citing statutes from various states). Congress itself expressly recognized that not all States require excise taxes to be prepaid to the State. 15 U.S.C. § 376a(d)(2) expressly exempts from the prepayment requirement prepayment for smokeless tobacco – but not cigarettes – where "the law of the State or the local government of the place where the smokeless tobacco is to be delivered *requires* or otherwise provides that delivery sellers collect the excise tax from the consumer and remit the excise tax to the State or local government." (emphasis added).

Nevertheless, the district court held that it need not address the merits of SFTA's Tenth Amendment claim because it was bound by the Second Circuit's holding in *Brooklyn Legal Services Corp.*, 462 F.3d at 234 that "private parties lack standing to bring" a Tenth Amendment claim. *See* PI Order, JA 42. It was an error of law for the district court hold to that SFTA lacks standing to bring such a claim.

As the district court observed, there is a "split of circuit authority" on whether private parties have standing to bring a Tenth Amendment claim. JA 39 (citing *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009)). In *Bond*, the Third Circuit joined the Second Circuit in holding that private parties lack standing to bring Tenth Amendment claims. Although the Government prevailed in *Bond*, it recently asserted in a petition for a Writ of Certiorari that private parties have standing to bring certain claims under the Tenth Amendment when they "contend that a statute to which they are subject was beyond Congress's enumerated powers to enact." *Bond v. United States*, No. 09-1227, 2010 WL 2709837, at *15 (U.S. July 19, 2010). In its petition, the Government argued that decisions like *Brooklyn Legal Services* should not be understood to foreclose a private claim under the Tenth Amendment that Congress exceeded its enumerated powers. *See Bond*, 2010 WL 2709837, at *14-17.

Just last week, the Supreme Court granted certiorari in *Bond*. *Bond v. United* States, __ S. Ct. __, No. 09-1227, 2010 WL 1526520 (U.S. Oct. 12, 2010). While the Government does not contend that *Brooklyn Legal Services* was wrongly decided, it attempts to create two distinct types of Tenth Amendment claims: (i) exceeding Congress's enumerated powers and (ii) commandeering States. Although SFTA agrees with the Government's larger proposition that private parties can bring Tenth Amendment claims, SFTA believes the basis for the Government's attempt to distinguish two types of Tenth Amendment claims – one for which private parties have standing and one for which they lack standing – is untenable. As the Supreme Court has explained, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181. Indeed, in *New York*, one of the seminal anti-commandeering cases, the Court expressly noted that "[t]he Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power." *Id.* at 157. There is thus only one kind of Tenth Amendment claim; and SFTA has standing to raise such a claim.[24]

[24] The Government's position in *Bond* and the Supreme Court's decision to review the case and explain the contours of private party standing for Tenth Amendment claims provides a basis for the Court to reevaluate its decision in *Brooklyn Legal*

Consequently, SFTA has standing and established a likelihood of success that Congress exceeded its powers by implementing a statutory tax collection scheme that changes the manner in which States and localities collect excise taxes on cigarettes and thus violates the Tenth Amendment. Accordingly, the Court should reverse the district court holding that SFTA lacks standing and extend the injunction to include the SFTA's Tenth Amendment claim.[25]

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ENJOINING THE GOVERNMENT FROM ENFORCING THE NON-MAILABILITY PROVISIONS OF THE PACT ACT

The Equal Protection guarantees of the Constitution are designed to ensure that similarly situated individuals are not treated differently absent sufficient justification. *See Jankowski-Burczyk v. I.N.S.*, 291 F.3d 172, 176 (2d Cir. 2002) ("The Due Process Clause of the Fifth Amendment guarantees every person the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." (internal quotations and citation omitted)). In enacting the PACT Act's non-mailability provisions, Congress failed

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Services which, in any event, was wrongly decided. Moreover, *Brooklyn Legal Services* is distinguishable because SFTA is bringing its claim on behalf of member businesses chartered by the Seneca Nation – a sovereign Indian nation. Thus, SFTA does not stand in the shoes of an ordinary individual consumer; rather, under any reasonable standard, SFTA should have standing to assert the protections of the Tenth Amendment.

[25] For the reasons discussed *supra* Argument, Section III, SFTA established, and the district court found, irreparable harm and that a preliminary injunction is in the public interest.

to comply with the Equal Protection Clause by irrationally favoring residents of Alaska or Hawaii over similarly situated residents in other States.[26]

Specifically, the PACT Act deems all cigarettes and smokeless tobacco non-mailable through the USPS, 18 U.S.C. § 1716E(a)(1), but provides an exception for intrastate shipments within Alaska and Hawaii, § 1716E(b)(2). Individuals and entities who reside outside of Alaska and Hawaii are not afforded a similar opportunity to mail cigarettes and smokeless tobacco products intrastate, and, in fact, will be subject to criminal and civil penalties for such mailings. *Id.* at § 1716E(d) & (e). As such, the non-mailability provisions of the PACT are not only unconstitutional on their face, but also as applied to the businesses that SFTA represents.

To satisfy the rational-basis test, courts have insisted that the government advance a legitimate objective *for the disparate treatment* and a *rational means* of meeting that objective. *See, e.g., Connolly v. McCall*, 254 F.3d 36, 42 (2d. Cir. 2001); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1340-41 (D.C. Cir. 1998). However, where as here, no valid government interest is rationally served *by the disparate treatment*, the statute violates equal protection

[26] SFTA agrees with the district court that its equal protection claim is subject to the rational-basis review. *See* JA 37. Although rational basis is the least demanding standard of review, it is "not a toothless one." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

guarantees and is void and unenforceable. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (rejecting rational-basis arguments in support of State statute distinguishing citizens who established residency prior to 1959 and those who became residents after that date and therefore finding statute in violation of the Equal Protection Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-36 (1973).

The stated purposes of the PACT Act, such as preventing sales to minors and stopping smuggling and illegal trafficking, *see* 15 U.S.C. § 375 Note, are obviously not furthered by the mailing exception for Alaska and Hawaii. Thus, they cannot serve as a rational basis for Congress's differing treatment of individuals and entities who reside in Alaska and Hawaii and those who reside in other States.

There also is no rational reason outside of the confines of the PACT Act for exempting only residents of Alaska and Hawaii. As the district court noted, the legislative history of the Act indicates that Congress excluded Alaska and Hawaii from the non-mailability provisions so that rural residents in those two States who depend on the USPS to receive their groceries and other consumables can continue to obtain cigarettes. *See* JA 40. However, rural residents of other states who depend equally on the USPS to receive groceries and other consumables were irrationally deprived of the same benefit. *See* JA 39 n.13 (noting record

demonstrated places in the United States outside of Alaska and Hawaii which depend on the mail for groceries and tobacco products).[27] Furthermore, despite the numerous statutes deeming various materials non-mailable through the USPS, *see* 18 U.S.C. § 1691 et seq. (Chapter 18, Crimes, Postal Service), none excludes Alaska and Hawaii from its scope. Consequently, the PACT Act's exemption for residents of Alaska and Hawaii is unconstitutional because the disparity it creates between residents of different States serves no permissible government purpose and consequently violates Equal Protection. *See Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 986 (D.C. Cir. 1992) (stating the statute cannot be upheld because "[a]t the minimum level, [the legislation must] classify the persons it affects in a manner rationally related to legitimate government objectives" (*quoting Schweiker v. Wilson*, 450 U.S. 221, 230 (1981))).

The district court explained that SFTA is unlikely to succeed on the merits of its Equal Protection claim because Congress can "act incrementally" and "pass laws that are over (and under) inclusive" without running afoul of equal protection, and that Congress does not have to make mathematically precise classifications.

[27] For example, because of its remote location inside of the Grand Canyon, the USPS uses a mule train to deliver groceries to residents of Supai, Arizona. *See* Moar Decl. ¶ 3 (JA 235). In 2008, a study Defendant USPS published entitled "Report On Universal Postal Service and The Postal Monopoly" frankly admitted that the service USPS provides is vital not only to rural residents in Alaska and Hawaii, but to rural residents in many other States. *Id.* ¶ 6 (JA 235).

JA 39 (quoting *Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010)). However, in making cigarettes non-mailable in all states but Alaska and Hawaii, Congress was not addressing a problem incrementally – such as addressing the harmful effects of cigarette smoking, but not other tobacco products. Rather, Congress irrationally favored residents of two States over identically situated residents in the other States. Several courts have held that such blunt geographic distinctions are impermissible. *See, e.g.*, *Williams v. Vermont*, 472 U.S. 14, 23 (1985) ("A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation."); *Levy v. Parker*, 346 F. Supp. 897, 903-905 (E.D. La. 1972) (finding unconstitutional statute that arbitrarily distributed funds differently across Parishes as no rational basis existed for the geographical disparity), *aff'd Parker v. Levy*, 411 U.S. 978 (1973); *Foss v. City of Rochester*, 480 N.E.2d 717, 724 (1985) (no rational basis for imposing different taxes on similar properties due to their different locations).

Indeed, the Ninth Circuit, in upholding an Interior Department regulation excluding native Hawaiians from tribal recognition due to the unique nature of indigenous Hawaiians, noted that geographic presumptions are facially "problematic": "At first blush, *even under rational basis review, a geographic exception to an otherwise uniform federal regulation appears problematic*." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (emphasis added).

The concerns expressed by the Ninth Circuit lie at the heart of this matter. The PACT Act arbitrarily excludes Alaska and Hawaii from its reach, creating a discriminatory preference for individuals, businesses, and Tribes within those States in violation of the Equal Protection right guaranteed by the Constitution.

Regarding the other two factors for a preliminary injunction, the enforcement of the non-mailability provisions of the PACT Act will cause irreparable harm to SFTA members and, in turn, have a severe impact on the economies of the Seneca Nation and the larger Western New York community. *See supra* Argument, Section III. The enforcement of the non-mailability provision will cause such harms because prior to the district court entering the Preliminary Injunction, the USPS was the exclusive means of shipping for many SFTA businesses. While the district court's preliminary order will provide some relief pending a trial on the merits for those SFTA members who use alternative means of shipping under the terms of the Preliminary Injunction, these methods will not likely replicate the reach of the USPS. *Cf.* Moll Decl. at ¶¶ 31, 33, 35, 41, 44 (JA 122-26). Inevitably, this ban on shipping through USPS will force some of these affected businesses to close their doors and lay off employees which, in turn, will have a devastating economic impact on Western New York. *See id.* ¶¶ 41, 44 (JA 125-26).

In sum, the district court abused its discretion in finding that SFTA is unlikely to succeed on the merits of its Equal Protection claim. The PACT Act, under the guise of preventing terrorist trafficking in cigarettes and the sale of tobacco to minors, creates an unconstitutional statutory scheme whereby individuals outside of Alaska and Hawaii are unfairly restricted from conducting legitimate business activities that are otherwise permitted within Hawaii and Alaska. As such, SFTA has shown a substantial likelihood that it will succeed on the merits of its Equal Protection claim, irreparable harm, and that it is in the public interest that the non-mailability provisions should be preliminarily enjoined.

CONCLUSION

For the foregoing reasons, the Court should reject the Government's request to vacate the preliminary injunction. Additionally, the Court should expand the injunction to include SFTA's Tenth Amendment and Equal Protection claims and preliminary enjoin the PACT Act's non-mailability provisions.

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Respectfully submitted,

/s/ Russell R. Bruch
Howard M. Radzely
R. Edward Cruz
Russell R. Bruch
Leni D. Battaglia
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 739-3000
Fax: (202) 739-3001

Daniel B. Moar
GOLDBERG SEGALLA LLP
665 Main Street; Suite 400
Buffalo, NY 14203
Telephone: (716) 844-3416
Fax: (716) 566-5401

Counsel for Seneca Free Trade Association

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(c) that the foregoing brief satisfies the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 28.1(e)(2)(B) because the type-face is Times New Roman, proportionally spaced, fourteen-point font, and it contains 16,452 words, according to the count of Microsoft Word 2003.

/s/ Russell R. Bruch
Russell R. Bruch

CERTIFICATE OF SERVICE

I certify that on this 18th day of October, 2010, I caused the foregoing Seneca Free Trade Association's Principal and Response Brief to be filed with the Court in hard copy and through the Court's CM/ECF system. Counsel of record are ECF users.

/s/ Russell R. Bruch
Russell R. Bruch