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, AARON J. PIERCE, 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

RESPONSE/REPLY BRIEF FOR APPELLANTS/CROSS-APPELLEES

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STATEMENT OF THE ISSUES

Plaintiffs challenge the constitutionality of provisions of the Prevent All Cigarette Trafficking ("PACT") Act, Pub. L. No. 111-154, 124 Stat. 1087 (2010). The issues presented by the government's appeal are set out in our opening brief ("Gov. Br."). Plaintiffs' cross-appeals present the following additional issues:

1. Whether the PACT Act's ban on the delivery of cigarettes and smokeless tobacco through the U.S. mail is irrational because there is a limited geographic exception for mail deliveries within the States of Alaska and Hawaii.

2. Whether the PACT Act's requirement that state and local taxes on cigarette and smokeless tobacco sales be paid in advance of delivery "commandeers" state and local governments, and whether plaintiffs have standing to press this claim.

3. Whether the PACT Act, which applies to all remote sellers of cigarettes and smokeless tobacco, discriminates against members of Indian Tribes.

SUMMARY OF ARGUMENT

Plaintiffs do not question the importance of the federal goals furthered by the PACT Act. Congress found that the majority of Internet and other remote sales of cigarettes and smokeless tobacco are made without payment of state and local taxes, without compliance with existing federal registration and reporting requirements, and without adequate precautions to prevent sales to minors.

Congress found that sales over the Internet and through mail, fax, or phone orders make it cheaper and easier for children to obtain tobacco products; that criminals and terrorist groups profit from trafficking in untaxed cigarettes; and that billions of dollars of tax revenue are lost each year. *See* 15 U.S.C. § 375 Note (Findings).

To address these problems, the PACT Act prohibits remote sales of cigarettes and smokeless tobacco unless the applicable state and local taxes are paid in advance. *See id.* § 376a(a)(3)(A)-(B), (4), & (d). The Act requires that interstate sellers comply with state and local laws that place restrictions on sales to minors and that impose other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco. *See id*. §§ 376a(a)(3)(C)-(D). In addition, the Act makes it unlawful to deliver cigarettes and smokeless tobacco through the U.S. mail. *See* 18 U.S.C. § 1716E. Plaintiffs' challenges to the constitutionality of these provisions have no merit.

1. The district court's due process holding rests on a fundamental legal error, and plaintiffs offer no persuasive response to the points made in our opening brief. A statute does not lose its federal character because it requires compliance with state requirements in order to advance shared federal and state goals. As the three-judge court held in *Consumer Mail Order Ass'n of America v. McGrath*, 94 F. Supp. 705, 712 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951), in rejecting a due

process challenge to the Jenkins Act, Congress and the states are "not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion."

The district court also erred in analyzing the due process principles that apply when a state imposes requirements on out-of-state vendors. This Court reversed the decision on which the district court relied, *Chloé v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518 (S.D.N.Y. 2010), after the injunction was issued in this case. This Court confirmed that a state may exercise jurisdiction over an out-of-state business that makes its products available for sale online and sells its products to out-of-state residents. *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010).

2. Plaintiffs challenge the ban on of the delivery of cigarettes and smokeless tobacco through the U.S. mails, 18 U.S.C. § 1716E(a), urging that the ban is irrational because it does not apply to intrastate shipments that are made within the States of Alaska and Hawaii, *see id.* § 1716E(b)(2). The district court correctly rejected this challenge as baseless. Because of the unique geography of these two States, "without such an exception, some citizens in Alaska and Hawaii would not be able to obtain those products at all." JA 40. Congress acted well

within its power when it crafted a limited geographic exception for deliveries in these States.

3. Plaintiffs' Tenth Amendment challenge is equally insubstantial. The PACT Act was passed with strong state support to ensure that interstate businesses comply with state and local laws. The statute does not "commandeer" the workings of state government. Moreover, under Circuit precedent plaintiffs lack standing to urge a commandeering claim.

4. Red Earth's claim that the statute was impermissibly motivated by animus towards tribal retailers lacks any foundation. The PACT Act provisions are neutral on their face, and both SFTA and *amicus* Seneca Nation decline to support Red Earth's "intentional discrimination" claim.

5. The injunction is manifestly against the public interest. It permits out-of-state sellers to inundate other jurisdictions with cheap tobacco products, and thus undermines one of the principal means used to curb demand. The injunction allows out-of-state sellers to ignore state restrictions on sales to minors and other payment obligations or legal requirements relating to the distribution of tobacco products, including the ban on delivery sales that was upheld by this Court. The order contravenes the judgments of Congress and state legislatures and should be reversed at the earliest possible time.

ARGUMENT

I. Plaintiffs' Due Process Challenge Has No Likelihood Of Success.

A. Congress May Require Interstate Businesses To Comply With State And Local Law, Including Tax Law.

Congress found that the majority of Internet and other remote sales of cigarettes and smokeless tobacco are made without payment of state and local taxes. Although plaintiffs do not take issue with this finding, they assert that Congress violated principles of due process when it prohibited remote sales of cigarettes and smokeless tobacco unless the applicable state and local taxes are paid in advance. *See* 15 U.S.C. § 376a(a)(3)(A)-(B), (4), & (d).

The premise of plaintiffs' argument is that the PACT Act should not be treated as an exercise of federal authority, but as an attempt to "authorize" due process violations by states. SFTA Br. 12; *see also* Red Earth Br. 18-19. Plaintiffs misconceive the nature of federal legislation that requires interstate businesses to comply with state law. As the Supreme Court has explained, such statutes do not constitute a "delegation to the states" of federal authority. *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 326 (1917). The Supreme Court thus rejected a commerce clause challenge to the Webb-Kenyon Act, which prohibited the shipment of alcoholic beverages "when liquor is

intended to be used in violation of the law of the state." *Id.* at 325. The Court rejected the contention that this federal statute exceeded Congress's power to regulate interstate commerce on the theory that "it submitted liquors to the control of the states." *Id*. at 326. The Court explained that "the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." *Ibid*.

The Supreme Court applied the same reasoning in *Kentucky Whip & Collar Co. v. Illinois Cent. Ry. Co.*, 299 U.S. 334, 343 (1937), in upholding a federal statute that barred shipment of prisoner-made goods into states where the "goods are intended to be received, possessed, sold, or used in violation of its laws." The Court held that the statute was not in "collision with the requirements of due process of law," explaining that Congress had not "attempted to delegate its authority to the states," and had "not sought to exercise a power not granted or to usurp the police powers of the states." *Id.* at 352. Instead, Congress had "formulated its own policy and established its own rule." *Id.* As the Court made clear, "[t]he fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." *Id.*

Red Earth responds to *James Clark Distilling* and *Kentucky Whip & Collar* by declaring that it "was recognized by the dissent in *Granholm v. Heald*, 544 U.S.

460, 125 S. Ct. 1885 (2005)[,] that the vitality of those decisions, together with the enforceability of the Webb-Kenyon Act, is doubtful." Red Earth Br. 17. Neither the majority nor the dissent in *Granholm* (which involved a dormant commerce clause challenge to a state statute) suggested anything of the kind.

Plaintiffs are equally wide of the mark in declaring that these Supreme Court cases are irrelevant because Congress aided the exercise of state police power rather than state taxing power. *See* SFTA Br. 24-26; Red Earth Br. 17. Plaintiffs do not explain why this distinction should have any constitutional significance for their due process challenge. The case that established the taxing jurisdiction principles on which plaintiffs rely, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), invoked the personal jurisdiction standard articulated in *International Shoe v. Washington*, 326 U.S. 310 (1945). *See Quill*, 504 U.S. at 305, 307; *see also id.* at 319 (Scalia, J., concurring) (it is "difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax"). Nor is there a bright line between taxation and other means of regulation. As our opening brief explained, taxation is one of the principal means that governments use to curb demand for tobacco products and forms an integral part of tobacco control efforts. *See* Gov. Br. 5-10; *see also* Amicus Br. of State of New York, *et al*. 12-13; Amicus Br. of Campaign for Tobacco-Free Kids, *et al*. 11-14.

Plaintiffs likewise offer no meaningful response to *Consumer Mail Order Ass'n of America v. McGrath*, 94 F. Supp. 705 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951), which rejected a due process challenge to provisions of the Jenkins Act that require persons shipping cigarettes into a state to provide the state tobacco tax administrator with information regarding the purchaser and the shipment. The *McGrath* court squarely rejected "the contention that the Act forces a resident of one state to submit to the jurisdiction of a second state[.]" *Id*. at 712. The court explained that "it is the power of Congress, not of any state, which requires the information to be submitted. The Act imposes a condition upon the use of the facilities of interstate commerce, and neither obedience nor violation of that condition subjects the plaintiffs to the authority of any state." *Ibid.* The *McGrath* court made quite clear that its reasoning was fully applicable to congressional efforts to secure compliance with state tax requirements in furtherance of federal goals. It stressed that Congress and the states are "not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce *and taxation*, which, to some extent at least, neither could accomplish in isolated exertion." *Ibid.* (emphasis added) (citation omitted).

The district court's injunction in this case does not distinguish between tax-payment provisions and other requirements, and enjoins the PACT Act provisions

that require compliance with state laws that place "restrictions on sales to minors" and "other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco." 15 U.S.C. §§ 376a(a)(3)(C)-(D). *See* JA 46 (order); *see also* Red Earth Br. 33 (conceding that "the injunction prevents enforcement of ***State*** sales-to-minors laws") (bold in original). Thus, the district court did not embrace plaintiffs' implausible distinction between federal statutes that require compliance with state tax requirements and federal statutes that require compliance with other state requirements and restrictions.[1]

B. Red Earth And SFTA's Members Purposefully Avail Themselves Of The Benefits Of The Taxing States.

Plaintiffs, like the district court, thus fundamentally err in urging that the critical question is whether state tax requirements would pass scrutiny in the absence of a federal statute. Their argument is irreconcilable with the holdings and analysis of *James Clark Distilling* , *Kentucky Whip & Collar*, and *McGrath.*

[1] Plaintiffs' various "waiver" arguments are baseless. For example, although Red Earth urges this Court to disregard the fact that the PACT Act is a federal law, *see* Red Earth Br. 21 n.7, the government stressed the principles set out in *McGrath* in opposing a preliminary injunction. *See* 7/1/10 Preliminary Injunction Opposition 28 (Dkt. No. 25) (quoting *McGrath*). Although Plaintiffs suggest that that the government failed to object to the scope of the injunction, *see* Red Earth Br. 32 n.12; SFTA Br. 36 n.12, 40, the breadth of the order was revealed only when it was issued.

Even on its own terms, however, the district court's due process analysis is fundamentally flawed and relies on reasoning since rejected by this Court. In concluding that an Internet-based sale does not provide adequate contacts to support state jurisdiction, the district court adopted the reasoning of *Chloé v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518 (S.D.N.Y. 2010). *See* JA 25. This Court, however, subsequently reversed the *Chloé* ruling and held that a state can exercise personal jurisdiction over an out-of-state business that makes its products available for sale online and sells its products to residents of that state. *See Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 167 (2d Cir. 2010).

Similarly, in *Illinois v. Hemi Group LLC*, __ F.3d __, 2010 WL 3547647 (7th Cir. Sept. 14, 2010), the Seventh Circuit rejected a claim by an Internet cigarette seller that it lacked sufficient "minimum contacts" to subject it to the jurisdiction of a foreign state. The Seventh Circuit held "that exercising jurisdiction over Hemi in Illinois is fair" because Hemi "held itself out to conduct business nationwide and was apparently successful in reaching customers across the country." *Id.* at *6. The court explained that the seller could not have "the benefit of a nationwide business model with none of the exposure." *Ibid.*

As in *Chloé* , plaintiffs "purposefully avail[]" themselves "of the privilege of conducting activities" out-of-state, "thus invoking the benefits and protections"

of the foreign fora. *Chloé,* 616 F.3d at 165 n.3 (quotation marks and citation omitted). Red Earth's operations are illustrative. By its own account, Red Earth solicits out-of-state business in 46 states through its Internet website, *see* JA 79 ¶¶25-26, JA 95 ¶¶5-6; "acquire[s] cigarettes free of New York Excise taxes," JA 78 ¶ 21; and then "resell[s] [them] to customers and other end users in New York and other States free of such taxes." *Ibid.* Red Earth freely admits that "[s]hipment of tax-free cigarettes" is "an integral and important aspect of plaintiffs' business model, and allows plaintiffs to realize cost savings that result, in part, in the lower prices plaintiffs' customers pay for tobacco products." *Id*. ¶ 29 (JA 80); *see also* JA 96-97 ¶¶ 11-12.

The due process clause is not a protection for interstate businesses that seek to undersell local competitors by avoiding compliance with local tax requirements. Like the smokeshops in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980), what Red Earth offers its "customers, and what is not available elsewhere, is solely an exemption from state taxation." As the Supreme Court observed in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976), "[w]ithout the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."

SFTA does not suggest that Red Earth's operations are atypical. Robert Gordon, who identified himself as an SFTA member, admits that his internet retail business does "not pay state taxes on cigarettes and tobacco products" and that it "pass[es] this savings on to all of our customers nationwide by offering discount cigarettes, chewing tobacco, pipe tobacco and domestic cigars online." Gov. Br., AD-10. Other Seneca Nation retailers likewise advertise ostensibly "tax-free" tobacco products on their internet websites. *See, e.g.*, Gov. Br., AD-17 (Seller is "100% native owned located on the Seneca Nation of Indians reservation, which means that you WON'T get a large tax bill stating that you owe anything"); Gov. Br., AD-18 (Seller is "wholly owned and operated on Seneca Nation Sovereign Territory," which "means: . . . [n]o surprise tax bill in the mail").

Gordon's filings underscore the magnitude of the interstate operations of SFTA's members. Gordon's internet tobacco business, which has 22 employees, sold $2 million in tobacco products *each month* last year. *See* Gov. Br., AD-3 ¶ 4, AD-5 ¶ 13. According to SFTA, most of its member tobacco retailers employ 12-20 people and many employ "substantially more personnel than this range." JA 124-125 ¶ 39. Only "a handful of businesses that employ fewer personnel than this range." *Ibid.* The three largest SFTA businesses employ more than 310

people between them, *see* JA 124 ¶ 39, which means they are each several times the size of Gordon's $24-million-per-year business.

Plaintiffs offer no ground to distinguish this Court's decision in *Chloé*, which "update[d]" this Court's "jurisprudence on personal jurisdiction in the age of internet commerce," 616 F.3d at 165, and reversed the ruling on which the district court in this case relied. Plaintiffs note that *Chloé* and *Hemi Group* involved "personal" jurisdiction rather than "taxing" jurisdiction, and contend that the decisions are therefore inapposite. Red Earth Br. 25-26; SFTA Br. 32. But as already discussed, *Quill* itself relied on the personal jurisdiction principles set out in *International Shoe*, and plaintiffs' attempt to ascribe unique status to the exercise of a state's tax powers find no support in precedent or common sense.

Plaintiffs implausibly analogize this case to *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), *see* SFTA Brief 21, in which the Supreme Court held that a company selling goods only from its physical store in Delaware did not have minimum contacts with Maryland. The Court declared that the "occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising" was not a sufficient connection for due process purposes. *Id.* at 347. Here, by contrast, there is nothing "occasional" or

"incidental" about plaintiffs' out-of-state sales: plaintiffs' entire business model is premised on marketing an exemption from the taxes imposed by other states.

Contrary to SFTA's assertion, it is not "undisputed that SFTA members have, at most, a limited number of contacts with many States." SFTA Br. 22. SFTA has not identified *any* member that lacks minimum contacts with the states in which it distributes tobacco products. If such an entity in fact exists, it can challenge the statute as applied to its particular circumstances. A plaintiff cannot obtain the facial invalidation of a statute by declaring that unidentified members have "at most, a limited number of contacts with many States." The Supreme Court has stressed that a statute may not be invalidated on its face unless it is "unconstitutional in all of its applications" or has no "plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008); *accord United States v. Rybicki*, 354 F.3d 124, 130-131 (2d Cir. 2003) (*en banc*). Contrary to plaintiffs' contention (SFTA Br. 35-39; Red Earth Br. 31), a court is not free to enjoin an Act of Congress on a "preliminary" basis while the court explores whether there are any unconstitutional applications. Even "serious" legal arguments are insufficient to support a plaintiff's motion for a preliminary injunction to block enforcement of a statute — only "a likelihood that he will

succeed on the merits of his claim" will suffice. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010).

II. Plaintiffs' Cross-Appeals Rest On Errors Of Law.

A. The PACT Act's Mailing Ban Is Not Irrational.

1. The PACT Act makes it unlawful to send cigarettes and smokeless tobacco through the U.S. mail. *See* 18 U.S.C. § 1716E. As the district court explained, it is "beyond dispute that Congress has the authority to completely ban those products from the mails." JA-40. The Constitution vests Congress with plenary power over the postal system, *see United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (citing Art. I, § 8), and Congress has long provided that specified items are "nonmailable" — including alcohol, firearms, poisons, inflammable materials, motor vehicle master keys, locksmithing devices, and plant pests. *See* 18 U.S.C. §§ 1715-1717; 39 U.S.C. §§ 3001-3018.

To that list of nonmailable items, the PACT Act adds cigarettes and smokeless tobacco. *See* 18 U.S.C. § 1716E. As plaintiffs concede, Congress's decision to make cigarettes and smokeless tobacco nonmailable is subject to rational basis review, *see* SFTA Br. 60 & n.26, which is a "paradigm of judicial restraint." *FCC v. Beach Communications, Inc*., 508 U.S. 307, 314 (1993). Statutes reviewed under this standard bear "a strong presumption of validity," and

those "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id.* at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

It was plainly rational for Congress to prohibit the delivery of cigarettes and smokeless tobacco through the U.S. mails. Congress found that mail deliveries of cigarettes and smokeless tobacco facilitate tax evasion and cigarette trafficking. *See* 15 U.S.C. § 375 Note, Finding 5. The Assistant Director for Field Operations at ATF advised Congress that cigarettes are believed to be "the number one illegally trafficked 'legal' commodity in the world," and explained that estimates of world wide tax loss to governments are between $40 and $50 billion per year. Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary (May 1, 2008) ("2008 Hearing") at 42-43 (Statement of William Hoover, Assistant Director for Field Operations, ATF). Congress noted that there were more than 450 active tobacco investigations conducted by ATF in 2005. *See* 15 U.S.C. § 375 Note, Finding 8.

As Congress understood, remote sellers "have been very successful at eluding traditional enforcement measures, by making their cigarette and smokeless tobacco deliveries by mail." H.R. Rep. No. 111-117, at 19 (2009). Accordingly,

"[t]o combat this problem, the PACT Act makes cigarettes and smokeless tobacco a non-mailable matter through the U.S. Postal Service." *Ibid*.

2. Plaintiffs do not challenge the rationality of the mailing ban itself. Instead, they attack a limited geographic exception to that ban, which permits intrastate shipments of cigarettes entirely within the States of Alaska and Hawaii. *See* 18 U.S.C. § 1716E(b)(2).

As the district court explained, it was hardly irrational for Congress to exempt intrastate mailings that occur within Alaska and Hawaii. Because of the unique geography of these two States, "without such an exception, some citizens in Alaska and Hawaii would not be able to obtain those products at all." JA 40; *see also United Parcel Service, Inc. v. U.S. Postal Service*, 184 F.3d 827, 841 (D.C. Cir. 1999) (describing the difficulty in delivering mail to the "remote Alaskan 'bush country'"). Congress has repeatedly taken such geographic considerations into account, crafting exceptions for Alaska and Hawaii under a wide range of federal programs and policies.[2] Constitutional challenges to such

[2] *See, e.g.*, 5 U.S.C. §§ 5701(6), 5721(3), 5921(5) (federal employee pay); 7 U.S.C. § 1638a(a)(2)(A)(ii) (agricultural labeling); 7 U.S.C. § 2012(u) (Supplemental Nutrition Assistance Program); 7 U.S.C. § 2014(b) (national food assistance); 12 U.S.C. § 1713(c)(2) (rental housing insurance); 12 U.S.C. §§ 1717(b)(1)-(2) (mortgages); 15 U.S.C. § 1175(c) (gambling devices); 23 U.S.C. § 133(d)(3)(c) (highway funding); 26 U.S.C. § 4261(c)(3) (transportation taxes); (continued...)

exceptions have consistently been rejected. *See, e.g.*, *Matsuo v. United States*, 586 F.3d 1180, 1185 n.8 (9th Cir. 2009) (rejecting challenge to statutory exemption of federal employees in Alaska and Hawaii from locality pay adjustments); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279-83 (9th Cir. 2004) (rejecting challenge to regulations excluding native Hawaiians from tribal recognition process that governed in other 49 States); *see also United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (sustaining exemption of Alaskan crude oil from federal windfall profits tax given the "unique" and "disproportionate costs and difficulties" of drilling and transportation in Alaska). Indeed, the case on which plaintiffs rely, *Kahawaiolaa* (*see* SFTA Br. 63), rejected precisely such a challenge.

It is settled that an equal protection claim cannot succeed if it "rest[s] solely on a statute's lack of uniform geographic impact." *Hodel v. Indiana*, 452 U.S. 314, 332 (1981). Rather, "Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions." *Ibid*.

(...continued)
26 U.S.C. § 4462(b) (Harbor Maintenance Tax); 37 U.S.C. § 404a(a)(2) (subsistence expenses); 42 U.S.C. § 1395m(a)(10) (Social Security payments); 42 U.S.C. § 1760(f) (federal school lunch program); 42 U.S.C. § 4013(b)(1)(A)(iii) (national flood insurance program); 42 U.S.C. § 4955(b)(2) (antipoverty program); 42 U.S.C. § 7545(i)(4) (Clean Air Act); 49 U.S.C. § 13102(17) (surface transportation); 49 U.S.C. § 47107(j) (federal highway funds).

(citation omitted). Because Congress has the "power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974), "[t]he equal protection clause ... is not violated when a geographic area is singled out for different treatment," *Columbia River Gorge United-Protecting People and Property v. Yeutter*, 960 F.2d 110, 115 (9th Cir. 1992).

Plaintiffs cite no case ever to have invalidated a geographic distinction drawn by Congress, and the decisions that plaintiffs do cite (SFTA Br. 61, 63) are inapposite on their face. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985) (invalidating city ordinance requiring a permit to operate a group home for mentally disabled residents); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (Court's "quite narrow" decision invalidated a Vermont use-tax provision because there was "no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere"); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding that a state has no valid interest in "favoring established residents over new residents") (quotation marks and citations omitted); *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534-46 (1973)

(invalidating requirement restricting food stamp benefits to households composed only of related persons).

Plaintiffs' suggestion that the line drawn by Congress is underinclusive (SFTA Br. 61-62) would be irrelevant even if it were substantiated. Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Communications, Inc.*, 508 U.S. at 313-14. Defining legislative classes "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id*. at 315-16 (quotation marks and citation omitted). Thus, even if a classification is "to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (internal quotation marks and citation omitted); *see also Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.") (footnote omitted)).

In any event, even assuming *arguendo* that Congress had no rational basis to exempt intrastate mailings in Alaska and Hawaii, that would provide no basis to enjoin the mailability ban itself. *See* SFTA Br. 65 (arguing that "the non-mailability provisions should be preliminarily enjoined"). The PACT Act includes an express severability provision, which states that "[i]f any provision of this Act . . . is held invalid, the remainder of the Act and the application of the Act to any other person or circumstance shall not be affected thereby." Pub. L. 111-154, § 7, 124 Stat. 1111. "The Supreme Court has held that such a clause creates a presumption in favor of severability." *Federal Election Comm'n v. Survival Education Fund, Inc.*, 65 F.3d 285, 297 (2d Cir. 1995) (citing *Alaska Airlines v. Brock*, 480 U.S. 678, 686 (1987)). It is the duty of the Court to "maintain the act in so far as it is valid." *Alaska Airlines*, 480 U.S. at 684 (quotation marks and citation omitted). Thus, even assuming for the sake of argument that the exception for intrastate mailings in Alaska and Hawaii were irrational, the only result would be that the exception would be invalidated in a suit brought by a party that is injured by that exception. Plaintiffs have not shown that they are injured by the exception for intrastate mailings in Alaska and Hawaii and thus have no standing to challenge the exception. *See Lamar Advertising of Penn, LLC v. Town of*

Orchard Park, New York, 356 F.3d 365, 375 & n.13 (2d Cir. 2004) (noting the relationship between severability and standing).

B. The PACT Act Does Not Violate the Tenth Amendment.

SFTA asserts that 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." SFTA Br. 55. As an initial matter, private parties lack standing to assert this sort of Tenth Amendment "commandeering" claim. As Justice O'Connor noted in her concurring opinion in *Printz v. United States*, 521 U.S. 898 (1997), "States and chief law enforcement officers may voluntarily continue to participate in the federal program" even if their participation may not be required. *Id*. at 936. Absent an objection from a state or local government, there is thus no likelihood that adjudication of a private party's "commandeering" claim would provide redress for its alleged injuries. Thus, the question of commandeering is not properly presented unless a state or local official objects. *See Tennessee Elec. Power Co. v. Tennessee Valley Auth*., 306 U.S. 118, 144 (1939) ("*TVA*") (holding that utility companies lacked standing to raise a Tenth Amendment challenge). As the district court recognized, JA 42, this Court held that *TVA* deprives private parties of standing to bring Tenth Amendment

challenges. *See Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 234-36 (2d Cir. 2006).

The government has urged the Supreme Court that the *TVA* holding should be read narrowly, so as not to bar a private party from asserting that a federal statute exceeds Congress's Article I powers. *See* Brief for the United States, *Bond v. United States*, No. 09-1227, 2010 WL 2709837, *cert. granted*, __ S. Ct. __ (Oct. 12, 2010). Although such a claim is sometimes described as a "Tenth Amendment" claim, it is materially different from the sovereignty-based claim reflected in the Supreme Court's anti-commandeering cases. By contrast, SFTA's "commandeering" claim falls squarely within the rule announced in *TVA*.

SFTA's "commandeering" claim is, in any event, baseless. The PACT Act does not require state and local governments to enforce federal law or to change their tax regimes. Rather, it requires that sellers of cigarettes and smokeless tobacco ensure that the taxes that state and local governments choose to impose are paid. The Act makes it unlawful for a remote seller to deliver cigarettes or smokeless tobacco unless, in advance of delivery, "any cigarette or smokeless tobacco excise tax *that is imposed by the State* in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State." 15 U.S.C. § 376a(d)(1)(A) (emphasis added); *see also id.* § 376(d)(1)(B) (same for local

taxes); *id*. § 376a(a)(3) (requiring that remote sellers comply with "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific state and place, including laws imposing" excise taxes). Thus, contrary to SFTA's suggestion, nothing in these provisions requires states to change the way that they collect taxes or distribute their tax stamp; instead, delivery sellers will need to alter their practices to make sure that they obtain or distribute their products through stamping agents licensed by the states (where required).

These provisions do not commandeer state officials by "'by directly compelling them to enact and enforce a federal regulatory program.'" *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 204 (2d Cir. 2002) (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)). The three-judge court in *McGrath* rejected an analogous Tenth Amendment challenge to the Jenkins Act, which, like the PACT Act, is designed to facilitate collection of the tobacco taxes that states and local governments choose to impose. *McGrath* explained that "[t]he use of the commerce power to aid the several states in this manner is valid" and does not

constitute "a forbidden invasion of state power." *McGrath*, 94 F. Supp. at 710, *aff'd* 340 U.S. 925 (1951) (quotation marks and citation omitted).[3]

C. The PACT Act Does Not Discriminate Against Indian Tribes.

There is no support for Red Earth's contention that the PACT Act was motivated by animus towards tribal retailers. *See* Red Earth Br. 41-46. The PACT Act provisions are neutral on their face, and both SFTA and *amicus* Seneca Nation have declined to support Red Earth's "intentional discrimination" claim.

Congress heard testimony from the President of the Seneca Nation of Indians, *see* 2008 Hearing at 146-151, and included specified "Exclusions Regarding Indian Tribes and Tribal Matters" in the PACT Act. *See* 15 U.S.C. § 375 Note. As the district court explained, Congress enacted the PACT Act despite — not because of — its impact on Native American retailers, and the assertion of intentional discrimination thus fails. *See* JA 33-37.

[3] The government's brief indicated that all fifty states supported the Act's passage. Gov. Br. 8 (citing letter from National Association of Attorneys General). In fact, that letter was signed by the Attorneys General of 47 states, as well as the Attorneys General of the District of Columbia, Guam, Commonwealth of the Northern Mariana Islands, and Puerto Rico.

III. The Balance Of Equities And Public Interest Preclude An Injunction.

Our opening brief showed that the balance of harms and the public interest require that the preliminary injunction be vacated. *See* Gov. Br. 39-42. Congress enacted the PACT Act because it found that the majority of remote sales of cigarettes and smokeless tobacco are made without payment of applicable taxes, without compliance with federal reporting requirements, and without adequate cautions to prevent sales to minors. As discussed, untaxed cigarettes undermine tobacco control efforts and provide a significant source of revenue for other criminal activities.

Many Seneca Nation sellers explicitly advertise "tax-free" tobacco products on their websites, and SFTA does not claim that state and local taxes are paid on the tobacco products that its members sell. Thus, the operations of Red Earth and SFTA's members systematically undermine Congress's intent to ensure that the tobacco taxes on remote sales are paid.

Red Earth's assertion that the PACT Act "is not about public health" because cigarettes have not been banned, *see* Red Earth Br. 5, reflects a fundamental misunderstanding of the public health crisis that tobacco products have caused. There are tens of millions of addicted smokers in the United States, and a ban would cause them "extreme withdrawal" and produce "a black market

offering cigarettes even more dangerous than those currently sold legally." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000) (citation omitted). Accordingly, Congress addressed the tobacco crisis through a series of related measures that include FDA regulation, stronger health warnings, restrictions on youth access, and restrictions on tobacco advertising and promotions that appeal to youth. *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776. Congress raised the federal excise tax on a pack of cigarettes from 39 cents to $1.01, *see* 26 U.S.C. § 5701(b), and, through the PACT Act, prevented remote sales from being used as a means of tax evasion. Plainly, these price regulations form an integral part of federal tobacco control strategy and are directly undermined by the injunction.

Although plaintiffs object to the burden of PACT Act compliance, our opening brief noted that another Seneca Nation tobacco retailer declares on his website that he has come into compliance with the PACT Act. *See* Gov. Br., AD-15. Plaintiffs offer no response to this point and do not explain why they, too, cannot bear the burden of compliance with laws generally applicable to the sale and distribution of cigarettes. Nor do plaintiffs show that the mailing ban is causing them irreparable harm. As the district court observed, mail delivery "is not the only means" to deliver cigarettes and smokeless tobacco and "alternative

ways to deliver [these] products do exist." JA 53 (emphasis omitted). Indeed, Red Earth recently advised its customers that it has resumed delivery to certain areas,[4] and Mr. Gordon's website proclaims that "We can now take orders by Phone!"[5] Thus, even apart from the failure of plaintiffs' challenge to the mailing ban on the merits, there is no basis to enjoin the enforcement of that ban by the Postal Service, which already has undertaken a nationwide training campaign to ensure that its employees comply with the ban. *See* Dkt No. 25-3, No. 10-530 (W.D.N.Y.) (Raney Decl. ¶ 12).

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[4] *See Red Earth v. United States*, No. 10-3165 (2d Cir.), Docket Entry 167 (28(j) letter filed by the government, attaching Red Earth customer alert sent by email on August 20, 2010).

[5] *See* http://www.allofourbutts.com/ (visited Sept. 16, 2010) (copy attached to our opening brief); *see also* http://www.cigarettesavers.com (visited Sept. 16, 2010) (similar) (copy attached to our opening brief).

CONCLUSION

For the foregoing reasons, the district court order should be vacated insofar as it granted a preliminary injunction and affirmed insofar as it denied a preliminary injunction.

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**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) because the type face is Times New Roman, proportionally spaced, fourteen-point font, and it contains 6,323 words, according to the count of Corel WordPerfect X4.

/s/ Michael P. Abate
Michael P. Abate

CERTIFICATE OF SERVICE

I certify that on this 25th day of October, 2010, I caused the foregoing Response/Reply Brief For Appellants/Cross-Appellees to be filed with the Court in hard copy and through the Court's CM/ECF system. Counsel of record are registered ECF users.

/s/ Michael P. Abate
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