UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT GORDON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 10-1092 (HHK)
ERIC HOLDER, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S RENEWED APPLICATION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

On June 28, 2010, plaintiff filed this suit (Doc. 2) challenging on Constitutional grounds the Prevent All Cigarette Trafficking Act ("PACT Act" or "Act"), Pub. L. No. 111-154, 124 Stat. 1087 (2010), and at the same time asked this court to enter a temporary restraining order and a preliminary injunction (Doc. 1) to prevent implementation and enforcement of the Act. The Act was otherwise to become effective the next day, June 29, 2010. The court, considering the lateness of the hour and the fact that plaintiff had almost three months notice of the effective date of the Act, denied both the temporary and preliminary relief that plaintiff sought. Order (Doc. 6). On appeal, a panel of the District of Columbia Circuit, while recognizing that plaintiff's delay in commencing this case and seeking emergency relief could bear on the question of whether plaintiff was faced with the irreparable harm necessary for such relief, ultimately held that this court had not sufficiently considered all of the applicable factors. *Gordon v. Holder*, 632 F.3d 722, 724-25 (D.C. Cir. 2011). The panel, therefore, reversed the denial of plaintiff's request for

preliminary relief and remanded the case for further consideration by this court of each of those factors. In so remanding, and while making certain "observations" regarding matters that this court might need to consider in determining whether the factors necessary for preliminary relief are present here, the panel "deem[ed] it prudent not to address these issues in the abstract." *Id.* at 726. Thus, the court of appeals has instructed that this court must consider the factors but has decided nothing with respect to any of them.

Plaintiff has now renewed his request for a preliminary injunction (Doc. 16), arguing that the court should suspend implementation and enforcement of the PACT Act on the grounds that certain of its provisions are likely to be found unconstitutional, that he will suffer irreparable harm if he is subject to them during the pendency of this case, that the balance of harms weighs in his favor, and that the public interest will be served by the grant of the preliminary relief he requests. See, generally, Plaintiff Robert Gordon's Renewed Application for a Preliminary Injunction ("Application"). Plaintiff, however, is wrong on all counts.

Not only is plaintiff unlikely to prevail on the merits of his constitutional claims, he has failed to state any claim on which relief can be granted and, as to one of his claims, he lacks standing to invoke the court's jurisdiction. Furthermore, he is not faced with irreparable harm by virtue of the challenged provisions; and, to the extent he may be harmed by their operation, the harm to the public at large if the provisions are enjoined far outweighs any harm to plaintiff. For these reasons, not only should plaintiff's renewed request for preliminary relief be denied, this case should be dismissed in its entirety.

THE PACT ACT AND TOBACCO REGULATION

The panel that remanded this case recognized that "The [PACT] Act ... was aimed primarily at combating three evils: tobacco sales to minors, cigarette trafficking, and circumvention of state taxation requirements." 632 F.3d at 723.[1] The PACT Act, however, is not a stand-alone statute. Rather, it is part of a comprehensive regulatory scheme enacted by Congress to address a myriad of medical, social, and economic problems associated with tobacco products.

The Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776, vests the Food and Drug Administration with authority to regulate tobacco products and imposes new requirements and restraints on the marketing of those products. Congress separately raised the federal excise tax on a pack of cigarettes from 39 cents to $1.01, *see* 26 U.S.C. § 5701(b), and required anyone who manufacturers or imports processed tobacco to obtain a federal permit, *see id.* § 5712.

The PACT Act addresses the particular problems presented by Internet and other remote sales (also known as "delivery sales") of cigarettes and smokeless tobacco. The PACT Act was passed on March 31, 2010, with the strong support of the Attorneys General of 47 states and the District of Columbia and major public health groups including the Campaign for Tobacco-Free Kids, the American Cancer Society, the American Lung Association, and the American Heart Association.[2]

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[1] The findings of Congress and its purposes in enacting the PACT Act are set out in full in a note following 15 U.S.C. § 375.

[2] *See* http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf (March 9, 2010 Letter from National Association of Attorneys General to All Members of the

Since 1949, a federal law known as the Jenkins Act has required all "out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents," in order to facilitate state and local collection of taxes from the buyers. *Hemi Group, LLC v. City of New York,* 130 S. Ct. 983, 987 (2010). Nonetheless, in determining that there was a vital need for additional legislation in the form of the PACT Act, Congress found that the majority of Internet and other remote sellers do not comply with the registration and reporting requirements of the Jenkins Act. *See* 15 U.S.C. § 375 Note, Finding 5; *see also* Government Accountability Office ("GAO"), GAO-02-743, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement, at 4-5 (2002) (reporting that none of the approximately 150 Internet cigarette vendor websites reviewed indicated compliance with the Jenkins Act, and that 78% of those websites indicated that they did not comply with the Act).

Non-compliance with the Jenkins Act was far from the only motivation for the PACT Act. Congress found that billions of dollars of tax revenue are lost each year due to remote sales of cigarettes and smokeless tobacco, that sales over the Internet and through mail, fax, or phone orders make it cheaper and easier for children to obtain cigarettes and smokeless tobacco, and that the majority of remote sales are made without adequate precautions to prevent sales to children, 5 U.S.C. § 375 Note, Findings 1, 4, 5; that criminals and terrorist groups profit from trafficking in illegal cigarettes, *id.*, Findings 2 & 3; and that unfair competition from illegal sales

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United States Senate); H. Comm. On the Judiciary, 110 Cong. 50, 52 (May 1, 2008) ("2008 Hearing") (Statement of Matthew L. Myers, President, Campaign for Tobacco-Free Kids, noting the support of other public health groups).

takes billions of dollars of sales away from law-abiding retailers throughout the country, *id.*, Finding 6.

Congress confronted these serious and growing problems through the PACT Act's ban on delivery of cigarettes or smokeless tobacco through the U.S. mail, *see* 18 U.S.C. § 1716E, and its requirement that state and local taxes applicable to tobacco products be paid in advance, *see* 15 U.S.C. § 376a(a)(3)-(4), (d). The Act requires remote sellers to comply with the laws of the jurisdictions to which their products are delivered, including restrictions on sales to minors, *id*. § 376a(a)(3); imposes new federal registration, shipping, record keeping, and age-verification requirements, *id*. §§ 376(a)(1), 376a(b), (c), (e); and creates new penalties and enforcement mechanisms, *id*. §§ 377, 378. The Act also amends the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-2346, which bans the possession, receipt and shipment of more than 10,000 cigarettes that do not bear state tax stamps, by granting the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") authority to enter the business premises and inspect the records of any person who distributes more than 10,000 cigarettes. *See* 18 U.S.C. § 2343(c)(1).

The PACT Act contains specified "Exclusions Regarding Indian Tribes and Tribal Matters." 15 U.S.C. § 375 Note. Among other things, the Act shall not be construed to modify existing limitations imposed by treaties or federal common law on state and local taxing and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country. *See id*. Accordingly, under principles set out by the Supreme Court, "cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt." *Department of Tax. & Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994). By contrast, "sales to persons other than

reservation Indians . . . are legitimately subject to state taxation." *Id.* The Supreme Court has "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.'" *Id.* at 72 (citations omitted). The Court has also held that Native American sellers may be required to collect state taxes owed by the purchasers, explaining that "[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." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976).

ARGUMENT

I. PLAINTIFF'S CLAIMS MUST BE DISMISSED

In seeking a preliminary injunction, as in his complaint, plaintiff claims that the PACT Act violates the Constitution in three ways: (1) the Act's ban on use of the United States mail to deliver tobacco products violates the protections of the Fifth Amendment, Application at 12-22; (2) the Act violates principles of due process by requiring plaintiff to comply with taxing and other regulatory provisions of the states into which he sells tobacco products, Application at 22-27; and (3) the Act unconstitutionally "commandeers" the States to implement a federal tax scheme, Application at 27-31. These claims track the constitutional challenges asserted in plaintiff's complaint. Complaint (Doc. 2), ¶¶ 67-83, 91-99. Additionally, plaintiff's complaint asserts a Fifth Amendment claim grounded in alleged racial discrimination. *Id.*, ¶¶ 84-90. He does not, however, advance that claim as grounds for a preliminary injunction, and it is unclear whether he has abandoned it. In any event, each of the claims asserted in plaintiff's complaint

and in his request for preliminary relief is fatally deficient. Plaintiff's Fifth Amendment and due process challenges each fail to state a claim upon which relief can be granted; and he is without standing to assert his state commandeering claim. Those deficiencies require dismissal of plaintiff's claims under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure; and plaintiff, therefore, cannot establish the likelihood of success on the merits necessary for a preliminary injunction.[3]

A. The Act's Mailing Ban Comports With the Fifth Amendment

The Fifth Amendment claim asserted by plaintiff as a basis for preliminary relief is twofold. First, plaintiff argues that his right to due process is breached because "[t]he PACT Act 'largely preclud[es]' Mr. Gordon from following his chosen profession and plainly implicates the property interest he has in his salary." Application at 13 (citation omitted). Second, he asserts that his right to equal protection is violated because "[t]he PACT Act classifies individuals or businesses based on whether they sell their products in a face-to-face transaction or as 'delivery sellers,' *i.e.*, sellers who sell their goods over the Internet, over the telephone, or in any other non-face-to-face transaction." *Id.* Plaintiff acknowledges that both of these claims are to be assessed by the court under the "rational basis" standard. Application at 14. That rational basis standard is a "paradigm of judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and, when it is applied to the PACT Act's mailing ban, the ban easily passes muster.

[3] The well-established standards for dismissal under Fed. R. Civ. P. 12(b)(6) and 12(b)(1) were recently and succinctly articulated by Judge Boasberg in *Mylan Pharm. Inc. v. U.S. Food and Drug Administration*, ____ F. Supp. 2d___, No. Civ. A. 11-566 JEB, 2011 WL 1642531 *4-5 (D.D.C. May 2, 2011), and need not be repeated here.

In litigation raising essentially the same claims as the present case, *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 258, *appeal docketed*, No. 10-3191 (2d Cir. Aug. 24, 2010), the district court recognized that "It is beyond dispute that Congress has the authority to completely ban those [tobacco] products from the mails." 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 made a myriad of items "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. 18 U.S.C. § 1716E.

Congress found that mail deliveries of cigarettes and smokeless tobacco facilitate tax evasion and trafficking and make it cheaper and easier for children to obtain cigarettes and smokeless tobacco. *See, e.g.*, 15 U.S.C. § 375 Note, Finding 5. As Representative Weiner, the Act's sponsor, explained, there is a dramatic difference between the price of legally taxed cigarettes and untaxed cigarettes. *See* 2008 Hearing, at 10. For example, consumers can purchase a carton of Marlboro cigarettes online for $31.95, whereas the same carton would sell for $70 in New York City. *See id*. Matthew Myers, the President of the Campaign for Tobacco-Free Kids, advised Congress that "sales of these illegally tax-free products undermine ongoing state and local efforts to reduce tobacco use by increasing tobacco tax rates." *Id*. at 52. "Studies show, for example, that every 10% increase in real cigarette prices will reduce overall use by approximately three or four percent and reduce the number of youth smokers by six or seven

percent." *Id.*[4] "The availability of cheap cigarettes therefore increases overall tobacco use, thereby leading to higher levels of tobacco-caused disease, deaths and costs." *Id.* "By reducing the easy access to contraband tobacco products and other tobacco products on which taxes have not been paid," the PACT Act assists "in the effort to reduce tobacco use and its harms, especially among youth and lower-income persons." *Id.*

The price differentials between taxed and untaxed cigarettes also make it highly profitable to smuggle cigarettes for resale at a reduced price, and the profits from cigarette smuggling can be used to finance other illicit activities including organized crime and terrorism. *See*, *e.g.*, *id*. at 3 (Statement of Rep. Gohmert); *id*. at 10-11 (Statement of Rep. Weiner). 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. *Id*. 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.

Plaintiff asserts that Congress should have addressed these serious and growing problems by requiring "compliance with existing laws and enhanced penalties for violations," Application at 17, rather than by making it unlawful to send cigarettes and smokeless tobacco through the

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[4] *See also, e.g.*, Koh *et al*., Poverty, Socioeconomic Position, and Cancer Disparities: Global Challenges and Opportunities, 15 Geo. J. on Poverty L. & Pol'y 663, 685 (2008) ("Economists have estimated that a 10% increase in cigarette price reduces cigarette consumption by 3-5% overall, and over 6% among youths.") (citations omitted); Chaloupka *et al.*, Policy Levers For the Control of Tobacco Consumption, 90 Ky. L.J. 1009, 1024 (2002) ("[O]lder youth (twelfth graders) were highly sensitive to cigarette prices, smoking less where excise taxes are higher.").

mails. But 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." *Id.*

Plaintiff provides no basis for a court to second-guess this legislative judgment. Rational basis review is not "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Rather, 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)).

Plaintiff asserts that the PACT Act's age-verification requirements are adequate to prevent minors from obtaining cigarettes and smokeless tobacco through the mail. Application at 17-18 (citing 15 U.S.C. § 376a(b)(4)). But even if compliance with age-verification requirements were universal, it would not address the problems of tax evasion and trafficking discussed above. In reality, "recent studies have revealed that most Internet tobacco vendors fail to verify their customer's age, and those that purport to do so have largely been ineffective in obtaining age verification." Institute of Medicine, "Ending the Tobacco Problem: A Blueprint for the Nation," at 207 (2007) ("2007 IOM Report"). A nationwide survey conducted in 2001 showed that more than 100,000 children aged 12 to 17 had recently purchased cigarettes from the Internet. *See* 2008 Hearing, at 52 (Myers). A New York study found that in 2004 and 2005 more than 5% of 9th graders (14 and 15 year olds) had bought cigarettes — more than three times as

many as in 2001. *See id*. Purchase rates are even higher among older children. *See id*. Moreover, a cheap supply of "tax-free" cigarettes means that "purchasers of any age may supply youthful smokers who do not themselves purchase through direct channels." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003).

The difficulties of enforcing age verification and tax collection requirements have led some states to prohibit direct shipments of tobacco products to consumers altogether. 2007 IOM Report, at 209. For example, in 2000, New York State enacted a law that prohibits direct shipment of cigarettes to state residents and bans carriers from transporting such shipments. *Id*. The Second Circuit rejected a dormant commerce clause challenge to the New York law and held that the burden on interstate commerce was significantly outweighed by the statute's in-state benefits. *Brown & Williamson*, 320 F.3d at 217. Other states have enacted similar laws,[5] which Congress expressly preserved in enacting the PACT Act. *See* 15 U.S.C. § 376a(e)(5)(C).

In an effort to bolster his argument that the mailing ban is irrational, plaintiff asserts that "only a 'small portion' of underage tobacco sales occur online or through the mail, while most minors purchase cigarettes in-person at retail stores." Application at 18 n. 9 (citations omitted). From that assertion, plaintiff reasons that "Congress could more efficiently hinder youth smoking by taking the *opposite* approach to the PACT Act–banning all sales at brick and mortar locations, and requiring that *all* cigarette sales take place through the U.S. Postal Service." *Id*. This argument, assuming it is intended to be more than facetious, is unavailing. Even if plaintiff is correct that only a "small portion" of the cigarettes purchased by minors are bought via remote

[5] *See, e.g.*, Conn Gen. Stat. § 12-285c; Ind. Code. § 24-3-5-4.5; Md. Code. Ann. Business Reg. § 16-222.

sales that use the U.S. mails – an assertion that is contrary to the studies discussed above – it still constitutes a very serious problem that Congress was entitled to address. Plaintiff also also ignores the very real "possibility that purchasers of any age may supply youthful smokers who do not themselves purchase through direct channels." *Brown & Williamson*, 320 F.3d at 217. At bottom, this argument is an invitation for the Court to second-guess the legislative means chosen by the political branches to address the very serious problem of underage smoking (not to mention the diversion of untaxed cigarettes to criminal enterprises that will profit from them). As court in *Red Earth* explains, rational basis review is not a license to revisit the efficacy of the means employed by Congress:

> "[R]ational basis review allows legislatures to act incrementally and to pass laws that are over (and under) inclusive without violating [equal protection requirements]." *See Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010). "Even if the classification ... is to some extent both underinclusive and overinclusive, and hence the line drawn ... imperfect, it is nevertheless the rule that ... perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).... "The provision does not offend the Constitution simply because the classification is not made with mathematical nicety...." *Id*.

728 F. Supp .2d at 257.[6]

Plaintiff attempts to distinguish the PACT Act's mailing ban from others enacted by Congress on the ground that it is "an unprecedented ban on all mailing of a legal product that poses no danger to mail-carriers or the mail." Application at 15. Plaintiff's purported distinction

[6] The discussion quoted above was part of the *Red Earth* court's rejection of the claim that the exception from the mailing ban for remote delivery of tabacco products wholly within the states of Alaska and Hawaii violates the equal protection rights of delivery sellers in other states. Plaintiff makes a similar argument in support of his claim of irrationality of the mailing ban here, Application at 19 n. 10, and it is equally futile and for the same reasons.

begs the question. "[T]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134-35 (2000) (citation omitted). More to the point, however, Congress's plenary control over the postal service is not limited to banning only those items that may be considered "dangerous" to their recipients or to mail carriers. As noted above, Congress has long banned the mailing of items such as alcohol, motor vehicle master keys, locksmithing devices, and plant pests. *See, e.g.*, 18 U.S.C. §§ 1715-1717; 39 U.S.C. §§ 3001-3018.

Plaintiff concludes his attack on the constitutionality of the mailing ban by stating flatly that "[t]he real purpose of the mailing ban was not to increase tax collections or to protect children ... but rather to reward the lobbying efforts of the tobacco industry." Application at 21. Thus, plaintiff asks the court, in effect, to disregard or discount Congress's stated findings and purposes and overturn the statute based on what plaintiff claims really motivated Congress to adopt the mailing ban. This the court may not do. As the Supreme court has instructed:

> On rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity.... Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.... In other words, a legislative choice is not subject to courtroom fact-finding....

Beach Commc'ns, 508 U.S. at 314-15 (internal citations omitted).

B. <u>The Act's State and Local Tax Requirements Satisfy Due Process</u>

According to plaintiff, the PACT Act "violates due process by subjecting [him] to state taxation absent minimum contact with those states" into which he sells tobacco products.

Application at 2. Plaintiff reads the court of appeals decision in this case as "rejecting the government's primary argument," *id.*, with respect to due process and state taxation of tobacco products; but the panel did no such thing. Rather, the panel made "observations" with respect to its understanding of the government's due process argument but deferred, in the first instance, to this court to decide the issue. 632 F.3d at 725. Moreover, though plaintiff states as an absolute that the Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) provides the rule of decision with regard to his due process challenge, the panel was far more circumspect.

Plaintiff argues that "[a] state tax imposed on a non-resident seller will violate due process unless the seller has 'minimum contacts with the [taxing] jurisdiction.'" Application at 23 (quoting *Quill*, 504 U.S. at 307).[7] The panel, however, focused on the fundamental principal that "national legislation" like the PACT Act "cannot violate the Due Process principles of 'fair play and substantial justice.'" 632 F.3d at 726 (quoting *Quill*, 504 U.S. at 307, quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). As regards minimum contacts, the panel recognized that "[a]lthough *Quill* did not deal with excise taxes, there remains an open question

[7] Though plaintiff asserts that "[t]he PACT Act facially conflicts with *Quill*," Application at 24, he could only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the act is valid. i.e. that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 US 442, 449 (2008), quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiff admits that he is presently selling tobacco products into at least six states, and he does not deny minimum contacts with one or more of those states. Application at 32. Therefore, he cannot establish that the PACT Act would violate due process/minimum contacts in all of its possible applications even as to him alone, much less as to all delivery sellers. Moreover, courts are not permitted to "speculate about 'hypothetical' or imaginary' cases" in which plaintiff might not have sufficient contacts in a state. *See Wash. State Grange*, 552 U.S. at 450. Such speculation is one of the reasons that facial challenges are "disfavored." *Id. See also United States v. Raines*, 362 U.S. 17, 22 (1960)("the delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined".)

whether a national authorization of disparate state levies on e-commerce renders concerns about presence and burden obsolete." 636 F.3d at 726. For that reason, the panel found only that "*Quill*'s analytical approach is instructive." *Id.* (emphasis added).

The reason that *Quill's* approach to analyzing the question of minimum contacts is no more than instructive is that *Quill* did not deal with legislation adopted by the Congress of the United States. *Quill,* instead, was concerned with the effort of a state to impose its tax laws on a seller that had no physical presence in the state but solicited and filled orders for its products from purchasers within the state. The PACT Act is far different; it is a law of national scope that imposes the requirement to pay tobacco excise taxes on sellers who solicit and fill orders for tobacco products throughout the country. For that reason, to the extent that "e-commerce" has not "render[ed] concerns about presence and burden obsolete," 632 F.3d at 726, the minimum contacts that may be necessary to satisfy due process are contacts with the United States, not with any particular state. Therefore, the government does not "suggest[] that there can be no Due Process violation when Congress authorizes state levies," *id.* at 725, but rather that "minimum contacts" concerns are satisfied when a delivery seller engages in a congressionally regulated transaction anywhere in the United States. And, of course, plaintiff freely acknowledges that his business is national in scope; his claim that Congress has imposed an unconstitutional restriction on his ability to engage in that national business forms the entire basis of his challenge to the PACT Act.

It is of no moment that Congress has chosen in the PACT Act to regulate national sales of tobacco products by requiring sellers to comply with the tax laws of each state into which they sell their products. Such federal requirements are commonplace. Firearms distributors may not

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

It has never been suggested – other than by a single district court in the *Red Earth* case – that federal requirements of this sort offend notions of due process on a "minimum contacts" theory. Nor could they. In order for there to be a "minimum contacts" problem, there must be an assertion of authority by a sovereign who arguably lacks the constitutional power to regulate a person outside its jurisdiction. But, as the Supreme Court has explained, statutes that require interstate businesses to respect the laws of the places where they ship their products – *i.e.*, laws like the PACT Act – do not subject those businesses to the jurisdiction of any particular state. In *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326 (1917), the Court held that 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, did *not* "submit[] liquors to the control of the states," *id.* at 326. Rather, "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.* Likewise, in *Kentucky Whip & Collar Co. v. Illinois Cent. Ry. Co.*, 299 U.S. 334, 343 (1937), the Court upheld a 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." *Id.* at 352. Instead, Congress had "formulated its own policy and established its own rule." *Ibid.* "The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." *Ibid.* These cases undermine the central premise of plaintiff's due process claim: the assertion that he has somehow been subjected by Congress to the will of the states where he does business.

Quill underscores, rather than undermines, this understanding of the "minimum contacts" analysis. That case, which addressed a *state* law that required out-of-state sellers to collect an excise tax on products delivered into the state, noted that "[]he Due Process Clause 'requires some definite link, some minimum connection, between *a state* and the person, property or transaction *it* [the state] seeks to tax.'" 504 U.S. at 306 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954) (emphasis added). *Quill* concluded that although the North Dakota statute was invalid under the dormant commerce clause, the state law did not offend standards of due process.

Nowhere did *Quill* suggest that a federal statute that requires compliance with state law would violate due process.[8] And apart from the district court in *Red Earth*, no court has invoked *Quill*'s due process analysis as a basis for invalidating an Act of Congress. But even when such an analysis is applied, the PACT Act satisfies due process. The Court in *Quill* explained:

> [We have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State....
>
> Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign."

504 U.S. at 307-08 (quoting *Shafer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J. concurring in judgment).

There is no doubt that plaintiff purposefully avails himself of the benefits of the economic markets of the states into which he sells tobacco products. Plaintiff's business model is predicated on selling those products to customers nationwide who otherwise would pay state excise taxes at the point of sale. Plaintiff declares that his business "do[es] not pay state taxes on cigarettes and tobacco products" and "then pass[es] this savings on to all of our customers nationwide by offering discount cigarettes, chewing tobacco, pipe tobacco and domestic cigars

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[8] *Quill* relied upon *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945) for the proposition that Congress "does not ... have the power to authorize violations of the Due Process Clause." However, the federal statute addressed in *International Shoe* did not require compliance with state law; it provided that "'No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.'" *Int'l Shoe*, 326 U.S. at 315.

online." See http://www.allofourbutts.com/ (visited May 19, 2011). The success of that model, and hence the measure of plaintiff's contacts with and benefits received from the states into which he sells his products, is acknowledged by plaintiff: "Ninety-five percent of Mr. Gordon's business is based on internet and telephone sales. Only five percent of his business is based on walk-in sales to his brick and mortar store." Complaint ¶ 71 (Doc. 2).

Although in *Quill* the seller had sent printed catalogs into North Dakota, *see* 504 U.S. at 308, the Court did not suggest that such solicitation was a constitutional minimum. Instead, the Court declared that Quill's contacts with North Dakota were "more than sufficient for due process purposes." *Id.* Plaintiff's use of a website rather than mail order catalogs does not alter the due process analysis. The Court observed that "[i]n 'modern commercial life' it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." 504 U.S. at 308. In 1992, when *Quill* was decided, it was irrelevant that the seller solicited business by means of mail-order catalogs instead of maintaining a physical presence in the state. In the age of the Internet, it is likewise irrelevant that plaintiff solicits out-of-state business through his website rather than through physical mail-order catalogs.

The Second Circuit's decision in *Chloe v. Queen Bee of Beverly Hills, L.L.C.*, 616 F.3d 158 (2d Cir. 2010) is particularly instructive, and it is particularly noteworthy in that it reversed a district court decision relied on in *Red Earth* for the proposition that "it has never been held that a single sale, without more, will automatically satisfy due process requirements." *Red Earth*, 728 F. Supp. 2d at 250-51. In *Chloe*, the court of appeals was faced with the question whether, "in the age of internet commerce," 616 F.3d at 165, the State of New York, consistent with due

process, could exercise personal jurisdiction, in a case of trademark infringement, over an out-of-state seller of allegedly counterfeit hand bags based on the sale of a single bag into New York. The court found that the single sale satisfied the due process requirement of minimum contacts when coupled with the following:

> Queen Bee [the seller] operated a website which offered Chloe bags for sale to New York consumers, permitted New York consumers to purchase such bags, and facilitated the shipment of those bags into New York from Beverly Hills where [the seller] was located.

Id. at 166.

The parallels between the seller's business in *Chloe* and plaintiff's business here are inescapable. Though plaintiff now asserts that, "[d]ue to problems with our payment service, we no longer accept orders or payments through our website," Second Declaration of Marcia Gordon (Dkt #16, Att. 1) ¶ 11, there is no question that plaintiff has used the website for those purposes in the past. Affidavit of Marcia Gordon, Doc. 1, Att. 3, ¶ 6 ("We maintain two websites on which customers can place orders.... The vast majority of our customers place orders through those websites. Some customers also place orders by telephone."). And even now, plaintiff's website confusingly states both that "[t]o place an order you can use our online shopping cart and secure transaction system or call 1.800.337.2043 six days a week" and that "[if] you try to place an order, you won't be able to. Site is for pricing only..... Pick up a phone and call us!" See http://www.allofourbutts.com/ (visited May 19, 2011). At a minimum, plaintiff operates a website that offers his tobacco products for sale to consumers throughout the United States, directs consumers as to how to purchase those products, and facilitates the shipment of those products to the consumers.

Under the reasoning of the court of appeals in *Chloe*, these facts, coupled with a sale of one or more tobacco products into a state, constitutes sufficient contacts with that state to satisfy due process. As the *Chloe* court concluded in finding sufficient contacts to satisfy due process:

> [B]y offering bags for sale to New York consumers on the [seller's] website and by selling bags–including at least one counterfeit Chloe bag–to New York consumers, [the seller] "has purposefully avail[ed] [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of the its laws."

616 F.3d at 171 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). On that basis, the court also found that "asserting jurisdiction over [the seller] comports with 'traditional notions of fair play and substantial justice.'" *Id.* at 173 (quoting *Int'l Shoe*, 326 U.S. at 316).

As already discussed, Congress found that the majority of Internet and other remote sales of cigarettes and smokeless tobacco are made without payment of applicable taxes; that billions of dollars of tax revenue are lost each year due to remote sales of cigarettes and smokeless tobacco; that sales over the Internet and through mail, fax, or phone orders make it cheaper and easier for children to obtain cigarettes and smokeless tobacco; and that unfair competition from remote sales on which applicable taxes are not paid takes billions of dollars of sales away from tax-paying face-to-face retailers throughout the country. *See* 15 U.S.C. § 375 Note, Findings 1, 4, 5, 6. And significantly, the Attorneys General of 47 states and the District of Columbia, i.e., those in the best position to assess the impact of delivery sales of tobacco products in each of their states, wrote to "All Members of the United States Senate" the following:

> The need for federal regulation is imperative. The states have tried to stop these sales in a number of ways, but despite these efforts, have been unable to fully address the problem on a state-by-state basis. The tools contained in this legislation would significantly

> strengthen the ability of law enforcement, at both the state and federal levels, to put an end to illegal online sales of tobacco products which evade taxes, a necessary revenue source for many states, are suspected to be linked to terrorist operations, and, most disturbingly, place tobacco products in the hands of children.

http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf at 2. Congress's decision to require delivery sellers such as plaintiff to ensure that applicable state and local taxes are paid in order to ameliorate the harms that it found, and that are attested to by these chief law enforcement officers, is manifestly both fair and just and, therefore, fully satisfies plaintiff's right to due process.

C. The PACT Act is Not Unconstitutionally Vague

As an adjunct to his claim that due process is contravened by the PACT Act's requirements with respect to payment of state taxes, plaintiff also asserts that the statute is "impermissibly vague" and, therefore, in violation of his Fifth Amendment due process rights. Complaint ¶ 68. Plaintiff does not assert this claim as a ground on which the court should enter a preliminary injunction, but he does discuss the apparent basis for the claim in his renewed application. His due process complaint in this regard is that "the PACT Act purports to impose the taxes of at least 550 state and local taxing jurisdictions on delivery sellers who mail tobacco products to customers outside of their own states." Application at 22. The same claim was raised in *Red Earth*, and the district court there resolved it against the plaintiff:

> Compliance with the plethora of federal and local laws relating to cigarette sales no doubt will be burdensome. Before shipping an order, a remote seller will need to consult the existing laws to ensure that they have paid the requisite taxes and are in full compliance with the applicable laws of the destination jurisdiction. And a violation of any of those state or local laws could subject plaintiffs to civil and criminal penalties. However, the fact that

> compliance will be burdensome does not make it vague. As the *Interactive Media* court noted: "[w]hat renders a statute vague is not the possibility that it will sometime be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. *Interactive Media*, 580 F.3d at 117 (quotation omitted). Because a reasonable person could determine what is prohibited and what is permissible by consulting state and local laws governing cigarette sales in the governing jurisdictions, the PACT Act's incorporation of state and local laws does not make it unconstitutionally vague and therefore plaintiffs are unlikely succeed on that claim.

728 F. Supp. 2d 254. The same reasoning mandates dismissal of plaintiff's vagueness claim in this case.

As *Red Earth* indicated, *Interactive Media Entertainment and Gaming Ass'n, Inc. v. United States*, 580 F.3d 113 (3d Cir. 2009), provides apt guidance to determine why the PACT Act's state tax provisions are not void for vagueness, and we can describe that case no better than by quoting *Red Earth*:

> Plaintiff in that case challenged the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. 5361, as void for vagueness. That statute incorporated federal, state and tribal laws relating to the legality of gambling, and made it a crime for any person to engage in the business of gambling with another person via the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made. *Id.* at 114 (quoting 31 U.S.C. 5362). Like the PACT Act, a violation of that statute was punishable as a felony crime. Plaintiff argued that compliance with the statute was impossible because the statute lacked an ascertainable and workable definition of illegal gambling by failing to define illegal gambling and instead incorporating other federal and state laws relating to gambling. The Third Circuit rejected that argument stating: [A] statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions. *Id.* at 116 (quoting *United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir.1998)).

738 F. Supp. 2d at 254.

We have already shown that a myriad of federal statutes impose a duty to comply with varying state laws regarding not only gambling but also firearms, 8 U.S.C. § 922(b)(2), pharmacy licensing, 21 U.S.C. § 831(b), agricultural seeds, 7 U.S.C. §§ 1571, 1573, and explosives, 18 U.S.C. § 842(c). There is no principled difference between those laws and, as the *Red Earth* court found, the PACT Act's requirements relating to state and local tax laws. *See Red Earth*, 738 F. Supp. 2d at 254 ("Indeed, as the defendants note, there are a plethora of federal statutes that incorporate state and local laws by reference."). Just as those laws are not unconstitutionally vague, neither is the PACT Act.

D. <u>The PACT Act Does Not Deprive Native Americans of Equal Protection</u>

While plaintiff does not ground his renewed request for a preliminary injunction on a claim of unconstitutional discrimination against Native Americans, he does assert such a claim in his complaint, Complaint ¶¶ 84-90 (Doc. 2), and he devotes more than five pages of his preliminary injunction application to discussing the Act's alleged destruction of his business and those owned by other members of the Seneca Nation. Application at 1-2, 5-9, 12. The same claim was asserted as an equal protection violation by the individual plaintiff in *Red Earth*, and it was rejected by the court:

> In enacting the PACT Act, Congress was clearly concerned with the loss of state and local tax dollars each year. Congress attributed some of those losses to the fact that state and local governments were unable to collect taxes from Native American retailers who, in Congress's view, had improperly asserted sovereignty as a basis for avoiding taxes. Sovereignty is a characteristic unique to Native Americans as only Native Americans can plausibly make an assertion of sovereignty-whether properly or improperly. That the PACT Act was intended to curtail

> what Congress believed to be improper assertions of sovereignty by Native American retailers is not the same thing as saying that Congress purposefully discriminated against Native Americans as a group. Rather than purposeful discrimination against Native Americans because they are Native Americans, the Act is directed at leveling the playing field for all individuals engaged in retail sales of cigarettes and smokeless tobacco. Congress recognized that leveling the playing field would have an adverse impact upon Native American retailers, but took that action *in spite of* that fact, and *not because of* it. Accordingly, plaintiffs have failed to establish a clear likelihood of success on the merits of their invidious discrimination claim.

728 F. Supp. 2d at 256.

Perhaps plaintiff here does not seek a preliminary injunction based on any violation of his right to equal protection as a Native American because he recognizes that he also has no likelihood of succeeding on such a claim. Whatever plaintiff's reason for omitting any racial discrimination claim as grounds for a preliminary injunction, any such claim must be dismissed for the very reasons articulated in *Red Earth*. Plaintiff has alleged that the PACT Act has a disparate impact upon Native Americans, an impact that results from the disproportionate presence of Native Americans in the tobacco delivery sales business; but he has articulated no racial animus in Congress's enactment of the Act.

Plaintiff himself describes the tobacco delivery sales business as "an industry 60% owned by American Indians–and 30% owned by New York Seneca Indians." Complaint ¶ 59 (Doc. 2). Naturally, when Congress chose to address the harms caused by delivery sales of tobacco products it did so with knowledge of the extent to which Native Americans were involved in such sales, and the statements of the only member of Congress mentioned by plaintiff simply

reflect that knowledge. *Id.* ¶¶63-64.[9] But the PACT Act applies equally and without distinction to all delivery sellers, including the 40% (according to plaintiff's allegation) who are not Native Americans.

It is especially worthy of note that the Seneca Free Trade Association ("SFTA"), whose separate suit challenging the PACT Act has been consolidated with *Red Earth*, *see Seneca Free Trade Association v. Holder*, No 1:10-CV-00550 (W.D.N.Y.) (Doc. 34), has asserted no equal protection claim based on its members being Native Americans. This notwithstanding SFTA's description of itself as "a non-profit organization chartered by the government of the Seneca Nation ... comprised of hundreds of business licensed by the Seneca Nation, many of which are tobacco businesses" and its claims that "SFTA member businesses are in the process of shutting down because of the PACT Act" and that "[t]housands of jobs will be lost on Seneca Territory and the cigarette and tobacco economy [of the Senecas] will be devastated." *Id.*, Complaint ¶¶ 3, 6 (Doc. 1). Apparently the trade association sanctioned by the Seneca Nation and representing "over 140 tobacco businesses on Seneca territory," *id.* ¶ 6, saw no more merit in a claim of racial discrimination that did the *Red Earth* court.

[9] Even if the statement of "[a] representative of the New York State Association of Wholesale Marketers" mentioned by plaintiff, *id.*¶ 65, could somehow be viewed as derogatory of Native Americans, it is not, of course, the statement of any member of Congress. Moreover, the statement, "that Seneca Indians had convinced New York not to tax Seneca cigarettes sales 'through terrorism,'" *id.*, has nothing to do with the PACT Act. The Act requires the payment of state taxes on delivery sales of tobacco products; if New York does not tax such sales by Senecas, whatever the state's motivation, then the PACT Act's state tax provisions are simply inapplicable.

E. Plaintiff Does Not Have Standing to Assert a "Commandeering" Claim

Plaintiff complains that the PACT Act unconstitutionally "commandeers states to implement a state taxation scheme that is different than the ones that states had in place before the PACT Act." Application at 27. That, of course, is not at all what the Act does. As the Attorneys General recognized, the Act "requires all Internet retailers selling or delivering into a state to comply with all state laws relating to the collection of state and local taxes on cigarettes and smokeless tobacco products, just as if they were physically located within the state." http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf at 1. So, if plaintiff could bring his commandeering claim, if would have to be dismissed as being contrary to the plain words of the law. But there is a more fundamental reason why this court must dismiss plaintiff's claim; he has no standing to bring it and, therefore, it is outside the court's jurisdiction.

Plaintiff couches his commandeering claim in the Tenth Amendment, but that Amendment protects powers that are "reserved to the States," U.S. Const. Amend. X, not the rights of private individuals such as plaintiff. It is telling that no state has objected to, in fact they virtually all expressly support, the PACT Act. 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. Thus, the question of "commandeering" is not properly presented unless a state or local official objects. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939) ("*TVA*") (holding that utility companies lacked standing to raise a Tenth Amendment challenge); *compare Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002)

(noting the holding of *TVA* but describing the question whether private plaintiffs have standing to make a Tenth Amendment commandeering argument as "uncertain").[10]

In any event, the PACT Act does not "commandeer" state and local governments; it requires that sellers pay the taxes that state and local governments choose to impose. 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).

These provisions do not "commandeer" state officials by "compelling them either to create or administer a federal regulatory scheme." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1283 (D.C. Cir. 2007). Instead, like the Jenkins Act, the PACT Act requires payment of the taxes that are imposed by state and local governments. As plaintiff recognizes, Application at 30 n. 17, the Supreme Court affirmed the decision of a three-judge district court that sustained the Jenkins Act against a Tenth Amendment challenge. *See Consumer Mail Order Ass'n v. McGrath*, 340 U.S. 925 (1951), *affirming* 94 F. Supp. 705, 710

[10] The United States has urged the Supreme Court that the holding of *TVA* should not be understood to foreclose a private claim that Congress exceeded its enumerated powers. *See* Brief for the United States, *Bond v. United States*, No. 09-1227, 2010 WL 4954355, at *33 (U.S. Jan. 24, 2011) 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.

(D.D.C. 1950). The three-judge court noted that the Jenkins Act "has the purpose of aiding generally in the effectuation of valid state policy." 94 F. Supp. at 710. The court held 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." *Id.* (quotation marks and citation omitted). So, whether for lack of standing/jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6), plaintiff's commandeering claim, like all of his other claims, must be dismissed.

II. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST PRECLUDE ENTRY OF A PRELIMINARY INJUNCTION

Because all of plaintiff's claims fail at the outset and must be dismissed, he cannot meet the preliminary injunction requirement of likelihood of success on the merits. But even if that were not the case, the harm that plaintiff would suffer through implementation of the PACT Act is outweighed by the public harms that would flow from even a temporary hiatus in its implementation and, therefore, the public interest, militate against the court granting the preliminary relief sought here.

By enacting the PACT Act, the political branches have established where the public interest lies. As the Supreme Court stressed in vacating a preliminary injunction, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (quoting *Virginian Ry. Co. v. Ry. Emps.*, 300 U.S. 515, 551 (1937)). *See also Able v. United States*, 44 F.3d 128, 131-32 (2d Cir. 1995) (because "the full play of the democratic process involving both the legislative and executive branches has produced a policy in the name of the public interest

embodied in a statute," the court could not properly "substitute its own determination of the public interest for that arrived at by the political branches[.]").

Even if the balance of the parties' interests were open to debate, plaintiff's own statements and actions belie his claim of irreparable injury. At the very outset, plaintiff evidenced his lack of concern about the Act when he filed this case and asked for preliminary injunctive relief "fewer than twenty-four hours before the law was to take effect." Order (Doc. 6) at 2. Plaintiff did not contend that he was caught by surprise and should be excused for being so dilatory. Indeed, plaintiff acknowledged that he waited almost three full months to seek the extraordinary relief of a preliminary injunction against a statute of the United States. *Id.* at 1-2 ("According to plaintiff's motion, the PACT Act was signed into law on March 31, 2010 and became effective today, June 29, 2010."). While the panel remanding this case instructed that "late filing, on its own, is [not] a permissible basis for denying a preliminary injunction," it also recognized that "delay is relevant in considering ones' entitlement to injunctive relief because delay indicates a lack of irreparable harm." 632 F.3d at 725.

Plaintiff's claim of irreparable injury is focused on two aspects of the PACT Act, the ban on mailing of tobacco products and the requirement that state and local taxes be paid on all delivery sales of such products. Application at 33. He cannot, however, be suffering any harm at all, much less irreparable harm, by reason of the Act's tax provisions. As a result of the district court's ruling in *Red Earth*, 728 F. Supp. 2d at 260, which applied to all members of the Seneca Free Trade Association – including plaintiff Gordon – the state tax and other regulatory provisions have never become and are not now effective against him. Hence, plaintiff's assertion that he "faces the incredible burden of having to continuously monitor and comply with at least

550 state and local taxing scheme," Application at 33, is not correct. Ever since the effective date of the PACT Act, and as of this moment, he may, without any inquiry into the tax requirements of any state or locality, legally sell his products into any such state or locality that allows delivery sales of such products to its residents, assuming of course that he complies with the reporting requirements of the Jenkins Act.[11]

In that connection, it is worth noting that there is reason to doubt whether plaintiff is operating as a "*legal* seller[] of tobacco products," as he insists. Application at 17 (plaintiff's emphasis). It appears that plaintiff has shipped his tobacco products into at least two states (New York and Ohio, *see supra* n.5) where the law would ban any direct shipments to consumers. These state laws were expressly preserved by the PACT Act, *see* 15 U.S.C. § 376a(e)(5)(C), and the *Red Earth* plaintiffs did not obtain an injunction against that portion of the Act. Likewise, although plaintiff asserts that "he now uses a small shipping company to deliver some of his product ... to selected areas in six states," Application at 32, he conspicuously omits any suggestion that he is complying with the Jenkins Act by either registering with, or reporting his

[11] Nor could plaintiff show irreparable harm based on the burden of complying with state tax laws even if the Second Circuit vacates the *Red Earth* injunction, as the government has requested. All but three states require that cigarettes bear state tax stamps, which are typically purchased and affixed by state-licensed stamping agents. *See, e.g., Dep't of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994) (describing New York state excise tax regime); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 141 (1980) (describing Washington state taxing regime). As the Second Circuit recently explained in a rejecting a request for an injunction against a New York law that taxes on-reservation sales between tribal sellers and non-member purchasers, "[t]ribal retaliers, like other . . . retailers," may simply "pay the tax to wholesalers" by purchasing an inventory of pre-stamped cigarettes, and may "recoup the tax by adding it to the retail price." *Seneca Nation of Indians* v. *Cuomo*, __ F.3d __, No. 10-2976, 2011 WL 1745008, at *10 (2d Cir. May 9, 2011). To comply with the PACT Act, therefore, tribal sellers could simply partner with multi-state wholesalers that are licensed stamping agents in numerous jurisdictions to "drop-ship" pre-stamped cigarettes directly to consumers.

sales to, those states. *See* 15 U.S.C. § 376(a)(1)-(2). Nor does plaintiff allege that he has registered with the United States Attorney General, as is also required by a portion of the PACT Act that was not enjoined by the *Red Earth* court. *See* 15 U.S.C. § 376(a)(1). Similarly, at the time plaintiff filed his complaint, though he complained bitterly that he would not be able to continue his "sales of tobacco products over the internet, or by telephone," Complaint ¶ 4-5 (Doc. 2), he did not claim to comply with the Jenkins Act as to any of those sales, though he demonstrated his knowledge of that Act's requirements. *Id.* ¶ 18. Thus, for all this court can ascertain from plaintiff's filings in this case, the business that plaintiff claims to have lost and to be in danger of losing by reason of the PACT Act may all be contrary to the law that existed prior to the PACT Act and exists today.

As to the claimed injury to plaintiff's business that has resulted from the Act's mailing ban, the government does not dispute that it is now not nearly as easy or as cheap for plaintiff to accomplish his delivery sales of tobacco products. Plaintiff does not dispute, however, that there are means for him to accomplish such delivery sales. Plaintiff unabashedly says: "On appeal, the Government argued that Mr. Gordon could use an alternate carrier, citing several courier services it apparently found using an internet search.... The Government does not suggest that these carriers would be economically feasible for Mr. Gordon." Application at 32 n. 19. Thus, Mr. Gordon does not dispute the availability to him of "several" alternatives to delivery through the mail. Instead, without claiming to have investigated whether any of those carriers would be "economically feasible" for him, he attempts to shift his burden of demonstrating irreparable injury to the government. And he does not tell the court how much it would cost him to use those alternatives and how such cost would affect the prices he charges. As far as can be

determined from plaintiff's submissions, the increase in the price he would have to charge to recoup those alternative delivery costs would still allow him to undercut the prices of face-to-face sellers, especially since he presently does not have to ensure the payment of state and local taxes as do those face-to-face sellers.

When weighed against the "harm" to plaintiff just discussed, the harm to the public from further enjoining the implementation of the PACT Act is overwhelming. It is not necessary to repeat all of Congress's findings of harm directly resulting from delivery sales of tobacco products. Suffice it to reiterate that delivery sales "make[] it cheaper and easier for children to obtain tobacco products;" that "Internet sales alone account[] for billions of dollars of lost Federal, State, and local tobacco tax revenue each year;" and that "unfair competition from illegal [delivery] sales of cigarettes and smokeless tobacco is taking billions of dollars of sales away from law-abiding retailers throughout the United States." 15 U.S.C. § 375 Note, Findings 1, 4, & 6. These are harms that Congress has determined will continue every day that the PACT Act is not allowed to become fully effective.

CONCLUSION

For all of the foregoing reasons, the court should deny plaintiff's renewed application for a preliminary injunction and dismiss this case in its entirety.

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