[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 12-5031, 12-5051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT GORDON,

Plaintiff-Appellee/Cross-Appellant,

v.

ERIC H. HOLDER, et al.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PRINCIPAL BRIEF FOR APPELLANTS/CROSS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties And Amici. Plaintiff-Appellee/Cross-Appellant is Robert Gordon. Defendants-Appellants/Cross-Appellees are: Eric H. Holder, in his official capacity as Attorney General of the United States; the United States Department of Justice; B. Todd Jones, in his official capacity as acting director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; Patrick R. Donahoe, in his official capacity as Postmaster General; and the United States Postal Service.

The following parties appeared as amici curiae in support of defendants-appellants in district court: National Association of Convenience Stores; New York Association of Convenience Stores; City of New York; Campaign for Tobacco-free Kids; American Cancer Society; American Cancer Society Cancer Action Network; American Legacy Foundation; and American Lung Association.

B. Rulings Under Review. The United States appeals from the district court's order of December 5, 2011 (Lamberth, C.J.), which granted in part and denied in part plaintiff's request for a preliminary injunction of the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154. *See Gordon v. Holder*, 826 F. Supp. 2d 279 (D.D.C. 2011).

C. Related Cases. This case was previously before this Court in an appeal from an order denying plaintiff's request for a preliminary injunction in full. *See Gordon v. Holder*, No. 10-5227 (D.C. Cir.). This Court vacated that order and remanded the case to the district court for further proceedings.

A related case within the meaning of D.C. Circuit Rule 28(a)(1)(C) was filed in the Western District of New York and heard by the Second Circuit. In that case, plaintiffs Red Earth LLC and the Seneca Free Trade Association – of which Mr. Gordon is a member – sought a preliminary injunction of the PACT Act. The district court refused to enjoin the majority of the PACT Act, including the portion of the law that prohibits the Postal Service from carrying cigarettes and smokeless tobacco through the mail. *See Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010). The court did enjoin the portions of the law that require Internet cigarette sellers to comply with the laws of the states into which they deliver their products, including laws restricting sales to minors and requiring the payment of excise taxes. The Second Circuit affirmed that preliminary injunction without resolving the merits of the due process question, and remanded the case to the district court for a trial on the merits. *See Red Earth v. United States*, 657 F.3d 138 (2d Cir. 2011).

s/Michael P. Abate
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GLOSSARY

ATFE	Bureau of Alcohol, Tobacco, Firearms, and Explosives
GAO	Government Accountability Office
IOM	Institute of Medicine
PACT Act	Prevent All Cigarette Trafficking Act

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STATEMENT OF JURISDICTION

The district court's jurisdiction arises under 28 U.S.C. § 1331. The court granted in part and denied in part plaintiff's motion for a preliminary injunction on December 5, 2011. *See* JA 142. Defendants filed a timely notice of appeal on February 2, 2012 from the portion of the order granting the injunction. JA 172; Fed. R. App. P. 4(a)(1)(B). Plaintiffs filed a timely notice of cross-appeal on February 16, 2012 from the portion of the order denying the requested injunction. JA 174; Fed. R. App. P. 4(a)(3). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The district court preliminarily enjoined a provision of the Prevent All Cigarette Trafficking Act of 2009 that prohibits the remote sale of cigarettes or smokeless tobacco unless the sale complies with applicable tax and other laws in the destination state and locality. The court reasoned that the provision may violate the Due Process Clause because some delivery sellers might lack the "minimum contacts" with the destination state that would permit that state, acting unilaterally, to enforce its laws against the out-of-state seller. The questions presented by the government's appeal are:

1. Whether the district court committed a clear error of law by enjoining the PACT Act on due process grounds, where the Supreme Court has long made clear that Congress may, as a matter of federal law, forbid the shipment in interstate commerce of goods that violate the laws of the destination state.

2. Whether the district court abused its discretion by facially enjoining all applications of the PACT Act against plaintiff, even when he ships cigarettes and smokeless tobacco products to states with which he has "minimum contacts."

PERTINENT STATUTORY PROVISIONS

Relevant portions of the PACT Act are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

The Prevent All Cigarette Trafficking ("PACT") Act regulates Internet and other "remote" sales of cigarettes and smokeless tobacco – *i.e.*, sales that do not take place in person. Pub. L. No. 111-154, 124 Stat. 1087 (Mar. 31, 2010). In legislative findings set out in the statute, 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).

The provisions challenged in this action prohibit remote sales of cigarettes and smokeless tobacco unless the applicable state and local tax stamps are affixed, or other taxes are paid, in advance, *see* 15 U.S.C. § 376a, and make it unlawful to deliver cigarettes and smokeless tobacco through the U.S. mail, *see* 18 U.S.C. § 1716E.

Plaintiff Robert Gordon owns an Internet retail business that sells cigarettes and other tobacco products in interstate commerce. *See* JA 23 ¶ 5. In 2009, his business had gross revenues of about $2 million per month. *See* JA 25 ¶ 13. Plaintiff's website declares that his business does "not pay state taxes on cigarettes and tobacco products" and that it "then pass[es] this savings on to all of our customers nationwide by offering discount cigarettes, chewing tobacco, pipe tobacco and domestic cigars online."[1]

Plaintiff filed this action to enjoin enforcement of the challenged provisions on the day before the Act's effective date in June 2010. The district court denied plaintiff's motion without ordering a response, primarily relying on "the lateness of the hour in which plaintiff seeks this relief." S*ee* JA 31. This Court reversed and remanded so that the district court could weigh each of the preliminary injunction factors in the first instance, *see Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011).

On remand, the district court enjoined the statutory provisions that prohibit remote sales of cigarettes and smokeless tobacco unless applicable state and local taxes are paid in advance, 15 U.S.C. § 376a. Adopting the reasoning of an opinion issued by the district court for the Western District of New York, the court concluded that the federal requirement to comply with state tobacco laws violates due process

[1] http://www.allofourbutts.com/ (last visited June 4, 2012) (copy attached to this brief at A8); *see also* JA 23 ¶ 6 (identifying plaintiff's websites).

because plaintiff might lack "minimum contacts" with some of the states in which he sells cigarettes. *See Gordon v. Holder*, 826 F. Supp. 2d 279, 288 (D.D.C. 2011) The court denied plaintiff's request for an injunction of the Act's mailing ban, and dismissed that claim, along with a Tenth Amendment "commandeering" claim, under Fed. R. Civ. P. 12(b)(6). *Id.* at 285-88, 293-96.

The government has appealed the portion of the order that preliminarily enjoins a federal statute on constitutional grounds. Plaintiff has cross-appealed the court's refusal to enjoin other portions of the Act.

STATEMENT OF FACTS

I. Statutory Background

Since 1949, 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); *see also* JA 37 ¶ 19 (Amended Complaint describing reporting requirements of Jenkins Act). Half a century later, however, it had become clear that these requirements were routinely flouted by Internet sellers. A 2002 study by the Government Accountability Office ("GAO") reported that *none* of the approximately 150 Internet cigarette vendor websites GAO

reviewed indicated compliance with the Jenkins Act. *See* Government Accountability Office, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement (GAO-02-743), at 3-5 (Aug. 2002). Indeed, 78% of those websites declared that they did *not* comply with the Act. *Id.* at 4.

In enacting the PACT Act, Congress expressly found that the majority of Internet and other remote sellers do not comply with the registration and reporting requirements of the Jenkins Act, resulting in billions of dollars of lost tax revenue each year. *See* 15 U.S.C. § 375 Note, Findings 1 & 5. Congress also found that the majority of such sales are made without adequate precautions to prevent sales to children, making it cheaper and easier for them to obtain cigarettes and smokeless tobacco. *Id.*, Findings 4 & 5. Congress likewise found that criminals and terrorist groups profit from trafficking in illegal cigarettes, and that unfair competition from tax-free sales takes billions of dollars of sales away from law-abiding retailers throughout the country. *Id.*, Findings 2, 3, & 6.

To combat these serious harms, Congress amended the Jenkins Act to directly regulate Internet and other remote sales of cigarettes and smokeless tobacco (also known as "delivery sales") as a matter of federal law.[2] Congress prohibited delivery of

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[2] Congress passed this law with the strong support of the States and major public health groups including the Campaign for Tobacco-Free Kids, the American

cigarettes or smokeless tobacco through the U.S. mail. *See* 18 U.S.C. § 1716E. It also prohibited remote sales unless the applicable state and local taxes are paid in advance, *see* 15 U.S.C. § 376a(a)(3)-(4), (d), and required delivery sellers to comply with "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 restrictions on sales to minors. *See id.* § 376a(a)(3).

The Act additionally imposes new federal registration, shipping, record keeping, and age-verification requirements, *see id.* §§ 376(a)(1), 376a(b), (c), (e), and creates new penalties and enforcement mechanisms, *see*, *e.g.*, *id.* §§ 377, 378. The PACT Act also amends the Contraband Cigarette Trafficking Act – which bans the possession, receipt and shipment of more than 10,000 cigarettes that do not bear state tax stamps, *see* 18 U.S.C. §§ 2341-2346 – by granting the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATFE") authority to enter the business premises and

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Cancer Society, the American Lung Association, and the American Heart Association. *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 United States Senate); 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, 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).

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. This provision states (among other things) that 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 ibid.* 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). The Court has repeatedly made clear, however, that "sales to persons other than reservation Indians . . . are legitimately subject to state taxation." *Ibid.*

II. Factual Background and Prior Proceedings

A. Plainitiff Robert Gordon, a member of the Seneca Nation of Indians, owns and operates a business that sells cigarettes and other tobacco products through the Internet. *See* JA 23 ¶ 5. The business is located on the Seneca Territory in upstate New York. *See* JA 8 ¶ 3. At the time plaintiff filed this suit, his business had 22

employees, *see* JA 23 ¶ 4, and earned about $2 million in monthly gross revenues, *see* JA 25 ¶ 13.

Ninety-five percent of plaintiff's revenue comes from the sale of tobacco products over the Internet or by telephone. *See* JA 23 ¶ 5, 25 ¶ 11. The vast majority of plaintiff's customers place orders through his company websites. *See* JA 23 ¶ 5.[3] Plaintiff's website notes that he is a member of the Seneca Nation and declares: "As a Sovereign Nation, we do not pay state taxes on cigarettes and tobacco products, we then pass this savings on to all of our customers nationwide by offering discount cigarettes, chewing tobacco, pipe tobacco and domestic cigars online."[4]

B. Plaintiff filed this lawsuit on June 28, 2010, the day before the PACT Act was due to take effect, and challenged the constitutionality of the statute on three separate grounds. He argued that the law intentionally discriminates against the Seneca Nation in violation of the Fifth Amendment's guarantee of equal protection;

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[3] Contrary to the district court's understanding, *see Gordon*, 826 F. Supp. 2d at 283, plaintiff's website continues to advertise that customers may "place orders through our website." *See* http://www.allofourbutts.com (last visited June 4, 2012) (copy attached to this brief at A7).

[4] *See* http://www.allofourbutts.com/ (last visited June 4, 2012) (copy attached to this brief at A8). For many months after the PACT Act went into effect – and notwithstanding the clear requirements of the Jenkins Act – plaintiff continued to advertise on his website that he *does not* "report tax or customer information to any government agency or other entity." *See* http://allofourbutts.com/?page=shop/help#q2 (visited Sept. 16, 2010). That portion of his website has since been "disabled," *id.* (last visited June 4, 2012), but a copy of it was attached as an addendum to the government's brief in the prior appeal.

that it violates his supposed Fifth Amendment due process right to engage in his chosen profession of selling tax-free cigarettes over the Internet; and that it exceeded Congress's enumerated powers by attempting to change state tax laws in violation of the Tenth Amendment. Along with the complaint, plaintiff filed a motion for a temporary restraining order and preliminary injunction. *See* JA 1.

The district court denied plaintiff's motion upon consideration of his submissions, without ordering a response. *See* JA 31. The court cited "the lateness of the hour in which plaintiff seeks this relief," *ibid.*, and explained that it was "not convinced that the public interest would be served by ordering this extraordinary form of relief, which would stop in its tracks a legislative enactment of the Congress of the United States." JA 32.

Plaintiff appealed. While that appeal was pending, plaintiff amended his complaint to add a new claim. *See* JA 51. Relying on a decision of the district court for the Western District of New York, plaintiff claimed that the PACT Act provisions that bar delivery sales absent compliance with state tax laws violate the due process clause of the Fourteenth Amendment. *See Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010), *aff'd* 657 F.3d 138 (2d Cir. 2011).[5] Gordon argued that the

[5] Plaintiff is a member of the Seneca Free Trade Association, which was one of the co-plaintiffs in *Red Earth*. Therefore, he benefits from that injunction, which remains in place as of the date of the filing of this brief.

PACT Act violates due process principles because it requires delivery sellers to comply with the laws of the states to which they ship their tobacco products without regard to the existence of "minimum contacts" that would be required if the destination state, acting unilaterally, sought to exercise jurisdiction over them. Plaintiff urged this Court to reverse the denial of his request for a preliminary injunction based in part on this new due process theory not presented to the district court.

This Court declined to decide the merits of this new due process claim in the first instance, and remanded the case to the district court to undertake a full analysis of each of the four preliminary injunction factors. *See Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011). The Court nevertheless offered certain "observations" about the merits of the case, including a concern that the government's argument – as the panel understood it – "collapses the Due Process and Commerce Clause aspects of Gordon's claims." *Id.* at 725. The panel made clear that it "deem[ed] it prudent *not to address* these issues in the abstract," however. *Id.* at 726 (emphasis added).

C. On remand, plaintiff renewed his motion for a preliminary injunction, and the government moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. JA 3. The district court (Kennedy, J.) held a hearing on the motions on August 16, 2011. JA 5. On December 1, Judge Kennedy

transferred the case to Chief Judge Lamberth. JA 6. Four days later, without conducting a further hearing, Judge Lamberth preliminarily enjoined the PACT Act's taxation provisions (15 U.S.C. § 376a(a)(3)(A)-(B), (a)(4), and (d)) on grounds substantially identical to those cited by the district court in *Red Earth*.

The court held that the federal legislation can apply only in states in which a delivery seller has "minimum contacts." The court acknowledged that "the Supreme Court has repeatedly rejected the suggestion that Congress subjects interstate businesses to the independent authority of states when it requires them to comply with the laws of the places where they do business," *Gordon*, 826 F. Supp. 2d at 288, but held that those cases were inapposite because the federal laws at issue "merely required individuals to comply with *existing* state laws," whereas the PACT Act, in the court's view, "appears to impose a new, independent duty on the delivery seller by requiring that they ensure that the applicable state and local taxes are paid." *Id.* at 289 (emphasis added).

The court also stated that it believed this due process holding to be compelled by this Court's remand order in the prior appeal. *See id.* ("Moreover, the Court understands the D.C. Circuit to have already rejected the Government's argument. . ." (citing *Gordon*, 632 F.3d at 725-26)).

The court then found that plaintiff would suffer irreparable harm if forced to comply with the PACT Act's taxation provisions; that the balance of harms tipped in plaintiff's favor; and that the requested injunction is in the public interest. *Gordon*, 826 F. Supp. 2d at 296-97. It therefore enjoined the Act's taxation provisions pending a final determination on the merits.

The court denied plaintiff's request to enjoin the PACT Act's mailing ban. The court noted that Congress has plenary power over the U.S. mails, and held that plaintiff had failed to state a claim that the that the mailing ban runs afoul of either the due process or equal protection clause. *See id.* at 285-88. The court similarly rejected plaintiff's Tenth Amendment challenge, finding that plaintiff had failed to state a valid "commandeering" claim. *Id.* at 293-96.[6]

SUMMARY OF ARGUMENT

I. Congress enacted the PACT Act based on its considered judgment that the majority of Internet and other remote sales of cigarettes are being made without adequate precautions to protect against sales to children, without the payment of applicable taxes, and without compliance with preexisting federal registration and reporting requirements intended to facilitate the collection of state taxes. As a result of these sales, Congress found that federal, state, and local governments lose billions

[6] Plaintiff has cross-appealed from the portions of the order that denied injunctive relief. The government will address those issues in its response/reply brief.

of dollars in tobacco tax revenue each year; that minors have a cheap and easy way to obtain cigarettes illegally; and that terrorist organizations and criminal enterprises are profiting from trafficking in untaxed cigarettes.

To address these serious law enforcement and public health problems, Congress prohibited the interstate shipment of untaxed cigarettes, and prevented delivery sellers from sending their products through the U.S. mail. This law is an unremarkable exercise of Congress's commerce power, which is often employed to aid in the enforcement of valid state laws. As it did in the PACT Act, Congress regularly prohibits the shipment of items in interstate commerce in violation of the laws of the destination state. When considering – and rejecting – constitutional challenges to such statutes, the Supreme Court has repeatedly held that they are purely federal regulations of interstate commerce, and do not subject the regulated person any authority other than Congress's.

The district court's preliminary injunction of the PACT Act rests on a fundamental legal error, and thus reversal is required as a matter of law. The district court analyzed the PACT Act as if it were enacted by a single state, acting unilaterally. The "minimum contacts" test applied by the court is simply a means of determining whether a sovereign can impose its regulatory regime on non-residents consistent with

principles of fundamental fairness. Here, the relevant sovereign is Congress, and there is no question that plaintiff is subject to its legislative jurisdiction.

The district court further erred in holding that this Court had already resolved the due process question in plaintiff's favor. That is plainly not the case; this Court deemed it "prudent *not to address*" any of the preliminary injunction factors "in the abstract," and further noted that there remains an "open question" about "whether a national authorization of disparate state levies on e-commerce renders concerns about presence and burden obsolete." *Gordon*, 632 F.3d at 726 (emphasis added).

Even if there were merit to plaintiff's due process theory, the preliminary injunction must be reversed. The due process principles applicable to state statutes require only that a foreign corporation purposefully avail itself of the benefits of an economic market in the forum state. Here, where plaintiff has used Internet websites to sell millions of dollars of cigarettes each month, there can be no dispute that he has purposefully targeted the places where he chose to ship his products. Moreover, plaintiff's business is structured specifically to avoid the tobacco laws in these jurisdictions, and the Supreme Court has noted that attempts to obstruct a sovereign's laws can itself create constitutionally sufficient contacts.

At a minimum, the district court's facial injunction must be vacated. There is no dispute that plaintiff has substantial contacts with a number of jurisdictions into

which he sells his products. Under any formulation of the due process analysis, then, the PACT Act may be constitutionally applied to his activities in a large number of instances. Plaintiff is not entitled to an injunction that permits him to sell tax-free cigarettes into any state or locality irrespective of these substantial contacts.

II. The district court once again failed to undertake any meaningful analysis of the remaining preliminary injunction factors, finding them met principally because of its erroneous holding on the merits of plaintiff's due process challenge. When properly analyzed, those factors similarly require reversal of the preliminary injunction.

Plaintiff has not demonstrated irreparable harm from the PACT Act's taxation provisions. Nor could he; compliance with the laws of different jurisdictions is a burden commonly borne by those trafficking in highly-regulated commodities, such as cigarettes.

The balance of harms and public interest also favor immediate enforcement of the PACT Act. Congress determined that the law was necessary to address the serious fiscal and public health problems caused by online cigarette sales and decades of purposeful evasion of the Jenkins Act's reporting requirements. Those compelling public interests – and Congress's weighing of them – was entitled to great deference from the district court, but received none.

STANDARD OF REVIEW

This court reviews for abuse of discretion a district court's weighing of the factors governing a request for a preliminary injunction. *See Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009). "[I]nsofar as 'the district court's decision hinges on questions of law,' however," this Court reviews the decision *de novo*. *Id.* (quoting *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

ARGUMENT

Where a "moving party can show no likelihood of success on the merits, then preliminary relief is obviously improper and the appellant is entitled to reversal of the order as a matter of law." *Kiyemba*, 561 F.3d at 513 (citing *Munaf v. Geren*, 553 U.S. 674, 691 (2008)). As we show at Point I, the district court's injunction is premised on legal error, and reversal is thus required without regard to the other factors relevant to the issuance of preliminary relief. As we show at Point II, the balance of equities and public interest likewise preclude a preliminary injunction.

I. The PACT Act's Requirement that Internet Sellers Pay Taxes Applicable to Other Sellers of Tobacco Products is Wholly Consistent With Principles of Due Process

For 60 years, the Jenkins Act has facilitated the collection of state and local taxes on interstate cigarette sales by requiring "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." *Hemi Group*, 130 S. Ct. at 987.

These requirements have proved generally ineffective in regulating Internet tobacco sales. In enacting the PACT Act, Congress found that "the majority of Internet and other remote sales of cigarettes . . . are being made without adequate precautions to protect against sales to children, without the payment of applicable taxes," and without compliance with the Jenkins Act's preexisting federal registration and reporting requirements. 15 U.S.C. § 375 Note, Finding 5. In consequence, Congress found, "Internet sales alone account[] for billions of dollars of lost Federal, State, and local tobacco tax revenue each year," and terrorist organizations and criminal enterprises have profited from trafficking in untaxed cigarettes. *Id.*, Findings 1, 2, 3, & 7. *See also* GAO-02-743 at 3-5 (a 2002 review of 150 Internet cigarette vendors showed that none complied with the Jenkins Act and 78% of the websites affirmatively indicated that the sellers *did not* comply with the Act). Even the Online Tobacco Retailers Association, which opposed a federal requirement incorporating state and local taxes on interstate tobacco sales, recognized that it is "difficult to conceive of a less efficient means of tax collection than reporting sales in the hope that sums can later be collected from consumers." Youth Smoking Prevention and State Revenue Enforcement Act: Hearing Before the Subcomm. on Courts, the

Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 119 (May 1, 2003) (Statement of Ali Davoudi, President of the Online Tobacco Retailers Association).

Accordingly, Congress amended the PACT Act to prohibit remote sales of cigarettes and smokeless tobacco unless the applicable state and local taxes are paid, and required tax stamps are affixed, *before* the products are delivered. *See* 15 U.S.C. § 376a(a)(4) & (d). Delivery sellers can comply with the statute by purchasing cigarettes from state-licensed wholesalers which are responsible for ensuring that the required state tax is paid before selling cigarettes to a retailer. In all but three states, payment is shown by means of a required tax stamp, affixed by a state-licensed stamping agent (often the wholesaler itself). In the three remaining states – North Carolina, South Carolina, and North Dakota – wholesalers remit the required tax directly to the state, but there is no stamp to affix.[7] Retailers need do nothing more than acquire their inventory of cigarettes from one of these state-licenses wholesalers.[8]

[7] *See* N.C. Gen. Stat. § 105-113.5 ("A tax is levied on the sale or possession for sale in this State, by a distributor, of all cigarettes . . .."); S.C. Code Ann. § 12-21-735 (providing for payment of cigarette tax by distributors via reporting method); N.D. Cent. Code § 57-36-09(2) ("The tax levied by this chapter . . . must be remitted to the tax commissioner by each licensed distributor . . ..").

[8] State laws generally do not require tax stamps for smokeless tobacco products. *See, e.g.*, Mo. Rev. Stat. § 149.160 (levying tax "upon the first sale of tobacco products, other than cigarettes, within the state"). The PACT Act reflects this distinction by allowing delivery sellers to collect taxes on smokeless tobacco at the

A. Congress Regularly Prohibits the Interstate Shipment of Goods That Do Not Comply With Laws of the Destination State

In regulating interstate commerce by prohibiting the shipment of goods in violation the laws of a destination state, the PACT Act is in no sense novel. For example, 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). 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). Congress also has prohibited "[t]he shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State . . . into any other State" if the alcohol "is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." 27 U.S.C. § 122. Nor may any person "import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any "fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law," or any plant "taken, possessed, transported, or sold in violation of

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time of sale and then remit payment to the state, if permitted to do so by state law. *See* 15 U.S.C. § 376a(d)(2).

any law or regulation of any State." 16 U.S.C. § 3372(a)(2). 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).

Nor does the statute break new ground by requiring Internet cigarette sellers to comply with various tobacco laws of the states where they ship their cigarettes, including licensing laws. An online pharmacy likewise 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, similarly, 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. *See also United States v. Sharpnack*, 355 U.S. 286, 293-97 (1958) (collecting examples of federal statutes incorporating state laws by reference); 18 U.S.C. § 13 (Assimilative Crimes Act).

These statutes reflect Congress's recognized authority to regulate commerce in circumstances that might escape valid state regulation. As the Supreme Court has observed, "while the power to regulate interstate commerce resides in the Congress,

which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws." *Kentucky Whip & Collar Co. v. Illinois Cent. Ry. Co.*, 299 U.S. 334, 347-348 (1937). "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to" prevent "harm to the people of other states from the state of origin," and when it does, Congress "is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks v. United States*, 267 U.S. 432, 436-37 (1925) (collecting authorities).

Such a statute does not lose its federal character because it requires compliance with state regulatory schemes. In *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917), the Supreme Court rejected the argument that the Webb-Kenyon Act, which prohibited the shipment of alcoholic beverages into a state when it was "intended to be used in violation of the law of the state," constituted an unconstitutional "delegation to the states," *id.* at 325, 326 (internal quotation marks omitted). The Court stated that this argument "rests upon a mere misconception." *Id.* at 326. The Court acknowledged that "the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another," but emphasized 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." *Id.* (emphasis added).

Likewise, in *Kentucky Whip & Collar Co.*, the Supreme Court rejected a due process challenge to a federal statute that made it unlawful to ship prisoner-made goods into states where the "goods are intended to be received, possessed, sold, or used in violation of its laws." 299 U.S. at 343. The Court again explained: "The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." *Id.* at 352.

A three-judge district court in this Circuit, in an opinion affirmed by the Supreme Court, similarly rejected the argument that the Jenkins Act (which was amended by the PACT Act) violates due process because its reporting requirement "forces a resident of one state to submit to the jurisdiction of a second state." *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) (per curiam). The court explained that "it is the *power of Congress*, not of any state, which requires the information to be submitted." *Id.* (emphasis added).

B. The District Court's Analysis of Plaintiff's Fourteenth Amendment Due Process Claim Misunderstands the Federal Nature of the Requirements at Issue

1. The district court erred by subjecting this type of federal requirement to the same "minimum contacts" inquiry that it would apply to a state statute, standing alone. That minimum contacts test is a means for determining the extent to which a sovereign can impose its regulatory regime on non-residents consistent with principles of fundamental fairness. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786, 2789 (2011) (plurality) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power," and whether a state's exercise of authority "is lawful depends on whether the sovereign has authority to" assert jurisdiction over the person). The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (internal quotation marks omitted). *See also BMW v. Gore*, 517 U.S. 559, 568-574 (1996); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818-819 (1985); *Home Ins. Co. v. Dick,* 281 U.S. 397, 407-408 (1930). As applied to state statutes, "the due process nexus analysis requires that [a court] ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." *Quill*, 504 U.S. at 312.

Where, as here, Congress imposes a federal requirement on those engaged in interstate commerce (whether or not borrowed from state law), there is no question about the legitimacy of the sovereign's exercise of power. A court need only ask whether the regulated entity has sufficient contacts with *the United States* as a whole. *See, e.g.*, *SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004) ("the requirement of 'minimum contacts' with a forum state is inapplicable where the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process"); *In re Magnetic Audiotape Antitrust Litigation*, 334 F.3d 204, 207 (2d Cir. 2003) (examining whether defendant in federal antitrust suit possessed "sufficient minimum contacts with the United States to satisfy due process").

The Court in *Quill* applied due process principles to determine whether a state could require an out-of-state retailer to collect and remit use taxes on office supplies it shipped to consumers in the state. The Supreme Court explained that two separate constitutional provisions are at issue when a state attempts to regulate the conduct of an out-of-state business – the commerce clause and the due process clause – and observed generally that "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause." *Quill*, 504 U.S. at 305 (internal citation omitted).

Contrary to the district court's understanding, that general (and uncontroversial) observation does not control this case; the PACT Act does not submit delivery sellers to the authority of foreign states, and therefore does not "authorize" any sort of due process violation. Indeed, the Supreme Court made unambiguously clear in *Quill* that Congress was "free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.* at 318. That is precisely what Congress has done here.

The district court mistakenly understood this Court's prior opinion "to have already rejected the Government's [due process] argument." *Gordon*, 826 F. Supp. 2d at 289. That is plainly not the case. The panel "deem[ed] it prudent *not to address*" any of the preliminary injunction factors "in the abstract." *Gordon*, 632 F.3d at 726 (emphasis added). Indeed, the panel noted that there remains an "open question" about "whether a national authorization of disparate state levies on e-commerce renders concerns about presence and burden obsolete." *Id.* This Court's observation that *Quill* is "instructive" in analyzing plaintiff's due process claim did not purport to determine whether *Quill* imposes additional due process limitations on federal statutes that incorporate relevant provisions of state law, over and above those due process limitations that would otherwise apply to a federal enactment.

This Court did, however, appear to have misapprehended the government's position insofar as it believed that the United States sought to collapse the "analytically distinct" "Due Process and Commerce Clause aspects of Gordon's claims" by arguing that "that there can be no Due Process violation when Congress authorizes state levies based on minimum contacts." *Id.* at 725. As we have discussed, the PACT Act does not "authorize[] state levies." It incorporates provisions of state law into a federal statute. As in *Kentucky Whip & Collar Co.*, *James Clark Distilling Co.*, and *Consumer Mail Order Association of America*, the sovereign imposing the regulation is the United States, with which plaintiff indisputably has minimum contacts.

This is not, of course, to suggest that federal statutes that incorporate state laws are immune to due process challenges. For example, a delivery seller could bring a due process challenge to a state law, made applicable to him by the PACT Act, that compels him to pay state excise taxes but provides no mechanism for disputing or recovering improperly collected amounts. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990). Similarly, a delivery seller could bring a due process claim to challenge a statute that permits a state to suspend his business license without the opportunity for prompt post-suspension review. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979). And a delivery seller could raise a due process

challenge to a state tobacco price control scheme that is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (quotation marks and citation omitted); *see also, e.g.*, *United States v. Romano*, 929 F. Supp. 502, 509 (D. Mass. 1996), *rev'd on other grounds*, 137 F.3d 677 (1st Cir. 1998) (defendant unsuccessfully argued that Alaska hunting law, made applicable to him by the federal Lacey Act, 16 U.S.C. § 3371 *et seq.*, unconstitutionally discriminated against out-of-state hunters).

Here, however, the sole "due process" question is whether the federal government can regulate plaintiff's conduct. Congress can plainly do so, and the analysis is not altered because the federal statute adopts some provisions of state law.

2. The district court acknowledged that the Supreme Court has long "held that statutes that require interstate businesses to respect the laws of the places where they ship their products do not subject those businesses to the jurisdiction of any particular state." *Gordon*, 826 F. Supp. 2d at 288 (citing *James Clark Distilling Co.* and *Kentucky Whip & Collar Co.*). The court nevertheless found these cases distinguishable, reasoning that "the laws in *Kentucky Whip* and *James Clark* . . . merely required individuals to comply with *existing* state laws," whereas "the PACT Act appears to impose a *new*, independent duty on the delivery seller by requiring that they ensure that the applicable state and local taxes are paid." *Id.* at 289 (emphasis added).

The purported distinction is both inaccurate and immaterial. In each of these cases, as well as in the numerous statutes discussed above, Congress regulated by requiring compliance with state laws that a state might not have had authority to apply to persons outside its territorial jurisdiction. As the Supreme Court explained in *James Clark*, absent a federal statute "the application of state prohibitions would cease." *James Clark*, 242 U.S. at 326.

In rejecting the same due process arguments accepted by the district court in this case, the district court in *Musser's Inc. v. United States et al.*, 2011 WL 4467784 (E. D. Pa. Sept. 26, 2011), explained that it could not properly "analyze[ ] the federal ban on untaxed interstate shipments as if that ban had been imposed by a state, acting unilaterally." *Id.* at *5. "[T]he Act's tax-payment requirement is not being imposed by a state, acting unilaterally, but by Congress, and the legislative due process analysis must reflect the federal character of the legislation." *Id.* The court further observed that "Congress has for decades required interstate businesses to comply with state and local law," and that "[f]ederal requirements like these have been found not to offend due process" because "[i]nterstate businesses are subject to the legislative jurisdiction of Congress, which is free to require compliance with state and local law." *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)).

C. Even If Plaintiff's Contacts With the States Were Relevant to the Due Process Inquiry, Application of The PACT Act Would Be Constitutional

The district court erred in concluding that the relevant due process analysis entails an examination of the contacts between a particular seller and a particular state. For reasons just explained, the precise extent of plaintiff's contacts with the states in which he does business has no bearing on the constitutionality of the federal requirement that he refrain from shipping cigarettes in interstate commerce in violation of state tobacco laws, and plaintiff's invocation of the Fourteenth Amendment – which applies only to state laws, in any event, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) – does not alter this analysis.

Even if it were assumed, however, that a "minimum contacts" inquiry were appropriate, the statute would plainly survive scrutiny. As long as a "foreign corporation purposefully avails itself of the benefits of an economic market in the forum State," the "requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Quill*, 504 U.S. at 307-08. Indeed, "[s]o long as it creates a 'substantial connection' with the forum, *even a single act* can support jurisdiction." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n.18 (1985) (emphasis added) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("[I]f the sale of a product . . .

arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury . . ..").

Under these principles, the magnitude of plaintiff's contacts with the States is more than sufficient to establish minimum contacts. By plaintiff's own admission, he distributed $2 million of tobacco products each month at the time he filed this suit. *See* JA 25 ¶ 13. At an annualized rate, that amounts to $24 million in untaxed tobacco products – hardly a trivial amount. Courts have found minimum contacts between e-commerce vendors and foreign States based upon far less. *See, e.g.*, *Illinois v. Hemi Group LLC*, 622 F.3d 754, 757-58, 760 (7th Cir. 2010) (finding minimum contacts between state and online cigarette seller, and noting that principles of fundamental fairness do not entitle the defendant to "the benefit of a nationwide business model with none of the exposure"); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 166 (2d Cir. 2010) (finding minimum contacts between state and online handbag seller).

Moreover, contrary to the district court's understanding, the constitutionality of a state excise tax collection requirement does not turn on whether a seller sends mail-order catalogs into the state, like the company in *Quill*. *See Gordon*, 826 F. Supp. 2d at 292. The Court in *Quill* 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." *Quill*, 504 U.S. at 308. Just as it was sufficient in 1992 that a seller solicited business by mail-order catalogs instead of maintaining a physical presence in the State, so too is it sufficient in the age of the Internet that a plaintiff uses a commercial website to direct a substantial volume of sales to foreign jurisdictions.[9]

Even apart from the magnitude of plaintiff's contacts with the States, it would be anomalous to allow a seller to structure its operations so as to evade state regulations and then assert that its sales operations does not generate sufficient "contacts" to permit enforcement of applicable laws. In such instances, a seller should "fall within the State's authority by reason of his attempt to obstruct its laws." *J. McIntyre*, 131 S. Ct. at 2787.

Plaintiff has structured his business in order to circumvent state taxes and regulations aimed at discouraging cigarette use (particularly among minors) and raising

[9] The district court apparently believed it relevant to the holding in *Quill* that the state of North Dakota disposed of the mail-order catalogs the defendant sent into that State. *See Gordon*, 826 F. Supp. 2d at 292. It is hard to see why the due process inquiry should turn on such a fact, but even if it did, plaintiff derives a similar benefit here from the states to which he ships his cigarettes. Those states must dispose of thousands cigarette cartons each year, as well as the remnants of the 200 cigarettes in each carton. More importantly, the states bear significant costs related to the health consequences of the cigarettes plaintiff sells.

needed state revenues. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("[w]hat the smokeshops offer these customers, and what is not available elsewhere, is *solely* an exemption from state taxation") (emphasis added). Plaintiff's own website makes precisely this point, advertising that "[a]s a Sovereign Nation," he does "not pay state taxes on cigarettes and tobacco products" and "then pass[es] this savings on to all of our customers nationwide . . ."[10] Plaintiff cannot plausibly invoke notions of fair play and substantial justice to escape requirements imposed on all other sellers.

D. At a Minimum, the Facial Injunction Must Be Vacated

Where a plaintiff seeks to enjoin a statute on its face, he must demonstrate that "the law is unconstitutional in all of its applications" or has no "plainly legitimate sweep." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-450 (2008) (quotation marks omitted); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiff has not even attempted to meet this demanding standard. He has not

[10] *See* http://www.allofourbutts.com/ (last visited June 4, 2012) (copy attached to this brief at A8). This statement is misleading in several respects. Neither plaintiff nor his business is a "Sovereign Nation." Moreover, the Supreme Court has repeatedly "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere.'" *Milhelm Attea*, 512 U.S. at 71-72 (quoting *Colville*, 447 U.S. at 155); *see also Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991).

identified a single state with which he assertedly lacks minimum contacts. This inability to offer such evidence is unsurprising, in light of his concession that he made annual gross sales of approximately $24 million in untaxed tobacco products. JA 25 ¶ 13. Even if this Court were to assume that those sales were distributed evenly across all 50 states and the District of Columbia (including those jurisdictions that ban delivery sales), that would amount to more than $470,000 in annual sales per jurisdiction. At the going rate on his website – plaintiff currently offers 10-pack cartons of Seneca brand cigarettes for approximately $30 each, and some much cheaper than that[11] – that would amount to more than 15,000 cartons of cigarettes per jurisdiction.

In any event, plaintiff is not entitled to an injunction that bars operation of the statute with regard to states as to which plaintiff does not even claim a lack of minimum contacts.

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[11] *See* http://www.allofourbutts.com/?page=shop/browse&keyword=Seneca&ps_session=a9fdc0f24249359fc84ab414a60094ef (prices on Seneca brand cigarettes) (last visited June 4, 2012) (copy attached to this brief at A9).

Plaintiff also sells something called "Rollies," which he describes as "1 bag of 200 cigarettes. yep, we're serious. A bag," for $15.00. *See* http://www.allofourbutts.com/?page=shop/browse&keyword=Rollies&ps_session=2488d59a916bdb630dd318fd8ce3e9e5 (last visited June 4, 2012) (copy attached to this brief at A10). These are illegally manufactured cigarettes on which no federal or state tax has been paid; they lack the required Surgeon General's warning and bear no markings concerning their manufacture, so as to conceal their origin from law enforcement and taxing authorities. *See generally* Government Accountability Office, Illicit Tobacco: Various Schemes Are Used to Evade Taxes and Fees (GAO-11-313) at 19 (Mar. 2011).

II. The Balance of the Equities and the Public Interest Require Reversal of the District Court's Order

In addition to showing a likelihood of success on the merits, a party seeking a preliminary injunction must show "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court here abused its discretion by failing to undertake a meaningful evaluation of plaintiff's allegations of irreparable harm, the balance of equities, and the public interest. *See id.* at 26 (district court erred when it "addressed these considerations in only a cursory fashion"); *Gordon*, 632 F.3d at 725 ("[T]he district court erred by failing to consider meaningfully the preliminary injunction factors."); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("An appellate court, in reviewing for an abuse of discretion, must consider whether the decision maker failed to consider a relevant factor, whether he [or she] relied on an improper factor, and whether the reasons given reasonably support the conclusion." (quotation marks and citation omitted)).

Instead, the court reasoned that: (1) a "potential deprivation of constitutional rights constitutes irreparable harm"; (2) the equities tip in plaintiff's favor because he is "likely to suffer irreparable harm . . . by virtue of a potential deprivation of his constitutional right to due process"; and (3) that "enforcement of a potentially

unconstitutional law that would also have severe economic effects is not in the public interest." *Gordon*, 826 F. Supp. 2d at 296-97.

Plaintiff has not adequately demonstrated irreparable harm distinct from his claimed constitutional injury. Plaintiff enormously exaggerates the administrative burden of complying with the tax laws of the states and localities to which he ships his products. *See Gordon*, 826 F. Supp. 2d at 296. As discussed above, nearly every State requires that cigarettes bear state tax stamps, which are typically purchased and affixed by state-licensed stamping agents, not the retailer. *See, e.g.*, *Milhelm Attea*, 512 U.S. at 64 (1994) (describing New York state excise tax regime); *Colville*, 447 U.S. at 141 (describing Washington state taxing regime). And in any event, compliance with the laws of different jurisdictions is an administrative burden that is commonly borne by a business that chooses to engage in nationwide distribution of a highly regulated commodity.

Plaintiff similarly errs by focusing on the loss of business that he claims to have suffered as a result of the PACT Act. *See Gordon*, 826 F. Supp. 2d at 296. None of that lost business can be attributed to the PACT Act's taxation provisions, which have *never* applied to him. Because he is a member of the Seneca Free Trade Association, plaintiff has benefitted from the temporary restraining order and preliminary injunction entered by the district court in the *Red Earth* case, which enjoined the

taxation provisions even before the law went into effect. At most, plaintiff can argue that these asserted drops in sales are attributable to the PACT Act's mailing ban, but the district court properly declined to consider the effect of that law in conducting its equitable weighing of the preliminary injunction factors. *See id.* at 296 n.16 ("Because Gordon's mail ban claim and Tenth Amendment claim will be dismissed for failure to state a claim, his motion for a preliminary injunction is moot. Accordingly, the Court need not address the remaining three preliminary injunction factors as to these claims.").

Nor, for that matter, is there any merit to plaintiff's assertion that the PACT Act harms him by denying him the ability to sell untaxed cigarettes across state lines. No principle of law entitles plaintiff to undercut his "law-abiding competitors throughout the United States," 15 U.S.C. § 375 Note, Finding 6, by marketing "an exemption from state taxation." *Colville*, 447 U.S. at 155.

2. Whereas plaintiff's assertions of harm are unsubstantiated, the harm that an injunction would cause is reflected in express legislative findings and supported by the legislative record. Congress enacted the PACT Act because it found that the majority of Internet and other remote sales are made without payment of taxes, without compliance with existing federal registration and reporting requirements, and without adequate precautions to protect children. Congress similarly found that untaxed

cigarettes and smokeless tobacco provide a cheap supply of tobacco products that encourages underage demand and undermines tobacco control efforts. And Congress found that billions of dollars in federal, state, and local tax revenues are lost each year, and that the profits from illegal sales are also used to finance other criminal activities.

These harms are real, and are borne by wide cross-sections of the American public. A cheap supply of tax-free cigarettes obviously harms the State governments who are deprived of substantial tax revenues, as well as law-abiding businesses that lose sales to competitors that neither pay state taxes nor report their sales.

Even more significantly, plaintiff's business model causes immediate harm to the public health. Numerous studies have shown that even small increases in the price of cigarettes can have a dramatic impact on the consumption of cigarettes – particularly among younger populations.[12] Addressing this problem was of particular concern to Congress, because the "overwhelming majority of Americans who use tobacco products begin using such products while they are minors and become addicted to the nicotine in those products before reaching the age of 18." 21 U.S.C. § 387 Note, Finding 31. And it is a problem that calls for an immediate solution – not

[12] The Institute of Medicine concluded that "raising tobacco excise taxes is one of the most effective policies for reducing the use of tobacco." Institute of Medicine, "Ending the Tobacco Problem: A Blueprint for the Nation," at 182 (2007). Minors are particularly price-sensitive; every 10% increase in real cigarette prices will reduce the number of youth smokers by six or seven percent. *See* 2008 Hearing at 50, 52 (Statement of Matthew L. Myers, President, Campaign for Tobacco-Free Kids).

an injunction – because "[*e*]*very day*, approximately 4,000 children under age 18 experiment with cigarettes for the first time; another 1,500 become regular smokers." President's Cancer Panel, "Promoting Healthy Lifestyles," at 64 (2007) (emphasis added). "Of those who become regular smokers, *about half* eventually will die from a disease caused by tobacco use." *Id.* (emphasis added).

The district court utterly failed to explain how plaintiff's purported right to sell tax-free cigarettes across state lines can outweigh these paramount public purposes.

3. Finally, the court erred as a matter of law by failing to give any deference to Congress's assessment of 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 R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)). A court should not "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited," *id.*, as the district court plainly did here.

There are good reasons for this rule. Statutes like the PACT Act result from "the full play of the democratic process" in which the combined effort of "the legislative and executive branches has produced a policy in the name of the public interest embodied in a statute." *Able v. United States*, 44 F.3d 128, 131-32 (2d Cir.

1995). "[T]he public interests imperatively demand" that such "legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin v. State of Kansas*, 191 U.S. 207, 223 (1903). Indeed, an injunction that blocks an Act of Congress is itself a form of irreparable injury. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

CONCLUSION

In sum, plaintiff has no likelihood of success on the merits of his due process claim, and the balance of equities and public interest preclude an injunction. The district court's preliminary injunction should be vacated.

Respectfully submitted,

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JUNE 2012

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 contains 8,619 words, according to the count of Microsoft Word.

/s/ Michael P. Abate
Michael P. Abate

CERTIFICATE OF SERVICE

I certify that on this 4th day of June, 2012, I caused the foregoing Brief For 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
Michael P. Abate

ADDENDUM

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Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154 (Mar. 31, 2010).

15 U.S.C. § 375, NOTE (Findings)

Congress finds that--

(1) the sale of illegal cigarettes and smokeless tobacco products significantly reduces Federal, State, and local government revenues, with Internet sales alone accounting for billions of dollars of lost Federal, State, and local tobacco tax revenue each year;

(2) Hezbollah, Hamas, al Qaeda, and other terrorist organizations have profited from trafficking in illegal cigarettes or counterfeit cigarette tax stamps;

(3) terrorist involvement in illicit cigarette trafficking will continue to grow because of the large profits such organizations can earn;

(4) the sale of illegal cigarettes and smokeless tobacco over the Internet, and through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products;

(5) the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made without adequate precautions to protect against sales to children, without the payment of applicable taxes, and without complying with the nominal registration and reporting requirements in existing Federal law;

(6) unfair competition from illegal sales of cigarettes and smokeless tobacco is taking billions of dollars of sales away from law-abiding retailers throughout the United States;

(7) with rising State and local tobacco tax rates, the incentives for the illegal sale of cigarettes and smokeless tobacco have increased;

(8) the number of active tobacco investigations being conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives rose to 452 in 2005;

(9) the number of Internet vendors in the United States and in foreign countries that sell cigarettes and smokeless tobacco to buyers in the United States increased from only about 40 in 2000 to more than 500 in 2005; and

(10) the intrastate sale of illegal cigarettes and smokeless tobacco over the Internet has a substantial effect on interstate commerce.

15 U.S.C. § 375. Definitions

As used in this Act, the following definitions apply:

* * *

(5) DELIVERY SALE.--The term 'delivery sale' means any sale of cigarettes or smokeless tobacco to a consumer if--

(A) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(B) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

(6) DELIVERY SELLER.--The term 'delivery seller' means a person who makes a delivery sale.

15 U.S.C. § 376. Reports to State tobacco tax administrator

(a) Contents

Any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco, or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment, shall--

(1) first file with the Attorney General of the United States and with the tobacco tax administrators of the State and place into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business, as well as telephone numbers for each place of business, a principal electronic mail address, any website addresses, and the name, address, and telephone number of an agent in the State authorized to accept service on behalf of the person;

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month into such State; the memorandum

or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, the quantity thereof, and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller, with all invoice or memoranda information relating to specific customers to be organized by city or town and by zip code; and

(3) with respect to each memorandum or invoice filed with a State under paragraph (2), also file copies of the memorandum or invoice with the tobacco tax administrators and chief law enforcement officers of the local governments and Indian tribes operating within the borders of the State that apply their own local or tribal taxes on cigarettes or smokeless tobacco.

(b) Presumptive evidence
The fact that any person ships or delivers for shipment any cigarettes or smokeless tobacco shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a)(1) of this section, be presumptive evidence that such cigarettes or smokeless tobacco were sold, or transferred for profit, by such person.

(c) Use of information
A tobacco tax administrator or chief law enforcement officer who receives a memorandum or invoice under paragraph (2) or (3) of subsection (a) shall use the memorandum or invoice solely for the purposes of the enforcement of this chapter and the collection of any taxes owed on related sales of cigarettes and smokeless tobacco, and shall keep confidential any personal information in the memorandum or invoice except as required for such purposes.

15 U.S.C. § 376a. Delivery Sales

(a) IN GENERAL.--With respect to delivery sales into a specific State and place, each delivery seller shall comply with--
(1) the shipping requirements set forth in subsection (b);
(2) the recordkeeping requirements set forth in subsection (c);
(3) 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--

(A) excise taxes;
(B) licensing and tax-stamping requirements;
(C) restrictions on sales to minors; and
(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

(4) the tax collection requirements set forth in subsection (d).

* * *

(d) DELIVERY.--
(1) IN GENERAL.--Except as provided in paragraph (2), no delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender--

(A) 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;

(B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered has been paid to the local government; and

(C) any required stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

(2) EXCEPTION.--Paragraph (1) does not apply to a delivery sale of smokeless tobacco if the law of the State or local government of the place where the smokeless tobacco is to be delivered requires or otherwise provides that delivery sellers collect the excise tax from the consumer and remit the excise tax to the State or local government, and the delivery seller complies with the requirement.

* * *

[(e)(5)](C) STATE LAWS PROHIBITING DELIVERY SALES.--
(i) IN GENERAL.--Except as provided in clause (ii), nothing in the Prevent All Cigarette Trafficking Act of 2009, the amendments made by that Act, or in any other Federal statute shall be construed to preempt, supersede, or otherwise limit or restrict State laws prohibiting the delivery sale, or the shipment or delivery pursuant to a delivery sale, of cigarettes or other tobacco products to individual consumers or personal residences.

* * *

15 U.S.C. § 377. Penalties

(a) Criminal penalties
(1) In general. Except as provided in paragraph (2), whoever knowingly violates this chapter shall be imprisoned for not more than 3 years, fined under Title 18, or both.

* * *

(b) Civil penalties
(1) In general. Except as provided in paragraph (3), whoever violates this chapter shall be subject to a civil penalty in an amount not to exceed--

(A) in the case of a delivery seller, the greater of--

(i) $5,000 in the case of the first violation, or $10,000 for any other violation; or

(ii) for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation.

* * *

15 U.S.C. § 378. Enforcement

(a) IN GENERAL.--The United States district courts shall have jurisdiction to prevent and restrain violations of this Act and to provide other appropriate injunctive or equitable relief, including money damages, for the violations.

(b) AUTHORITY OF THE ATTORNEY GENERAL.--The Attorney General of the United States shall administer and enforce this Act.

(c) STATE, LOCAL, AND TRIBAL ENFORCEMENT.--
(1) IN GENERAL.--

(A) STANDING.--A State, through its attorney general, or a local government or Indian tribe that levies a tax subject to section 2A(a)(3), through its chief law enforcement officer, may bring an action in a United States district court to prevent and restrain violations of this Act by any person or to obtain any other appropriate relief from any person for violations of this Act, including civil penalties, money damages, and injunctive or other equitable relief.

(B) SOVEREIGN IMMUNITY.--Nothing in this Act shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government or Indian tribe against any unconsented lawsuit under this Act, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government or Indian tribe.

* * *

(d) PERSONS DEALING IN TOBACCO PRODUCTS.--Any person who holds a permit under section 5712 of the Internal Revenue Code of 1986 (regarding permitting of manufacturers and importers of tobacco products and export

warehouse proprietors) may bring an action in an appropriate United States district court to prevent and restrain violations of this Act by any person other than a State, local, or tribal government.

(e) NOTICE.--

(1) PERSONS DEALING IN TOBACCO PRODUCTS.--Any person who commences a civil action under subsection (d) shall inform the Attorney General of the United States of the action.

(2) STATE, LOCAL, AND TRIBAL ACTIONS.--It is the sense of Congress that the attorney general of any State, or chief law enforcement officer of any locality or tribe, that commences a civil action under this section should inform the Attorney General of the United States of the action.

18 U.S.C. § 1716E. Tobacco products as nonmailable

(a) Prohibition.--

(1) In general.--All cigarettes and smokeless tobacco (as those terms are defined in section 1 of the Act of October 19, 1949, commonly referred to as the Jenkins Act) are nonmailable and shall not be deposited in or carried through the mails. The United States Postal Service shall not accept for delivery or transmit through the mails any package that it knows or has reasonable cause to believe contains any cigarettes or smokeless tobacco made nonmailable by this paragraph.

(2) Reasonable cause.--For the purposes of this subsection reasonable cause includes--

(A) a statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment; or

(B) the fact that the person is on the list created under section 2A(e) of the Jenkins Act.

* * *

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Seneca Sweet Lil Cigar Natural SPECIAL	28.20 USD	10 packs of 20 little cigars	1	Order
Seneca Sweet Lil Cigar Vanilla SPECIAL	28.20 USD	10 Packs of 20 Cigars	1	Order
Economy Cigarettes				
Seneca 120 Full Flavor SPECIAL	30.50 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca 120 Full Menthol SPECIAL	30.50 USD	10 Packs of 20 cigarettes	1	Order
Seneca 120 Light SPECIAL	30.50 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca 120 Menthol Light SPECIAL	30.50 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca 120 Ultra Light SPECIAL	30.50 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Chill King Box SPECIAL	29.20 USD	10 Packs of 20 Cigarettes	1	Order
Seneca Full 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Full 100 Soft SPECIAL	29.20 USD		1	Order
Seneca Full King Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Light 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Light 100 Soft SPECIAL	29.20 USD		1	Order
Seneca Light King Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Medium 100 Box SPECIAL	29.20 USD	10 packs of cigamaretteicles....	1	Order
Seneca Medium King Box SPECIAL	29.20 USD	10 packs of 20 delicious goodness smokey smokes.	1	Order
Seneca Menthol 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Menthol King Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Menthol Light 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Menthol Light King Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Non Filter Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Ultra Light 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Ultra Light 100 Soft SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Ultra Light King Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
Seneca Ultra Menthol 100 Box SPECIAL	29.20 USD	1 Carton (10 Packs = 200 Cigarettes)	1	Order
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Seneca Snuff MInt 5ct. SPECIAL	9.50 USD	1 pack of 5 tins of moist snuff.	1	Order
Seneca Snuff Original 5ct. SPECIAL	9.50 USD	1 pack of 5 tins of moist snuff.	1	Order
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Rollies Full King 200ct Bag	15.00 USD	1 bag of 200 cigarettes. yep, we're serious. A bag.	1 Order
Rollies Light 100s bag	15.00 USD	200 cigarettes in a bag	1 Order
Rollies Light King 200ct Bag	15.00 USD	1 bag of 200 cigarettes. yep, we're serious. A bag.	1 Order
Rollies Menthol King 200ct Bag	15.00 USD	1 bag of 200 cigarettes. yep, we're serious. A bag.	1 Order
Rollies Menthol Light King 200ct Bag	15.00 USD	1 bag of 200 cigarettes. yep, we're serious. A bag.	1 Order

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