[SCHEDULED FOR ORAL ARGUMENT ON OCTOBER 22, 2012]

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

RESPONSE/REPLY BRIEF FOR APPELLANTS/CROSS-APPELLEES

STUART F. DELERY
Acting Assistant Attorney General

RONALD C. MACHEN
United States Attorney

MARK B. STERN
ALISA B. KLEIN
MICHAEL P. ABATE
(202) 616-8209
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

* Authorities chiefly relied upon are marked with an asterisk

* Authorities chiefly relied upon are marked with an asterisk

* Authorities chiefly relied upon are marked with an asterisk

Constitution:

Statutes:

* Authorities chiefly relied upon are marked with an asterisk

* Authorities chiefly relied upon are marked with an asterisk

---

* Authorities chiefly relied upon are marked with an asterisk

Legislative Materials:

Other Authorities:

* Authorities chiefly relied upon are marked with an asterisk

GLOSSARY

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

STATEMENT OF THE ISSUES

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

1. Whether the PACT Act's ban on the delivery of cigarettes and smokeless tobacco through the U.S. mails survives rational basis review.

2. Whether the PACT Act's requirement that delivery sellers pay any state excise tax on cigarette and smokeless tobacco sales in advance of delivery "commandeers" state governments.

SUMMARY OF ARGUMENT

Plaintiff does not question the importance of the federal goals furthered by the PACT Act. Congress found that the majority of Internet and other remote sales of cigarettes and smokeless tobacco are made without payment of state and local taxes, without compliance with existing federal registration and reporting requirements, and without adequate precautions to prevent sales to minors. Congress found that sales over the Internet and through mail, fax, or phone orders make it cheaper and easier for children to obtain tobacco products; that criminals and terrorist groups profit from trafficking in untaxed cigarettes; and that billions of dollars of tax revenue are lost each year. *See* 15 U.S.C. § 375 Note (Findings).

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

I. The district court's due process holding rests on a fundamental legal error, and plaintiff offers no persuasive response to the points made in our opening brief. Congress has for decades regulated interstate commerce by incorporating various prohibitions of state law into the federal statutes, and the Supreme Court has repeatedly upheld such laws as valid exercises of the commerce power to thwart attempts to frustrate valid state laws. The PACT Act falls squarely within this longstanding practice, as it was enacted in order to end the widespread practice of shipping cigarettes across state lines without paying taxes or even reporting sales to state taxing authorities, as required by federal law.

Plaintiff concedes that Congress could have created a federal cause of action to be brought in federal court without offending the due process clause, Pl. Br. 25, and in so doing gives away his constitutional claim. That is precisely what the PACT Act does,

by making noncompliant delivery sellers subject to either federal criminal prosecutions or federal civil enforcement actions by state and local governments. *See* 15 U.S.C. § 378(b)-(c).

II. Plaintiff's cross-appeal challenges the ban on of the delivery of cigarettes and smokeless tobacco through the U.S. mails, 18 U.S.C. § 1716E(a), urging that it is irrational. Like every other court to consider the question, the district court correctly rejected this challenge as baseless.

The Constitution gives Congress plenary power over the mails. Congress has routinely exercised that authority to ban the mailing of goods without regard to whether they are illegal or dangerous. Plainly, Congress's decision to ban the mailing of cigarettes and smokeless tobacco was rationally related to its goal of ending the widespread distribution of untaxed cigarettes across state lines, which had been carried out almost exclusively by use of the U.S. mails.

Plaintiff's Tenth Amendment challenge is equally insubstantial. The PACT Act was passed with strong state support to ensure that interstate businesses comply with state and local laws. The statute does not "commandeer" the workings of state government or force any state to alter its existing tax regime. Instead, it merely requires delivery sellers to adopt the same business practices as their in-state competitors, who obtain tax-paid cigarettes from wholesalers and distributors that have been licensed by one or more states to distribute them.

Contrary to plaintiff's suggestion, the existence of consumer use taxes on cigarette purchases do not demonstrate that states have made "conscious policy choices" to exempt out-of-state retailers from tax collection requirements that would otherwise apply to their sale of cigarettes. Pl. Br. 43. Rather, those taxes simply reflect the fact that without a statute like the PACT Act, the dormant commerce clause would prohibit a state from requiring an out-of-state seller to collect cigarette excise taxes, even if it had minimum contacts with that jurisdiction. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311-12 (1992).

ARGUMENT

I. PLAINTIFF'S DUE PROCESS CHALLENGE HAS NO LIKELIHOOD OF SUCCESS.

A. As a Matter of Federal Law, Congress May Require that Those Engaged in Interstate Commerce Comply with the Laws of the States and Places Where they Ship Their Products.

Plaintiff acknowledges that "minimum contacts may be assessed nationally when Congress creates a *federal* cause of action to be brought in *federal* court," but nevertheless asserts that the Supreme Court's opinion in "*Quill* requires minimum contacts with the taxing state when Congress imposes *state* taxes on nonresidents." Pl. Br. 25.[1] This

[1] Plaintiff further asserts that "[w]here a nonresident must pay state taxes to a foreign state, *Quill* declares that is irrelevant for Due Process purposes that Congress caused the obligation to arise." Pl. Br. 25. *Quill* did not involve a federal law and made no such declaration.

argument betrays a fundamental misunderstanding of Congress's power to regulate interstate commerce, and the statute at issue in this case.

1. Plaintiff fails to come to grips with the federal nature of the PACT Act's requirements. The Supreme Court has long recognized that federal statutes that incorporate state law requirements do not constitute a "delegation to the states" of federal authority, but rather are independent expressions of Congress's will in regulating interstate commerce. *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 326 (1917). It is undisputed that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to" cause "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). Congress has broad discretion to establish a federal policy for interstate commerce, and may "shape that policy in the light of the fact that the transportation [of an item] 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, 347-48 (1937).

Exercising that authority, Congress has for decades enacted federal statutes that forbid the shipment of goods in interstate commerce unless the shipper complies with relevant laws of the destination state. *See* U.S. Br. 20-21. These federal statutes do not lose their federal character because the state law requirements were "determined by the

state legislature." Pl. Br. 25. All of the federal statutes discussed in our opening brief require compliance with some requirements enacted by state legislatures. And contrary to plaintiff's suggestion, those federal statutes are not more limited in their scope than the PACT Act, and they do not merely prohibit the shipment of goods whose possession would be illegal in the destination state. *See* Pl. Br. 26-27. Many go farther – like the PACT Act – by requiring interstate businesses to take affirmative steps to comply with state laws on matters like licensing requirements. *See, e.g.*, 21 U.S.C. § 831(b) (requiring online pharmacies to comply with state licensure laws); *see also United States v. Romano*, 137 F.3d 677, 678 (1st Cir. 1998) (to comply with Alaska state hunting laws made applicable to him by the federal Lacey Act, Massachusetts resident was required to obtain Alaska an hunting license and "big game locking tags").

The federal nature of the PACT Act's taxation requirements is further demonstrated by the way the statute is enforced. The PACT Act creates the "*federal* cause of action to be brought in *federal* court" (Pl. Br. 25) that Congress concededly may enact. As a condition of engaging in interstate commerce, the Act requires that a delivery seller 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" of delivery. 15 U.S.C. § 376a(a)(3). Violations of the PACT Act are not subject to a state-law prosecution or a tax collection action in a foreign jurisdiction (like the suit at issue in *Quill*). Rather, the failure to comply with this federal requirement to obey state tobacco laws can result in one of two types of

federal court actions against a delivery seller. The United States may prosecute a delivery seller for knowingly violating the PACT Act. 15 U.S.C. §§ 377(a), 378(b). And a state, local, or tribal government "may bring an action in a United States district court to prevent and restrain violations of this chapter by any person or to obtain any other appropriate relief from any person for violations of this chapter, including civil penalties, money damages, and injunctive or other equitable relief." *Id.* § 378(c)(1)(A). Indeed, plaintiff is the subject of such a civil enforcement proceeding brought by *amicus* City of New York. *See City of New York v. Robert Gordon et al.*, No. 12-cv-4838-JMF (S.D.N.Y. June 20, 2012).[2]

2. Notwithstanding the plainly federal nature of the PACT Act's requirements and enforcement mechanisms, plaintiff urges that "[t]he government's national minimum-contacts test makes no sense in this context" because "[u]nder that theory, Congress could impose the Nebraska excise tax on a New York merchant who sells cigarettes to Texas." Pl. Br. 25. The problem presented by plaintiff's hypothetical statute is not an absence of minimum contacts that would permit assertion of jurisdiction by the United States; the difficulty, instead, is that the hypothetical statute

[2] Among other things, that suit seeks injunctive relief and civil penalties under the PACT Act based in part on plaintiff's alleged failure to report his sales to state and local taxing authorities each month (as required by 15 U.S.C. § 376), or use federal age verification procedures (as required by *id.* § 376a(b)(4)). These provisions have not been enjoined by any court and have already gone into effect.

would almost certainly not constitute a reasonable means of regulating interstate commerce.

In contrast, Congress enacted the PACT Act to regulate commerce that is calculated to achieve the "frustration of valid state laws" that control access to tobacco products. *Kentucky Whip & Collar Co.*, 299 U.S. at 347. Tobacco taxes are an important mechanism used by states to control the demand – particularly among the young – for a lethal and deadly product. Congress could properly enact federal laws to prevent delivery sellers from undermining that goal by "market[ing] an exemption from state taxation to persons who would normally do their business elsewhere." *Department of Tax. & Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71-72 (1994) (internal quotation marks omitted); *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (Congress is "free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes").

Congress enacted the new federal regulations in the PACT Act based, in part, on overwhelming evidence that existing federal requirements had failed to stem the traffic in untaxed cigarette shipments. For over sixty years, the Jenkins Act has required delivery sellers to file monthly reports with the state tobacco tax administrators identifying the purchasers of their products, so that the states could attempt to collect tobacco use taxes from the consumers themselves. *See* 15 U.S.C. § 376. But delivery sellers – including plaintiff – have routinely flouted that requirement and refused to report their sales. *See* 15 U.S.C. § 375 Note, Finding 5; GAO, Internet Cigarette Sales:

Giving ATF Investigative Authority May Improve Reporting and Enforcement (GAO-02-743), at 3-5 (Aug. 2002) (noting that none of the approximately 150 Internet cigarette vendor websites it reviewed indicated compliance with the Jenkins Act, and that 78% of those websites affirmatively declared that they *did not* report tobacco sales to state authorities); U.S. Br. at 9 n.4 (plaintiff's website claims that he does not report sales information to any third party); Br. of *Amici Curiae* Nat'l Ass'n of Convenience Stores *et al.*, at 11 (same).

To justify his longstanding disregard of federal law, plaintiff asserts that "the federal government has traditionally declined to apply or enforce the Jenkins Act to reservation Indians," and that it "remains . . . hotly disputed" "[w]hether or not Indians are exempt from the Jenkins Act." Pl. Br. 8. Neither assertion is accurate. The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has long made clear that "[s]ales or shipments of cigarettes from Native American Reservations are *not* exempt from the requirements of the Contraband Cigarette Trafficking Act and the Jenkins Act." ATF Industry Circular No. 99-2 (June 16, 1999)[3]; *see also* 2002 GAO Report at 18 ("Nothing in the Jenkins Act or its legislative history implies that . . . Native American cigarette sales[] are exempt."). And the government has, in fact, enforced the Jenkins Act against individuals that operate tribally-licensed smokeshops, like plaintiff. *See*

[3] Copy available at: http://www.ttb.gov/industry_circulars/archives/1999/99-02.html (last visited August 15, 2012).

United States v. $1,250,000.00 in U.S. Currency, No. 06-cv-0542RJA-LGF (W.D.N.Y. Nov. 8, 2006) (forfeiture action against Seneca-licensed cigarette seller based on failure to report interstate cigarette sales under the Jenkins Act); *United States v. 1,920,000 Cigarettes*, 2003 WL 21730528 (W.D.N.Y. Mar. 31, 2003) (same); *see also United States v. Melvin*, 544 F.2d 767, 774 (5th Cir. 1977) (mail fraud conviction premised on violation of Jenkins Act); *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975) (same).

Moreover, as the Seneca Nation has itself made clear in the related Second Circuit litigation, plaintiff would be in no position to invoke the Tribe's immunity on behalf of his private, tribally-licensed business, even if he were correct about the law's application to Indian tribal governments. *See* Amicus Br. of Seneca Nation of Indians at 2 n.1, *Red Earth v. United States*, No. 10-cv-530 (W.D.N.Y. July 16, 2010) (Dkt. No. 42-3) (urging the court not to reach the tribal sovereignty claims raised by tribally-licensed businesses and noting that "the Nation would be the proper party to assert any claim based upon its 'sovereignty rights' under its treaties"). To permit plaintiff to assert a tribal sovereignty defense would be like permitting a state-licensed business to invoke the Eleventh Amendment if sued without its consent.[4]

---

[4] Even assuming that plaintiff could invoke the Seneca Nation's sovereignty rights as a basis for his failure to file Jenkins Act reports prior to the PACT Act, he has no basis for claiming that it "*remains*" an open question whether "Indians are exempt from the Jenkins Act." Pl. Br. 8 (emphasis added). The Jenkins Act requires "[a]ny person" that ships cigarettes in interstate commerce to file a report with state and local taxing authorities, 15 U.S.C. § 376(a), and the PACT Act amended the relevant

Continued on next page.

In any event, the extent of government enforcement efforts does not determine plaintiff's obligation to comply with the law. *See United States v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012) ("New York's decision, for political and practical reasons, to refrain from enforcing [its tobacco tax provision in on-reservation sales] did not grant Morrison leave to sell massive quantities of untaxed cigarettes to non-Native Americans. . . . New York's forbearance policy did not free him to engage in conduct that the law forbade. . . .").

3. Plaintiff also errs in suggesting that this Court (and the Second Circuit) have "already rejected" the government's primary argument. Pl. Br. 23-24. As explained in our opening brief (U.S. Br. 15), this Court did not resolve the merits of the due process question, deeming it "prudent *not to address*" any of the preliminary injunction factors "in the abstract." *Gordon v. Holder*, 632 F.3d 722, 726 (D.C. Cir. 2011) (emphasis added). (The Second Circuit, likewise, expressly concluded that "there is no need for us to decide the merits at this preliminary stage" of the case. *Red Earth v. United States*, 657 F.3d 138, 145 (2d Cir. 2011)). This Court therefore did not address the relevant Supreme Court cases on which the government has placed principal reliance. Indeed, the only court to do so to date is the district court here, *see Gordon v. Holder*, 826 F.

---

definition of "person" to include any "Indian tribal government" or "governmental organization of such a government," *id.* § 375(10).

Supp. 2d 279, 289 (D.D.C. 2011), and even plaintiff does not defend the grounds on which the court attempted to distinguish these precedents.

4. Plaintiff also seriously misunderstands the minimum contacts analysis applicable in analyzing state legislation of the kind at issue in *Quill*, a misunderstanding that permits him to make the remarkable assertion that he has *no* minimum contacts with *any* state in the country, notwithstanding the fact that he operates a nearly $25 million per year interstate tobacco business. Pl. Br. 32.[5]

Quill did not suggest a more stringent constitutional standard for assertion of what plaintiff describes as a state's "taxing jurisdiction" than the standard that would otherwise apply. Pl. Br. 33. In *Quill* , the Supreme Court applied its personal jurisdiction cases such as *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and noted that "'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.'" *Quill*, 504 U.S. at 307-08 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).[6]

---

[5] Plaintiff does not appear to dispute that the injunction must be vacated if this Court were to conclude that he has "minimum contacts" with even a single state, including his home state of New York. *See* U.S. Br. 33-34.

[6] In his concurrence in *Quill*, Justice Scalia observed that "[i]t is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax," and that the Court had already rejected a distinction "between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State." *Quill*, 504 U.S. at 333 (Scalia, J., concurring).

Moreover, the PACT Act is not simply about taxes. Congress required delivery sellers to comply with "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco," including laws imposing "licensing . . . requirements," "restrictions on sales to minors," and all "other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco." 15 U.S.C. § 376a(a)(3). Plaintiff does not challenge these provisions on due process grounds, and offers no explanation of why Congress offends due process when it requires compliance with state tax laws, but not state licensing or registration laws.[7]

Plaintiff is similarly mistaken in arguing that "mere sales into a foreign jurisdiction" are not enough to establish that a plaintiff has purposefully directed his activities at a forum state in a manner sufficient to create minimum contacts there. Pl. Br. 34. Indeed, elsewhere in his brief he goes so far as to suggest that a foreign business may never be constitutionally subjected to a state's taxes to the same extent as

---

[7] Plaintiff mistakenly suggests that he derives no value from the states into which he ships his products. Pl. Br. 30-31. His business exists *only* because those states impose cigarette taxes, providing him an opportunity to engage in a form of tax arbitrage. Moreover, Mr. Gordon takes advantage of the roads and other infrastructure provided by the states; the trash service needed to dispose of the packaging and cigarettes he sends; and the courts they maintain, should he wish to sue any customer over a payment or other dispute. *See* Brief of *Amici Curiae* States at 30-31. Finally, the states bear significant public health costs related to Mr. Gordon's untaxed cigarettes, particularly where they wind up in the hands of minors. *See* President's Cancer Panel, "Promoting Healthy Lifestyles," at 64 (2007) ("Every day, approximately 4,000 children under age 18 experiment with cigarettes for the first time; another 1,500 become regular smokers. Of those who become regular smokers, *about half* eventually will die from a disease caused by tobacco use." (emphasis added)).

"an in-state chain of giant brick-and-mortar warehouse stores." Pl. Br. 32. The Court in *Quill* abandoned as outdated the physical presence test that had governed due process clause jurisprudence under *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967), noting that "[i]n 'modern commercial life' it matters little that . . . 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.

Following the Supreme Court's lead, the courts of appeals have similarly found that the modern due process clause does not guarantee that an out-of-state seller can "have its cake and eat it, too" by reaping "the benefit of a nationwide business model with none of the exposure." *Illinois v. Hemi Group LLC*, 622 F.3d 754, 760 (7th Cir. 2010). Courts have, in fact, found minimum contacts between a state and an out-of-state business based solely on remote sales into that jurisdiction. *See id.* at 757-59 (finding New Mexico cigarette seller had minimum contacts with Illinois where it "stood ready and willing to do business with Illinois residents" and "in fact, knowingly did do business with Illinois residents"); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 170 (2d Cir. 2010) (finding minimum contacts between an online retailer and a foreign state based on fifty-two remote sales into that jurisdiction); Br. of *Amici Curiae* Nat'l Ass'n of Convenience Stores et al. 21-23 & n.34 (collecting additional authorities); *see also U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 887-88 (D.C. Cir. 2010) (finding jurisdiction over a foreign business with no presence in the United States

because it performed work for a joint venture bidding for a single contract from the U.S. government).[8]

B. This Court May Not Affirm the Injunction Without Deciding Whether Plaintiff Has Established a Likelihood of Success on the Merits of his Facial Challenge to the PACT Act.

A preliminary injunction is an "extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotation marks and citations omitted). A party seeking a preliminary injunction must therefore "establish that he is likely to succeed on the merits, 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). Indeed, an appellate court commits reversible error when it affirms a preliminary injunction without finding a likelihood of success on the merits. *See Munaf*, 553 U.S. at 690-91.

Plaintiff nevertheless urges this Court to follow the lead of the Second Circuit, which affirmed a preliminary injunction against the PACT Act without deciding whether the plaintiff had established a likelihood of success on the merits. *See* Pl. Br.

---

[8] In *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000), on which plaintiff relies, the defendant merely made telephone listings available for free over the Internet. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512 (D.C. Cir. 2002) (distinguishing GTE and finding minimum contacts with online website that allowed customers to engage in financial transactions). Plaintiff, by contrast, uses his website as the sole means by which he advertises his goods and targets his consumers.

38. This Court should decline to adopt that approach, which would violate fundamental principles of inter-branch comity.[9]

II. PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CROSS-APPEAL.

A. The PACT Act's Ban on Sending Cigarettes and Smokeless Tobacco Through the U.S. Mail Is Not Irrational.

The PACT Act makes it unlawful to send cigarettes and smokeless tobacco through the U.S. mail. *See* 18 U.S.C. § 1716E. The district court here, like every other court to consider the question, correctly held that the mailing ban falls squarely within Congress's "authority to ban any material from the mails in the name of public policy." *Gordon*, 826 F. Supp. 2d at 287; *see also Red Earth LLC v. United States*, 657 F.3d 138, 147 (2d Cir. 2011) (plaintiffs failed to establish likelihood of success on rational-basis challenge to PACT Act's mailing ban); *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 256-58 (W.D.N.Y. 2010) (same); *Musser's Inc. v. United States*, 2011 WL 4467784, at *7 (E.D. Pa. Sept. 26, 2011) (same).

---

[9] *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), does not justify this proposed approach. *Ashcroft* was a First Amendment challenge to a federal statute and its resolution of the preliminary injunction factors turned on burdens unique to that context. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (discussing *Ashcroft*). Here, by contrast, plaintiff challenges a regulation of interstate commerce subject only to rational basis scrutiny; he bears the burden of proof on all elements of his constitutional challenge at every stage of the case, including this preliminary one.

The Constitution vests Congress with plenary power over the postal system, *see United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (citing Art. I, § 8), and Congress has long provided that specified items are "nonmailable" — including alcohol, firearms, poisons, inflammable materials, motor vehicle master keys, locksmithing devices, and plant pests. *See* 18 U.S.C. §§ 1715-1717; 39 U.S.C. §§ 3001-3018. "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Ex parte Jackson*, 96 U.S. 727, 736 (1877).

To that list of nonmailable items, the PACT Act adds cigarettes and smokeless tobacco. *See* 18 U.S.C. § 1716E. As plaintiff concedes (Pl. Br. 47), Congress's decision to make cigarettes and smokeless tobacco nonmailable is subject to rational basis review, which is a "paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The district court had little trouble concluding that the mailing ban survives under this deferential standard "because it can be said to advance the legitimate government interests of reducing underage tobacco use and cigarette trafficking." *Gordon*, 826 F. Supp. 2d at 287. It likewise found the means chosen by Congress to be a

permissible way to achieve these important ends, noting: "the ban has a rational relationship to the purposes of the Act, which include a desire to eliminate the problems associated with selling tobacco products remotely, such as the ease of avoiding age-verification and tax-collection." *Id.*

Plaintiff asserts that Congress should have addressed these serious and growing problems by requiring "compliance with existing laws and enhanced penalties for violations," Pl. Br. 52, rather than by making it unlawful to send cigarettes and smokeless tobacco through the 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." *Ibid.*[10]

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 Communications,* 508 U.S. at 313. Rather, statutes reviewed

---

[10] For these same reasons, many states have banned delivery sales altogether, and Congress expressly preserved such laws against preemption challenge when it enacted the PACT Act. *See* 15 U.S.C. § 376a(e)(5)(C); Ariz. Rev. Stat. § 36-798.06; Conn. Gen. Stat. § 12-285c; Md. Code. Ann. Business Reg. § 16-222; Me. Rev. Stat., tit. 22, § 1555-F; N.Y. Pub. Health Law § 1399-ll; Ohio Rev. Code Ann. § 2927.023; South Dakota Codified Laws § 10-50-99; Utah Code Ann. § 59-14-509; Vt. Stat. Ann., tit. 7, § 1010; Wash. Rev. Code § 70.155.140(1)(a); *see also* Ind. Code. § 24-3-5-4.5(d). If the allegations in the City of New York's PACT Act suit are correct, plaintiff appears to have violated the New York delivery sale ban.

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 also asserts that the PACT Act's age-verification requirements are adequate to prevent minors from obtaining cigarettes and smokeless tobacco through the mail. *See* Pl. Br. 53 (citing 15 U.S.C. § 376a(b)(4)). But even if compliance with age-verification requirements were universal – contrary to the allegations in the City of New York's PACT Act enforcement suit against plaintiff – it would not address the additional problems of tax evasion and trafficking discussed above. And 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 ("IOM"), "Ending the Tobacco Problem: A Blueprint for the Nation," at 207 (2007). 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). But irrespective of these concerns, Congress is free to enact overlapping provisions that serve the same important ends, even if the resulting law is "to some extent both underinclusive and overinclusive." *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

Although plaintiff asserts that the PACT Act creates an "unprecedented mailing ban" on a product that is neither illegal nor dangerous to the mail and mail carriers, Pl. Br. 47, that argument is neither true nor legally relevant to the Court's rational basis review. Congress has banned the mailing of numerous products, many of which are neither illegal nor dangerous to mail carriers, such as locksmithing devices and motor vehicle master keys, 18 U.S.C. § 1716A, certain plants, *id.* § 1716B, forged agricultural certifications, *id.* § 1716C, certain wildlife and fish, *id.* § 1716D, certain letters and writings, *id.* § 1717, mail bearing a fictitious name or address, 39 U.S.C. § 3003, lottery materials, *id.* § 3005, "pandering" advertisements, *id.* § 3008, and "skill contest" materials, *id.* § 3017. But even if the mailing ban were in some manner unique, that would not render it unconstitutional under rational basis review, because the ban is legitimately related to Congress's desire to reduce sales to minors and cigarette trafficking.

Finally, plaintiff does not advance his case by insisting that the "real purpose of the mailing ban was not to increase tax collection or protect children . . . but rather to reward the lobbying efforts of the tobacco industry." Pl. Br. 59. The PACT Act was passed with the strong support of major public health groups, federal law enforcement officials, and the States. And, when employing rational basis review, a court must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [it] to conclude that they

could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n.7 (1981) (internal quotation marks omitted).

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

Although the PACT Act was passed with the strong support of the states,[11] plaintiff asserts that it unconstitutionally "commandeers states to implement a state taxation scheme that is *different* than the ones that states had in place before the PACT Act." Pl. Br. 39. The district court correctly dismissed this claim, finding that "the PACT Act starkly contrasts with" the two laws the Supreme Court has invalidated under the Tenth Amendment. *See Gordon*, 826 F. Supp. 2d at 293-95. The court held that the Act neither "'requir[es] a state legislature to enact a particular kind of law' as in *New York* [*v. United States*, 505 U.S. 144 (1992)], nor does it command any state officials 'to administer or enforce a federal regulatory program' as in *Printz* [*v. United States*, 521 U.S. 898 (1997)]." *Id.* Moreover, the district court held, the "Act also does not infringe on any state's power to tax, nor limit its ability to change its tax scheme in the future." *Id.* (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 438–39 (1946)).

The district court's holding is undoubtedly correct. The PACT Act places no new duties on states, and does not modify their existing tax laws in any way. Instead, it simply requires a delivery seller to ensure that "any cigarette or smokeless tobacco

---

[11] *See* March 9, 2010 Letter from National Association of Attorneys General to All Members of the United States Senate, *available at* http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf (last visited August 15, 2012).

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.* § 376a(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).

Although delivery sellers must alter their business model to comply with this law – that was its very point – states need not do anything different. In all but three states, the tobacco excise tax is collected by means of a tax stamp purchased from the state by a state-licensed wholesaler or stamping agent. *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). The remaining states do not use tax stamps, but still require state-licensed wholesalers and distributors to pay the excise tax on cigarettes to be sold in that state before passing them on to retailers. *See, e.g.*, N.C. Gen. Stat. Ann. § 105-113.5; N.D. Cent. Code § 57-36-26; S.C. Code §§ 12-21-620, 12-21-735. Thus, to collect taxes on out-of-state sales, states need do nothing more than continue to issue licenses to the wholesalers and stamping agents that apply for them. Retailers, in turn, need only obtain their cigarettes from a wholesaler licensed to stamp or distribute tax-paid cigarettes in the state to which plaintiff wishes to sell them.

Plaintiff incorrectly asserts that states currently have no mechanism to collect taxes on his cigarette sales because "states only allow in-state, large-scale licensed wholesalers to obtain tax stamps," which "excludes out-of-state wholesalers and retailers, like the Seneca." Pl. Br. 43-44. In fact, states *do* permit out-of-state wholesalers to obtain a stamping agent or distributor's license. *See, e.g.*, Alaska Stat. § 43.50.035(b); Conn. Gen. Stat. § 12-301; 30 Del. Code Ann. § 5301(1); Fla. Stat. §§ 210.05(3)(a), 210.06(1); Iowa Code Ann. §§ 453A.10, 453A.16; N.C. Gen. Stat. § 105-113.12(c). Florida, for example, has licensed stamping agents located in Alabama, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, New York, North Carolina, South Carolina, Tennessee, and Virginia – including Six Nations Manufacturing, owned by J. Conrad Seneca and located on the Seneca Reservation in Irving, NY. *See* Fla. Dep't of Business & Professional Regulation, Cigarette Wholesale Dealers, at 9 (updated Aug. 14, 2012).[12] And, of course, nothing prevents plaintiff from buying his inventory from one of the many existing multi-state wholesalers used by his convenience store competitors, such as Core-Mark, Eby-Brown, H.T. Hackney Co., or McLane. Alternatively, plaintiff could seek to contract with a multi-state wholesaler to drop-ship pre-stamped cigarettes directly to his consumers. *See* Ind. Code. § 24-3-5-

[12] *Available at* http://www.myfloridalicense.com/dbpr/abt/auditing/documents/florida_cigarette_distributors.pdf (last visited Aug. 15, 2012).

4.5(d) ("A merchant may make a drop shipment of tobacco products to an Indiana resident or retailer that is billed through a distributor.").

Plaintiff also errs in suggesting that the PACT Act prohibits a state from changing its tobacco tax laws. *See Gordon*, 826 F. Supp. 2d at 295 ("The Act also does not infringe on any state's power to tax, nor limit its ability to change its tax scheme in the future."). In the unlikely event that a state wished to "increase the willingness of delivery sellers to sell to its citizens," Pl. Br. 43, nothing in the Act forbids a state from taxing delivery sales at a lower rate than in-person sales, or, indeed, from exempting such sales from the excise tax requirements altogether.

Plaintiff confuses the matter further by suggesting that states have made "conscious policy choices" not to require out-of-state sellers to collect excise taxes on sales made into their states. Pl. Br. 43. That is simply not true. The consumer use taxes plaintiff cites reflect the fact that, prior to the PACT Act, the separate limitations of the dormant commerce clause prohibited states from imposing a tax collection requirement on delivery sellers that lacked a "substantial nexus" with the state – usually, a physical presence there. *See Quill*, 504 U.S. at 311-12. Congress can of course lift that dormant commerce clause restriction, *Quill*, 504 U.S. at 318, which it did through the PACT Act.

Plaintiff's repeated invocations of the states' sovereignty are difficult to fathom in this context. The very point of plaintiff's business is "to market an exemption from state taxation to persons who would normally do their business elsewhere." *Milhelm*

Attea, 512 U.S. at 71-72. Plaintiff has compounded that purposeful evasion of state taxation and tobacco control laws by openly failing to report his sales to state and local taxing authorities, as required by the original Jenkins Act and the unenjoined portions of the PACT Act. It is telling that forty states and the District of Columbia have appeared in this litigation to strongly oppose plaintiff's Tenth Amendment challenge to the PACT Act (and his other claims), while none have appeared to support him.[13]

In short, the PACT Act does not "commandeer" state officials by "compelling them either to create or administer a federal regulatory scheme." *National Ass'n of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277, 1283 (D.C. Cir. 2007). On the contrary, and like the Jenkins Act that it amended, the PACT Act "has the purpose of aiding generally in the effectuation of valid state policy." *See Consumer Mail Order Association v. McGrath*, 94 F. Supp. 705, 710 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951). "The 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." *Ibid.* (quotation marks and citation omitted).

---

[13] Plaintiff tries to turn the states' *amici curiae* brief in his favor, noting that ten states did not sign the brief. Those states' absence from this litigation says nothing about their views on this statute, however. For example, both Texas and Florida – whose absence is discussed in plaintiff's brief – strongly urged Congress to pass this law. *See* NAAG Letter, *supra* n.11.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST PRECLUDE AN INJUNCTION.

Our opening brief showed that the balance of equities and the public interest require that the preliminary injunction be vacated. *See* U.S. Br. 35-40. Congress enacted the PACT Act because it found that the majority of remote sales of cigarettes and smokeless tobacco are made without payment of applicable taxes, without compliance with federal reporting requirements, and without adequate cautions to prevent sales to minors. As discussed, untaxed cigarettes undermine tobacco control efforts and provide a significant source of revenue for other criminal activities.

Plaintiff offers no response to our description of the serious harms that his business model continues to inflict on public health and fisc. His only answer is to assert that the public is equally harmed by the enforcement of an allegedly unconstitutional law, *see* Pl. Br. 64-65, but that argument rests on his flawed view of the merits and utterly fails to engage in any real balancing of the parties' asserted harms. When viewed against the serious harms caused by his business model, plaintiff's assertion that Congress has improperly compelled him to play by the same rules as in-state retailers must give way in any equitable balancing analysis.

Nor is plaintiff correct in asserting that the states into which he ships his products are not harmed by the injunction. *See* Pl. Br. 62-63. Plaintiff focuses solely on the question of state taxes, without regard for the serious health consequences born by state governments facing an artificially cheap supply of interstate cigarette sales.

Moreover, plaintiff does not explain how the states will supposedly be able to "collect that revenue at the conclusion of this litigation," Pl. Br. 63, when plaintiff has been making these sales pursuant to an injunction that excuses him from his tax collection obligations.

Finally, plaintiff does not advance his case by discussing the law's impact on *other* delivery sellers. Pl. Br. 65. Mr. Gordon is the only plaintiff here, and the district court's order in this case does not prevent the United States from enforcing the PACT Act against any other party.

CONCLUSION

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

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RONALD C. MACHEN
United States Attorney

/s/ Michael P. Abate

MARK B. STERN
ALISA B. KLEIN
MICHAEL P. ABATE
(202) 616-8209
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

AUGUST 2012

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A) because it contains 7,087 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Michael P. Abate
MICHAEL P. ABATE

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight paper copies of this brief to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Michael P. Abate
MICHAEL P. ABATE