ORAL ARGUMENT NOT SCHEDULED

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 Holder, *et al.*,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Columbia, Civ. Action No. 10-cv-01092

PRINCIPAL BRIEF FOR APPELLEE/CROSS-APPELLANT

Aaron M. Streett
Counsel of Record
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1855
aaron.streett@bakerbotts.com

R. Stan Mortenson
Sara E. Kropf
Julie Marie Blake
Vernon A.A. Cassin III
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 639-7700

Counsel for Appellee/Cross-Appellant Robert Gordon

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

A. Defendants-Appellants/Cross-Appellees:

Eric Holder, the Attorney General of the United States of America, in his official capacity;

The United States Department of Justice;

B. Todd Jones, the Acting Director of the Bureau of Alcohol, Firearms and Explosives, in his official capacity (substituted for Kenneth Melson, his predecessor, by order of the district court);

The Bureau of Alcohol, Tobacco, Firearms and Explosives;

Patrick R. Donahoe, the Postmaster General of the United States, in his official capacity (substituted for John "Jack" Potter, his predecessor);

The United States Postal Service

B. Plaintiff-Appellee/Cross-Appellant:

Robert Gordon, a Seneca Indian

C. *Amici* before the district court

National Association of Convenience Stores

New York Association of Convenience Stores

Campaign for Tobacco-Free Kids

American Cancer Society

American Cancer Society Cancer Action Network

American Legacy Foundation

American Lung Association

City of New York

D. *Amici* before this Court in *Gordon I*, Case No. 10-5227 (D.C. Cir.)

State of Idaho

E. *Amici* before this Court presently

American Cancer Society

American Cancer Society Cancer Action Network

American Heart Association

American Legacy Foundation

American Lung Association

Campaign for Tobacco-Free Kids

City of New York

District of Columbia

National Association of Convenience Stores

New York Association of Convenience Stores

States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota,

Mississippi, Nebraska, New Hampshire, New Mexico, New York, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming

II. RULINGS UNDER REVIEW

The government Defendants and Mr. Gordon have both appealed from the December 5, 2011 order of Chief Judge Royce Lamberth of the United States District Court for the District of Columbia.

The government Defendants appeal the order's grant of a preliminary injunction on Mr. Gordon's claim that the taxation provisions of the Prevent All Cigarette Trafficking Act of 2009 (the "PACT Act") violate the Due Process Clause. *Gordon v. Holder*, 826 F. Supp. 2d 279, 289–93 (D.D.C. 2011) (enjoining enforcement of 15 U.S.C. §§ 376a(a)(3)(A)–(B), 376a(a)(4), and 376a(d)).

Mr. Gordon has cross-appealed from the same order on two issues. First, he appeals the order's denial of a preliminary injunction on his claim that the PACT Act's taxation provisions violate the Tenth Amendment and exceed Congress's enumerated powers. *Id*. at 295 (refusing to enjoin 15 U.S.C. §§ 376a(a)(3)(A)–(B), 376a(a)(4), and 376a(d) on these grounds). Second, Mr. Gordon appeals the order's denial of a preliminary injunction on his claim that the PACT Act's ban on

mailing tobacco products violates the Constitution's guarantees of due process and equal protection. *Id*. at 287–88 (refusing to enjoin 18 U.S.C. § 1716E(1)).

III. RELATED CASES

This case was previously before this Court in *Gordon v. Holder*, 632 F.3d 722 (D.C. Cir. 2011) (No. 10-5227). In that interlocutory appeal, Mr. Gordon challenged the district court's blanket denial of his application for a preliminary injunction of the PACT Act. On February 18, 2011, this Court vacated the district court's order and remanded for further proceedings. *Id.* at 724–26. On remand, the district court granted in part and denied in part Mr. Gordon's motion for injunctive relief. The parties have now appealed from that ruling. *See* § II, *supra*.

A related case was recently before the United States Court of Appeals for the Second Circuit. *See Red Earth LLC v. United States*, Nos. 10-3165, 10-3191, 10-3213 (2d Cir. 2011). There, the plaintiffs, Red Earth LLC and the Seneca Free Trade Association, sought to enjoin enforcement of the PACT Act. The defendants in *Red Earth* are defendants in this case.

The district court in *Red Earth* granted the plaintiffs' motion for a preliminary injunction in part and denied the motion in part. *Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010). The *Red Earth* plaintiffs and defendants both appealed the district court's order. On September 20, 2011, the Second Circuit affirmed the district court's order. *Red Earth LLC v. United*

States, 657 F.3d 138 (2d Cir. 2011). The United States then filed a petition for rehearing and rehearing en banc. On February 3, 2012, the Second Circuit denied that petition. *Red Earth LLC v. United States*, No. 10-3165, Dkt. No. 343 (2d Cir. Feb. 3, 2012). On July 2, 2012, the Solicitor General declined to file a petition for a writ of certiorari.

Dated: July 5, 2012

/s/Aaron M. Streett
Aaron M. Streett
Counsel for Appellee/
Cross-Appellant Robert Gordon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases[1] **Page(s)**

[1] Authorities upon which we chiefly rely are marked with an asterisk.

STATUTES

OTHER AUTHORITIES

GLOSSARY

PACT Act	The Prevent All Cigarette Trafficking Act of 2009, Pub. L. 111-154 (March 31, 2010).
NACSO	National Association of Convenience Store Owners
SFTA	Seneca Free Trade Association
USPS	United States Postal Service
DOJ	Department of Justice
ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
App.	Joint Appendix
GAO	Government Accountability Office

STATEMENT OF JURISDICTION

Mr. Gordon concurs in the government's jurisdictional statement.

STATEMENT OF THE ISSUES

1. Whether the taxation provisions of the Prevent All Cigarette Trafficking Act of 2009 (the "PACT Act"), which impose state excise taxes upon nonresident sellers who lack minimum contacts with the state, violate the Constitution's guarantee of due process.

2. Whether the PACT Act's taxation provisions unlawfully commandeer the states by rewriting state taxation law and requiring state officials to collect excise taxes from nonresident sellers in advance of interstate tobacco sales.

3. Whether the PACT Act's total ban on mailing legal tobacco products through the United States Postal Service violates the Constitution's guarantees of due process and equal protection.

STATEMENT OF THE CASE

This case concerns the constitutionality of various provisions of the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154 ("PACT Act") (*see* Statutory Addendum).

"Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (quotation omitted). The PACT Act is unprecedented in at least two ways. First, it expands states' taxing authority by requiring nonresident sellers to pay state excise taxes on the basis of a single sale into a state. *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 259 (W.D.N.Y. 2010) (preliminarily enjoining the PACT Act's "unprecedented" taxation provisions), *aff'd*, 657 F.3d 138 (2d Cir. 2011). Second, it completely bans the mailing of a consumer product that is lawful in all 50 states and is not dangerous to the mail or mail carriers.

These unprecedented provisions of the PACT Act are an affront to the Due Process Clause, which protects nonresidents from taxation in foreign states. They are an affront to federalism because they purport to rewrite state taxation laws and to commandeer state officials to enforce these newly-rewritten laws. And they are an arbitrary affront to the basic rights of consumers and small businesses to buy and sell a lawful product.

Robert Gordon, a small business owner and a member of the Seneca Nation of Indians, filed this lawsuit to enjoin enforcement of the taxation and mailing provisions of the PACT Act. The undisputed record in this case shows that their enforcement will destroy Mr. Gordon's business. More than one hundred other Seneca-owned businesses, and several thousand employees, will also have their livelihood destroyed by the enforcement of this unconstitutional legislation.

The district court initially denied Mr. Gordon relief on June 29, 2010. This Court then reversed the district court's order and remanded for further proceedings in *Gordon v. Holder*, 632 F.3d 722 (D.C. Cir. 2011). After extensive briefing and oral argument, the district court (Chief Judge Lamberth) granted in part and denied in part Mr. Gordon's motion for a preliminary injunction. The court preliminarily enjoined the PACT Act's taxation provisions as a likely violation of the Due Process clause, but denied Mr. Gordon's commandeering claim and refused to enjoin the Act's mailing ban. *Gordon v. Holder*, 826 F. Supp. 2d 279 (D.D.C. 2011). The parties have now appealed that order.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

A. Laws Governing Tobacco Sales

Much of the government's argument rests on its misconception that Mr. Gordon (and other internet retailers) evaded taxes on his pre-PACT Act interstate tobacco sales. That is not so, as a brief overview of cigarette-taxation law shows.

For a typical face-to-face tobacco transaction, cigarette wholesalers purchase stamps from the state (say, New York), reflecting payment of New York excise taxes, and affix them to packages before transmitting the cigarettes to a retailer, such as a convenience store, for sale to New York consumers. *E.g.*, *Dep't of Tax & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994); App. 20; Gov't Br. 19. The consumer's purchase price then reflects this pre-paid tax. *Id.* Approximately 550 state or local jurisdictions impose an excise tax on cigarettes in this way. *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 253 (W.D.N.Y. 2010).

The legal framework is different for an interstate sale. When a New York merchant sells cigarettes to a Texas resident, Texas (not New York) taxes the transaction. However, the Due Process Clause and "dormant" Commerce Clause prohibit Texas from imposing its excise-tax obligation on the nonresident seller. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 307–08, 318–19 (1992). That is,

Texas could not force nonresident retailers to affix a Texas excise-tax stamp. Consequently, before the PACT Act, state law imposed the excise tax on the in-state buyer in these interstate transactions, and states collected the tax from the buyer after the sale. Government Accountability Office, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement (GAO-02-743), at 6 (Aug. 2002) ("2002 GAO Report") ("Consumers who use the Internet to buy cigarettes from vendors in other states are liable for their own state's cigarette excise tax."); D.C. Cir. Br. of *Amici Curiae* NACSO, *Gordon v. Holder*, No. 10-5227, at 14 ("Prior to the PACT Act, when cigarettes were sold across state lines by an out-of-state seller, the State could collect the tax *only from the purchasing customer*.") (emphasis added). This is no different from Internet purchases of other goods, where the incidence of state sales and use taxes typically falls on the in-state buyer, not the nonresident seller. *See, e.g.*, Editorial, *Yes, You Owe That Tax*, N.Y. TIMES, Nov. 27, 2009, at A38 (noting that "the buyer is supposed to remit [taxes on Internet purchases] to the state.").

Thus, interstate tobacco transactions were "untaxed" only in the sense that all interstate, Internet transactions are untaxed—because the buyer may fail to pay the state taxes *he* owes. *Cf. Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976) ("[T]he competitive advantage which the Indian seller doing business on tribal land enjoys . . . is dependent on the

extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax") (emphasis added). For this reason, the government's claim that Indians like Mr. Gordon are merely "'market[ing] an exemption from state taxation'" to their out-of-state customers is wrong. Gov't Br. 33 n.10, 37 (quoting *Milhelm Attea*, 512 U.S. at 72).[2] Indeed, Mr. Gordon's website expressly advises that "i[t] is the responsibility of the Buyer to ascertain and comply with any laws in regard to the purchase or use of any cigarette products," including "taxing responsibilities." App. to Gov't Br. at AD-4, *Gordon v. Holder*, 10-5227 (D.C. Cir. Sept. 20, 2010); *accord* App. 58.

Federal law aids states in collecting the excise tax from in-state buyers on these interstate tobacco transactions. The Jenkins Act has long required delivery sellers to provide notice of the sale to the state where the buyer was located. Pub. L. No. 363, 63 Stat. 884 (1949). Courts upheld the Jenkins Act because it merely enables states to more effectively enforce their existing taxes on in-state buyers. *Consumer Mail Order Ass'n of Am. v. McGrath*, 94 F. Supp. 705, 710 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951).

[2] The quoted statement comes from a case rejecting a tribe's claim that it was exempt from collecting the New York tax on *in-state*, face-to-face sales on Indian reservations to non-tribal members. It does not support the government's implication that Indian internet retailers are evading taxes on their *interstate* sales—sales for which excise taxes are owed by the *buyers*.

Without evidence, the government accuses Mr. Gordon of violating the Jenkins Act. But it is undisputed that as a matter of political and legal judgment, the federal government has traditionally declined to apply or enforce the Jenkins Act to reservation Indians. *See* App. 139. Whether or not Indians are exempt from the Jenkins Act remains a hotly disputed issue. *Id*. Even the Department of Justice has conceded that "the lack of case law on this issue" makes any claim regarding the Act's applicability to reservation Indians "somewhat speculative." 2002 GAO Report at 18. In any event, "[a]ccording to DOJ, the Jenkins Act itself does not forbid Internet sales nor does it impose any taxes." *Id*. at 6. Thus, there is no basis for the government's repeated insinuations that Mr. Gordon and other Internet retailers were operating illegal businesses or evading taxes on their interstate sales.[3]

[3] The government observes that Mr. Gordon's website claims an exemption from "state taxes" as a member of a sovereign nation. This merely refers to the fact that Seneca retailers are able to obtain cigarettes without the *New York* excise stamp because federal law prevents states from imposing taxes on tobacco products sold on tribal lands to other tribal members. *Red Earth*, 657 F.3d at 142. Seneca retailers could in turn legally mail these products to out-of-state customers because no state or federal law prohibited mailing any form of tobacco product to customers outside of New York. *Id*. As explained above, the *buyer's* state—not New York—taxed this interstate transaction by collecting the excise tax from the buyer. Thus, the statement on Mr. Gordon's website has nothing to do with the PACT Act's concern with tax evasion on interstate tobacco transactions.

B. The Prevent All Cigarette Trafficking Act of 2009

On March 31, 2010, consumers, American Indians, and small tobacco retailers were dealt a serious blow when the President signed the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154 ("PACT Act"). Enacted at the behest of Big Tobacco and the National Association of Convenience Store Owners ("NACSO"), the PACT Act aims to eliminate small tobacco manufacturers and mail-order tobacco retailers—businesses primarily owned and operated by American Indians.[4] The Act radically changes the rules governing "delivery sellers" of cigarettes: it first bans the use of the U.S. mail to deliver tobacco products, and then, in case mail-order tobacco retailers manage to find an alternate means of delivery, the Act requires sellers to pay all state and local taxes in the place of delivery *before* making a sale.

The PACT Act requires that "[t]he delivery seller must pay all applicable excise taxes and affix all required stamps or other indicia . . . in advance of

[4] For nearly a decade, those groups have lobbied Congress to enact legislation to remove one of their few serious competitors—the Seneca. In 2003 Philip Morris (now Altria) almost succeeded in banning Internet tobacco sales when Representative Roy Blunt, a longtime beneficiary of Philip Morris campaign contributions, secretly slipped a provision restricting Internet tobacco sales into the Homeland Security bill. *See* Jim VandeHei, *GOP Whip Quietly Tried to Aid Big Donor; Provision was Meant to Help Philip Morris*, WASH. POST, June 11, 2003 at A1. The company admitted that the provision had been "pretty important" to Altria. *Id.* In 2002 Philip Morris saw a 13% fall in profits because the rising cost of cigarettes had resulted in smokers finding better bargains from websites and discount brands. Patricia Sellers, *Altria's Perfect Storm*, FORTUNE, Apr. 28, 2003, at 96.

completing the sale or delivery." H. R. Rep. No. 111-117, at 25 (2009). Whereas state law previously taxed *buyers* on interstate transactions and collected the tax *after* the sale, delivery sellers must now pay "any" excise tax that the delivery state's law imposes, and they must pay the tax "*in advance of the sale*, delivery, or tender." 15 U.S.C. § 376a(a)(3)-(4) & (d) (emphasis added). The Act does not require minimum contacts with a jurisdiction before a delivery seller is subject to the tax-prepayment obligation. And delivery sellers must pre-pay these taxes even if the state has no mechanism by which delivery sellers may obtain excise stamps from the delivery state. Indeed, even if the state *wished* to allow delivery sellers, or their buyers, to pay state taxes after the sale, the PACT Act rewrites states' excise-tax laws to forbid it.

The statute marks the first time that Congress has overridden the dormant Commerce Clause's prohibition on taxing out-of-state sellers who lack a physical presence in the taxing state; it is also the first time Congress has purported to override the Due Process Clause restrictions that require minimum contacts before a state may tax a nonresident seller. *See Quill*, 504 U.S. at 307–08, 318–19. Congress itself recognized the unprecedented nature of its attempt to authorize state taxation of nonresident sellers. According to the House Report, the Act "is in no way meant to create a precedent regarding the collection of State sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State

entities that do not have a physical presence within the taxing State." H.R. Rep. No. 111-117, at 17.

The PACT Act also eviscerates the ability of delivery sellers to deliver their products. Section 3 of the Act amends 18 U.S.C. § 1716 so that it now provides:

> All cigarettes and smokeless tobacco . . . are nonmailable and shall not be deposited in or carried through the mails.

18 U.S.C. § 1716E(a)(1). The mailing ban is another legislative first: never before has Congress banned from the mails a consumer product that is lawful in all 50 states and is not dangerous to the mail or mail carriers.

The Act carries serious consequences. Knowing violations of the taxation requirements are punishable by up to three years in prison, as well as criminal fines and civil penalties. 15 U.S.C. §§ 377(a)(1); 377(b)(1). Knowing violations of the mailing ban are punishable by imprisonment of up to one year and criminal fines. 18 U.S.C. § 1716(j)(1).

II. FACTUAL BACKGROUND

A. Robert Gordon and the Seneca Nation

Mr. Gordon, a Seneca Indian, owns and operates a tobacco store on the Allegany Indian Territory in New York. App. 8. He sells tobacco products to walk-in customers, and he also accepts orders over the phone. App. 23. Until the summer of 2010, he accepted orders over the Internet and through the mail as well. App. 23–24, 57. Due to problems with his payment service, he no long accepts

orders or payments through the website. App. 57. The website is used solely to display products, which customers may then order by phone. *Id.* Mr. Gordon's business has no physical presence or employees outside of New York. *Id.* He does not advertise, telemarket, or send catalogs to other states. *Id.*

Before March 31, 2010, more than 90 percent of Mr. Gordon's customers were located outside of New York. App. 23–24, 56. Mr. Gordon used the United States Postal Service ("USPS") to deliver 95% of his sales. App. 24. That was not by choice. Pursuant to an agreement with former New York Attorney General Eliot Spitzer, Federal Express, UPS, and DHL all refuse to accept tobacco products for shipment, making the USPS Mr. Gordon's only commercially feasible option. App. 24.

Mr. Gordon is one of many Seneca Indians who relies on the tobacco trade to make his living. Although there are only 8,000 enrolled members of the Seneca Nation, in 2010 those members operated more than 140 tobacco-related businesses and constituted approximately 30 percent of mail-order tobacco retailers in the United States. App. 12–13, 16. Seneca businesses employed more than 3,000 people. App. 60–61, 138. The tobacco trade was thus the Seneca Nation's predominant source of private-sector employment and a vital part of the Seneca economy. App. 16, 60–61. The Seneca Nation taxed each carton of cigarettes sold from its territories and used the revenues to fund essential government services.

App. 13, 61, 64–65. The Seneca Nation strictly enforced (and enforces) laws preventing cigarette trafficking and the sale of cigarettes to minors. App. 13–14, 24, 61–64. The efforts of the Seneca Nation have not gone unnoticed. In fact, the ATF has informed the Seneca Nation that "the Nation's law enforcement activities and cooperation with the ATF *have largely eliminated the Nation's Territories as a source of contraband cigarette trafficking*." App. 63 (emphasis added).

Mr. Gordon follows the Seneca Nation's regulations by, *inter alia*, using a payment service that verifies the age of all his buyers using their driver's license numbers and the last four digits of their social security numbers. App. 24. In addition, he uses a USPS-affiliated system to mark his packages as requiring an adult signature. *See id.*

B. The Act's Effects on Mr. Gordon and the Seneca Nation

The record reflects that many provisions of the PACT Act have nothing to do with preventing teen smoking or fighting illegal trafficking, but instead transfer an incredible amount of wealth from a historically disadvantaged minority group to a select few, namely, Altria (formerly known as Phillip Morris), Reynolds American, and Lorillard (collectively, "Big Tobacco"), as well as the members of NACSO. App. 19, 36–37, 126. Sales made by Seneca-owned businesses represent approximately 80 percent of the mail-order and Internet sales potentially affected by the PACT Act. App. 65.

If the PACT Act is not enjoined in full, it will be impossible for Mr. Gordon and other Seneca tobacco retailers to continue to operate. The Seneca Nation estimates that 60 Seneca-licensed tobacco sellers have already closed their doors as a result of the PACT Act, which will cause approximately thirteen percent of all Seneca Indians to lose their jobs. App. 17–19, 20, 64. Without the USPS, Mr. Gordon has no other practical shipping alternatives. App. 15–16, 24, 56, 138. As a result of the Act's mailing ban, Mr. Gordon has lost approximately 90 percent of his customers, 90–95 percent of his sales volume, and 95 percent of his gross revenue. App. 56. His business is currently operating at a net loss. *Id.* In addition, he has had to fire 19 of his 22 employees and has reduced all but one employee to part-time status. *Id.*

Even if Mr. Gordon had a realistic shipping option, he would still face the incredible burden of having to continually monitor and comply with the tax laws of 550 jurisdictions around the country. 15 U.S.C. § 376a(d); *see also Red Earth*, 728 F. Supp. 2d at 253. After passage of the PACT Act, Mr. Gordon began that monumental effort: his attorneys contacted numerous state agencies to determine how Mr. Gordon could prepay the required taxes. But most states have failed to explain how Mr. Gordon can realistically obtain excise-tax stamps or otherwise prepay their excise taxes, and many states have not responded to his inquiries at all. App. 8, 57–58. Because enforcement of 15 U.S.C. § 376a(d) has been

enjoined by the District Court for the Western District of New York, Mr. Gordon has not yet suffered its draconian impact. But if the injunction is lifted, it will become impossible for Mr. Gordon's business to survive. App. 57–58. Even with the taxation provisions enjoined, Mr. Gordon does not expect to be able to maintain his business in this tenuous state for long. Indeed, Mr. Gordon's belief that the PACT Act will be held unconstitutional is the main reason that he has taken such extraordinary efforts to keep his business going, despite operating at a loss. App. 56.

III. PROCEDURAL HISTORY

On June 28, 2010, the day before the PACT Act took effect, Mr. Gordon filed an application for a temporary restraining order and a preliminary injunction. App. 1. In his amended complaint, Mr. Gordon alleged, *inter alia*, that the PACT Act violates (i) his due process rights because the Act subjects him to the taxing jurisdiction of other states without regard to his contacts with those states; (ii) the Tenth Amendment's reservation of certain powers to the states because the Act improperly forces the states into the service of the federal government; and (iii) his equal protection and due process rights because the Act discriminates against delivery sellers and is not rationally related to any legitimate government interest.

The district court initially denied Mr. Gordon's request for preliminary injunction. App. 31–32. This Court reversed and remanded for further

proceedings, holding that the district court had erred by relying on the "late" hour of the filing and by insufficiently addressing the preliminary injunction factors. *Gordon v. Holder*, 632 F.3d 722, 724–25 (D.C. Cir. 2011). This Court also made additional observations intended to guide the district court on remand. Most importantly, the Court rejected the government's principal argument that there can be no Due Process violation when Congress imposes state taxes on nonresidents who lack minimum contacts with the taxing state, noting that "[e]ven national legislation . . . cannot violate the Due Process principles of 'fair play and substantial justice.'" *Id.* at 726 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992)). The Court explained that "[t]he government's suggestion that there can be no Due Process violation when Congress authorizes state levies based on minimum contacts collapses the Due Process and Commerce Clause aspects of Gordon's claims." *Id.* at 725. While Congress can override the dormant Commerce Clause restrictions on state taxation of nonresidents, "it does not similarly have the power to authorize violations of the Due Process Clause." *Id.* at 725–26 (quoting *Quill*, 504 U.S. at 305).

On remand, the district court granted Mr. Gordon a preliminary injunction (and denied the Government's motion to dismiss) on Mr. Gordon's claim that the PACT Act's taxation provisions violate the Due Process Clause. *Gordon v. Holder*, 826 F. Supp. 2d 279, 289–93 (D.D.C. 2011) (App. 142–171) (enjoining

enforcement of 15 U.S.C. §§ 376a(a)(3)(A)–(B), 376a(a)(4), and 376a(d)). The district court recognized that this Court had "already rejected the Government's primary argument" that Congress may impose state taxes on non-residents who lack minimum contacts with the taxing state. 826 F. Supp. 2d at 288 (citing *Gordon*, 632 F.3d at 725–26). The Court distinguished cases that merely required delivery sellers to comply with existing state substantive laws because the PACT Act "appears to impose a new, independent duty on the delivery seller that they ensure that the applicable state and local taxes are paid." *Id.* at 289.

Turning to whether Mr. Gordon had minimum contacts that would allow the imposition of state taxes, the district court was "not convinced" by the government's suggestion that a single sale by Mr. Gordon is sufficient to trigger a state's full taxing power. *Id.* And "even if a single sale of tobacco" were sufficient, the district court held that the Act likely violated Due Process because it could not find "on the record before it . . . that the tax on Gordon's products is 'rationally related to the values connected with the taxing state.'" *Id.* at 291 (quoting *Quill*, 504 U.S. at 307–08). Indeed, the court could not "determine what, if any, 'protection, opportunities, [or] benefits' Gordon receives from the State into which he delivers his products, aside from the fact that his buyer resides there." *Id.* at 292 (alteration in original) (citation omitted).

The district court denied a preliminary injunction (and granted the Government's motion to dismiss) on Mr. Gordon's claims that the Act's (1) taxation provisions violate the Tenth Amendment's anti-commandeering principle, 826 F. Supp. 2d at 293–95, and (2) mailing ban violates the Equal Protection and Due Process clauses. *Id.* at 285–88. The parties timely cross-appealed.

SUMMARY OF ARGUMENT

The PACT Act's unprecedented taxation provisions and mailing ban violate the Constitution. For that reason, Mr. Gordon has satisfied each of the requisites for a preliminary injunction of the challenged provisions.

1. The Due Process Clause prohibits the collection of state or local taxes from nonresidents who lack minimum contacts with the taxing jurisdiction. Supreme Court precedent affirms that Congress may not override these protections by itself imposing the state taxes on nonresidents. The PACT Act violates this bedrock principle. The Act is not like other federal statutes that merely incorporate state rules as part of federal law. The Act requires nonresidents to pay a state excise tax to state officials. It therefore subjects nonresidents to *state* authority, triggering Due Process protections.

The Act is unconstitutional because it requires delivery sellers to pay the state excise tax beginning with the seller's first sale into the taxing jurisdiction. It

does not even attempt to accommodate the Due Process Clause's minimum-contacts requirement. A single sale has never been held to constitute minimum contacts for purposes of personal jurisdiction, much less taxing jurisdiction. Nor has the operation of a website ever been held to support taxing (or personal) jurisdiction in every state in which it can be accessed. The Act also fails to respect the Due Process rule that states must tax nonresidents proportionally to the state benefits they enjoy. Instead, it imposes the full excise tax on sellers who have no physical presence in the taxing state, do not advertise or actively solicit business, and do nothing more than mail goods to customers who order them.

The Act is plainly unconstitutional as applied to Mr. Gordon, who merely operates a passive website, does not advertise or solicit, and has no physical presence in *any state* outside of his home state. Nor does he consume state services in *any state* outside his home state. Yet the Act improperly imposes the full excise tax in every state in which he makes a single sale. Given the undisputed record before it, the district court correctly issued a preliminary injunction. If the government wishes to dispute these facts, it may do so at the permanent-injunction stage.

2. The Act's taxation provisions are also facially unconstitutional because they commandeer states in violation of the Tenth Amendment. Before the Act, state law imposed the excise tax on the in-state buyer and collected the tax

after the sale. The Act alters that state taxation regime and now requires states to collect their excise taxes from nonresident sellers before the sale is even made. Congress may not modify state taxation law to serve federal objectives. Nor may it dragoon state tax officials to implement this federally-preferred scheme of state taxation.

3. Finally, the Act bans, for the first time in our history, the mailing of a consumer product that is lawful in all 50 states and is not dangerous to the mails or mail carriers. To be sure, Congress could take such an extraordinary step, but only if it is rationally related to a legitimate governmental interest. The sweeping ban is not rationally tailored to the proffered interests in preventing underage smoking and defeating evasion of state taxes. Other provisions of the PACT Act make it a felony to mail cigarettes without verifying the buyer's age or prepaying all state excise taxes. Given the existence of these provisions, a total ban on mailing tobacco products is so disproportionate to any residual government interest that it cannot pass the form of rational-basis scrutiny that applies when Congress enacts an unprecedented law. This discontinuity between ends and means lays bare that the mailing ban was really motivated by a desire to reward brick-and-mortar retailers at the expense of delivery sellers.

STANDARD OF REVIEW

Mr. Gordon concurs in the government's description of the standard of review.

ARGUMENT

I. MR. GORDON HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. The PACT Act Violates Due Process by Subjecting Nonresidents to the Taxing Jurisdiction of State and Local Governments Without Regard to Minimum Contacts

The PACT Act violates nonresident tobacco retailers' due process rights in an unprecedented way: by subjecting them to taxes in state and local forums without regard to whether they have minimum contacts with the taxing jurisdiction. *See Red Earth*, 728 F. Supp. 2d at 247–52, *aff'd*, 657 F.3d 138 (2d Cir. 2011) (granting a preliminary injunction against the taxation provisions).

1. *The Due Process Clause Prohibits Congress from Imposing State Taxes on Nonresident Sellers, Absent Minimum Contacts*

The district court correctly held that the PACT Act's unconstitutionality is dictated by the Supreme Court's decision in *Quill*. There, the Court considered whether the Due Process Clause and Commerce Clause forbade North Dakota to require Quill Corporation to collect the use tax on mail-order sales it made into the state. The Court held that the Due Process Clause prohibits states from imposing a use tax on nonresident sellers unless they satisfy a three-part test for "minimum

contacts" with the state. *Quill Corp. v. North Dakota*, 504 U.S. 298, 307–08 (1992). Under that test, (i) the remote seller must "purposefully direct[] its activities" at the state; (ii) "the magnitude of those contacts" must be such as to permit imposition of the tax, *and* (iii) the tax must be "related to the benefits [the remote seller] receives from access to the State." *Id.* at 308.

At the outset of its analysis the Court noted that "cases involving the application of state taxing statutes to out-of-state sellers" often implicate "both the Due Process Clause and the Commerce Clause." *Id.* at 305. In the very next paragraph, the Court elaborated:

> The two constitutional requirements differ fundamentally . . . and reflect different constitutional concerns. . . . [W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause.*

Id. (emphasis added). Thus, in the direct context of discussing when states may tax nonresident sellers, the Court declared that Congress may override the Commerce Clause's restrictions on that practice, but it *cannot* similarly lift the Due Process Clause's strictures. Consequently, even Congressional action to impose state taxes on resident sellers must comply with *Quill*'s minimum-contacts test.[5]

[5] The government rips from its context the statement at the end of *Quill* that "Congress is now free to decide whether, when, and to what the extent the States may burden interstate mail-order concerns with a duty to collect use taxes," 504

Remarkably, the government asks this Court to ignore *Quill*'s minimum-contacts test precisely because *Congress* imposed state taxation on nonresident sellers in the PACT Act. Gov't Br. 24–26. But this Court has already rejected the government's argument "that there can be no Due Process violation when Congress authorizes state levies." *Gordon*, 632 F.3d at 725. The Court explained that this approach impermissibly "collapses the Due Process and Commerce Clause." *Id.* Indeed, citing the "instructive" opinion in *Quill*, the Court admonished that "even national legislation . . . cannot violate the Due Process principles" restricting state taxation set forth in that decision. *Id.* at 725–26.

The government argues that this Court "appear[s] to have misapprended the government's position" in the earlier appeal. Gov't Br. 27. It claims that "the PACT Act does not 'authorize state levies.' It incorporates provisions of state law into a federal statute." *Id.* But surely the *Quill* Court did not mean that so long as

---

U.S. at 318, reading it to mean that Congress has *carte blanche* to authorize State taxes on nonresidents that would otherwise violate the Due Process Clause. Gov't Br. 26. The preceding sentence in *Quill* clarifies that Congress previously had been flatly prohibited from authorizing state taxes on mail-order businesses by the Court's holding in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), that the Due Process Clause prevented states from taxing businesses that lacked a physical presence in the state. *See Quill*, 504 U.S. at 318 (explaining that congressional inaction was "dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits states from imposing such taxes"). In context, the Court was *reaffirming* that Congress is bound by Due Process restrictions on state taxing power, and simply recognizing that *Quill*'s abandonment of the physical-presence test made it possible for Congress now to authorize some sort of State taxation of nonresident sellers—so long as such taxation was consistent with the new, three-part Due Process test laid out earlier in the Court's opinion.

Congress *itself* imposes the state tax on nonresidents (by incorporating it into a federal statute)—as opposed to "authorizing" states to impose the tax—the Due Process Clause is satisfied. That is a classic distinction without a difference and would render *Quill*'s (and this Court's) language meaningless. The Due Process Clause's fundamental restraints on the reach of state taxes cannot be overcome by such sophistry.

The government's argument has also been rejected by the Second Circuit in *Red Earth*. The Second Circuit agreed with this Court that *Quill* provides the relevant test for assessing the PACT Act's taxation provisions, and that Congress may not authorize states to tax remote sellers absent compliance with *Quill*'s three-part minimum contacts test. 657 F.3d at 143–45.

The government's argument that Due Process restrictions on state authority fall away when Congress imposes the state tax on nonresidents finds no support in any of the government's cases. When Congress mandates that nonresidents pay the state tax, the government contends, "court[s] need only ask whether the regulated entity has sufficient contacts with *the United States* as a whole." Gov't Br. 24–26 (emphasis in original). As *Quill* states clearly, that proposition is flawed. Before *state* authority can be brought to bear on a nonresident, the Due Process Clause requires minimum contacts with the *state*. And state authority is undoubtedly brought to bear when a nonresident must pay *state* taxes to a *state* official in an

amount determined by the *state* legislature. The government is correct that minimum contacts may be assessed nationally when Congress creates a *federal* cause of action to be brought in *federal* court. Gov't Br. 25 (citing federal antitrust and securities cases that permit nationwide service of process). But *Quill* requires minimum contacts with the taxing state when Congress imposes *state* taxes on nonresidents. The government's national minimum-contacts test makes no sense in this context. Under that theory, Congress could impose the Nebraska excise tax on a New York merchant who sells cigarettes to Texas. Because Congress imposed the tax, and the seller has minimum contacts with the United States, the seller would have no recourse under the government's theory.

The Act does not merely "incorporate provisions of state law into a federal statute," thereby creating a new, purely federal rule of conduct. Gov't Br. 27; *id*. at 25 ("here, Congress imposes a federal requirement"). It uses federal law to impose a *state tax* upon nonresidents—a tax that nonresidents must pay to the *state's* tax collection officials. The government does not (and could not) claim that the Act imposes a *federal* tax. Thus, the government's claim that the Act "does not submit delivery sellers to the authority of a foreign state" is simply incorrect. Gov't Br. 26. Where 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. When the state collects a state tax from a nonresident who lacks minimum

contacts, the individual is subjected to state authority, and the Due Process Clause's protections must apply. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 182 (1980) (Rehnquist, J., concurring in part) ("in order to collect the tax from [an out-of-state merchant], there must also be a relationship between the State and the burdened merchant sufficient to satisfy principles of due process").

The government relies heavily on statutes that "forbid the shipment in interstate commerce of goods that violate the laws of the destination state." Gov't Br. 2, 14, 20–21. According to the government, courts have upheld such statutes as "purely federal regulations of interstate commerce [that] do not subject the regulated person to any authority other than Congress's." *Id.* at 14. But the PACT Act is not such a law. Mr. Gordon's cigarettes do not "violate the laws of the destination state;" it is the buyer, not Mr. Gordon, who must remit taxes on the sale under state law. *Red Earth*, 657 F.3d at 142. Nor does the PACT Act submit nonresidents to purely federal authority. Unlike statutes that merely incorporate state substantive rules into federal law, the Act subjects Mr. Gordon to *state* taxing authority.

Moreover, the statutes upheld in the government's cited cases—which predate modern minimum-contacts analysis—merely "aid the [states in] enforcement of valid state laws" against residents, by preventing the importation of

goods that would be unlawful under state law. *Ky. Whip & Collar Co. v. Ill. Cent. Ry. Co.*, 299 U.S. 334, 343 & 352 (1937) (federal ban on importation of prisoner-made goods that violate state law); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 325–26 (1917) (federal ban on importing alcohol for use in violation of state law).[6] None of the statutes requires a non-resident seller to prepay state taxes by effectively *amending* state law that imposes the tax on the buyer after the sale. In this way, the PACT Act goes beyond requiring a seller to comply with existing state law. It "impos[es] a *new, independent duty* on the delivery seller by requiring that they ensure that the applicable state and local taxes are paid" before the sale. *Gordon*, 826 F. Supp. 2d at 289 (emphasis added). This extension of state taxing authority is precisely what *Quill* prohibits, absent minimum contacts, and is quite different from simply ensuring that a product entering a state complies with the laws of the destination state.

In sum, when a federal statute incorporates a substantive rule of state law, it becomes a federal rule of law. But when a federal statute requires nonresidents to pay a *state* tax to *state* officials at the rate set by the *state* legislature, it does not thereby become a federal tax. It is just a state tax that the seller must pay by virtue

[6] The Jenkins Act is further afield because it does not even subject a seller to a rule of state substantive law by incorporating it into federal law. It imposes a purely federal requirement on delivery sellers to submit sales reports to the state, so that the state may collect taxes from in-state buyers. *Consumer Mail Order Ass'n of Am. v. McGrath*, 94 F. Supp. 705, 710 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951) (upholding this provision).

of federal law. And *Quill* mandates that Congress may not impose such a tax absent minimum contacts with the taxing state.

2. *The PACT Act's Taxation Provisions Violate the Due Process Clause.*

The PACT Act is unconstitutional because it imposes state taxes on nonresidents without regard for the Due Process requirements set forth in *Quill*. 826 F. Supp. 2d at 292–93. A state tax imposed on a non-resident seller is invalid unless the seller has "minimum contacts with the [taxing] jurisdiction." *Quill*, 504 U.S. at 307. Applying its three-part minimum-contacts test, the *Quill* Court held that a North Dakota tax on a mail-order seller did not violate due process because the seller was "engaged in continuous and widespread solicitation of business" within that state. *Id.* at 308. The seller mailed *24 tons* of mail order catalogs into the state that necessarily had to be disposed of by the state. *Id.* at 304. And while Quill had no physical presence in the state, it was the sixth largest vendor of office supplies in the state, with approximately 3,000 North Dakota customers and nearly $1 million in North Dakota sales. *Id.* at 302, 304, 308. The Court found that Quill had purposefully directed its activities at North Dakota residents, creating contacts of sufficient magnitude for due process purposes. *Id.* And due to its active solicitation and advertisement, including its "deluge of catalogs" disposed of by the state, the Court found that the tax was "related to the benefits Quill receives from access to the State." *Id.* at 308.

Because the PACT Act imposes full state excise taxes beginning with the first sale into a jurisdiction, the district court correctly held that the Act violates Due Process. The Act does not limit sellers' obligation to pay state or local taxes to jurisdictions where they actively solicit business or where they have made thousands of sales. *See Quill*, 504 U.S. at 308. Nor does the PACT Act limit sellers' tax burden to states in which sellers have made use of state services or otherwise availed themselves of state benefits. *See id*. Tellingly, the government cites no case in which taxing (or even personal) jurisdiction was asserted on the basis of a single sale. Even in the personal jurisdiction context, "the Supreme Court has never found 'that a single isolated sale . . . is sufficient.'" *Red Earth*, 657 F.3d at 145.

Moreover, the taxation burden imposed on nonresidents here is much greater than the burden at issue in *Quill*, where nonresident sellers merely were required to *collect* and remit the use tax to the state *after* the sale. Under the PACT Act, "[t]he delivery seller must *pay* all applicable excise taxes and affix all required stamps or other indicia . . . *in advance* of completing the sale or delivery." H. R. Rep. No. 111-117, at 25 (emphasis added). If anything, the Due Process Clause should require a greater level of contacts and receipt of state benefits to correspond to this greater burden.

The Act's unconstitutionality is especially clear as applied to Mr. Gordon. The district court correctly found that Mr. Gordon does not purposefully direct his activities at foreign states, and that the nature of Mr. Gordon's contacts with many states likely does not permit imposition of a tax. 826 F. Supp. 2d at 291. Mr. Gordon has no physical presence outside of New York. He does not own any facilities or equipment outside of New York. App. 57. He has no employees who perform work in other states, and does not have company vehicles that deliver his cigarettes to other states. *Id.* He does not send catalogs or advertising materials to other states, nor does he reach out to other states through telemarketing. *Id.* He does not maintain an "interactive" website through which customers can place orders. *Id.* Mr. Gordon currently only sells his products when a buyer reaches out to him to place an order by telephone. *Id.* And there are several states—and many local jurisdictions—into which Mr. Gordon has never made a single sale. *Id.*

Even if Mr. Gordon had actively solicited business in foreign states and compiled a sufficient magnitude of contacts, the district court correctly held that it could not find "on the record before it," 826 F. Supp. 2d at 291, that "the taxing power exerted by" the states pursuant to the PACT Act has any "fiscal relation to protection, opportunities and benefits given by the state." *Id.* (quoting *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24–25 (2008)) (quotations and citations omitted). Under *Quill*, this lack of a "rational

relation[ship]" between the level of taxation and state benefits afforded to the nonresident is an independent ground for striking down the tax. 504 U.S. at 306. That is because before a state can tax a remote seller, *the state* must provide some benefit *to the nonresident seller* that is related to the level of taxation. *Cf. Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 561 (1977) (finding Due Process satisfied where nonresident had in-state offices that enjoyed "municipal services fire and police protection" from the taxing state).

Here, the district court could not find that any state has "given anything for which it can ask return" from Mr. Gordon. 826 F. Supp. 2d at 291–92 (quoting *MeadWestvaco*, 553 U.S. at 24–25). The undisputed evidence supports that finding: Mr. Gordon does not utilize foreign states' services or benefits, such as police and fire protection, unemployment insurance, and state labor. App. 57. The district court rightly agreed that "these circumstances are unlike those presented in *Quill*, in which Quill 'engaged in continuous and widespread solicitation of business' within North Dakota . . . through twenty-four tons of catalogs and flyers mailed into the state every year, which were ultimately disposed of by the state." 826 F. Supp. 2d at 292 (citations omitted). It is unconstitutional to tax Mr. Gordon

at the same rate as an in-state chain of giant brick-and-mortar warehouse stores that consume state services supported by tax revenues.[7]

In light of this undisputed record evidence, the government errs when it suggests that Mr. Gordon has never identified any states with which he lacks minimum contacts. *See* Gov't Br. 33–34. To the contrary, the record reflects that *no state* could impose the full excise tax on Mr. Gordon under the principles of *Quill*. With respect to Mr. Gordon, therefore, the Act has no "plainly legitimate sweep" and must be facially enjoined. *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449–50 (2008) (cited at Gov't Br. 33).[8]

None of the government's cursory arguments support a contrary result. Gov't Br. 30–34. Ignoring the undisputed record, the government first infers that Mr. Gordon must be subject to taxing jurisdiction in the various states because at one time he sold nearly $2 million of tobacco products per month. *Id.* at 30–31,

[7] The government asserts without record evidence that Mr. Gordon derives benefits from foreign states that dispose of his customers' cigarette butts and provide health care to the customers. Gov't Br. at 32 n.9. This unsupported claim conflates benefits provided by states to *buyers* with benefits sought by and provided to *sellers*. Gov't Br. at 32 n.9; Brief of New York *et al*. at 27-30.

[8] The government similarly argued that a facial injunction was improper in *Red Earth*, but the Second Circuit affirmed without discussion of this point. *See* Gov't Br., *Red Earth LLC v. United States*, Nos. 10-3165, 10-3191, 10-3213, at 34 (arguing against facial injunction because plaintiffs did not submit enough detailed evidence showing which sellers do "not operate a website or otherwise solicit out-of-state business"). The Second Circuit presumably recognized that those evidentiary inquiries are appropriately addressed on remand in the context of a fuller proceeding.

34. And according to the government, it is "sufficient in the age of the Internet that a plaintiff use a commercial website to direct a substantial volume of business to foreign jurisdictions." Gov't Br. at 15, 30–33. For this proposition, it cites two e-commerce cases in which *personal* jurisdiction was exercised over Internet sellers. *Id.* at 31.

But, as discussed above, the record shows that in many (if not all) states, Mr. Gordon has no minimum contacts that could support *taxing* jurisdiction under *Quill*'s three-part test, which requires active solicitation, a significant magnitude of contacts, and a rational relationship between the tax imposed and state benefits provided. App. 57; *see Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (noting that the standards for taxation, judicial, and legislative jurisdiction may not be identical, and citing *Quill* as the appropriate standard for taxation jurisdiction). The government offered no evidence in the district court to contradict this record. Instead, it now asks this Court to "assume" that Mr. Gordon has "equal" contacts with every state and that these contacts support each of the elements of taxing jurisdiction for a given state. Gov't Br. 34. At this stage, Mr. Gordon's uncontested record evidence suffices to enjoin the Act on a preliminary basis. *Cf. Sottera v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) (finding likelihood of success where the "factual record . . . [was] meager," but

uncontested, and noting that the government may establish contrary facts at a later stage of the proceedings).

Even if personal-jurisdiction cases were controlling, they would not support the PACT Act. *Red Earth*, 657 F.3d at 144–45. If mere sales into a foreign jurisdiction were sufficient, "the Supreme Court in *Quill* likely would have rested its due process discussion on that ground." 826 F. Supp. 2d at 292 (citing *Red Earth*, 728 F. Supp. 2d at 251). There would have been no need to extensively analyze the purposeful, targeted nature of *Quill*'s solicitations and the "magnitude" of Quill's extensive contacts with North Dakota. Likewise in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), a case cited favorably in *Quill*, the Court squarely held that merely contracting with a resident of the forum state is not sufficient for jurisdiction. *Id.* at 473. Rather, a nonresident must "purposefully direct" his activities toward forum residents by engaging in "significant activities" within the forum state and creating "continuing obligations" between himself and residents of that state. *Id.* at 476. Accordingly, both the district court in this case and the courts in *Red Earth* properly "rejected the Government's contention that each tobacco 'transaction itself creates sufficient minimum contacts with a forum for due process purposes.'" 826 F. Supp. 2d at 292 (quoting *Red Earth*, 728 F. Supp. 2d at 250).

The government wrongly argues that operation of a website substitutes for these minimum contacts. Gov't Br. at 15, 30–33. Operation of a website is not enough even for personal jurisdiction, much less taxing jurisdiction. This Court has explained that "personal jurisdiction surely cannot be based solely on the ability of District residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants in the District." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000); *see also Be2 L.L.C. v. Ivanov*, 642 F.3d 555, 558–59 (7th Cir. 2011) (no minimum contacts where website had 20 registered customers in Illinois, because defendant did not "target the forum state's market"). This Court's opinion in *Gorman v. Ameritrade Holding Corp.*, cited by the Court in *Gordon*, reinforces this rule. 293 F.3d 506, 512 (D.C. Cir. 2002). Mr. Gordon is not subject to taxation in all foreign states merely because he operates a website.[9] Rather, the

[9] NACSO effectively accuses Mr. Gordon of committing fraud on the district court because the nature of Mr. Gordon's website has allegedly changed since the preliminary injunction was entered. Brief of Amici Curiae NACSO Stores *et al*. at 9; *see also* Gov't Br. 9 n.3. At the time of the preliminary injunction, however, the undisputed record reflected that Mr. Gordon was unable to take orders through his website "due to problems with [his] payment service." App. 57. That record was appropriately considered by the district court, 826 F. Supp. 2d at 283, and is the record on appeal to this court. If circumstances have changed, new facts may be assessed at a later stage of the proceedings. In any event, the precise nature of Mr. Gordon's website is immaterial in light of the undisputed record evidence showing that Mr. Gordon lacks minimum contacts under *Quill*'s Due Process test.

Due Process Clause protects him from state taxation except where his contacts with the jurisdiction satisfy *Quill*'s minimum-contacts standard.

The government's personal jurisdiction cases involving websites are inapposite. In *Chloe v. Queen Bee of Beverly Hills, LLC*, there was a specific record of "extensive business contacts with New York customers" that created minimum contacts. 616 F.3d 158, 166–67 (2d Cir. 2010). Furthermore, the website in *Chloe* was an "interactive" website that not only offered products to New York consumers but permitted New York consumers to purchase such products online and facilitated shipment into New York. *Id.* at 166. Likewise in *Hemi Group*, the internet merchant operated an interactive website, engaged in a documented number of sales into Illinois, and consciously targeted Illinois. *Illinois v. Hemi Group* LLC, 622 F.3d 754, 755–56, 757–58 (7th Cir. 2010). None of these factors are present in the record here.

Whether passive or interactive, Mr. Gordon's website does not involve purposeful targeting of customers in any particular state, App. 57, unlike the "deluge of catalogs" or "phalanx of drummers" referenced by *Quill*. 504 U.S. at 308. And unlike those other methods of targeting out-of-state customers, Mr. Gordon's website does not require any state benefits or protection. The Due Process Clause therefore prohibits imposing the full excise tax on Mr. Gordon.

Finally, the government is incorrect that Mr. Gordon is subject to state taxing authority because he purposely *avoids* foreign states' taxing jurisdiction. Gov't Br. 15, 32–33. That concept has no purchase in *Quill*, which requires that nonresidents' contacts satisfy its three-part test of actual, significant contacts. Even in the personal jurisdiction context, the Due Process Clause "*allows potential defendants to structure their primary conduct* with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (emphasis added). One way businesses may lawfully "structure their primary conduct" to avoid taxation in foreign states is to sell goods through mail order without establishing a physical presence. That is hardly "obstruction." The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011), merely suggests that a person who commits an "intentional tort" in a state might be subject to personal jurisdiction because he "obstructs" the forum state's law (as opposed to the traditional requirement of "purposeful availment"). Here, there is no record evidence that Mr. Gordon has violated any foreign state's tax law, for foreign states tax *buyers* on interstate transactions. The government's "obstruction" rationale would perversely subject all Internet businesses to taxation in foreign states whenever buyers fail to remit applicable taxes.

At the very least, the novel taxation provisions of the PACT Act present a close constitutional question. And where "the underlying constitutional question is close," a court "should uphold the injunction and remand for trial on the merits." *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004); *accord Red Earth*, 657 F.3d at 145 (affirming facial preliminary injunction).

B. The PACT Act Unconstitutionally Commandeers States to Implement a Federal Taxation Scheme

Even if the Due Process Clause did not prevent Congress from imposing state taxes on out-of-state sellers, the Tenth Amendment would independently prohibit Congress from forcing states to adopt or administer the PACT Act's federally-mandated taxation scheme governing nonresident sellers.

1. *The PACT Act is a Federally-Mandated Change to State Tax Laws and Enforcement Procedures*

The PACT Act provides that no delivery seller may "sell" or "tender [cigarettes] to any common carrier," unless "*in advance* of the sale, delivery, or tender . . . *any* cigarette . . . excise tax that is imposed by" the state or locality of delivery "has been paid" to the state or locality. 15 U.S.C. § 376a(d) (emphasis added). In other words, a delivery seller cannot make a delivery sale unless it prepays "any" excise taxes "imposed by" the state or locality. *Id.* Delivery sellers must pay state taxes "*as if* the delivery sales occurred entirely within the [taxing state]." 15 U.S.C. § 376a(a)(3) (emphasis added).

This is a remarkable—and facially unconstitutional—provision for a simple reason: It commandeers states to implement a state taxation scheme that is *different* than the ones that states had in place before the PACT Act. The Tenth Amendment does not permit Congress to "commandeer state governments into the service of federal regulatory purposes" by requiring states to implement a federally-mandated tax-collection regime. *New York v. United States*, 505 U.S. 144, 175 (1992); *accord Printz v. United States*, 521 U.S. 898, 926–30 (1997).

The PACT Act forces states to collect excise taxes from a particular person (the seller) and at a particular time (before sale), regardless of whether state law requires prepayment or imposes the tax on the seller at all. This works a radical change from the way states previously collected the excise tax on interstate transactions. Before the PACT Act, state law taxed the in-state *buyers* on such transactions and collected the tax *after* the sale. 2002 GAO Report at 6 ("Consumers who use the Internet to buy cigarettes from vendors in other states are liable for their own state's cigarette excise tax."); Br. of *Amici Curiae* NACSO *et al.* at 14 (filed in *Gordon I*, Case No. 10-5227 (D.C. Cir.)) ("Prior to the PACT Act, when cigarettes were sold across state lines by an out-of-state seller, the State could collect the tax *only from the purchasing customer*.") (emphasis added). Illinois, for example, "leaves it to the buyers to pay the applicable state tax on cigarettes purchased over the Internet or by mail, phone, or fax." *Illinois v. Hemi*

Grp. LLC, 622 F. 3d 754, 756 (7th Cir. 2010); *see also Hemi Grp., LLC v. City of New York*, 130 S. Ct. 983, 987 (2010) (noting that "[New York City] is responsible for recovering, directly from the customers, use taxes on cigarettes sold outside New York"); *id.* at 986 (noting that New York law does *not* require the delivery seller to "charge, collect, or remit the tax"). Indeed, this was the entire premise of the Jenkins Act, which required delivery sellers to submit lists of buyers to the buyers' state of residence, so that states could collect *existing* taxes due from buyers. Jenkins Act, Pub. L. No. 363, 63 Stat. 884 (1949), *Consumer Mail Order Ass'n of Am. v. McGrath*, 94 F. Supp. 705, 710 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951).

Thus, the Act does not, as the district court apparently believed, "simply requir[e] delivery sellers to comply with existing state and local tax laws." 826 F. Supp. 2d 293. Rather, as the district court elsewhere correctly stated, 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). States must now administer their excise taxes in the manner preferred by the federal government, instead of the manner in which they previously administered them under existing state law.

Nor can a state change its excise-tax statutes to preserve its choice of how to collect the excise tax, as the district court apparently believed. *Id.* at 293

(recounting government's argument that "states can still determine with full autonomy whether and to what extent to tax sales of tobacco products"); *id.* at 295 (holding that the Act "does not infringe on any state's power to tax, nor limit its ability to change its tax scheme"). To the contrary, if states wish to impose "any" excise tax at all on interstate transactions, the PACT Act requires that *sellers* pay the tax *before* the sale. 15 U.S.C. § 376a(d). The fact that existing state law imposes the tax on buyers after the transaction is of no moment in light of the PACT Act's mandates. And any amendments to those laws would likewise be pointless. The state is locked into a federally mandated excise-tax regime.

That much is made clear by the PACT Act's requirement that delivery sellers must pay state taxes "*as if* the delivery sales occurred entirely within the [taxing state]." 15 U.S.C. § 376a(a)(3) (emphasis added). Of course, interstate delivery sales by definition *do not* "occur entirely within the [taxing state]," and thus states have not traditionally imposed their excise taxes on *sellers* in *interstate* transactions. Congress has now ordered states to pretend that interstate sales occur entirely within a state such that the incidence of the tax now falls on the seller (just as it would in a genuinely intrastate transaction). Thus, if states wish to impose the excise tax on sellers in *intrastate* transactions—as all do—they must also collect the tax from sellers in *interstate* transactions—as none did. In this way, the "PACT Act '*automatically subjects*' delivery sellers to the laws of the forum

state.'" *Red Earth*, 657 F.3d at 144 (citing *Red Earth*, 728 F. Supp. 2d at 251) (emphasis added). As the government candidly admits in its opening brief, it is the will of Congress—not the choice of the states—that has imposed the state tax on delivery sellers. It is not optional for sellers to pre-pay the state tax, nor is it optional for states to collect the tax. This is coercion.

2. *The PACT Act's Commandeering of State Tax Officials Violates the Tenth Amendment*

The Act's commandeering of state officials cannot be justified by the Commerce Clause, which Congress purported to invoke in support of the PACT Act. The Commerce Clause "authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce*." *New York*, 505 U.S. at 166 (emphasis added). The power to regulate commerce does not include the power to rewrite state taxation law and commandeer state officials to implement the federally-preferred scheme. Congress must not "commandeer state governments into the service of federal regulatory purposes." *Id*. at 175. Congress cannot use state taxation officials as federal "puppets" to regulate the interstate tobacco trade by requiring them to implement new procedures to collect prepaid excise taxes from out-of-state sellers. *Printz*, 521 U.S. at 928.

The contours of a state's taxation system are integral to state sovereignty. "[I]t is upon taxation that the several States chiefly rely to obtain the means to

carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330 (2010) (quoting *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871). A state's choices about whom to tax and when those taxes should be paid are based on both policy and administrative preferences. For example, a rural state may wish to increase the willingness of delivery sellers to sell to its citizens because it is difficult for its citizens to reach traditional brick-and-mortar stores, and may therefore choose not to impose onerous excise-tax obligations on out-of-state sellers. Or a state may choose not to undertake the burden of collecting taxes from remote sellers before sales are even made, choosing instead to allow delivery sellers to bear the burden of collecting taxes from purchasers and then remitting them to the state. The PACT Act, however, purports to nullify the states' conscious policy choices.

By forcing states to collect excise taxes from delivery sellers before sales are made, the Act forces states to make an important and burdensome change to their internal taxation systems. States will have to create a mechanism for providing remote sellers "required stamps or other indicia that the excise tax has been paid," 15 U.S.C. § 376a(d)(1)(C), something that states previously have not done. As the government recognizes, states only allow in-state, large-scale licensed wholesalers

to obtain tax stamps. Gov't Br. 19, 36. This excludes out-of-state wholesalers and retailers, like the Seneca. And, because Congress has engrafted the pre-payment requirement onto state law, a state's entire tax collection apparatus will be triggered. States will have to monitor and audit remote sellers for compliance, just as they monitor and audit other businesses for compliance with other state taxes. States then must expend the resources of their law enforcement and judicial bodies to hold non-complying sellers accountable. In this way, the PACT Act upsets the "complex" procedures for "mass assessment and collection of state taxes," which are necessarily organized in accordance with "*state* procedures." *Levin*, 130 S. Ct. at 2330 n.2 (emphasis added). It thus violates the longstanding "policy of federal noninterference with state tax collection." *Id.*

To be sure, Congress has constitutional authority to impose a *federal* tobacco tax. If desired, such a federal tax could preempt state taxes entirely. Congress could even distribute the proceeds of uniform tobacco taxes to states on a pro rata basis. But Congress has not done that here. Congress instead has purported to expand state taxes. It has dictated that sellers must pre-pay *state* excise taxes, even if various states choose not to require prepayment or choose not to impose the tax on the seller at all. As a result of this requirement, states will be required to alter their own taxation laws and implement mechanisms to collect prepaid excise taxes from out-of-state sellers. This Congress may not do, either

with a federal tax or a federal directive, because Congress must not "commandeer state governments into the service of federal regulatory purposes." *New York*, 505 U.S. at 175; *accord Printz*, 521 U.S. at 926–30 (holding that federal government may not commandeer state officials to enforce background-check provisions of the Brady Act). Indeed, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162; *Printz*, 521 U.S. at 912 ("[S]tate legislatures are *not* subject to federal direction.")

Such commandeering is unconstitutional even if some states do not object to the federal directive. *Printz*, 521 U.S. at 928. It is hardly surprising that 40 states wish Congress could expand their taxing jurisdiction, and consequently do not mind being commandeered. Brief of New York *et al*. at 31–33. But it is at least as noteworthy that 10 states—representing nearly 27% of the U.S. population—declined to join the States' *amicus* brief, including Texas, Florida, and Virginia. In any event, it is the role of the courts to preserve our nation's federal structure, lest states surrender their sovereignty in the pursuit of greater tax revenue.

Finally, the PACT Act's requirements—like all commandeering schemes—obscure the line between federal and state power, and blur the lines of political accountability. *See New York*, 505 U.S. at 169. Voters do not know who is actually responsible for this "new, independent duty on the delivery seller" that

will drastically diminish the ability of residents to purchase tobacco for delivery. 826 F. Supp. 2d at 289. No doubt, Congress, like the government defendants here, will protest that it bears no responsibility for the new taxes sellers must pay, asserting that the Act merely requires payment of taxes imposed by a state. And, equally predictably, state politicians will point to the PACT Act and state that they had no choice under a federal law but to require pre-payment of state taxes on all tobacco sales. This lack of accountability is exacerbated where the tax is imposed on *nonresidents* who have no voice in the legislature of the taxing state. In contrast, a federal tobacco tax would clearly be attributable to Congress, just as state tobacco taxes, before the PACT Act, were attributable to states.[10]

Whether the PACT Act is a federally-mandated change in state substantive law, or a federally-mandated change in state methods of tax administration, the result is the same: the state is involuntarily commandeered to change its internal taxation regime in line with federal directives. This interference with, and commandeering of, the internal workings of state taxation regimes exceeds

[10] Predictably, this breakdown of accountability has already borne fruit. The record reveals that most states were—and remain—completely unprepared to implement the tax-collection provisions, making it impossible for a delivery seller to comply with the law. *See* App. 8-9, 27, 57–58.

Congress's enumerated powers and violates the reserved powers of the states under the Tenth Amendment.[11]

C. The PACT Act's Mailing Ban Violates the Equal Protection and Due Process Protections of the Fifth Amendment

Never before in the history of our nation has Congress banned the mailing of a consumer product that is lawful in all 50 states and is not dangerous to the mail or mail carriers. "The absence of precedent for [the legislation] is itself instructive," for "'[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (alteration in original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)). The district court failed to give the requisite "careful consideration" to the government's asserted justifications for the Act's unprecedented mailing ban. The ban brands *all* mail-order sellers as felons, even those who comply with the Act's other provisions requiring age verification and prepayment of state excise taxes. There can be no rational relationship between a total mailing ban and governmental interests that are fully addressed by other provisions punishable by felony convictions.

[11] Because the Act's taxation provisions are facially unconstitutional under the Tenth Amendment, there is no basis for carving out an exception for the City of New York, as requested in its amicus brief.

That Congress has "plenary" powers over the mail is only the beginning of the inquiry. *See Gordon v. Holder*, 826 F. Supp. 2d 279, 286–87 (D.D.C. 2011). No one disputes the *extent* of Congress's powers; only *how* it exercised those powers here. And there can be no dispute that Congress may not employ its plenary powers over the mail in a manner that violates constitutional guarantees of individual liberty. *See USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126 (1981) ("However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution."); *Tollett v. United States*, 485 F.2d 1087, 1088–91 & n.1 (8th Cir. 1973) (striking down under First Amendment a federal statute defining envelopes bearing visible defamatory material as nonmailable); *Hiett v. United States*, 415 F.2d 664, 665, 667 (5th Cir. 1969) (rejecting proposition that mailing power overrode limitations in Bill of Rights, and holding unconstitutional federal statute prohibiting use of mails to distribute information about divorces). Congress's power to define "mailable matter" is not exempt from constitutional restraints.

Historically, Congress has used its plenary powers over the mail to ban the mailing of items that are illegal in certain states,[12] and has likewise prohibited the

[12] *See Champion v. Ames*, 188 U.S. 321, 357 (1903) (upholding ban on shipment of lottery tickets because "Congress only supplemented the action of those states—perhaps all of them—which . . . prohibit . . . lotteries"). Similarly, alcohol was

mailing of products that are hazardous to mail carriers or might damage other mail, *see, e.g.*, 18 U.S.C. § 1715 (banning mailing of firearms); 18 U.S.C. § 1716 (banning mailing of "injurious articles," including poisons, certain animals, explosives, and other materials that could damage persons or property in transit). It has never banned the mailing of a consumer product that is lawful in all 50 states and is not hazardous to the mail or mail carriers.

The ban on mailing these legal consumer products is made even more extraordinary because Congress was fully aware that no other common carrier could serve as an alternate shipper. *See* 15 U.S.C. § 376a(e)(3)(B) (recognizing agreements not to ship tobacco products by other common carriers); 156 Cong. Rec. H1534 (daily ed. Mar. 17, 2010) (statement of Rep. Weiner) (stating that there was "only one common carrier that today still delivers tobacco through the mail—the United States Postal Service."). This unprecedented ban flies in the face of the longstanding tradition of a free and open postal service. *See Currier v. Henderson*, 190 F. Supp. 2d 1221, 1227–30 (W.D. Wash. 2002) (recognizing that the post office is a "basic and fundamental service" and that there is a fundamental right to receive mail), *aff'd sub nom. Currier v. Potter*, 379 F.3d 716 (9th Cir.

---

made nonmailable in 1909, when alcohol was illegal in many states. 35 Stat. 1131 (1909); James A. Tanford, *E-Commerce in Wine*, 3 J.L. Econ. & Pol'y 275, 285 (2006). Moreover, the alcohol ban is included in the statutory ban on mailing "injurious articles," suggesting Congress believed alcohol would be hazardous to the mails and to mail carriers, perhaps due to its flammable nature. *See* 18 U.S.C. § 1716.

2004). Given the "unusual character" of the PACT Act's mailing ban, the Court must give "careful consideration" to its constitutionality. *Romer*, 517 U.S. at 633.

Mr. Gordon does not suggest that Congress lacks authority to ban new categories of material that are neither illegal nor dangerous to mail carriers or the mail. *Gordon*, 826 F. Supp. 2d at 287. Rather, consistent with *Romer*, he simply urges that an unprecedented ban on a lawful, nonhazardous consumer good must be given "careful consideration" under the rational-basis test. Because it failed to recognize the unprecedented nature of the mailing ban here, the district court engaged in only the most cursory form of rational-basis review. 826 F. Supp. 2d at 287.

Under the rational basis test, the Court may uphold the ban only if "there is a rational relationship between [the ban] and some legitimate governmental purpose." *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 742 (D.C. Cir. 2011) (internal quotation marks omitted). An Act satisfies rational basis review only if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour v. City of Indianapolis*, No. 11-161, ---U.S.---, slip op. at 7 (June 4, 2012) (quoting inter alia *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). The same test

applies to both equal protection and due process challenges that do not implicate "fundamental rights." *Compare id. with Wash. Teachers' Union Local No. 6 v. Bd. of Educ.*, 109 F.3d 774, 781 (D.C. Cir. 1997) (due process "prevents . . . action that is legally irrational [in that] it is not sufficiently keyed to any legitimate state interests") (alteration in original). However, when judging an unprecedented legislative act, courts must also ensure that the act's "sheer breadth is [not] so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. If so, the unprecedented act "lacks a rational relationship to legitimate state interests." *Id.* In rubberstamping the ban, the district court failed to engage in this inquiry.

Congress claimed to have six specific purposes in enacting the PACT Act:

> (1) require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers;
>
> (2) create strong disincentives to illegal smuggling of tobacco products;
>
> (3) provide government enforcement officials with more effective enforcement tools to combat tobacco smuggling;
>
> (4) make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities;
>
> (5) increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco; and

> (6) prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales.

PACT Act § 1(c)(1)–(6).

The mailing ban fails the rational basis test because it is not rationally related to any of these stated purposes. As an initial matter, only the fourth, fifth and sixth stated purposes have anything to do with the mailing ban.[13] The question, then, is whether the mailing ban is rationally related to the purposes of (i) making it more difficult to "engage in and profit from illegal" sales of tobacco, (ii) preventing and reducing youth access to these products, or (iii) increasing collections of federal, state, and local excise taxes on cigarettes and smokeless tobacco. The answer is "no."

The mailing ban is far too sweeping to be rationally related to the three potentially applicable legislative purposes, especially because other provisions of the Act fully and directly address them. If Congress wanted to "make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their *illegal* activities," PACT Act § 1(c)(4)(emphasis added), Congress could have required compliance with existing laws and enhanced penalties for violations. Indeed, the Act contains numerous new provisions doing just that, including a

[13] The first purpose is aimed at the new taxing and state-law compliance requirements. The second and third purposes relate to the increased investigatory tools and enhanced penalties in the statute.

mandate that delivery sellers comply with various state, federal, and local laws concerning taxation and sales to minors. *E.g.*, 15 U.S.C. § 376a(a)(3). However, the statutory mailing ban as written destroys myriad *legal* sellers of tobacco products, such as Mr. Gordon, along with the illegal ones. The ATF itself has indicated that the Seneca—who comprise a plurality of the United States' delivery sellers—"*have largely eliminated the Nation's Territories as a source of contraband cigarette trafficking*." App. 63 (emphasis added). A complete ban that makes no distinction between criminals and law-abiding sellers is not rational. The Act's ban on mailing tobacco products is so over-inclusive and duplicative of other provisions that require legal compliance that it can only be explained by animus to delivery sellers at the behest of "special interests" such as Big Tobacco and NACSO. *See Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983) ("providing a benefit to special interests" is not a legitimate governmental purpose).

The second relevant purpose—reducing youth access—is likewise ill-served by the mailing ban *and* amply addressed by a separate provision of the PACT Act. The PACT Act expressly requires delivery sellers to confirm the ages of their buyers, and makes failure to do so a felony. 15 U.S.C. § 376a(b)(4); 15 U.S.C. § 377(a). For this reason, in *Red Earth*, the court specifically rejected the government's reliance on the youth-protection purpose as a basis for staying the

court's injunction. *Red Earth LLC v. United States*, 10-cv-530A (W.D.N.Y. Aug. 12, 2010) (Stay Order). Indeed, *the USPS itself* offers an age-verification service that requires an adult signature for delivery—a service that Mr. Gordon consistently uses. App. 24. A complete ban on mailing is not rationally related to any youth-protection purpose not already achieved by the Act. It destroys countless legitimate retailers who have rigorous age-verification procedures under the pretextual guise of addressing a youth-smoking problem directly and completely addressed by another part of the Act.

In addition, a recent study by an anti-smoking group revealed that only a "small portion" of underage tobacco sales occur online or through the mail, while most minors purchase cigarettes in-person at retail stores.[14] Courts may consider such "available evidence" to determine whether a law passes rational basis review. *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (holding that a ban on public-school attendance by illegal aliens did not advance a resource-preservation rationale because the "available evidence suggests that illegal aliens underutilize public

[14] *See* Tobacco Free Kids Org., *Where do Youth Smokers Get Their Cigarettes?*, http://www.tobaccofreekids.org/research/factsheets/pdf/0073.pdf. A 2003 survey found that, among 12 to 17 year olds, only 2.6 percent had purchased cigarettes over the internet, and only 2.9 percent had purchased cigarettes through the mail. *Id.* By contrast, the same study showed that 53 percent of children had directly purchased their own cigarettes, and 63.3 percent had given money to others to make direct purchases. Other studies had similar results. *See id.* These surveys reflect the reality that children do not risk parental discovery by ordering cigarettes *for delivery to their homes*, but instead seek out brick-and-mortar sellers such as convenience stores.

services, while contributing their labor to the local economy and tax money to the state fisc"). As in *Plyler*, the targeted class is at most a "small" part of the problem—a problem already addressed by the Act's age-verification provision—yet it bears a grossly disproportionate burden in the form of a total ban. In light of this evidence, gratuitously forcing mail-order sellers out of business—even those who use age verification—while leaving in-person retailers untouched bespeaks illegitimate government motives. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) ("[A] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.").

The district court found the ban's disparate treatment of mail-order sellers justifiable for a third reason: it will supposedly address the interstate flow of "untaxed" cigarettes, thereby increasing state tax revenues, forcing customers into "brick-and-mortar" outlets with higher prices, indirectly discouraging smoking (including underage smoking), and dampening cigarette trafficking. *Gordon*, 826 F. Supp. 2d at 287. This tax-enforcement justification for the mailing ban does not provide a rational basis in light of the Act's other provisions.

First, and most fundamentally, the PACT Act *already* requires delivery sellers to pay state taxes before shipping an order, and makes the failure to pay a

felony. 15 U.S.C. §§ 376a(a)(3), 376a(d), 377(a). This provision completely achieves the legislature's goal of preventing "untaxed" cigarettes from flowing in interstate commerce and eliminates the tax differential that enables trafficking. With the tax-enforcement objective directly addressed by these provisions, a sweeping ban on mailing all tobacco products—even ones for which taxes have been paid—does not bear a rational relationship to the Act's tax-enforcement aims.

Second, the government's tax-enforcement rationale is limitless. The government claims the ability to ban interstate mailing of a commercial item because buyers ordinarily fail to pay the taxes they owe under state law. If the government can ban the mailing of cigarettes on this basis, there is no reason the government could not also ban shipment of *any item purchased on the Internet*, since buyers notoriously fail to remit applicable state sales taxes on Internet purchases. *See, e.g.*, Editorial, *Yes, You Owe That Tax*, N.Y. TIMES, Nov. 27, 2009, at A38 (noting that "the buyer is supposed to remit [taxes on Internet purchases] to the state," but "they are virtually never paid"). It is unfathomable that the Constitution would permit this level of interference with economic freedom in the name of preventing the flow of "untaxed" Internet sales, particularly when the less drastic option of merely requiring payment of taxes is available in some form. Indeed, the desire to increase tax revenue, by shifting

economic value from one private business to another, is not a legitimate governmental interest at all. *Kelo*, 545 U.S. at 491.

In the end, the PACT Act's mailing ban is nothing but "simple economic protectionism," which is subject to a "virtually *per se* rule of invalidity." *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978). Congress's own findings disclose its protectionist animus. Congress labels *all* "Internet and other remote sellers" as criminals, by contrasting them with "law-abiding tobacco retailers"—that is, those who sell in-person—who are left untouched by the law.[15] Thus, Congress impermissibly chose to "provid[e] a benefit to special interests," *Energy Reserves Group*, 459 U.S. at 412, namely Big Tobacco and NACSO members. App. 19, 126–27, 140. These powerful interest groups made no secret of their support of the PACT Act, and their fierce lobbying efforts are spectacularly well funded, in sharp contrast to those of the Seneca.[16] Congress was well aware, not only that these powerful interests would be unaffected by the mailing ban, H.R. Rep. No. 111-117, at 23 (2009) ("[M]ost companies that ship tobacco products . . . rarely use the Postal Service to distribute their products"), but also that imposing the ban would

[15] Congress "found" that the Act will "require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with the same laws that apply to law-abiding tobacco retailers." PACT Act § 1(c)(1).

[16] In 2009 alone, the tobacco industry spent nearly $25 million on lobbying. Center for Responsive Politics, Lobbying: Tobacco, http://www.opensecrets.org/lobby/indusclient.php?id=A02&year=2009. NACSO spent $3,011,000. *Id*. at http://www.opensecrets.org/lobby/clientsum.php?id=D000054405&year=2009.

shut down this industry's main competition—remote delivery sellers such as Mr. Gordon. 156 Cong. Rec. H1534 (daily ed. Mar. 17, 2010) (statement of Rep. Weiner) (noting that the mailing ban would make it "very, very difficult, if not impossible, for Internet tobacco sales to continue"). And NACSO freely admits that the mailing ban's purpose was to "prevent legitimate cigarette retailers—like [NACSO's] members—from losing billions of dollars in sales to companies like Gordon's." Br. of NACSO, *Gordon v. Holder*, No. 10-5227, at 18 (Sept. 21, 2010).

The Supreme Court "ha[s] repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (collecting cases and invalidating under rational-basis review a state law requiring sellers of caskets to attend mortician school). Nor can Congress hide behind "pretextual" legislative purposes in an effort to serve these special interests. *Kelo*, 545 U.S. at 491. The mailing ban impermissibly does both.

The mailing ban is not rationally related to any of Congress's stated purposes. To the contrary, "[t]he relationship of the classification to its goal is . . . so attenuated as to render the distinction arbitrary or irrational." *Armour*, slip op. at 7 (quoting *Nordlinger*, 505 U.S. at 11). The Act bans the sale of a lawful product through the mail and arbitrarily forces out of business a class of small-

business owners. The real purpose of the mailing ban was not to increase tax collections or to protect children—those objectives are directly addressed by other sections of the Act—but rather to reward the lobbying efforts of the tobacco industry. "This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review." *Craigmiles*, 312 F.3d at 229. This Court should therefore hold that the mailing ban likely violates due process and equal protection, in line with long-standing precedents striking down statutes under rational-basis review that "discriminated against out-of-state commerce." *Armour*, slip op. at 6–7, 12 (citing *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)).

II. ENFORCEMENT OF THE PACT ACT WOULD IRREPARABLY HARM MR. GORDON

Mr. Gordon has established considerable irreparable injury, including deprivation of his constitutional rights and the loss of his business. Therefore, this factor should weigh strongly in support of injunctive relief. *See Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 244 (W.D.N.Y. 2010) (holding that "plaintiffs have easily satisfied their burden of showing a threat of irreparable injury if injunctive relief is not granted"), *aff'd*, 657 F.3d 138 (2d Cir. 2011).

The government utterly ignores the rule that "the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal

quotation marks omitted); *accord Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998). Thus, as the district court held, because Mr. Gordon has shown a substantial likelihood of success on his constitutional claims, he does not need to show further injury to meet the "irreparable harm" factor. 826 F. Supp. 2d at 296 (holding that Mr. Gordon's "potential deprivation of constitutional rights constitutes irreparable harm").

Moreover, it is well established that an irreparable injury exists "where the loss threatens the very existence of the movant's business." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The government claims that Mr. Gordon's business losses have not stemmed from the PACT Act's taxation provisions, but from the mailing ban. Gov't Br. 36–37. But the fact that Mr. Gordon has suffered devastating losses even while the taxation provisions are enjoined hardly means that those provisions would not also irreparably harm his business if they were allowed to take effect. Indeed, while Mr. Gordon has been able to keep the proverbial lights on at his business due to the *Red Earth* injunction, enforcement of the PACT Act's taxation provisions would completely destroy his business. App. 56, 138. Mr. Gordon faces the incredible burden of having to continuously monitor and comply with at least 550 newly applicable state and local taxing schemes, regardless of minimum contacts with a given jurisdiction. *See Red Earth*, 728 F. Supp. 2d at 253. Mr. Gordon has attempted to

ascertain how he could prepay taxes in remote jurisdictions, but most states have failed to create any realistic way for Mr. Gordon to prepay such taxes or affix excise stamps prior to sale. App. 57–58. Even if they did, the costs of complying with 550 state and local tax-stamping requirements, and monitoring the laws of thousands of other jurisdictions, would create impossible compliance burdens. App. 58.[17] Thus, the taxation provisions of the PACT Act will independently prevent him from continuing his business, even if he finds an alternative delivery method. Should the PACT Act's tax provisions cease to be enjoined, Mr. Gordon will suffer irreparable harm in the loss of his business.

This evidence is undisputed. The government instead asserts that, should the PACT Act's provisions take effect, Mr. Gordon need only obtain his inventory from existing out-of-state wholesalers in order to continue his business. Gov't Br. 19, 36. But there is no evidence that such multi-state wholesalers exist in New York or that such an arrangement would be possible. Instead, the undisputed record evidence shows that Mr. Gordon and the Seneca Free Trade Association have explored these options and have concluded that these supposed alternatives are not feasible. App. 138–39; *see Red Earth LLC v. United States*, 657 F.3d 138,

[17] The government declares that Mr. Gordon has no right to sell "untaxed cigarettes across state lines" and asserts that complying with the laws of hundreds of jurisdictions is standard fare for interstate businesses. Gov't Br. 36, 37. At most, those unsupported assertions go to the merits, not to whether Mr. Gordon will be irreparably harmed by having to comply with the PACT Act's unprecedented imposition of state and local taxes upon his business.

146 (2d Cir. 2011) (affirming injunction despite the government's claim that plaintiffs could "simpl[y] rel[y] on state-licensed stamping agents to apply tax stamps to the product").

There is no serious dispute that the *mailing ban* is presently destroying Mr. Gordon's business. Ninety-five percent of Mr. Gordon's sales are to out-of-state customers, and before enactment of the PACT Act, Mr. Gordon's *only* option for shipping his products to his out-of-state customers was the U.S. mail. Now, Mr. Gordon has no economically feasible shipping options, and for that reason alone, he has already lost 90–95 percent of his business and is operating at a loss. App. 56. This loss of customers, money and employees threatens the very existence of Mr. Gordon's business.

III. ENJOINING ENFORCEMENT OF THE PACT ACT WOULD NOT SUBSTANTIALLY INJURE OTHER PARTIES

The district court did not abuse its discretion in holding that "[t]he possible [constitutional] injury to Gordon from enforcement of the provisions . . . outweighs the possible injury to defendants from enjoining enforcement until the merits of Gordon's claim can be determined." 826 F. Supp. 2d at 297. The defendants in this case are the DOJ, the ATF, and the USPS. The only impact an injunction would have on the DOJ and the ATF is that they would not have to *start* enforcing the PACT Act. In other words, the DOJ and the ATF would essentially operate as they have been operating for the last several years, which is no injury at all. As for

the states, to the extent they do not collect tax revenue, they will not lose the right to collect that revenue at the conclusion of this litigation. As for the USPS, because Mr. Gordon is simply seeking to preserve the status quo as it existed prior to June 29, 2010, the USPS can simply continue to operate as it has for decades by accepting tobacco products for shipment (garnering much-needed revenue).

The government raises the alleged harms to children, states, other businesses, and the public that would result if the Act's unconstitutional provisions are enjoined. Gov't Br. 37–39. These issues should be considered on the public-interest prong, not the balance-of-harms prong. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) (noting that court "must consider the effect *on each party* of the granting or withholding of the requested relief") (quotation omitted). Regardless, a preliminary injunction would not undermine the purported goals of the PACT Act, many of which are served by multiple provisions that are not being challenged, such as age verification, reporting, and registration requirements.[18] More fundamentally, the government cites no cases where harm to congressional

[18] The *Red Earth* court's denial of the defendants' request for a stay pending appeal, which was affirmed by the Second Circuit, is instructive. *Red Earth LLC v. United States*, 10-cv-530A, slip op. at 5-6 (W.D.N.Y. Aug. 12, 2010) (holding that "[i]f it is later determined that plaintiffs are required to comply with the state and local taxes of a particular jurisdiction, plaintiffs will need to pay the taxes owed at that point" and rejecting claimed harms to minors and public given that remainder of PACT Act is not enjoined).

goals was held to outweigh the deprivation of plaintiff's constitutional rights. And that cannot be the law.

IV. THE PUBLIC INTEREST SUPPORTS ENJOINING THE PACT ACT

The district court did not abuse its discretion when it held that Congress's asserted public-health and tax-collection goals should temporarily yield to the public interest in enjoining unconstitutional laws and avoiding the destruction of the Seneca Nation's economy. 826 F. Supp. 2d at 297 ("[E]nforcement of a potentially unconstitutional law that would also have severe economic effects is not in the public interest.").

The government fails to recognize that a preliminary injunction would serve the public's paramount interest in avoiding enforcement of unconstitutional laws. *See O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). That interest is especially important here, where "Congressional expansion of state and local taxing schemes—as mandated under the PACT Act—is unprecedented." *Red Earth*, 728 F. Supp. 2d. at 259–60 (holding that "the public interest favors staying enforcement of a sweeping and unprecedented congressional mandate pending opportunity by this Court and others to fully consider the positions of all parties outside of the hurried context of a preliminary injunction motion"). Unsurprisingly, the government does not cite a single case where a plaintiff

demonstrated likely success on a constitutional claim and a court nonetheless found that the public interest favored allowing the unconstitutional law to take effect.

Additionally, the public interest favors an injunction because of the "severe economic consequence[s] likely to befall [] members of the Western New York community" as a result of the PACT ACT. *Red Earth*, 728 F. Supp. 2d at 259. Most remote tobacco retailers are likely to shut down their businesses as a result of the PACT Act. *Id.* As a result, the Seneca Nation—already struggling—has been devastated by the loss of its primary source of private-sector employment. App. 67, 139. Sixty of just over 100 licensed cigarettes retailers have closed their doors since the PACT Act's mailing ban came into effect, with the remaining retailers at risk of doing the same. App. 60–61, 64. The PACT Act, if implemented in full, will eventually result in the loss of more than 3,000 jobs on the Seneca Territories. App. 20. This would devastate the entire Seneca economy and disrupt essential government services. App. 64–65.

Rather than confronting these undisputed facts, the government suggests that the district court was bound, *as a matter of law*, to defer to Congress's "compelling" determination of the public interest. Gov't Br. 16, 36–40. But if this were true, courts would never be able to enjoin an act of Congress. *See O'Donnell*, 963 F.2d at 429 (enjoining Minority Contracting Act and holding that "issuance of

a preliminary injunction would serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications"). None of the government's cases undermine this Court's precedent holding that enforcing unconstitutional laws is not in the public interest. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496, 498–99 (2001) (reversing partial injunction of Controlled Substances Act in *statutory* challenge where lower court held that declining to enforce law against those with a "medical necessity" defense was in the public interest); *Able v. United States*, 44 F.3d 128, 130–32 (2d Cir. 1995) (holding that plaintiff in a constitutional challenge must show a substantial "likelihood of success on the merits").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of a preliminary injunction on Mr. Gordon's claim that the PACT Act's taxation provisions violate the Due Process Clause. In addition, the Court should reverse the district court's denial of a preliminary injunction on (a) Mr. Gordon's claim that the PACT Act's taxation provisions facially violate the Tenth Amendment and exceed Congress's enumerated powers and (b) Mr. Gordon's claim that the PACT Act's ban on mailing tobacco products violates the Constitution's guarantees of due process and equal protection.

Respectfully submitted,

/s/ Aaron M. Streett
Aaron M. Streett
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1855

R. Stan Mortenson
Sara E. Kropf
Julie Marie Blake
Vernon A.A. Cassin III
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700

Counsel for Appellee/Cross-Appellant
Robert Gordon

Dated: July 5, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 16,085 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman Font.

Dated: July 5, 2012

/s/ Aaron M. Streett

Aaron M. Streett
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1855
aaron.streett@bakerbotts.com

Counsel for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2012, I filed and served the foregoing Gordon's Principal Brief, in addition to the Statutory Addendum, by electronic service through the CM/ECF system to all counsel of record.

In addition, pursuant to D.C. Circuit Rule 31(b) and this Court's Administrative Order Regarding Electronic Case Filing, I will cause to be mailed to the Court eight paper copies of this brief within two business days of this filing.

/s/ Aaron M. Streett

Aaron M. Streett
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
(713) 229-1855
aaron.streett@bakerbotts.com

Counsel for Appellee/Cross-Appellant

ADDENDUM

ADDENDUM CONTENTS

Page

Prevent All Cigarette Trafficking Act Provisions

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 chapter, 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 chapter 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 chapter.

(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 376a(a)(3) of this title, through its chief law enforcement officer, 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.

(B) Sovereign immunity

Nothing in this chapter 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 chapter, 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 title 26 (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 chapter by any person other than a State, local, or tribal government.

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.