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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

**RED EARTH LLC d/b/a  
SENECA SMOKESHOP and AARON J.  
PIERCE,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA, et al.,**

**Defendants.**

**SENECA FREE TRADE ASSOCIATION,**

**Plaintiff,**

**v.**

**ERIC H. HOLDER, et al.,**

**Defendants.**

**Civil Action No. 10-CV-530A  
Civil Action No. 10-CV-550**

**Hon. Richard J. Arcara**

**BRIEF OF AMICI CURIAE NATIONAL  
ASSOCIATION OF CONVENIENCE  
STORES AND NEW YORK  
ASSOCIATION OF CONVENIENCE  
STORES IN OPPOSITION TO  
MOTIONS FOR PRELIMINARY  
INJUNCTIVE RELIEF**

*Amici curiae* National Association of Convenience Stores (“NACS”) and New York Association of Convenience Stores (“NYACS”) — both associations of retail stores that sell taxed cigarettes to adult consumers in compliance with all applicable federal, State, and local tax

laws — respectfully submit this brief in opposition to Plaintiffs’ motion for a preliminary injunction.

Plaintiffs’ requests for extraordinary injunctive relief rest on four fundamental — yet incorrect — assertions. *First*, their core claim in this litigation is that they have a constitutionally-protected right to sell cigarettes over the Internet without paying the required state and local excise taxes, thus following a “business model” that affords them a “competitive advantage over traditional brick and mortar retail establishments . . . that do not engage in mail, telephone, or Internet sales” and that pay all applicable taxes. Affidavit of Aaron J. Pierce ¶¶ 5, 10-13, 18-19. But the Supreme Court has held on five occasions that tribal retailers have no right to “market an exemption from state taxation” to non-tribal members. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980); *see* Argument § B(4)(b), *below*. Nor is there any basis to claim that the due process or any other provision of the Constitution prevents Congress from imposing on Internet cigarette sellers the simple obligation to pay State and local taxes in the jurisdictions into which they market, sell, and deliver cigarettes.

*Second*, Plaintiffs claim Congress lacks the power to regulate interstate Internet sales of untaxed cigarettes. To the contrary, Congress’ ability to regulate in this area is *plenary*. As the Supreme Court has explained, “[w]hen Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.” *Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve Sys.*, 472 U.S. 159, 174 (1985). Federal authority over interstate commerce is easily broad enough to support a requirement that Internet sellers trading in interstate commerce must comply with the laws of the States into which they sell their products.

*Third*, Plaintiffs quarrel with the policy judgments Congress made in enacting the Act, such as creating an exception to the prohibition on mailing cigarettes through the U.S. Postal Service for Alaska and Hawaii — the only two states that are non-contiguous with the other forty-eight, and whose geographical considerations create special dependencies on the U.S. Postal Service for intra-state mail. Equal protection guarantees do not permit “the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). This Court’s review is limited to ensuring that there is some *conceivable* rational basis for the legislative choices Congress made, and that test is easily satisfied here. As detailed in Argument § B(5)(a), *below*, Congress has a long history of creating exceptions to nationwide standards and requirements to take account of the special circumstances and challenges facing the residents of Alaska and Hawaii; literally dozens of such statutory exceptions are contained in the *United States Code*; and the Supreme Court and lower federal courts have *repeatedly* and *uniformly* upheld the constitutionality of such exceptions for these States.

*Finally*, Plaintiffs assert that this Court has “wide discretion” to enjoin a duly enacted Act of Congress pending a final decision on the constitutional merits. Red Earth Mem. at 2. Just the opposite is true. The PACT Act, “like all Acts of Congress, is presumptively constitutional [and] ‘should remain in effect pending a final decision on the merits.’” *Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1806, 1807 (1993) (Rehnquist, C.J.). Courts “will not exercise their power to enjoin the enforcement of an act of Congress except under the most imperative or exigent circumstances.” *Katzenbach v. McClung*, 85 S. Ct. 6, 7 (1964) (Black, J.); *see also Walters v. National Ass’n of Radiation Survivors*, 468 U.S. 1323 (1984) (Rehnquist, J.) (“The presumption

of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in ... balancing [the] hardships” involved in granting or denying preliminary injunctive relief).

Moreover, the balance of equities weighs overwhelmingly in favor of denying injunctive relief. Plaintiffs’ interests in continuing to sell enormous volumes of untaxed cigarettes into the States and localities all over the United States has to be weighed against the *harms* that these practices cause, harms that *Congress* concluded after many years of investigation and deliberation are real and substantial. Issuing an injunction to prevent enforcement of the PACT Act thus will allow the plaintiffs to continue the sale over the Internet of untaxed cigarettes, thereby indefinitely depriving State and local governments of enormous revenues they lose to this form of contraband, perpetuate weak age verification for cigarette sales, and deprive legitimate retailers of the business they lose every day to Internet sites that avoid State and local laws.

## I. INTRODUCTION

**The PACT Act.** The Prevent All Cigarette Trafficking (“PACT”) Act, P.L. 111-154, 124 Stat. 1087 (2010), which became law on March 31, 2010 and became effective on June 29, 2010, was designed by Congress to end tax-evading Internet, mail order, and other remote sales of cigarettes and smokeless tobacco products by *all* sellers (regardless of whether they are Native American or not). The Act features two major components. *First*, it makes cigarettes and smokeless tobacco products generally “non-mailable” to consumers through the U.S. Postal Service. *Second*, it amends the pre-existing Jenkins Act<sup>1</sup> in order to impose heightened

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<sup>1</sup> 15 U.S.C. §§ 375-378. Since 1949, the Jenkins Act has required all delivery sellers of cigarettes to report those sales to the purchaser’s home state’s taxing authority so that the home state is aware of these transactions and can ensure that all applicable taxes are collected. *Id.* The Act was adopted in order to assist States in combating what was already 61 years ago “[t]he large

registration, reporting, and other regulatory requirements on those who engage in Internet and other delivery sales of cigarettes. By its express terms, the PACT Act was enacted by Congress to prevent the sale of untaxed cigarettes; to prevent sales over the Internet of cigarettes to minors; and to remove the unfair competitive advantage that illegal Internet cigarette sellers have over tobacco businesses that comply with applicable tax, reporting, and other laws. *See* PACT Act, § 1(c).

**Plaintiffs.** Plaintiffs are Internet cigarette sellers located on Seneca Nation reservation lands in western New York State who do not want to comply with the PACT Act or any state laws taxing and regulating their sale of cigarettes to *non-tribal members* in New York or anywhere else.<sup>2</sup> *By their own allegation*, their central “business model” is to sell untaxed cigarettes into States for the purpose of evading those States’ taxes. They have built a business unlawfully<sup>3</sup> selling untaxed, unreported cigarettes over the Internet precisely because it gives them a competitive price advantage over retailers such as *Amici* that sell taxed cigarettes — a

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and increasing loss of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in interstate commerce to consumers.” S. Rep. No. 84-1147, at 1 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2883, 2883.

<sup>2</sup> The *Red Earth* Plaintiffs claim that, because they operate from Seneca tribal lands, they “have no ‘physical presence’ in New York and do not otherwise occupy any physical property in the State, and none of their employees works in the State. ... [P]laintiffs’ only contact with the residents of any State is by mail, wire, or mail [sic].” *Red Earth Cpt.* ¶ 31. That is not the law. The Supreme Court has repeatedly made clear that a tribal reservation and its residents are “considered part of the territory of the State” in which they are located, and are “subject to its jurisdiction except as forbidden by federal law.” *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); *see also United States v. Montour*, 2010 WL 2293143, at \*\* 5-6 (W.D. Wash. May 3, 2010) (tribal trust lands within State are not “separate” from, but are “part of” the State).

<sup>3</sup> Internet cigarette sellers have long ignored the federal Jenkins Act. As the GAO Director of Homeland Security and Justice advised Congress in 2003: “most Internet vendors do not comply with the Jenkins Act or notify customers of their responsibilities under the act.” *Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary of the United States House of Representatives on H.R. 1839*, at 6 (May 1, 2003) (“*Judiciary Hearings*”) (Exhibit A). Internet cigarette vendors have also ignored state laws, such as N.Y. Public Health Law § 1399-ll, which prohibits Internet cigarette sellers from delivering cigarettes to New York consumers.

practice repeatedly condemned by courts and law enforcement agencies. *See, e.g.*, Red Earth Complaint, ¶¶ 28-29 (“Shipment of tax-free cigarettes by plaintiffs is an integral aspect of plaintiffs’ business model, and allows plaintiffs to realize cost savings that result, in part, in the lower prices plaintiffs’ customers pay for tobacco products”).<sup>4</sup> Plaintiffs object to the PACT Act because it prevents them from continuing to ignore the law and frustrates their ability to capitalize on the competitive advantage they have enjoyed for years by illegally selling untaxed cigarettes. Accordingly, they challenge those aspects of the PACT Act that enhance and strengthen existing laws requiring them and all other Internet cigarette sellers to comply with reporting and taxation laws.

**Amici.** Founded in 1961, *Amicus* NACS is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. The convenience store industry in the United States, with nearly 145,000 stores across the country, posted \$511 billion in total sales in 2009, with \$182 billion in non-motor fuel sales. Tobacco products accounted for approximately 35% of non-motor fuel sales.

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<sup>4</sup> *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (Native American tribes and their members enjoy no right to “market an exemption from state taxation” to non-tribal members). Indeed, the Second Circuit and district courts within this Circuit have repeatedly held that Internet websites’ claims that “cigarettes are ‘tax free,’ that their customers do not have to pay taxes, and/or that defendants did not have to file Jenkins Act” reports are “untrue,” materially deceptive, and “actual and intentional misrepresentation[s].” *City of New York v. Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 456 (2d Cir. 2008), *reversed on other grounds sub nom. Hemi Group LLC v. City of New York*, 130 S.Ct. 983 (2010); *see also Gristede’s Foods, Inc. v. Unkechaug Nation*, 532 F. Supp. 2d 439, 449-50 (E.D.N.Y. 2007); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 553, 563 (S.D.N.Y. 2005). *See also, e.g.*, New York City’s Finance Dep’t Website notice at [www.nyc.gov/html/dof/html/services/services\\_fraud\\_cigarettes.shtml](http://www.nyc.gov/html/dof/html/services/services_fraud_cigarettes.shtml): “A vendor who promises ‘tax-free cigarettes’ is lying. There is no such thing as ‘tax-free cigarettes’ in New York. And when a vendor is caught, the purchasers are too. [Advertisements for ‘tax-free cigarettes’] are misleading the public and encouraging tax fraud . . . .”

Founded in 1986, *Amicus* NYACS is a private, not-for-profit trade association dedicated to unifying, serving, and representing the convenience store industry of New York State. NYACS' retail membership consists of 250 companies that operate convenience stores, ranging in size from one store to over 300. Collectively, its retail members operate more than 1,500 store locations from Hamburg, Erie County to Hempstead, Long Island that serve nearly 1.3 million customers per day. Almost every major convenience store chain in the State is a NYACS member. Yet more than two-thirds of NYACS member retail companies are single-store operators. Tobacco products constitute a significant portion of NYACS members' sales and NYACS members have a price disadvantage of more than \$50 per carton simply due to the state and local taxes that NYACS members lawfully pay on their cigarette sales which Internet sellers like Plaintiffs do not pay.

As businesses that comply with applicable cigarette taxation, age verification and other laws, NACS and NYACS members have a strong interest in this litigation. They are the *very businesses* that Plaintiffs unfairly and admittedly target by selling untaxed cigarettes, and Congress expressly recognized that they are victims of this unfair competition. *See* PACT Act, §1(b)(6) (finding that “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”).

## **II. BACKGROUND**

*Amici* believe that when considering Congress's enactment of the PACT Act, the Court may find it helpful to understand the manner and context in which cigarettes are legitimately sold, the rise of illegal “tax free” Internet sales, and the problems that are associated with illegal Internet cigarette sales.

### **A. The Legitimate Distribution of Taxed Cigarettes.**

Cigarettes are one of the most heavily regulated — and taxed — consumer products. Brick and mortar retailers like *Amici* purchase cigarettes from wholesalers that have themselves purchased the cigarettes from manufacturers. Certain wholesalers are licensed by the States to place excise tax stamps on cigarette packages prior to selling them to other wholesalers and retailers, and these wholesaler stamping agents directly remit the excise tax amounts to State tax authorities when they purchase tax stamps. Retailers then sell stamped (and therefore taxed) products to consumers, and further charge and remit applicable sales taxes.

Internet cigarette sellers such as Plaintiffs enjoy an enormous advantage over legitimate retailers precisely because they can avoid the cost of doing business in environments that impose high taxes on the product. Excise taxes on cigarettes have risen dramatically over the past ten years, so that the tax burden on cigarettes is now tremendous: currently, a single pack of cigarettes sold legitimately at a brick and mortar store in New York City costs a consumer over \$11.00. Nicholas Confessore, *Cigarette Tax Increased to Keep State Running*, New York Times, June 21, 2010 available at <http://www.nytimes.com/2010/06/22/nyregion/22budget.html>. Almost *half* of that \$11.00 price is attributable to State and local taxes alone. N.Y. Tax Law § 471(1) (excise tax is \$4.35 per pack); New York City Adm. Code, Title 11, ch.13, § 11-1302 (city excise tax is additional \$1.50 per pack, for a total state and local excise tax of \$5.85 per pack). Excise tax rates vary widely across the country, ranging from a low of 17 cents in Missouri to a high of \$4.35 in New York State. Mo. Rev. Stat. § 149.015(1) and (4).; N.Y. Tax Law § 471

## **B. Internet Sales of Untaxed Cigarettes**

The rising tax burden on cigarettes created a black market in untaxed cigarettes as consumers sought ways to buy less expensive cigarettes.<sup>5</sup> As described in great detail in a 2002 GAO Report to Congress, the Internet rapidly became the principal distribution mechanism for these untaxed black market cigarettes.<sup>6</sup> With names such as “taxfreecigarettes.com” and “notaxsmokes.com” and unfounded claims that Native American or foreign status enjoyed a tax exemption that could be passed along to the purchaser, hundreds of websites began to acquire untaxed or under-taxed cigarettes and sell them direct to consumers over the Internet and principally by shipping them through the United States mail. (*GAO Internet Cigarette Sales Report*, at 29-51).

These websites varied in provenance: some were domestic and others were foreign, and among the domestic websites, some were owned and operated by Native Americans and others were not. And some businesses operated as mail order or telephone/fax order businesses, but accomplished the same goal of delivering untaxed cigarettes to consumers. The federal Jenkins Act, as it existed for more than sixty years prior to the PACT Act’s amendments, required all such remote sellers of cigarettes (including Native American vendors selling from reservation lands) to report out-of-state sales of cigarettes to the taxing authority of the purchaser’s State, in order that the purchaser’s State could take appropriate tax collection and enforcement action

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<sup>5</sup> “The incentive to profit by evading payment of taxes rises with each tax rate hike imposed by federal, state and local governments.” U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Bureau of Alcohol, Tobacco, Firearms and Explosives’ Efforts to Prevent the Diversion of Tobacco,” page ii (Sept. 2009) (Exhibit B).

<sup>6</sup> See, e.g., GAO Report to Congress, GAO-02-743 (2002) (“*GAO Internet Cigarette Sales Report*”) (2002) (Exhibit C).

against the purchaser.<sup>7</sup> But before it was amended by the PACT Act, the Jenkins Act was a relatively weak federal law, one that had not been revised since well before the rise of the Internet and other forms of remote sales and that included only relatively mild penalties. The Jenkins Act, in fact, simply required reports to be filed with the States in which cigarettes were shipped, and deemed failure to do so a misdemeanor, not a felony. Not surprisingly, compliance with Jenkins Act reporting requirements has historically been sparse at best, and enforcement even less so. As a result, virtually all cigarette websites flouted the Jenkins Act and unabashedly sold untaxed cigarettes.<sup>8</sup>

For example, prior to the effective date of the PACT Act, many Internet cigarette businesses located on the Seneca reservation boasted that they sold “*Tax Free*” premium cigarettes and that they would not comply with the Jenkins Act’s reporting requirements. See the website examples submitted as Appendix A to this Memorandum. As explained in Argument § I (B)(4)(b) *below*, the claim that sales to non-tribal members are legitimately tax free, or that reservation sellers are exempt from the Jenkins Act, is simply incorrect. At most, Native American sellers may sell untaxed product only to fellow members of their tribe and only if both the sale and consumption of the cigarettes take place on the tribe’s reservation.<sup>9</sup>

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<sup>7</sup> See generally *United States v Howe*, 591 F.2d 454, 454 (8<sup>th</sup> Cir. 1979); ATF Industry Circular No. 99-2 (June 16, 1999) (“Sales or shipments of cigarettes from Native American Reservations are not exempt from the requirements of the Contraband Cigarette Trafficking Act and the Jenkins Act.”); *GAO Internet Cigarette Sales Report*, at 18 (concluding that “nothing in the Jenkins Act or its legislative history implies that cigarette sales for personal use, or Native American cigarette sales, are exempt” from having to comply with reporting obligations).

<sup>8</sup> *GAO Internet Cigarette Sales Report*, at 16 *et seq.*

<sup>9</sup> See *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976); *Golden Feather Smoke Shop*, 2009 WL 2612345, at \*10 (“cigarettes to be consumed on the reservation by enrolled tribal members are tax-exempt and need not bear stamps”; all other reservation sales are subject to state taxation and stamping requirements).

The problem has not been limited, however, to Native American-owned websites. Non-Native American websites have similarly marketed their purported untaxed cigarettes. 2002 GAO Report at 27-51 (listing over two hundred domestic, foreign and Native American websites); *see also, e.g.*, <http://savontobacco.com/> (offering “Cheap Tax-Free Cigarettes and NO Purchase Reporting”); <http://www.alwaysfreecigarettes.com/> (“Here you get TAX free American cigarettes for the best prices”); <https://www.sovran-solutions-online.com/> (offering “low-cost tax exempt cigarettes & tobacco products online! Without the risk of being reported to ANY Government Agency!”); <http://get-cheap-cigarettes.com> (“We do not report any sales activity to any State taxing authority”); [www.site4smokers.com](http://www.site4smokers.com) (“[W]e do not provide customer information to governments or authorities”).

Consumers’ ability to obtain untaxed black market cigarettes — at up to half the cost of legitimate cigarettes — led to a rapid expansion in the Internet marketplace,<sup>10</sup> and by 2005 there were at least 500 cigarette-selling websites. PACT Act §1(b)(9). As a result, State and local governments began to lose billions of dollars in tax revenues.<sup>11</sup> *See* PACT Act § 1(b)(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”); 2002 GAO Report at 1 (citing studies that annual State tax losses could be as high as \$1.4 billion). As the National Center for Tobacco-Free Kids testified before Congress, “Tax evasion via Internet sales of tobacco products

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<sup>10</sup> One study estimated that losses in state tax revenue as a result of cigarette tax evasion (including Internet sales) increased from less than \$170 million in 1990 to more than \$550 million by 2000. *See, e.g.* K. Davis, M. Farrelly, Q. Li, and A. Hyland, *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, at 3 (March, 2006) (prepared for the New York Department of Health and available at [http://www.rti.org/pubs/8742\\_Excise\\_Taxes\\_FR\\_5-03.pdf](http://www.rti.org/pubs/8742_Excise_Taxes_FR_5-03.pdf) (“*Cigarette Purchasing Patterns*”).

<sup>11</sup> *Id.* at 11-12.

is rampant. Internet tobacco prices are much lower than those in regular bricks-and-mortar retail outlets because Internet prices almost never include the taxes charged by retail stores. These low prices make Internet tobacco products attractive to both adult and underage smokers, and help to boost overall smoking levels." *Judiciary Hearings*, at 30.

Moreover, evidence began to emerge that Internet cigarette businesses' weak age verification practices were resulting in cigarettes being sold to minors over the Internet. *See, e.g.*, H.R. Report 110-147 (May 1, 2008) (Exhibit D) (testimony of Matthew L. Myers, President, Campaign for Tobacco-Free Kids at pp. 50, *et seq.*) ("The vast majority of Internet tobacco product sellers do not do any age or ID verification. A New York study found that in 2004 and 2005, more than 5 percent of the ninth graders had bought cigarettes online"); *see also* K. Ribisli, A. Kim & R. Williams, *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 96 *Am. J. Public Health* (2001) ("most Internet cigarette vendors use inadequate procedures for age verification").<sup>12</sup>

And, as *Amici* know all too well and as described more fully below, law-abiding retailers and other cigarette businesses began to lose significant amounts of business to these websites which, by virtue of their tax avoidance schemes, could sell cigarettes at an unnaturally (and unlawfully) low price.

### **C. Congressional Action to Address the Problem of Internet Cigarette Sales**

Faced with this evidence, Congress carefully investigated the issue of illegal untaxed Internet sales. In considering the nature and magnitude of the problem, Congress over the course

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<sup>12</sup> *See also* the Campaign for Tobacco-Free Kids' testimony before the House Judiciary Committee: "'There are currently about 200 U.S. websites and 200 foreign-based websites that sell cigarettes to U.S. smokers. Effective safeguards against kids being able to purchase cigarettes via the Internet are almost non-existent. While many Internet websites post notices that sales to persons under 18 are illegal or not allowed, very few do anything at all to make sure such sales do not occur.'" *Judiciary Hearings*, at 30.

of several years took testimony from dozens of witnesses representing State and federal agencies, research entities, and specifically including the Seneca Nation of Indians (the location of many website cigarette businesses, including Plaintiffs’). *See, e.g.*, H.R. Report 111-117 (May 18, 2009) (Exhibit E); H.R. Report 110-836 (Sept. 9, 2008) (Exhibit F); H.R. Report 110-147 (May 1, 2008) (Exhibit G); S. Report 110-153 (Sept. 11, 2007) (Exhibit H).

Congress then took decisive bi-partisan action by enacting the PACT Act. As noted, the Senate passed the PACT Act unanimously, and days later the House of Representatives passed it by a vote of 387 to 25.<sup>13</sup> Congress made several important findings in the PACT Act, including:

- (1) “the sale of illegal cigarettes . . . reduces Federal, State, and local government revenues, with Internet sales alone accounting for billions of dollars of lost . . . tax revenue each year”
- (2, 3) “Hezbollah, Hamas, al Qaeda, and other terrorist organizations have profited from trafficking in illegal cigarettes. . . and terrorist involvement . . . will continue to grow”
- (4) “the sale of illegal cigarettes . . . 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 . . . 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 . . . 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 ha[s] increased”
- (8) the number of federal investigations has increased
- (9) “the number of Internet vendors in the United States and in foreign countries that sell cigarettes . . . to buyers in the United States has increased from only 40 in 2000 to more than 500 in 2005; and

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<sup>13</sup> *See* <http://www.thomas.gov/cgi-bin/bdquery/z?d111:SN01147:@@@R|/home/LegislativeData.php>.

- (10) the interstate sale of illegal cigarettes . . . over the Internet has a substantial effect on interstate commerce.”

PACT Act, § 1(b). Importantly, the Supreme Court has made clear that federal courts “owe Congress' findings deference in part because the institution ‘is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon’ legislative questions. . . . This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power.” *Turner Broadcasting Sys. Inc. v. FCC*, 520 U.S. 180, 195 (1997).

The PACT Act imposes various requirements to address these Congressional findings. First, Sections 2 and 2A of the PACT Act amend the Jenkins Act to substantially strengthen that statute and to impose new and additional requirements on delivery sellers. “Delivery sellers” such as the Plaintiffs in this case are now required to register with and report all sales into each taxing State, city or Indian nation, and to pre-collect all taxes. These sections also impose heightened age verification requirements on delivery sellers, and impose specified requirements on the packaging and shipment of cigarettes. Violators of the Jenkins Act are now subject to felony conviction and up to three years imprisonment. 15 U.S.C. § 377(a)(1).

Second, the PACT Act also makes it unlawful (with only very narrow exceptions) for the U.S. Postal Service to carry, or for any person to attempt to mail through the U.S. Postal Service, cigarettes or smokeless tobacco products. (Most other delivery services such as FedEx, UPS and DHL, had already committed, by way of an agreement with the State Attorneys General, not to ship cigarettes.<sup>14</sup>) The USPS has already issued regulations and guidance, and has been

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<sup>14</sup> See, e.g. Attorney General Spitzer’s press release, *FedEx to Strengthen Policies Restricting Cigarette Shipments*, [http://www.ag.ny.gov/media\\_center/2006/feb/feb07a\\_06.html](http://www.ag.ny.gov/media_center/2006/feb/feb07a_06.html) (Feb. 7, 2006) (noting that “Today's agreement means that the three major package delivery

enforcing the mail ban since it became effective on June 29, 2010. *See* USPS, *Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter, Final Rule*, 75 Fed. Reg. 29,662 (May 27, 2010); *see also* *Gordon v. Holder*, Case No. 1:10-cv-01092-HHK (D.D.C. Slip Op. filed June 29, 2010) (denying request—made by a member of the SFTA—for TRO and preliminary injunction against the PACT Act’s mailing ban).

## ARGUMENT

### A. PLAINTIFFS FACE A HEAVY BURDEN IN SEEKING TO ENJOIN DULY-ENACTED CONGRESSIONAL LEGISLATION

Contrary to Plaintiffs’ argument, this Court does not have “wide discretion” to enjoin the PACT Act pending the final outcome of this litigation. *Red Earth Mem.* at 2. The injunction plaintiffs seek is “an extraordinary and drastic remedy,” *Medical Society of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977), that this Court must deny “absent a clear showing that the movant has met its burden of proof.” *Fisher v. Goord*, 981 F. Supp. 140 (W.D.N.Y. 1997).

That burden is higher when, as here, plaintiffs wait until the last possible moment to seek an injunction. *See Majorica, S.A. v. R.H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir.1985) (“[I]ack of diligence . . . may. . . preclude the granting of preliminary injunctive relief”). Versions of the PACT Act have been pending in Congress since 2006 and similar legislation under a different name was introduced as early as 2003. The SFTA and the Seneca Nation have long been involved in lobbying against the PACT Act’s enactment. The final version of the Act was passed by the Senate on March 11, 2010 and by the House on March 17, 2010, and was signed by the President on March 31. Even though Seneca Nation leaders and retailers immediately

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companies – FedEx, UPS and DHL – have all agreed to prohibit deliveries of cigarettes to individual consumers nationwide”).

condemned the enactment of the law and vowed to bring suit, they waited until the last possible moment of the 90-day transition period before filing their long-promised complaints.<sup>15</sup>

The PACT Act, “like all Acts of Congress, is presumptively constitutional [and] ‘should remain in effect pending a final decision on the merits.’” *Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1806, 1807 (1993) (Rehnquist, C.J.). Courts “will not exercise their power to enjoin the enforcement of an act of Congress except under the most imperative or exigent circumstances.” *Katzenbach v. McClung*, 85 S. Ct. 6, 7 (1964) (Black, J.); *see also Walters v. National Ass’n of Radiation Survivors*, 468 U.S. 1323 (1984) (Rehnquist, J.) (“The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in ... balancing [the] hardships” involved in granting or denying preliminary injunctive relief).

In this case, Plaintiffs’ request for an injunction fails because they can establish *neither* any likelihood of success on the merits *nor* any danger of irreparable harm. *See, e.g., Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989); *Frederick v. Shalala*, 862 F. Supp. 38, 41 n.1 (W.D.N.Y. 1994). As the United States District Court for the District of Columbia observed in rejecting a similar motion to enjoin enforcement of the PACT Act, “the Court is not convinced that the public interest would be served by ordering this extraordinary form of relief, which would stop in its tracks a legislative enactment of the Congress of the United States.” *Gordon v. Holder*, Case No. 1:10-cv-01092-HHK (D.D.C. Slip Op. filed June 29, 2010).

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<sup>15</sup> *See, e.g., Seneca Nation blasts passage of PACT Act* (Mar. 12, 2010), available at <http://www.observertoday.com/page/content.detail/id/537193.html?nav=5047>

**B. PLAINTIFFS HAVE DEMONSTRATED NO LIKELIHOOD OF SUCCESS ON THE MERITS.**

**1. Plaintiffs' Commerce Clause Argument Is Meritless Because the PACT Act Was Enacted Pursuant to the Federal Government's Plenary Authority Over Interstate Commerce.**

Red Earth's main argument is that the PACT Act violates the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) by requiring simply that Internet cigarette sellers pay the required state and local taxes in the jurisdictions into which they sell cigarettes — the very same laws that *Amici's* members are required to obey—because plaintiffs do not have a “physical presence” in these States.<sup>16</sup> That contention fails as a matter of law, because Congress has clearly exercised its “plenary” authority over interstate commerce (including commerce involving Native Americans) to require all delivery sellers to comply with the tax laws of the States into which they sell, and because physical presence is *not* a standard that applies in this context.

**a. Congress Has Plenary Authority to Require Out-of-State Cigarette Sellers To Comply With State Laws.**

In making this argument, Red Earth relies entirely on two decisions—*Quill v. North Dakota*, 504 U.S. 298 (1992), and *National Bella Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)—that considered whether *state* revenue statutes violated the Commerce Clause. Red Earth Mem. 4-10; *see Quill*, 504 U.S. at 301 (*Quill and Bella Hess* involved “attempt to require an out-of-state mail-order house . . . to collect and pay a use tax on goods”) (emphasis added). In both cases, the Court invalidated State statutes on the theory that they “unduly burden[ed] interstate commerce.” *Quill*, 504 U.S. at 312.

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<sup>16</sup> Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction, at 7 (filed June 25, 2010) (“Red Earth Mem.”).

This case, in contrast, involves legislation enacted by the *Congress*, and there is no corresponding Commerce Clause limitation on *the Federal* government’s right to regulate interstate commerce. To the contrary, the “Framers granted Congress *plenary* authority over interstate commerce,” *Oregon Waste Sys. Inc. v. Department of Env. Quality*, 511 U.S. 93, 98 (1994), providing that “*Congress shall have Power . . . [t]o regulate Commerce among the several States.*” Art. I, § 8, cl. 3 (emphasis added). “The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body.” *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983).

Red Earth complains that the PACT Act will allow States to collect cigarette excise taxes even from Internet sellers not physically present in those States, a result (it says) that *Quill* and *Bella Hess* found beyond the *States’* authority to burden commerce. *See* Red Earth Mem. 7-10. But *Congress* has well-settled authority to legislate precisely that result. As the Supreme Court has explained, “[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.” *Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve Sys.*, 472 U.S. 159, 174 (1985); *see Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 422-23 (1946) (upholding a South Carolina tax imposed solely on *foreign* insurance companies, a tax that plainly would have violated the Commerce Clause had Congress not authorized it in the McCarran-Ferguson Act).<sup>17</sup>

The bottom line is that “[w]here state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with

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<sup>17</sup> *See also Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945) (“Congress has undoubted power to redefine the distribution of powers over interstate commerce,” including by “permit[ting] states to regulate the commerce in a manner which would otherwise not be permissible.”); *James Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917) (upholding against Commerce Clause challenge a Federal statute prohibiting the interstate delivery of alcohol into a State if it would be used in violation of the receiving State’s laws).

interstate commerce.” *White*, 460 U.S. at 213; *see Merrion v. Micarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (“[w]hen Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the State tax or regulation under the Commerce Clause in the absence of congressional action”); *New York v. United States*, 505 U.S. 144, 171 (2002) (recognizing Congress’s “power to authorize the States to burden interstate commerce”); *Silver v. Woolf*, 694 F.2d 8, 13 (2d Cir. 1982) (a “state law which a federal court might invalidate where Congress is silent will thus be upheld where Congress has indicated its desire to allow states to act”). *See also* Houghton & W. Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 Brigham Young Univ. L. Rev. 9, 57 (2000) (“Congress’s authority . . . to expand state power to tax or regulate interstate commerce, by comparison to the restraints on such power that would otherwise exist under the so-called ‘dormant’ Commerce Clause in the absence of congressional legislation, is well-settled”).

Indeed, the *Quill* case—which Red Earth relies on almost exclusively for its Commerce Clause challenge—expressly recognizes Congress’s authority to pass legislation that would allow States to impose sales and use taxes on Internet sellers without a physical presence in the State. In declining to overrule *Bella Hess*, the Court observed that

[t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve . . . . Accordingly, *Congress is now free to decide whether, when, and to what extent the States may burden interstate mail order concerns with a duty to collect use taxes.*”

504 U.S. at 310 (emphasis added).

Congress has expressly exercised that authority in the PACT Act, forbidding interstate Internet sellers like Plaintiffs from selling cigarettes into a State unless in so doing they comply with the laws (including the excise tax laws) of the destination State. Because Congress has to

this extent authorized the States to impose their laws on out-of-state sellers like Plaintiffs, their Congressionally authorized requirements are now “invulnerable to constitutional attack under the Commerce Clause.” *Northeast Bancorp*, 472 U.S. at 174.

Red Earth appears to argue that different standards apply to Congressional restrictions on Native American retailers, claiming that, while Congress can impose “minimal burdens” on such retailers, it cannot impose “extraordinary burden[s]” on them. *See* Red Earth Mem. at 9-10. There is no such rule; the Supreme Court has repeatedly made clear that, if anything, Congress’s “plenary” powers over commerce involving tribes and their members are even *broader* than its “plenary” powers over non-Indian interstate commerce. *See, e.g., United States v. Lara*, 541 U.S. 193, 200 (2004) (“plenary and exclusive”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“central function of the Indian Commerce Clause [U.S. Const. Art. I, § 8, cl. 3] is to provide Congress with plenary power to legislate in the field of Indian affairs”); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance”).<sup>18</sup>

**b. Congress Was Abundantly Clear That Out-of-State Internet Sellers Must Comply With State Laws, Including State Excise Tax Laws.**

Conceding that its Commerce Clause argument is meritless if Congress in fact required out-of-state sellers to comply with state excise tax (and other) laws, Red Earth asserts that

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<sup>18</sup> Like the non-Indian commerce cases it cites, Red Earth’s “minimal burden” cases involve situations in which Congress has *not* authorized state regulation. *See* Red Earth Mem. at 9-10. The Supreme Court repeatedly has made clear that, even in the absence of affirmative Congressional authorization, States have broad inherent powers to tax and regulate tribal sales of cigarettes to non-tribal members, whether those purchasers are non-Indians or members of other tribes based on other reservations. *See* Argument § B(4)(b), *below*. Pursuant to its “plenary” powers over Indian commerce, Congress can redefine these federal common law jurisdictional rules and give States even *greater* authority over Indian tribes and their members. *See, e.g., Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71, 501 (1979). (Congress has authority to “readjust the allocation of jurisdiction over Indians,” including by subjecting them to state civil and criminal jurisdiction).

Congress failed to impose that requirement with sufficient clarity. Red Earth Mem. at 10-13. As plaintiffs themselves acknowledge, Congress explicitly intended the PACT Act to “help the States enforce their laws that target online sales of certain tobacco products.” Red Earth Mem. at 12, *citing* PACT Act, Pub. L. No. 111-154 at § 8, 124 Stat. at 1111. Congress thus intended the Act to “benefit State, local, and tribal governments by expanding their authority to collect cigarette taxes.” Red Earth Mem. at 17, *citing* H.R. Rep. No. 111-117, at 23 (2009).

Moreover, the words of the Act could not be plainer: they require remote sellers like Plaintiffs to comply with “all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco,” specifically including laws imposing excise taxes. 15 U.S.C. § 376a(a)(3). Internet and other delivery sellers are further explicitly prohibited from delivering cigarettes or smokeless tobacco to their out-of-state customers unless any “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.” *Id.* § 376a(d)(1)(A). Congress could not have been more clear that it intended to require out-of-state sellers of cigarettes and smokeless tobacco to comply with the excise tax and other laws of the States into which they deliver their products.

*Citing Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), Red Earth asserts that if Congress wanted to require Internet sellers to comply with the tax and other laws of the States into which they deliver cigarettes, it was somehow obliged to “examine them and to evince its intent to ratify *each* of them.” Red Earth Mem. at 11 (emphasis added). But *Hillside Dairy* imposes no requirement that Congress demonstrate that it has separately considered each and every one of the State, local, and tribal cigarette and smokeless tobacco laws before requiring that Internet sellers comply with them if they ship into the local jurisdiction.

In *Hillside Dairy*, out-of-state dairies asserted that California regulations governing milk pricing and pooling violated the Commerce Clause. California claimed Congress had immunized its regulations from Commerce Clause scrutiny in the Federal Agricultural Improvement and Reform Act of 1996, which provided that:

Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding-

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7524.

The Supreme Court began by observing that “*Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce.*” 539 U.S. at 66 (emphasis added). The Court observed, however, that while the federal statute in question “unambiguously expresses such an intent with respect to California’s compositional and labeling laws, that express intent does not encompass the pricing and pooling laws.” *Id.* Because the federal statute did not clearly address State pooling and pricing laws, the Court held, it did not insulate them from Commerce Clause scrutiny. *Id.*

*Hillside Dairy* thus requires only that Congress express clearly what *categories* of State laws it seeks to authorize (*e.g.*, compositional and labeling laws). 539 U.S. at 66. The decision in no way requires Congress to list each such law and demonstrate that Congress has separately considered and adopted it. *See also Prudential Insurance Co.* 328 U.S. at 422-23 (upholding Congressional general authorization of State laws governing interstate insurance practices,

without requiring Congress separately to review, discuss, and adopt separately each such State law).

Identical rules apply to Acts of Congress that require Indian tribes and their members to comply with State law. The Supreme Court has emphasized that, pursuant to its “plenary” authority over tribes and their members, Congress may enact a “jurisdictional law of general applicability to Indian country” without having to “itemize[] all potentially conflicting treaty rights that it wished to affect.” *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979). Congress clearly made the terms of the PACT Act applicable to tribes and their members whether acting inside or outside of “Indian country,”<sup>19</sup> and in this context Plaintiffs’ argument that Congress was required specifically to address and catalog every potentially affected law is simply “tendentious.” *Id.*

In the PACT Act, Congress plainly and clearly required out-of-state Internet sellers (including Native Americans operating from their reservations) to comply with State laws governing cigarette and smokeless tobacco sales. Nothing more than this plain expression of intent is required for Congress validly to “authorize state regulations that [are claimed to] burden or discriminate against interstate commerce.” *Hillside Dairy*, 539 U.S. at 66.

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<sup>19</sup> The Act comprehensively defines a “person” subject to its terms to include any “individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company.” 15 U.S.C. § 375(10). It defines the “interstate commerce” subject to its terms to include commerce into and out of “Indian country,” including “commerce between a State and any Indian country in the State.” *Id.* § 375(9); *see also id.* § 375(7) (defining “Indian country”). Moreover, the exceptions for a “tribal government” from certain enforcement provisions of the PACT Act confirms by necessary implication that (1) individual tribal members and their privately owned companies are fully subject to those provisions, and (2) tribal governments are subject to those enforcement provisions from which they are not excluded. *See id.* §§ 377(a)(2)(A) (“tribal government” not subject to criminal penalties; no such exemption from civil penalty provisions), 378(c)(1)(B) (“tribal government” may not be sued by state or local government; no such exemption for suits against individual tribal members and their companies), 378(d) (same with respect to private suit against a “tribal government”).

**2. Plaintiffs' Delegation Argument is Meritless Because the PACT Act Does Not Delegate Congressional Authority to the States.**

Plaintiffs next argue that the PACT Act unconstitutionally delegates Congress' legislative powers to state and local governments. Red Earth Mem. 13-15. In the PACT Act, however, Congress simply exercised *its* power to forbid Internet sellers from selling cigarettes and smokeless tobacco in interstate commerce unless they comply fully with the laws of the States and localities into which they ship their tobacco products. This was not a delegation of *anything* to state or local governments, it was a direct exercise of Congress' plenary authority over interstate commerce.

In the *Clark Refining* case, the Supreme Court rejected an almost identical delegation challenge made with respect to the Webb-Kenyon Act, which prohibited interstate shipments of alcohol for use in any way inconsistent with the laws of the destination State:

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.

242 U.S. at 185. As in *Clark Refining*, the PACT Act represents the will of Congress, not a delegation of any authority to any State or locality. *See also Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U.S. 334, 347 (1937) (“while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property”).

Because the PACT Act does not work any delegation of Congressional authority to the States, it is unnecessary for the Court to consider Plaintiffs' further argument that the delegation

is made without providing sufficiently clear standards for its exercise. Red Earth Mem. 15-17.

It bears note, however, that the authority Plaintiffs cite for their delegation arguments is highly suspect and has been limited by subsequent decisions to its unique historical context.

*Knickerboxer Ice Co. v. Stewart*, 253 U.S. 149 (1920) (see Red Earth Mem. 14) has “been confined to [its] facts, viz., to suits relating to the relationship [of] vessels, plying the high seas and our navigable waters, and to their crews.” *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 344 (1973). *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (see Red Earth Mem. 13, 15-16), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 US. 495 (1935) (see Red Earth Mem. 15 n.3), fare even worse:

As Professor Davis has pointed out, these decisions “are best understood in their unique historical context,” which included deep skepticism about President Roosevelt's revolutionary economic recovery program after the Great Depression and, in the case of *Schechter Poultry*, “the most sweeping congressional delegation of all time.” KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, 70-71 (3d ed. 1994). Likewise, Judge Leventhal characterized these cases as arising from an “extremist pattern” of “delegation run riot” in the New Deal era. *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F.Supp. 737, 763 (D.D.C.1971) (three-judge court). And as Professor Davis has pointed out, “[t]he *Panama* decision cannot be reconciled with earlier or later decisions of the Supreme Court,” and neither *Panama* nor *Schechter* “reflect the law today.” KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, 71-72 (3d ed.1994).

*Milk Industry Foundation v. Glickman*, 949 F. Supp. 882, 889 (D.D.C. 1996).

### **3. Plaintiffs Have No Hope of Prevailing on Their Tenth Amendment Claim Because the PACT Act is a Valid Exercise of Congress’s Commerce Clause Authority.**

Plaintiffs next argue that the PACT Act violates the Tenth Amendment by somehow placing the States under federal direction with respect to cigarette excise taxes. Red Earth Mem. at 18-20; SFTA Mem. at 22-25. This argument is meritless.

To begin, the Second Circuit has squarely ruled that private plaintiffs—like those here—lack standing to assert Tenth Amendment challenges. *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234-36 (2d Cir. 2006). Refusing Plaintiffs standing to assert a Tenth Amendment challenge is particularly appropriate here, where the States (whose interests the Tenth Amendment protects) have wholeheartedly endorsed the PACT Act and are among its principal beneficiaries. *See* NAAG Press Release, *Attorneys General Praise PACT Act Being Signed into Law* (available at <http://www.naag.org/attorneys-general-praise-pact-act-being-signed-into-law.php>).

In any event, Plaintiffs’ Tenth Amendment challenge is meritless. The PACT Act regulates interstate commerce, a function the Constitution expressly delegates to Congress. *See* Art. I, § 8, cl. 3 (the Commerce Clause). As the Supreme Court recently explained:

[T]he Tenth Amendment's text is clear: “The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” . . . The powers “delegated to the United States by the Constitution” include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution “reserved to the States.”

*United States v. Comstock*, 130 S. Ct. 1949, 1962-63 (2010).

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. at 438-39, the Supreme Court rejected an almost identical Tenth Amendment argument with respect to the McCarren-Ferguson Act, which authorized State regulation of insurance taxes, notwithstanding a prior Supreme Court decision holding that insurance was interstate commerce. The Court rejected as “clearly lacking in merit” the assertion that “the Act, and thus the [challenged State] tax, would be an invasion of the state's own power of taxation.” *Id.* at 438. Though our system of government assigns certain powers to the Federal government and others to the States, “[t]hey were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of

regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.” *Id.* 438-39.

Moreover, the whole point of the PACT Act is to “help the States enforce their laws that target online sales of certain tobacco products.” Red Earth Mem. at 12, *citing* PACT Act, Pub. L. No. 111-154 at § 8, 124 Stat at 1111. As such, the Act does not “invade state sovereignty or otherwise improperly limit the scope of ‘powers that remain with the States.’” *Comstock*, 130 S.Ct. at 1962. As an “accommodation” of state interests, the PACT Act simply does not intrude on the interests protected by the Tenth Amendment. *Id.*<sup>20</sup>

**4. Plaintiffs’ Due Process Arguments Are Meritless Because the PACT Act Does Not Violate Personal Jurisdiction Requirements and Is Not Vague.**

**a. Plaintiffs’ “Minimum Contacts” Argument is Irrelevant to Federal Legislation and, In Any Event, Inconsistent with the *Quill* Decision.**

Relying almost exclusively on *Quill*, 504 U.S. at 311-12, Plaintiffs argue that their Fifth Amendment due process rights are violated because the PACT Act helps States collect excise taxes from out-of-state Internet sellers who have insufficient contacts with those States. Red Earth Mem. 21-27; SFTA Mem. 13-16. But this due process jurisdictional argument fails for at least two reasons.

*First*, the *Quill* case involved the extent to which a *State* could impose taxes on a foreign vendor; it turned on whether the vendor’s “connections with a State are substantial enough to legitimate the State’s exercise of power over him.” 504 U.S. at 312. This case, in contrast, involves the *Federal Government’s* exercising its broad authority to impose restrictions on

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<sup>20</sup> Plaintiffs also appear to challenge the PACT Act as imposing a non-uniform federal tax. *See* Red Earth Mem. 19-20. But the PACT Act imposes no federal tax at all; it simply aids States and localities in their efforts to collect *their* taxes.

cigarette vendors' right to engage in interstate commerce. Congress has the right to impose such restrictions wholly independent of any inquiry about the vendors' contacts with the various States. *See, e.g. Clark Distilling*, 242 U.S. at 324 (Congress has authority under the Commerce Clause to require those shipping liquor in interstate commerce to comply with the laws of the States into which they ship; it may prevent jurisdictional "immunity" rules "from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught"). This is consistent with the long-established principle that Congress may provide for nationwide personal jurisdiction and service of process, unconstrained by "minimum contacts" restrictions to particular States. *See, e.g., Mississippi Publishing Co. v. Marphree*, 326 U.S. 438, 442 (1946) (*re* nationwide service of process); *In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction.").

*Second*, even if the *Quill* minimum contacts analysis *were* applicable to Federal legislation, it is easily satisfied here:

Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." . . . In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs . . . The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State.

*Quill*, 504 U.S. at 308.

Consistent with *Quill's* analysis, lower courts have repeatedly held that due process allows the exercise of jurisdiction over defendants who use the Internet to sell to consumers located in a foreign State. As the court explained in *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999), for example:

By maintaining a commercial website through which it markets and sells its goods, NeatO has reached out beyond its home state of Connecticut to avail itself of the benefits of the California forum. . . . Although the actual number of sales to California citizens may be small, the critical inquiry in determining whether there was a purposeful availment of the forum state is the quality, not merely the quantity, of the contacts. . . . By advertising and offering its products for sale via the Internet, NeatO has placed its products into the stream of commerce intending that they would be purchased by consumers with access to the Web, including California citizens. By engaging in Internet commerce with California citizens, NeatO has established the minimum contacts that are a prerequisite to the exercise of jurisdiction over it.

*See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa 1997) (“Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper . . . Different results should not be reached simply because business is conducted over the Internet.”).<sup>21</sup> As numerous courts have held, precisely the same rules apply to Internet sales from tribal reservation lands to other parts of the country.<sup>22</sup>

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<sup>21</sup> *See also Conlin Enterprise Corp. v. Snews LLC*, 2008 WL 803041, at \*6 (2008) (“This is a 'doing business over the Internet' case . . . We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does”); *More Cupcakes, LLC v. Lovemore LLC*, 2009 WL 3152458, at \*4 (N.D. Ill. 2009) (“Defendants in this case have used their website to conduct business with Illinois customers on two occasions. Defendants thus purposefully availed themselves of doing business in Illinois by selling their t-shirts with the alleged infringing marks to Illinois consumers”); *L'Athene Inc. v. EarthSpring LLC*, 570 F.Supp.2d 588, 591 (D. Del. 2008) (finding personal jurisdiction because “Defendants purposefully availed themselves of doing business with Delaware, which is shown through their conducting business with Delaware residents and knowingly shipping products to the State”).

<sup>22</sup> *See, e.g., Oregon v. Maybee*, No. 06C12593, 2010 WL 1878752, \*3 (Or. Ct. App., May 12, 2010) (“state courts may exercise jurisdiction in civil cases involving Native Americans and relating to conduct that extends beyond the reservation’s boundaries”); *see also Department*

The PACT Act meets this test. It obligates an out-of-state seller to comply with state and local laws only when the seller has deliberately sold cigarettes or smokeless tobacco into the State and caused that product to be delivered to customers located within the State. Especially after passage of the PACT Act, any out-of-state seller engaged in such conduct has “fair warning” that its sales into a State will subject it to the tax and other laws of that State. As such, an out-of-state company selling cigarettes or smokeless tobacco products into a given State has the minimum contacts necessary to require that the seller, consistent with the Due Process Clause, comply with the excise tax and other laws of the destination State.<sup>23</sup>

**b. The PACT Act is Not Vague as it Relates to Sales by Native American Retailers.**

Section 2(a) of the PACT Act clearly requires Plaintiffs to comply with all laws generally applicable to the sale of cigarettes or smokeless tobacco as if the sales occurred entirely within the delivery State. Plaintiffs argue, however, that the PACT Act is unconstitutionally vague because it is unclear whether Section 5 creates an exception to the Act’s requirements as they apply to the sale of cigarettes on Native American reservations. *See* Red Earth Mem. at 28-31.

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*of Health and Human Services (Maine) v. Maybee*, 965 A.2d 55, 56-57 (Me. 2009); *Idaho ex rel. Wasden v. Maybee*, 224 P. 3d 1109, 1116-1118 (Idaho 2010).

<sup>23</sup> Plaintiffs’ due process cases are entirely inapposite, because they address the question of *general* jurisdiction, not the due process minimum contacts necessary to sustain personal jurisdiction with respect to a *specific* transaction. *See Tamburo v. Dworkin* 601 F.3d 693, 701 (7<sup>th</sup> Cir. 2010) (Red Earth Mem. 24, addresses general jurisdiction); *Bird v. Parsons*, 289 F.3d 865, 874 (6<sup>th</sup> Cir. 2002) (Red Earth Mem. 24, addresses general jurisdiction); *In re Ski Train Fire in Kaprun, Austria*, 230 F. Supp.2d 376, 383 (S.D.N.Y. 2002) (Red Earth Mem. 24, addresses general jurisdiction under N.Y. CPLR § 301); *Meteoro Amusement corp. v. Six Flags, Inc.*, 267 F.Supp.2d 263, 269 (N.D.N.Y. 2003); Red Earth Mem. 25, addresses general jurisdiction); *Nelson v. Massachusetts Gen. Hosp.*, 2007 U.S. Dist. LEXIS 70455, \*\*65-66 (S.D.N.Y. 2007) (Red Earth Mem. 25, addresses general jurisdiction). As this Court recognized in *Xerox Corp. v. Arizona Digital Prods., Inc.*, 2009 WL 2992036, \*11 at n.8 (W.D.N.Y. 2009), cases analyzing general jurisdiction are “inapposite” to whether there are sufficient contacts to sustain personal jurisdiction with respect to a *specific* transaction consistent with the due process clause. *Loudon Plastics, Inc. v. Brenner Tool & Die Inc.*, 74 F.Supp.2d 182, 185-86 (N.D.N.Y. 1999) (Red Earth Mem. 25), involved an entirely “passive” website that did not make sales in the foreign State.

Section 5(a) provides that the Act does not “amend, modify, or otherwise affect . . . any limitations under Federal or State law, including Federal common law and treaties . . . with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country” or “other lands held by the United States in trust for one or more Indian tribes.” Plaintiffs claim they have “sovereign immunity” to sell cigarettes “to other Natives,” whether members of their own tribe on their reservation lands or members of other tribes “on other Indian Territory situated within New York State or [on] Indian Reservation lands in any other State.” Red Earth Mem. at 28, 30; Pierce Aff. ¶ 16.

Plaintiffs do not have the Federal common law or treaty rights they claim. They have the right under Federal common law to sell cigarettes to members of the Seneca Nation on Seneca reservation lands for those members’ personal consumption without collecting New York’s excise and sales taxes. Consistent with the savings provision in Section 5, nothing in the PACT Act touches these rights. But that is as far as Plaintiffs’ immunities go. Under long-established principles of Federal common law, Native American retailers selling from their reservations may be required to collect and remit State taxes on *all* sales to *all* non-tribal members and to comply with state recordkeeping and reporting requirements. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 482-83 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158-59 (1980); *California State Board of Equalization v. Chemeheuvi Indian Tribe*, 474 U.S. 9, 11-12 (1985) (per curiam); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-75 (1994). The Supreme Court has repeatedly emphasized that these principles apply with full force to tribal sales to members of other tribes; there is no such thing as

*intertribal* immunity from State taxation and regulation. *See, e.g., Duro v. Reina*, 495 U.S. 676, 686-87 (1990) (“We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. . . . *But this rationale does not apply to taxation of nonmembers, even where they are Indians.*”) (emphasis added); *Colville*, 447 U.S. at 160-61 (sales to members of other tribes “stand on the same footing” as sales to non-Indians); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) (tribal member’s commerce with “Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred” is subject to State licensing and regulation).<sup>24</sup>

Given these decisions, Plaintiffs’ claim of an “inviolable” right to “sell cigarettes free of excise taxes” to non-tribal members over the Internet is spurious. Cpt. ¶ 22; *see also id.* ¶ 29 (“Shipment of tax-free cigarettes by plaintiffs is an integral and important aspect of plaintiffs’ business model, and allows plaintiffs to realize cost savings that result, in part, in the lower prices plaintiffs’ customers pay for tobacco”). The Supreme Court has repeatedly emphasized that, contrary to claims such as these, tribes and their members have *no* right or authority to “market an exemption from State taxation to persons who would normally do their business elsewhere”; *nothing* in federal Indian law “goes so far as to grant tribal enterprises selling goods

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<sup>24</sup> Although not developed in their briefing, the Red Earth plaintiffs appear to argue in their complaint and in Mr. Pierce’s affidavit that special immunities apply to cigarettes manufactured by Native Americans, and that such cigarettes may be freely traded without being subject to state taxation and regulation. *See* Red Earth Cpt. ¶ 22; Pierce Aff. ¶ 15. No such immunities exist; this claim to “supersovereign” status for Native-manufactured goods in interstate commerce is “unprecedented.” *See Muscogee (Creek) Nation v. Henry*, Civ. No. 10-019-JHP, 2010 WL 1078438, at \*3 (E.D. Ok. Mar. 18, 2010) (“What Plaintiff ultimately seeks in this case is something that no other sovereign has — the ability of a Tribe to immunize goods made within its borders from taxation and regulation by other sovereigns once those goods leave its boundaries. Just as China or New York State may not decree that their products are immune from Oklahoma taxation when those goods enter this State, neither may a Native American tribe claim such special treatment.’ . . . Here again, plaintiffs are seeking ‘supersovereign status’ — the ability to avoid state taxation and regulation of their commerce with non-Indians and members of other tribes even where that commerce travels outside of Indian country. Such an immunity . . . would truly be unprecedented.”) (citations omitted).

to nonmembers an artificial competitive advantage over all other businesses in a State.” *Colville*, 447 U.S. at 155; *see also Milhelm Attea*, 512 U.S. at 71-72; *Moe*, 425 U.S. at 482. These principles apply to non-Indian and Native-manufactured cigarettes alike; Native brands do not enjoy some kind of “supersovereign” status once they enter interstate commerce, but are subject to the same laws as all others. *See* n. 4, *above* and Argument § B(4)(b), *below*.

Thus, the central premises of Plaintiffs’ vagueness claim with respect to “Native American Rights” (Red Earth Mem. at 28) — that there is a broad intertribal immunity from State taxation and regulation that *might* be embodied in Section 5’s savings provisions, along with a federally protected “right” to sell “tax free” product to non-Indians — are incorrect. There are no such immunities or rights. Whatever on-reservation sales might be shielded by Section 5’s savings provisions are immaterial here because federal Indian law does not protect any delivery sales in interstate commerce rendered unlawful by the PACT Act.<sup>25</sup>

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<sup>25</sup> Although they do not develop the point in their preliminary injunction brief, the Red Earth Plaintiffs’ argue in their complaint and Mr. Pierce’s supporting affidavit that the PACT Act violates four treaties between the Seneca Nation and United States (dated 1784, 1789, 1794, and 1842). *See* Red Earth Cpt. ¶¶ 18-20, 32-35, 40, 61-63; Pierce Aff. ¶ 18 (complaining of PACT Act’s violation of “my personal Treaty rights to be ‘free from taxes’”). The short answer is that none of these treaties exempt the Seneca Nation or its members from the usual principles of federal Indian law discussed in text. *Every* federal and state court to have addressed these claims has rejected the Plaintiffs’ reading of these four treaties. *See, e.g., United States v. Kaid*, 241 F. App’x 747, 750 (2d Cir. 2007) (rejecting argument that 1842 Seneca treaty preempted New York taxation and regulation of tribal cigarette sales to nonmembers); *Lazore v. Commissioner of Internal Revenue*, 11 F.3d 1180, 1185-87 (3rd Cir. 1993) (1794 treaty at most might require an exemption from a tax on income derived directly from reservation land, but not from other taxes); *Cook v. United States*, 32 Fed. Cl. 170, 175 (1994) (1794 treaty deals only with taxes on land itself, not excise taxes for activities on that land), *aff’d*, 86 F.3d 1095, 1097 (Fed. Cir. 1996) (1794 treaty only “applies to the use of land,” as opposed to “a tax on the sale of a commodity” from that land); *New York State Dep’t of Tax. & Fin. v. Bramhall*, 235 A.D.2d 75, 85, 667 N.Y.S.2d 141, 147-48 (1997) (“The immunity from taxation that [Seneca retailers] claim here is not conferred by Federal treaties ... or by case law interpreting those treaties .... The 1784, 1789 and 1794 Treaties ... do not confer any immunity from taxation, and the 1842 Treaty ..., although it prohibits the State from taxing reservation land, does not bar the imposition of excise and sales taxes on cigarettes and motor fuel sold to non-Indians on the Seneca Nation’s

**c. The PACT Act's Requirements Are Not Vague.**

The PACT Act is not unconstitutionally vague because it satisfies both requirements of the void-for-vagueness doctrine. First, it provides people of ordinary intelligence a reasonable opportunity to know what is prohibited, setting forth relatively clear guidelines as to prohibited conduct. Second, it does not encourage arbitrary or discriminatory enforcement. *Gonzales v. Carhart*, 550 U.S. 124, 127 (2007). Plaintiffs claim that it will be impossible for any cigarette purveyor to comply with Section 2A of the PACT Act because of the broad scope of the Act and the ever-changing nature of the applicable statutes. Red Earth Mem. 31-33; SFTA Mem. 25-27. Section 2A simply mandates compliance with “all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place ....” The crux of Plaintiffs’ argument is that complying with existing State and local laws will just be too hard.

Courts have repeatedly upheld laws that require sellers of goods to comply with the laws of the States to which they are shipping. *See, e.g., James Clark Distilling Co. v. Western Maryland Ry.* 242 U.S. 311 (1917) (liquor sellers are required to comply with the regulations of the States to which they ship); *United States v. Baker*, 63 F.3d 1478, 1487 (9<sup>th</sup> Cir. 1995) (applying the Contraband Cigarette Trafficking Act’s requirements to require remote sellers to comply with Washington State regulations). As the Second Circuit has explained, due process “does not impose ‘impossible standards,’ and lest we convert the Constitution into an ‘insuperable obstacle to legislation,’ we must acknowledge that it requires only reasonable precision in criminal statutes.” *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007) (citations omitted).

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reservations[.]”); *Snyder v. Wetzler*, 193 A.D.2d 329, 603 N.Y.S.2d 910 (1993), *aff’d*, 84 N.Y.2d 941 (1994) (same with respect to 1842 Seneca treaty).

The simple truth is that businesses “which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Local point-of-sale tobacco retailers are obliged to familiarize themselves with the laws applicable to their business. Many of NACS’ and NYACS’ members sell cigarettes from multiple locations in many States, yet they manage to identify and comply with the relevant laws. If Plaintiffs wish to sell into a particular State and/or locality, there is nothing unfair or unconstitutional in requiring them to do the same.

Moreover, the PACT Act’s criminal penalties only apply to “knowing” violations of the delivery sales provisions. 15 U.S.C. § 377(a)(1). As the Supreme Court has made clear, “the constitutionality of a vague standard is closely related to whether that standard incorporates a requirement of *mens rea*.” *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)(collecting cases). In this case, as in *United States v. Schneiderman*, 968 F.2d 1564, 1567 (2d Cir. 1992), the “scienter element . . . ensures that defendants have notice that their conduct is prohibited . . . . Because defendants must have the requisite scienter in order to violate the statute, it poses no trap for the innocent . . . .”<sup>26</sup>

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<sup>26</sup> Nor does the PACT Act present any serious risk of arbitrary and capricious enforcement. *Cf.* SFTA Mem. at 27. “Effective law enforcement often ‘requires the exercise of some degree of police judgment’ but this alone does not render a statute unconstitutional.” *Schneiderman*, 968 F.2d at 1568, *citing Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Just as local cigarette retailers are able to investigate and identify the laws relevant to their business practices, both Plaintiffs and the Department of Justice should be able to determine those laws with reasonable specificity.

**5. Plaintiffs' Equal Protection Claims Are Meritless Because the PACT Act Uses Rational Means To Advance Legitimate Governmental Purposes.**

Plaintiffs argue that the PACT Act violates the equal protection guarantees embodied in the Fifth Amendment's Due Process Clause in a variety of ways. Although the *Red Earth* plaintiffs disagree, the SFTA properly concedes that the equal protection analysis is governed by the rational basis standard of judicial review. *See* SFTA Mem. at 16-22. This standard of review is extremely deferential to the lines drawn by Congress:

[R]ational-basis review in equal protection analysis “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” Nor does it authorize “the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not “actually articulate at any time the purpose or rationale supporting its classification.” Instead, a classification “must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification.*”

*Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (emphasis added, citations omitted). On rational-basis review, “a classification [bears] a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden ‘to negative *every conceivable basis which might support it.*’” *FCC v. Beach Comm'ns Inc.*, 508 U.S. 307, 314-15 (1993) (emphasis added, citation omitted). None of Plaintiffs' equal protection challenges overcomes this “strong presumption of validity.”

**a. Congress Had a Rational Basis for Granting an Intrastate Exception to the No-Mail Rule for Alaskan and Hawaiian Mail Customers.**

The PACT Act’s delivery sales provisions apply to all “States,” defined to include Alaska and Hawaii. *See* 15 U.S.C. § 315(6). The Act’s ban on using the U.S. mails to make *interstate* cigarette deliveries also applies nationwide to all 50 States and the District of Columbia. *See* 18 U.S.C. § 1716E(i) (incorporating definition of “State” in 18 U.S.C. § 1716(k)). The Act’s ban on *intrastate* mail deliveries is similarly nationwide in scope, except for “mailings *within* the State of Alaska or *within* the State of Hawaii.” *Id.* § 1716E(b)(2) (emphasis added). Thus, cigarettes may be mailed through the U.S. Postal Service within Alaska and Hawaii, but they may not be mailed through the U.S. Postal Service *into* or *out* of these two non-contiguous States.

The SFTA argues that this statutory exemption for *intrastate* mailings within Alaska and Hawaii renders the *intrastate* ban unlawful in the other 48 States and also invalidates the entire nationwide *interstate* mail ban, because it “irrationally favor[s] citizens, Indian Tribes, and entities who reside in Alaska or Hawaii over similarly situated citizens, Indian Tribes, and entities who reside in other States.” SFTA Mem. at 16. According to the SFTA, “[t]here is no legitimate reason for treating persons and businesses in the contiguous United States differently than those within the boundaries of Alaska and Hawaii.” *Id.* at 21.

This argument ignores long-standing Congressional practice, flouts well-settled equal protection principles, and fails to acknowledge the long line of judicial decisions holding just the opposite. The SFTA claims to be “aware” of only a *single case* involving an Act of Congress that differentiated between the contiguous 48 States and other parts of the United States. SFTA Mem. at 20 n.7. But the U.S. Code is replete with such classifications, and the *Federal Reporters* include many decisions upholding such classifications against equal protection and other constitutional challenges. *See, e.g., Matsuo v. United States*, 586 F.3d 1180, 1185 n.8 (9<sup>th</sup>

Cir. 2009) (statutory exemption of federal employees in Alaska and Hawaii from “locality pay” adjustments applicable to federal employees in the 48 contiguous States “*clearly satisfies rational-basis scrutiny*” under the equal protection component of the Fifth Amendment’s Due Process Clause) (emphasis added); *Alaskan Central Express Inc. v. United States*, 145 Fed. Appx. 211, 212 (9<sup>th</sup> Cir. 2005) (special benefits and subsidies for U.S. mail customers in Alaska served legitimate ends, employed rational means, and thus did not violate equal protection); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279-83 (9<sup>th</sup> Cir. 2004) (rejecting equal protection challenge to Department of Interior regulations excluding native Hawaiians from tribal recognition process that governed in other 49 States); *United States v. Pollard*, 326 F.3d 397, 409-10 n.12 (3d Cir. 2003) (“Just as Congress and the Executive may attack a perceived problem in piece-meal fashion without running afoul of equal protection guarantees, . . . [they] may attack the problem . . . in different ways in different jurisdictions”) (*re* differences in immigration laws between Virgin Islands and U.S. mainland); *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1430-31 (9<sup>th</sup> Cir. 1989) (“Contrary to appellants’ assertion, it is simply not true that Congress may not create exemptions from generally applicable statutes in order to authorize state-specific projects”; “many decisions” have approved the “carving out [of] a local exception to a national policy”) (discussing exemptions of Trans-Alaska Pipeline and Hawaii interstate highway project from nationally applicable permitting requirements); *see also United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (upholding constitutionality of exemption of Alaskan crude oil from federal windfall profits tax given the “unique” and “disproportionate costs and difficulties” of drilling and transportation in Alaska); *Thompson Multimedia, Inc. v. United States*, 340 F.3d 1355, 1365 (Fed. Cir. 2003) (Congress may “craft[] a narrow exemption to alleviate a disproportionate

incidence of the [federal Harbor Maintenance Tax] on Alaska and Hawaii as a result of their heavy reliance on domestic shipping”).<sup>27</sup>

These decisions upholding differential treatment between the contiguous 48 States and Alaska and Hawaii are based on the blackletter rule that an equal protection claim “cannot rest solely on a statute’s lack of uniform geographic impact,” because “Congress may devise ... a national policy with due regard for the varying and fluctuating interests of different regions.” *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (upholding federal mining law that “impose[d] a greater burden on mine operators in the Midwest” than elsewhere in the country) (citation omitted); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974) (Congress has “power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems”); *Columbia River Gorge*

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<sup>27</sup> For additional Congressional classifications treating Alaska and/or Hawaii differently from other States, see, e.g., 5 U.S.C. §§ 5701(6), 5721(3), 5921(5) (restricting various federal employee pay and allowance provisions to “continental United States,” which “does not include Alaska or Hawaii”); 7 U.S.C. § 1638a(a)(2)(A)(ii) (special rules for Alaska and Hawaii *re* “country of origin” labeling requirements for agricultural products); 7 U.S.C. § 2012(u) (special rules for cost adjustments in Supplemental Nutrition Assistance Program “for Hawaii and the urban and rural parts of Alaska”); 7 U.S.C. § 2014(b) (exempting Alaska and Hawaii from “uniform national standards of eligibility” for food assistance); 12 U.S.C. § 1713(c)(2) (imposing different eligibility requirements for rental housing insurance in Alaska); 12 U.S.C. § 1717(b)(1)-(2) (special rules for mortgages covering property in Alaska and Hawaii); 15 U.S.C. § 1175(c) (“Exception for Alaska” from certain prohibitions *re* gambling devices); 23 U.S.C. § 133(3)(c) (“noncontiguous States exemption” for Alaska and Hawaii from certain highway funding rules); 26 U.S.C. § 4261(c)(3) (“Special rule for Alaska and Hawaii” *re* certain transportation taxes); 26 U.S.C. § 4462(5)(b) (“Special rule for Alaska, Hawaii, and possessions” *re* Harbor Maintenance Tax); 37 U.S.C. § 404a(a)(2) (exempting Alaska and Hawaii from provisions governing subsistence expenses); 42 U.S.C. § 1395m(10) (requiring “exceptions” to certain Social Security provisions for “[a]reas outside continental United States ... to take into account the unique circumstances of covered items furnished in Alaska, Hawaii, or Puerto Rico”); 42 U.S.C. § 1760(f) (special “adjustments” in federal school lunch program for Alaska and Hawaii); 42 U.S.C. § 4013(b)(1)(A)(iii) (special provisions in national flood insurance program for Alaska and Hawaii); 42 U.S.C. § 4955(b)(2) (special provisions in federal antipoverty program for Alaska and Hawaii); 42 U.S.C. § 7545(i)(4) (“The States of Alaska and Hawaii may be exempted from the requirements of” certain Clean Air Act provisions); 49 U.S.C. § 13102(17) (special provisions in Surface Transportation Act for “noncontiguous domestic trade,” defined as “traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States”); 49 U.S.C. § 47107(j) (special provisions *re* use of federal highway funds in Hawaii).

*United -Protecting People and Property v. Yeutter*, 960 F.2d 110, 115 (9<sup>th</sup> Cir. 1992) (“The equal protection clause . . . is not violated when a geographic area is singled out for different treatment”); *Augusta Towing Co. v. United States*, 5 Cl. Ct. 160, (1984) (“The type of classification the law requires to be rational, however, is the classification of persons, not geographical areas. It is settled that ‘[t]he Equal Protection Clause relates to equality between persons as such rather than between areas.’”) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954)); *United States v. Ramirez*, 404 F. Supp. 273 (W.D. Tex. 1974) (“It has . . . been clearly established that due process and equal protection do not require that statutes be nationally uniform in their application among all states.”). These principles apply with equal force to classifications among Native American tribes and their members based on which States they live in; federal Indian law is full of special legislative and regulatory provisions addressed to Alaskan and Hawaiian native peoples.<sup>28</sup>

The Court will take note that the SFTA’s lead cases, while containing *dicta* expressing skepticism about the wisdom of certain classifications between the contiguous 48 States and Alaska and Hawaii, all ultimately *upheld* these geographical classifications under the rational basis standard of review. *See, e.g., Kahawaiolaa*, 386 F.3d at 1280 (concluding that, while “[a]t first blush . . . a geographic exception to an otherwise uniform federal regulation appears

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<sup>28</sup> *See, e.g.,* Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601 *et seq.* (extinguishing aboriginal title in Alaska and creating unique, experimental system of Alaskan Native village corporations to acquire land and administer Alaska Native Fund); *Kahawaiolaa v. Norton*, 386 F.3d at 1279-83 (upholding statutory exclusion of Hawaiian Native peoples from federal tribal recognition laws that apply to Native peoples in the other 49 States); *Cohen’s Handbook of Federal Indian Law* § 4.07[3]-[4] (2005 ed.) (discussing history of unique federal regulations of Alaskan and Hawaiian native peoples). *See also* Public Law 280, which imposes “mandatory” state criminal and civil jurisdiction on Native American tribes in only six States — California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. *See* 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). That law and the state enforcement actions undertaken pursuant to its terms have repeatedly survived equal protection and other constitutional challenges. *See, e.g., Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979).

problematic,” the “unique history of Hawaii” justified exempting aboriginal peoples in that State from the tribal recognition process that applies in the other 49 States); *Matsuo v. United States*, 532 F. Supp. 2d 1238, 1252-54 (D. Haw. 2008) (although court was “puzzled by the legislative anomaly,” it upheld exclusion of federal workers in Alaska and Hawaii from an otherwise-uniform nationwide system of “locality pay” for federal employees), *aff’d*, 586 F.3d 1180, 1185 n.8 (9<sup>th</sup> Cir. 2009) (differential treatment of federal workers in Alaska and Hawaii “clearly satisfies rational basis scrutiny”). Indeed, the SFTA fails to cite to a *single* decision that has struck down an Act of Congress because it exempted Alaska and/or Hawaii from its scope.

In these circumstances, the narrow exemption in § 1716E(b)(2) for *intrastate* mail deliveries must be upheld so long as there is “a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. at 319-20. And as discussed above, it is SFTA’s heavy burden “to negative *every conceivable basis* which might support” the geographic exception. *Id.* at 320 (emphasis added). The SFTA claims to have searched the PACT Act and its legislative history in vain for any “explanation” for the exemption of Alaska and Hawaii from the *intrastate* mail ban, and to be unable to conceive of *any* “legitimate reason for treating persons and businesses in the contiguous United States differently than those within the boundaries of Alaska and Hawaii.” Mem. at 21. But the explanation for the classification is plainly spelled out in the key Senate Report accompanying the PACT Act:

[The Act] includes a geographic exception to the nonmailable matter provision. This exception was included to allow mailings of cigarettes and smokeless tobacco to persons located in remote areas of Hawaii or Alaska, where individuals are forced to rely exclusively on the mails to obtain groceries and other consumables.

S. Rep. 110-153, at 15 (2007).

Although the SFTA argues that “many” people live in “remote areas” throughout the country, the reliance on USPS deliveries in Alaska and Hawaii is orders of magnitude different in both degree and kind than anywhere else in the country. Virtually everyone in the lower 48 States may travel by road, rail, or water to nearby communities to buy groceries and other consumables; it may be a long journey in some instances, but it is nearly always feasible. Not so in many parts of Alaska or Hawaii. Many Alaskans live in areas “not served by road, sea, or river,” and that “can be reached only by air, foot, dogsled, or snowmobile.”<sup>29</sup> This problem is so acute that Congress created the “intra-Alaska bypass mail system” so as to provide “hundreds of rural and isolated communities within the State” with an “affordable means of delivering food and everyday necessities to these rural and isolated communities.” Pub. L. 107-206, Title III, § 3002(b), 116 Stat. 924; *see generally* 39 U.S.C. § 5402 (contracts for transportation of mail within Alaska by air). The archipelago of Hawaii obviously presents similar delivery challenges unlike those of any other State in the continental 48 States. Hawaii is our only island State, consisting of “an archipelago of over nineteen distinct volcanic islands” and a 1,500-mile chain of over 100 additional, smaller islands.<sup>30</sup> The Congressional delegations from Alaska and Hawaii have long contended that U.S. mail issues in those two States are “very different from the

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<sup>29</sup> *See* <http://en.wikipedia.org/wiki/Alaska#Roads> (“Alaska has few road connections compared to the rest of the U.S. The state's road system covers a relatively small area of the state ....The state capital, Juneau, is not accessible by road, only a car ferry .... The western part of Alaska has no road system connecting the communities with the rest of Alaska. ... Cities not served by road, sea, or river can be reached only by air, foot, dogsled, or snowmachine ....”).

<sup>30</sup> <http://wikitravel.org/en/Hawaii>. “Because Hawaii is an archipelago, air travel is, for the most part, compulsory for traveling within the state. ... [C]rossing the channels between islands can be extremely rough going.” *Id.*

other 48 states” given “our constituents’ reliance on that mail service for basic and necessary items.”<sup>31</sup>

The special importance of mail deliveries in the Nation’s only Arctic State and its only archipelago State obviously provides a rational basis for exempting them from the nationwide intrastate mailing ban; for many residents in those States, the U.S. mails are the *only* practicable means for obtaining cigarettes as well as other daily consumables. Moreover, Congress took care to draw this exception narrowly and with precision. Alaskan and Hawaiian cigarette sellers are fully subject to the PACT Act’s delivery sales provisions, and the *interstate* mail ban applies to both outgoing and incoming mail deliveries in those States. Thus there is no chance that Internet cigarette vendors might flock to Alaska and Hawaii and sell back into the “lower 48”; the PACT Act flatly prohibits the use of the U.S. mails in such circumstances.

Early versions of the Act would have allowed mailed deliveries “*into or within*” Alaska and Hawaii, but the exemption was narrowed to mailed deliveries *within* each of these States, thus ensuring that Alaskan and Hawaiian consumers could not evade their own States’ cigarette excise and sales tax laws by purchasing from out-of-state vendors.<sup>32</sup> Both Alaska and Hawaii have comprehensive tax systems that provide for the collection of all applicable cigarette taxes,

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<sup>31</sup> June 9, 2010 Letter from Sens. Murkowski, Inouye, Begich, and Akaka to Chairwoman Ruth Y. Goldway, Postal Regulatory Commission, reprinted at [http://murkowski.senate.gov/public/?a=Files.Serve&File\\_id=33fcf13d-24c8-498a-ba5e-c50d4cef6a97](http://murkowski.senate.gov/public/?a=Files.Serve&File_id=33fcf13d-24c8-498a-ba5e-c50d4cef6a97) (discussing special reliance by “the people of Alaska and Hawaii” on the USPS to provide “efficient and timely delivery of medication, food, water and other necessities”); *see also* Mar. 2, 2009 Letter from Gov. Sarah Palin to Postmaster General John Potter, reprinted at [http://www.gov.state.ak.us/pdf/Potter-MailIncrease\\_Mar3-2009.pdf](http://www.gov.state.ak.us/pdf/Potter-MailIncrease_Mar3-2009.pdf) (arguing that postal rate increases have “an exponentially greater impact on Alaskans than those in other states due to the reliance of Alaskans on the bypass mail system for food and supplies,” which serves “more than 160 remote and isolated communities”).

<sup>32</sup> *See, e.g.*, H.R. 4081, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess., § 3 (providing that the mailing ban “shall not apply to mailings within or into any State that is not contiguous with at least 1 other State of the United States”).

including those on cigarettes delivered intrastate by retailers through the U.S mails along with groceries and other routine consumables.<sup>33</sup> Thus, the challenged exception does not open a potential contraband loophole either into, within, or out of Alaska and Hawaii.

The SFTA’s argument that “residents of major cities such as Honolulu or Anchorage are less remote” than many rural residents in the contiguous 48 States is an example of the kind of hair-splitting line-drawing objections that consistently *fail* under the deferential rational basis test. The limitations on rational basis review have “added force ‘where the legislature must necessarily engage in a process of line-drawing. . . Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—‘inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.’” *Beach Comm’ns*, 508 U.S. at 315-16 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 160,179 (1980)).

Thus “the statute need not employ a perfect fit between means and ends”; a classification is not impermissible “simply because [it] ‘is not made with mathematical nicety or because in practice it results in some inequity.’” *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). Given the oft-expressed concerns about the special reliance by significant numbers of Alaskans and Hawaiians on mail deliveries of groceries and other consumables and Congress’s frequent

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<sup>33</sup> On Alaska’s collection of cigarette taxes, see Alaska Stat. §§ 43.50.090 (reporting obligations), 43.50.100 (civil penalties), 43.50.105(b) (prohibiting delivery sales unless the tax imposed on the cigarettes has been paid), 43.50.190, 43.50.580 (prohibiting possession of unstamped cigarettes anywhere within the State), 43.50.610 (seizure provisions), 43.50.640 and .650 (criminal penalties); Press Release, Alaska Dep’t of Revenue, *State Works to Collect Tobacco Tax on Mail Order Cigarettes* (July 11, 2006), [http://www.revenue.state.ak.us/PressReleases/Cig tax 7-11-06.pdf](http://www.revenue.state.ak.us/PressReleases/Cig%20tax%207-11-06.pdf). On Hawaii’s collection of cigarette taxes, see Haw. Rev. Stat. §§ 245-3, 245-37 (criminal penalties), 245-39, 245-40 (seizure and forfeiture provisions); State of Hawaii, Dep’t of Taxation, Form M-19: *Cigarette and Tobacco Products Monthly Tax Return* (“Use Form M-19 (Rev. 2008) for sales, use, or possession of cigarettes and tobacco products after September 30, 2008.”), available at <http://www6.hawaii.gov/tax/2009/m19.pdf>.

exclusions of Alaska and/or Hawaii from otherwise-nationwide rules, the challenged exemption readily passes rational-basis muster.<sup>34</sup>

**b. The PACT Act Is Facially Non-Discriminatory as Between Native and Non-Native Retailers, and There Is No Evidence That Any Disparate Impact Is Based on Racial Discrimination.**

Red Earth argues that the PACT Act also violates equal protection guarantees because it “applies more forcefully against Native retailers than it does against non-Native retailers.” Red Earth Mem. at 35. On its face, the PACT Act treats tribes and their members *exactly* like everyone else. Moreover, the Act was designed, in part, to “require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with *the same laws* that apply to law-abiding tobacco retailers” and to “create strong disincentives to illegal smuggling of tobacco products.” 15 U.S.C. § 375(1)(c) (emphasis added). Plaintiffs’ real complaint is not that they are being treated differently, but that they are being treated the *same* as everyone else notwithstanding their supposed “sovereign rights” to special treatment. Red Earth Mem. at 35. It cannot be a violation of equal protection to treat people equally.

For Plaintiffs to establish that the admittedly facially neutral PACT Act violates equal protection guarantees, they must demonstrate that (1) the law works a disparate impact against a group and (2) this disparate impact is the result of purposeful racial discrimination. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Plaintiffs cannot show that any disparate impact is the result of purposeful discrimination against Native American

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<sup>34</sup> Even if the SFTA’s claim were otherwise sound — which it is not for all of the reasons set forth above — it would at most only call into question the ban on *intrastate* deliveries in the lower 48 States. The ban on *interstate* cigarette shipments through the U.S. mails applies in Alaska and Hawaii as well as the rest of the country, and the SFTA has offered no reason why a potential objection to the *intrastate* ban has any relevance to the universal *interstate* ban that is not even subject to the challenged exemption.

tribes or their members. To the contrary, Congress included numerous provisions in the PACT Act specially designed to *preserve* tribal sovereignty and sovereign immunity.<sup>35</sup>

Red Earth argues that the PACT Act targets Native American cigarette retailers based on their race and that the Act is accordingly subject to the more stringent strict scrutiny standard and must be suitably tailored to serve a compelling state interest. Red Earth Mem. at 43-36.

However, the Supreme Court has repeatedly rejected the application of the strict scrutiny standard to laws that are alleged to impose disparate impacts on federally recognized Native American tribes or their members, instead applying the more relaxed rational basis standard of review because classifications based on tribal status are “*political* rather than *racial*” in nature. *Morton v. Mancari*, 417 U.S. 535, 554 & n.24 (1974) (emphasis added); *see also Yakima Indian Nation*, 439 U.S. at 501 (“It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.”) (citation omitted); *United States v. Antelope*, 530 U.S. 641, 646 (1977) (rejecting equal protection challenges to criminal laws that made only Indians subject to federal prosecution for certain offenses; “federal regulation of Indian tribes . . . is governance of once sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians.’”).

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<sup>35</sup> *See, e.g.*, 15 U.S.C. § 376 (requiring anyone selling cigarettes or smokeless tobacco into Indian country to register and file monthly reports with tribal government officials); § 376a(b) (requiring delivery sellers to comply with tribal laws if they ship into Indian country); § 376a(e)(1)(D) (requiring Attorney General to include on list of unregistered or non-compliant delivery sellers any entity suggested by tribal authorities); § 378(c)(1)(A) (allowing tribal enforcement of amended Jenkins Act); § 378(c)(1)(B) (clarifying that nothing in the Act “shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a . . . Indian tribe . . . or otherwise to restrict, expand, or modify any sovereign immunity of a[n] . . . Indian tribe”); § 378(d) (excluding suits against a “tribal government” from private cause of action to prevent and restrain violations of the Act).

**c. Congress Had Ample Justification for Treating Internet and Other Remote Cigarette Vendors Differently From “Point-of-Sale” Vendors.**

Red Earth also contends that there is no rational basis for Congress’s decision to limit the PACT Act to remote sellers of cigarettes and smokeless tobacco rather than extending the Act to cover so-called “point of sale” sellers as well. (Red Earth Mem. 40-41). But point of sale sellers of cigarettes and smokeless tobacco are *already* subject to the stringent regulations of the States and municipalities in which they are located and have not presented the extreme jurisdictional and enforcement challenges posed by remote sellers. Congress specifically enacted the PACT Act to reach remote sellers that were evading the reach of these State and local laws. In fact, the first enumerated purpose of the Act as codified is to “require Internet and other remote sellers of cigarettes and smokeless tobacco to comply with *the same laws* that apply to law-abiding tobacco retailers”. 15 U.S.C. § 375(1)(c)(1) ( emphasis added). Equal protection guarantees do not prevent Congress from identifying the classes of business that create “enforcement dilemma[s]” due to “the unique traits of the target businesses” and to enact special enforcement measures targeted at these businesses for the purpose of ensuring equal compliance with all applicable laws. See *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 970-71 (9<sup>th</sup> Cir. 2003).

**6. The Export-Import Clause Is Irrelevant to Interstate Sales and Shipments.**

Although not developed in their brief, Red Earth’s complaint also alleges that the PACT Act contravenes the Import-Export Clause of the United States Constitution (Art. I, § 10). See Cpt. ¶¶ 56-59. At least since the Supreme Court’s Civil-War era decision in *Woodruff v. Parnham*, 8 Wall. 123, 19 L.Ed. 382 (1869), however, it has been settled law that the Import-Export Clause applies “only to articles imported *from foreign countries* into the United States,”

not to sales in interstate commerce. *Dooley v. United States*, 183 U.S. 151, 153 (1901) (emphasis added). The Import-Export Clause is irrelevant to the constitutionality of the PACT Act.

**C. THE BALANCE OF EQUITIES WEIGHS HEAVILY FOR DENIAL OF INJUNCTIVE RELIEF**

The Court should deny the requested injunction not just because Plaintiffs' have no likelihood of success on the merits but also because the balance of equities weighs heavily in favor of that result. Plaintiffs' own dilatory conduct demonstrates the lack of any serious risk of irreparable injury. Moreover, any threatened injury to Plaintiffs is easily outweighed by the equitable factors weighing against injunctive relief, including: (a) the harm of judicial interference with duly enacted Congressional legislation passed in the public interest; and (b) the continued harm that Internet cigarette sales works on Federal, State and local tax revenues as well as to the businesses that comply with the local laws governing cigarette sales.

**1. Plaintiffs' Delay in Seeking Injunctive Relief Demonstrates the Lack of Any Real Danger of Irreparable Harm.**

The whole "purpose of a preliminary injunction is to prevent irreparable injury and preserve a court's ability to render a meaningful decision on the merits." *Amaker v. Fisher*, 2010 WL 2572936 (W.D.N.Y. 2010). Delay in seeking a preliminary injunction "undercuts movant's claim of irreparable harm." *Passlogix, Inc. v. 2FA Technology, LLC*, 2010 WL 2505628 (S.D.N.Y. 2010) (citing *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995) and *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)). Versions of the Congressional bills that led to the PACT Act date back 2003. The President signed the Act into law on March 31, 2010. See P.L. 111-154, 124 Stat. 1087. Yet Plaintiffs waited three full months before filing their challenge.

The Red Earth Plaintiffs filed on June 25, 2010, only four days before the Act became effective. The Seneca Free Trade Association filed on July 1, 2010, *after* the PACT Act had already taken effect. If Plaintiffs seriously believed that the Act threatened irreparable harm, they would have filed their challenge promptly after the PACT Act was enacted and signed into law.

As the United States District Court for the District of Columbia held in rejecting a similarly-timed request to enjoin enforcement of the PACT Act:

Paramount to the Court’s consideration is the lateness of the hour in which plaintiff seeks this relief. According to plaintiff’s motion, the PACT Act was signed into law on March 31, 2010, and became effective today, June 29, 2010. Plaintiff’s application was filed in the Court’s after hours drop box yesterday, June 28, 2010, fewer than twenty-four hours before the law was to take effect. As such, the Court’s “conclusion that an injunction should not issue is bolstered by the delay of the appellants in seeking one.”

*Gordon v. Holder*, Case No. 1:10-cv-01092-HHK (D.D.C. Slip Op. filed June 29, 2010) (*citing Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975)).

## **2. The Balance of Equities and Overall Public Interest Overwhelmingly Favor Denying the Requested Injunction.**

Finally, the overall equities and public interest overwhelmingly favor denying the injunction here. “The presumption of constitutionality which attaches to every Act of Congress is . . . an equity to be considered in . . . balancing [the] hardships” relevant to a request for injunctive relief. *Walters*, 408 U.S. at 1323; *see also* Argument § A, *above*.

Here, Congress has conclusively determined that interstate Internet sales of untaxed cigarettes cause a variety of harms, including depriving State and local governments of billions of dollars of needed tax revenue and, at the same time, diverting billions of dollars of revenues away from legitimate, law-abiding retailers. *See* PACT Act, §§ 1(b)(1), 1(b)(6). The requested injunction would perpetuate these harms.

On the other side of the balance, Plaintiffs' *only* risk of harm is that Congress will achieve its intended purpose of denying retailers like them the continued unfair and unlawful benefit of selling cigarettes *without* paying the required excise taxes, a cost that is borne by the legitimate businesses against whom Plaintiffs compete. These equities balance overwhelmingly in favor of the Court denying the requested injunction.

### CONCLUSION

Courts "will not exercise their power to enjoin the enforcement of an act of Congress except under the most imperative or exigent circumstances." *Katzenbach*, 85 S. Ct. at 6. No such circumstances are presented here, and the Court should deny the requests for injunctive relief.

Dated: Buffalo, New York  
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Respectfully submitted,

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