10-3165-cv
10-3191-cv
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RED EARTH, LLC, d/b/a SENECA SMOKESHOP,
AARON J. PIERCE, and SENECA FREE TRADE ASSOCIATION,
Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES, *et al.*,
Defendants-Appellants/Cross Appellees.

On Appeal from the United States District Court
for the Western District of New York

BRIEF OF *AMICUS CURIAE* CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF VACATING THE INJUNCTION

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Amicus curiae The City of New York (the "City"), respectfully submits this brief in support of the appeal of the United States, which seeks to vacate the July 30, 2010 order of the District Court for the Western District of New York to the extent that the order preliminarily enjoins enforcement of 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d) of the Prevent All Cigarette Trafficking ("PACT") Act. *See Red Earth LLC v. United States*, 2010 U.S. Dist. LEXIS 77719, at *59-60 (W.D.N.Y. July 30, 2010) ("*Red Earth*").[1]

PRELIMINARY STATEMENT

The District Court correctly rejected nearly all of the attacks on the constitutionality of the Prevent All Cigarette Trafficking ("PACT") Act, 18 U.S.C. § 375, *et seq*., offered by the plaintiff-appellees, a group of mail-order cigarette sellers. The District Court did err, however, in holding that the PACT Act violates the Due Process Clause of the United States Constitution on the ground that the Act "requires remote sellers who are not physically present in a taxing jurisdiction to collect state and local excise taxes . . . regardless of whether their existing contacts with that taxing jurisdiction rise to the level of minimum contacts necessary to satisfy due process considerations." *Red Earth*, at *22-23.

[1] No party's counsel authored this brief in whole or in part. No one other than the City contributed money intended to fund the preparation or submission of this brief.

The District Court's error arises directly from its misreading of the plain language of the PACT Act, which simply does not require remote sellers to "collect" or to remit taxes to any state or to otherwise participate in the administration of any state's cigarette taxation regime. The PACT Act in fact expressly provides that remote sellers may not deliver cigarettes into a jurisdiction unless any applicable tax on the cigarettes "has been paid." 15 U.S.C. § 376a(d)(1)(A), (B). The Act's crucial use of the passive voice eliminates any requirement that a remote seller itself collect or pay any tax. Remote sellers instead can easily sell cigarettes on which the tax "has been paid" by purchasing the supply intended for sale into a particular jurisdiction from those suppliers who are licensed by that jurisdiction to apply tax stamps, just as the non-remote "brick and mortar" sellers within that jurisdiction do. Remote sellers must purchase their stock somewhere; requiring them to patronize suppliers who sell tax-paid cigarettes does not subject the remote seller to the state's jurisdiction. By purchasing tax-stamped cigarettes, remote sellers will sell cigarettes on which the tax "has been paid" to consumers in the taxing jurisdiction, without collecting, remitting or administering taxes in that jurisdiction.

The PACT Act thus does not impose a state tax collection or payment burden on remote sellers, but merely imposes a federal requirement that participants in interstate commerce comply with certain state laws, a practice long

since approved by the Supreme Court as consistent with the Due Process Clause, and to which the "minimum contacts" analysis utilized by the District Court is entirely inapplicable.

INTEREST OF AMICUS CURIAE

The City of New York (the "City") is a municipality that levies an excise tax on cigarette sales. The City, New York State and other States nationwide, have experienced tax losses in the hundreds of millions of dollars at the hands of Internet delivery sellers who have exploited cross-border tax differences through Internet sales to the public. The City has engaged in litigation and other efforts to combat such sales and brings to this issue the experience gained from a seven-year effort within the legal thicket, now unsnarled by the PACT Act, in which mail-order cigarette sellers were formerly able to conceal themselves. In a series of actions brought against Internet cigarette sellers, the City learned the remarkable lesson that conduct long held to constitute mail and wire fraud, that deprived governments of hundreds of millions in tax dollars and that undercut a myriad of public health measures, could not be remedied by State and local governments under then-existing law. *See Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), reversing *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008).

Fortunately, in unanimously enacting the PACT Act, Congress understood and addressed the need for an effective measure to extirpate at its root the interstate tax evasion that is the business model for Internet cigarette sales. The City respectfully submits that Congress was fully empowered to conclude that the public interests in government finance, public health and law enforcement vastly outweigh the private profits – generated through tax evasion – of a few Internet cigarette sellers.

ARGUMENT

The District Court's determination that the PACT Act violates the Due Process Clause of the Constitution by potentially imposing duties on remote cigarette sellers with respect to states with which the sellers may not possess "minimum contacts" is flatly incorrect. That determination is mistakenly premised on the notion that the PACT Act requires remote cigarette sellers to collect, pay or otherwise administer State excise taxes when the statute plainly requires none of those things. A telltale sign of the District Court's flawed understanding of the PACT Act is the court's reliance on the inapposite Supreme Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) to support its reasoning. *Quill* addressed a state law that required mail-order businesses selling to North Dakota residents to register with the State of North Dakota and then to physically calculate, collect, and remit North Dakota taxes to the state. By contrast, the

PACT Act is a federal statute that requires remote sellers to ensure that a tax "has been paid" prior to sales into a state. Just like in-state "brick and mortar" stores, remote sellers can accomplish this, *inter alia*, by purchasing tax-stamped cigarettes from licensed wholesale suppliers or stamping agents for the states into which they desire to make sales. The PACT Act does no more than require interstate remote sellers to comply with state laws – a long-approved type of federal mandate that does not trigger due process concerns because the requirement is imposed by the federal government, not any State.

The PACT Act therefore does not violate the Due Process Clause of the Constitution and this Court should vacate the portion of the District Court's decision enjoining 15 U.S.C. §§ 376a(a)(3), (4) and 376a(d) of the PACT Act.

I. The PACT Act Does Not Require Remote Sellers to Collect or Pay State Excise Taxes on Cigarettes.

Although the District Court's decision relies on the notion that the PACT Act imposes the taxation power of all 50 states on remote sellers by requiring them to collect, pay and administer state cigarette taxes whenever a sale is made to a customer in that state, the District Court never actually points to any language in the Act imposing that requirement. In reality, the PACT Act's provisions that address matters of state taxation provide:

15 U.S.C. § 376a

(a) In general. With respect to delivery sales into a specific State and place, each delivery seller shall comply with—

* * *

(3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing—

(A) excise taxes;

(B) licensing and tax-stamping requirements;

* * *

and

(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

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

* * *

(d) Delivery.

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

(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered **has been paid to the State**;

> (B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered **has been paid** to the local government; and
>
> (C) any required stamps or other indicia that the excise tax has been paid **are properly affixed or applied** to the cigarettes or smokeless tobacco.

15 U.S.C. § 376a (emphasis added).

Nothing in these provisions, which are the sections that the District Court found offensive to the Due Process Clause, requires that remote sellers *themselves* collect, pay or administer cigarette excise taxes. The operative language of 15 U.S.C. § 376a(d) is written in the passive voice: a remote seller may not make a delivery sale unless in advance of the sale, the excise tax imposed by the state or local government "has been paid" to the State or local government. 15 U.S.C. § 376a(d)(1)(A), (B). Congress's choice of language has a critical impact on the definition of the conduct that will comply with the statute. "The passive voice focuses on an event that occurs without respect to a specific actor, ... It is whether something happened--not how or why it happened--that matters." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009); *see Watson* v. *United States*, 552 U.S. 74 (2007) (use of passive voice in statutory phrase reflects "agnosticism . . . about who does the using"). Accordingly, a remote seller can fulfill the requirements of § 376a(d) by delivering cigarettes on which someone has already paid the tax. As discussed in more detail below, a remote seller can meet

that requirement simply by purchasing its supply of cigarettes from suppliers of tax-paid cigarettes licensed by the particular states into which the remote seller wishes to make retail sales.[2]

The language of § 376a(a)(3), that all delivery sellers "shall comply with . . . all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place," likewise does not require the physical collection, payment or administration of taxes by the remote seller. The District Court cited no state or local laws that so require and, as discussed below, remote sellers can comply with state taxation schemes merely by purchasing tax-paid cigarettes from state-licensed wholesalers.[3]

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[2] Nor would remote sellers be restricted to the method suggested here. They are free to adopt any method that assures that the tax "has been paid" by someone on the cigarettes they sell – for example, by requiring customers to provide proof that the customer has paid the tax.

[3] Even if the District Court's reading of the PACT Act were plausible and the Act's language could be read to require a remote seller to itself collect and remit taxes, to the extent that under such a reading the Act would violate due process, the canon of constitutional avoidance requires that reading to be rejected in favor of the reading advanced by the City: "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). The canon of constitutional avoidance is based on the principle that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Id*. The canon is a tool for choosing between competing plausible interpretations of a statute's language, "resting on the

II. Remote Sellers Can Ensure Taxes Have Been Paid Prior to Sale Without Themselves Collecting or Paying State Taxes.

The District Court's error is rooted in the fact that the parties below did not explain the manner in which cigarette taxes are "collected." The process is a passive one, requiring nothing of a retailer beyond buying its cigarette stock from state-licensed sources. A description of the manner in which state cigarette taxes are imposed and collected explains why the PACT Act cannot and does not impose state tax collection, remittance or administration duties on remote sellers. In contrast with cigarette excise taxes, retailers who collect general state sales taxes must calculate the amount of the tax based on the purchase amount, charge the customer that tax amount, and then remit the payment to the taxing entity, as, for example, the statute in *Quill* provided. *See Quill*, 504 U.S. at 302; pp. 12-13, 21 n.8 *infra*. Cigarette excise taxes are handled in an entirely different manner. In nearly every state that imposes a cigarette excise tax, state-licensed "stamping agents" themselves pay the tax by purchasing tax stamps that are equal in cost to the amount of the tax. *See Opening Brief for Appellants/Cross-Appellees*, at 40-41. Stamping agents, who are also usually cigarette wholesalers, then apply those stamps to the cigarettes. The tax is thereby transformed into a cost incorporated

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reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 543 U.S. 371, 381-382 (2005).

into the wholesale price of the cigarettes; that cost is passed along in the price of the cigarettes, first to the retailer and then to the consumer.

> New York's scheme is typical:
>
> > Under New York law, taxes on cigarettes are largely collected through a system of pre-payments, and then passed along the distribution chain to the consumer. *See* N.Y. Tax L. 471(2). Wholesalers, such as the defendants in this action, may be licensed by New York as "stamping agents" pursuant to New York Tax Law § 472. A stamping agent pre-pays cigarette taxes and affixes a tax stamp to each package of cigarettes; when the tax is paid, <u>any dealer subsequently receiving the stamped cigarettes is not required to purchase and affix tax stamps</u>. *See id.* § 471(1). State-licensed stamping agents are permitted to sell tax-stamped cigarettes and other tobacco products to registered New York retailers and licensed wholesalers. *See id.* §§ 472(1), 480(1)(a).

City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 337 (E.D.N.Y. 2008) (emphasis added) (some citations omitted). By New York's statute, it is the wholesaler/stamping agent to which the payment and collection obligations attach:

> > The [stamping] agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe.

N.Y. Tax L. § 471(2).

New York cigarette retailers (and the retailers of nearly every other state with a cigarette tax) thus do not charge and collect taxes or remit any taxes to the State. Instead, retailers pay a wholesale price which reflects a prepayment of taxes by the licensed wholesaler/stamping agents from whom retailers are required to buy their supply of cigarettes; that cost is in turn passed on to retail customers like any other wholesale cost. The retailer remits nothing to a taxing jurisdiction, has no administrative role in collecting the tax, and keeps for itself all of the money received from a customer who purchases cigarettes.

Accordingly, brick and mortar retailers located within a taxing jurisdiction such as New York State assure that "the excise tax imposed by the state or local government has been paid to the State" merely by buying stamped cigarettes from wholesalers who either are or obtain their stock from state-licensed stamping agents. Remote sellers may do so as well – a remote seller wishing to sell into New York (or nearly any other state) may buy tax-paid, New York-stamped cigarettes (or tax-paid cigarettes stamped by the state into which it desires to sell).[4] Remote sellers would thereby easily ensure that state tax "has been paid"

[4] Alternately, for sales into states without tax stamps, remote sellers could use any other method of assuring the tax has been paid, for instance by requiring customers to provide proof of payment. Additionally, in North Dakota, one of the states without tax stamps, in-state wholesalers prepay the state taxes, so remote sellers could ensure that North Dakota taxes have been paid by purchasing from in-state wholesalers. *See* http://www.nd.gov/tax/misc/faq/tobacco/index.html (last visited September 22, 2010).

and comply with applicable tax laws. The District Court did not point to any state statutory scheme that would not permit this result, nor did it point to any state statute that required remote sellers to collect, pay or administer any state tax.

Of course, the unfair competitive advantage and illicit profit that remote sellers now generate by selling untaxed cigarettes into a taxing jurisdiction disappear if the remote seller complies with the PACT Act by purchasing tax-paid cigarettes for their retail sales, but Congress can surely constitutionally legislate that result.

III. Because the PACT Act Does Not Require Remote Sellers to Collect and Pay State Taxes, *Quill* Is Inapposite and the District Court's Due Process Holding is Erroneous.

The District Court's "minimum contacts" holding relies almost exclusively on the Supreme Court's *Quill* decision. *Quill*, however, is inapplicable to this case because the North Dakota statute analyzed in that case required out-of-state sellers to register with the state and then "collect the tax from the consumer and remit it to the State." *See Quill*, 504 U.S. at 302. The North Dakota law provided:

> Collection of use tax
>
> The tax imposed by this chapter must be collected in the following manner:
>
> 1. [E]very retailer . . . before making any sales shall

> obtain a permit from the commissioner to collect the tax imposed by this chapter, which permit is subject to all of the requirements, conditions, and fees for its issuance . . . , and . . . shall . . . collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner . . . .

N.D. Cent. Code, § 57-40.2-07. *Quill* expressly noted "the imposition of [a] collection duty" on the out of state mail-order seller. *Quill*, 504 U.S. at 308.

The District Court recognized that *Quill* had "determine[d] whether a mail-order catalog business that did not have any physical presence in the State of North Dakota could be required to collect and pay an excise tax on goods purchased by North Dakota residents for use in that State." *Red Earth*, at *12 (emphasis added); *see also id.*, at *22 (describing holding of *Quill* in terms of a "state tax imposing a duty to collect excise taxes upon an out-of-state seller"). However, the District Court mistakenly applied *Quill*'s minimum contacts analysis to this case because it misread the PACT Act to require remote cigarette sellers to themselves collect and pay the tax (and because, as discussed below, it inappropriately treated the PACT Act's mandates as state, not federal, requirements). Read properly, the PACT Act does not require remote sellers to collect or pay state taxes or to administer a state's taxation scheme. In contrast to the North Dakota law at issue in *Quill*, there is no comparable "imposition of [a state tax] collection duty" in this case. *Quill*, 504 U.S. at 308. *Quill* is therefore

inapposite and the District Court's adoption of *Quill*'s minimum contacts analysis was in error.

IV. The PACT Act Imposes Federal Requirements on Participants in Interstate Commerce and Does Not Subject Them to State Jurisdiction.

The District Court wrongly held that the PACT Act "broaden[s] the jurisdictional reach of each state and locality without regard to the constraints imposed by the *Due Process Clause*." *Red Earth*, at *33. But that is not so. Rather than subjecting remote sellers to states' jurisdictions, the PACT Act simply requires, as a matter of federal law, that participants in interstate cigarette commerce comply with relevant state and local laws. That the PACT Act's requirements, including those regarding compliance with state law, are *federal* is reinforced by the fact that enforcement of the PACT Act provisions at issue is governed by federal enforcement provisions specifying the relevant procedures and penalties. *See* 15 U.S.C. §§ 377-378 (PACT Act §§ 3-4).[5]

Numerous decisions have upheld the power of Congress to require, without offending due process, compliance with State laws as a condition of conducting interstate business. *See e.g., Kentucky Whip & Collar Co. v. Illinois*

[5] Indeed, further confirming that the PACT Act does not "broaden the jurisdictional reach" of states and localities, the Act's enforcement provisions explicitly state that "[n]othing in this Act [15 U.S.C. §§ 375 *et seq.*] shall be construed to expand, restrict, or otherwise modify any right of an authorized [State or local government] official to proceed in State court, or take other enforcement actions, on the basis of an alleged violation of State or other law." 15 U.S.C. § 378(c)(4)(B), (D).

Central R.R. Co., 299 U.S. 334, 352 (1937) (rejecting due process challenge to federal statute barring the transport of convict-made goods if state law barred the import of such goods, noting: "The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection."); *Clark Distilling Co. v. Western Md. Railway. Co.*, 242 U.S. 311 (1917) (upholding against constitutional challenge an Act of Congress that prohibited shipment of alcohol into any State where it was intended to be used contrary to any state law).

Federal statutes that impose requirements to ensure compliance with state laws do not subject the actor to state jurisdiction at all. Indeed, in the original challenge to the Jenkins Act, which the PACT Act provisions at issue amend, the Supreme Court affirmed the holding of a three-judge district court that had rejected a due process challenge made by a mail order trade association representing remote cigarette sellers much like the plaintiff-appellees in this case:

> [A]s to the contention that the [Jenkins] Act forces a resident of one state to submit to the jurisdiction of a second state, it is the power of Congress, not of any state, which requires the information to be submitted. The Act imposes a condition upon the use of the facilities of interstate commerce, and neither obedience nor violation of that condition subjects the plaintiffs to the authority of any state. That the condition is imposed in order to cooperate with the power of the states to tax does not change the situation.

Consumer Mail Order Assoc. v. McGrath, 94 F. Supp. 705, 712 (D.D.C. 1950) (three-judge court), *aff'd*, *per curiam*, 340 U.S. 925 (1951).

The PACT Act simply does not subject remote sellers to state jurisdiction. Therefore, it is not amenable to the due process "minimum contacts" analysis the District Court applied. The PACT Act complies with the Due Process Clause of the Constitution and the preliminary injunction should be vacated.

V. The District Court Erred in Holding that the Public Interest is Served by Enjoining the PACT Act.

The District Court justified its decision to enjoin the PACT Act on the basis of two "public interests": (i) the Act's likely adverse economic consequences to remote sellers and their employees and (ii) the interest in "staying enforcement" of a purportedly "sweeping and unprecedented congressional mandate" pending fuller opportunity for briefing and argument. *Red Earth*, at *55-57. Because neither basis withstands serious analysis, the injunction should be vacated for that reason as well.

The District Court first observed that

> If this Act is permitted to take effect, remote cigarette retailers will be put out of business because they lack the financial resources needed to ensure compliance with the myriad of state and local ordinances to which they are now subject under the Act. . . . [M]ost retailers will be forced to shut down operations if injunctive relief is denied. Undoubtedly, this will have a <u>significant adverse economic impact upon plaintiffs and their employees</u>, all of whom presumably reside in the Western New York

> area and many of whom likely reside on the Seneca Nation reservation itself. … In light of the severe economic consequence likely to befall those members of the Western New York community, public interest favors staying enforcement pending further litigation of plaintiffs' claims.

Red Earth, at *55 (emphasis added). While the court plainly weighted heavily the economic impact on plaintiffs-appellees and their employees in western New York, nothing suggests that the District Court gave any countervailing consideration to the economic impact of remote cigarette sales on the United States as a whole.

The PACT Act represents a congressional choice to value the Nation's public health and national security, as well as federal, state, and local tax revenues, above the private and purely local economic interests of remote sellers and their employees, regardless of whether they are part of the "Western New York," or any other, community. In enacting the PACT Act, Congress found, *inter alia*, that:

> (1) the sale of illegal cigarettes and smokeless tobacco products significantly reduces Federal, State, and local government revenues, with Internet sales alone accounting for billions of dollars of lost Federal, State, and local tobacco tax revenue each year;
>
> ***
>
> (6) unfair competition from illegal sales of cigarettes and smokeless tobacco is taking billions of dollars of sales away from law-abiding retailers throughout the United States;
>
> ***

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

See PACT Act, March 31, 2010, P.L. 111-154, 124 Stat. 1087, § 1(b) (emphasis added).[6] Congress has accordingly chosen to place the interests of the national economy above purely local interests, by implementing PACT Act provisions that require to compliance with the full range of national tax laws:

> (c) Purposes.--It is the purpose of this Act to—
>
> ***
>
> (5) increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco;

Id. § 1(c).

The District Court itself expressly recognized that Congress had made a specific policy choice:

> In enacting the PACT Act, Congress was clearly concerned with the loss of state and local tax dollars each year. Congress attributed some of those losses to the fact that state and local governments were unable to collect

[6] Congress also found that "(2) Hezbollah, Hamas, al Qaeda, and other terrorist organizations have profited from trafficking in illegal cigarettes or counterfeit cigarette tax stamps; (3) terrorist involvement in illicit cigarette trafficking will continue to grow because of the large profits such organizations can earn; (4) the sale of illegal cigarettes and smokeless tobacco over the Internet, and through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products; (5) the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made without adequate precautions to protect against sales to children, without the payment of applicable taxes, and without complying with the nominal registration and reporting requirements in existing Federal law." *Id.*

> taxes from Native American retailers . . . . [T]he [PACT] Act is directed at leveling the playing field for all individuals engaged in retail sales of cigarettes and smokeless tobacco. Congress recognized that leveling the playing field would have an adverse impact upon Native American retailers, but took that action in spite of that fact, and not because of it.

Red Earth, at *46-47 (emphasis added).[7] The District Court's recognition of this congressional choice is completely inconsistent with a belief that the "public interest" could conceivably justify even a temporary injunction against the very provisions of the PACT Act that implement this choice. Even while recognizing that Congress thought to the contrary, the District Court found a "public interest" in protecting a particular segment of the economy of western New York, and found that interest to outweigh the injury to the national economy. Virtually by definition, a choice contrary to the choice made by Congress cannot be in the "public interest." It is certainly not within the powers of the District Court to reverse congressional policy: "The very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of

[7] Congress may well have been guided in this choice by decisions of the Supreme Court that make clear that Indians "have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all," and that principles of federal Indian law do not "authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 155 (1980).

regulation and control." *National Bellas Hess v. Department of Revenue*, 386 U.S. 753, 760 (1967); *see Sorenson v. Secretary of Treasury*, 475 U.S. 851, 868-69 (1986) ("The ordering of competing social policies is a quintessentially legislative function."); *Saratoga County Chamber of Commerce, Inc., v. Pataki*, 100 N.Y.2d 801, 823 (2003) (citations omitted) ("Decisions involving . . . taxation . . . require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure."). The District Court thus did not correctly identify the injunction it issued as in the public interest.

The District Court also invoked the public interest on the ground that the "Congressional expansion of state and local taxing schemes" which it believed was "mandated under the PACT Act—is unprecedented." *Red Earth*, at *56. "The Court is aware of no other federal statute requiring out-of-state retailers to be subject to taxing schemes for state and local governments into which they ship their goods, without regard to whether those retailers have minimum contacts required under the Due Process Clause." *Id.* "Certainly, the public interest favors staying enforcement of a sweeping and unprecedented congressional mandate pending opportunity by this Court and others to fully consider the positions of all parties outside of the hurried context of a preliminary injunction motion." *Id.* at *56-57.

To begin with, the District Court was incorrect that "no other federal statute require[es] out-of-state retailers to be subject to taxing schemes for state and local governments into which they ship their goods …," without regard to minimum contacts. *Id.* at *56. The Contraband Cigarette Trafficking Act, 18 U.S.C.§ 2341 *et seq*., does precisely that, by exposing to criminal and civil liability anyone who ships cigarettes into a state without complying with the state's tax laws. *See, e.g., United States v. Skoczen*, 405 F.3d 537 (7th Cir. 2005).

In any event, the District Court's notion that the PACT Act is a "sweeping and unprecedented congressional mandate" rests on its conclusion that the Act requires tax collection and payment, which, as shown above, the Act does not. The Act merely requires compliance with state laws, an unexceptionable demand.[8]

[8] The commentaries cited by the District Court as germane to its finding that the PACT Act is "unprecedented" reinforce the conclusion that the District Court misperceived the requirements of the PACT Act. The articles cited all discuss congressional power to require remote sellers to assume tax administration burdens – collection and remittance, not the mere compliance that the PACT Act requires. *See Id.* at *57-58, n.14 (citing H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of Quill's Two Nexus Tests*, 29 Seattle U. L. Rev 581, 600, 608, at n. 167 (2006) (addressing sales taxes, "a tax on consumption charged to consumers in the jurisdiction in which the sale occurs, *with the retailer assigned the legal responsibility for collecting the tax* …") (emphasis added); Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflection on the Emerging Issues*, 52 U. Miami L. Rev. 691, 722 (1998)(discussing a "sales and use tax regime … *in which vendors can be required to collect and remit the tax to the customer's state*") (emphasis added)).

In assessing the public interest, the District Court also neglected to consider the fact that plaintiffs' businesses were illegal even prior to passage of the PACT Act. The District Court should have reached the amply supported conclusion that these businesses operate outside of the law. Among the congressional findings in support of the PACT Act, Congress found that "the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made . . . without complying with the nominal registration and reporting requirements in existing Federal law." PACT Act, 111 P.L. 1254, § 1(b)(5). *See* United States General Accounting Office, *Internet Cigarette Sales: Limited Compliance and Enforcement of the Jenkins Act Result in Loss of State Tax Revenue* GAO-03-714T (May 1, 2003) ("We determined that most Internet cigarette vendors do not comply with the Jenkins Act).[9] As noted by the United States in its brief, plaintiff-appellee Red Earth and many members of plaintiff-appellee Seneca Free Trade Association admit (indeed, advertise) that they do not comply with the Jenkins Act. *See Opening Brief for Appellants/Cross-Appellees*, at 12-14. "It is settled law in this Circuit that a Jenkins Act violation . . . may form the basis of a wire or mail fraud conviction. Other circuits have also reached this conclusion." *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 446 (2d

[9] Available at http://www.gao.gov/new.items/d03714t.pdf (lasted visited September 8, 2010)

Cir. 2008) (citations omitted), *rev'd on other grounds, sub nom Hemi Group, LLC v. City of New York*, 130 S.Ct. 983 (2010).

The District Court should have been guided by the considerations articulated by this Court in *United States v. Diapulse Corp. of America*, 457 F.2d 25, 29 (2d Cir. 1972), which is that a party has no vested interest in business activity found to be illegal. In *City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 76306, at *125 (E.D.N.Y. Aug. 25, 2009), the court denied a stay of an injunction that would have permitted Indian cigarette sellers to remain in business while appealing a ruling that the sellers were in violation of the Contraband Cigarette Trafficking Act: "Defendants have failed to demonstrate their entitlement to a stay . . . [T]he public interest would not be served by permitting the defendants to continue to engage in conduct that this Court has concluded is unlawful." The business model of the present plaintiffs-appellees is founded entirely on continuous acts of mail and wire fraud. It was not in the public interest for the District Court to allow the conduct to continue.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court affirm the District Court's order.

Dated: October 4, 2010

Respectfully Submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 5,774 words.

/s/ Eric Proshansky
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CERTIFICATE OF SERVICE

I certify that on the 4th day of October, 2010, I filed the foregoing Brief of Amicus Curiae City of New York in Support of Defendants-Appellants and in Support of Vacating the Injunction through the Court's CM/ECF system. All counsel of record are registered ECF users.

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