

2012 WL 2114856 (C.A.D.C.) (Appellate Brief)  
United States Court of Appeals,  
District of Columbia Circuit.

Robert GORDON, Plaintiff-Appellee-Cross-Appellant,

v.

Eric H. HOLDER, Jr., In his official capacity as Attorney General of the United States;  
United States Department of Justice; Kenneth Melson, In his official capacity as Acting  
Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Alcohol,  
Tobacco, Firearms and Explosives; John Potter, "Jack," In his official capacity as  
Postmaster General; United States Postal Service, Defendants-Appellants-Cross-Appellees.

Nos. 12-5031(L), 12-5051(XAP).

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On Appeal from the United States District Court for the District of Columbia  
Oral Argument Not Yet Scheduled

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### \*1 INTEREST OF THE AMICI

Tobacco use is one of the deadliest and costliest public-health problems afflicting the States and their citizens. To address the harmful effects of smoking and to deter cigarette purchases, all fifty States have enacted laws taxing cigarettes and regulating and restricting their sale, especially to children.

Despite this uniform and nationwide policy to deter tobacco use, the States have long faced serious obstacles to enforcing their laws against out-of-state cigarette retailers who ship their products across state lines. For more than sixty years, Congress has responded to these obstacles by enacting federal laws that impose independent federal duties to reinforce compliance with the States' tobacco laws.

This case concerns the constitutionality of the most recent such enactment, the Prevent All Cigarette Trafficking (“PACT”) Act, [Pub. L. No. 111-154, 124 Stat. 1087 \(2010\)](#), a comprehensive federal statute aimed at reducing smoking by thwarting illegal cigarette sales. As relevant here, the PACT Act includes state-law-reinforcing provisions that require interstate cigarette sellers - as a matter of federal law - to comply with the laws of the States and localities to which they ship \*2 their cigarettes. [15 U.S.C. § 376a\(a\)\(3\)-\(4\), \(d\)](#). Among other things, the provisions require internet or mail-order cigarette retailers to sell only cigarettes for which the tax of the State and locality of delivery has been paid in advance, and to comply with laws of the destination State or locality restricting sales of cigarettes to persons below a statutory minimum age.

The district court below preliminarily enjoined the PACT Act's provisions reinforcing state tax laws based on the mistaken conclusion that they likely denied due process to the plaintiff, a New York-based online retailer of cigarettes. This injunction seriously obstructs the States' ability to ensure full compliance with their cigarette laws.

The *Amici* States have an obvious interest in enforcing *all* of their laws, and they have a particularly strong interest in enforcing the laws relating to the sale of cigarettes. Their interests include reducing the adverse health effects of smoking, which directly harm their citizens and burden state healthcare systems; and capturing the millions of dollars of revenue lost when cigarettes are sold tax-free over the internet. Because of the substantial incentives and opportunities for cigarette sellers and purchasers to evade state laws through internet or \*3 other remote sales, nearly every State and the District of Columbia wrote to Congress supporting the enactment of these provisions of the PACT Act. The *Amici* States thus have a strong interest in overturning the decision below.

### STATEMENT OF THE CASE

The PACT Act, which was supported by nearly every State, passed Congress with overwhelming bipartisan support and was signed into law on March 31, 2010. It was scheduled to take effect on June 29, 2010. The day before the effective date, plaintiff Robert Gordon - the owner of an online and telephone-order cigarette seller - filed suit in the U.S. District Court for the District of Columbia seeking to enjoin the PACT Act on a number of constitutional grounds. The district court at first summarily denied an injunction, but on appeal this Court remanded the case for further analysis.

On December 5, 2011, the district court issued an opinion denying most of Gordon's claims but granting in part his request for a preliminary injunction (J.A. 170-171). The district court dismissed Gordon's challenge to the provision of the PACT Act prohibiting \*4 transportation of cigarettes in the United States mails, [18 U.S.C. § 1716E\(a\)](#) (J.A. 148-153). The district court also rejected Gordon's argument that the PACT Act's state-law-reinforcing provisions commandeered the States in violation of the Tenth Amendment (J.A. 161-165). But the district court nonetheless granted a preliminary injunction to halt enforcement of the PACT Act's requirement that all interstate shipments must comply with the state and local laws of the destination State. The district court held that these state-law-reinforcing provisions likely violate due process because they do not specify that the remote cigarette seller must have minimum contacts with the taxing state (J.A. 153-161). Both Gordon and the United States appealed (J.A. 172-175).

### SUMMARY OF ARGUMENT

1. Before granting the extraordinary remedy of a preliminary injunction against the enforcement of a federal law, courts must carefully weigh the public consequences of enjoining a duly enacted act of Congress. The district court failed to give proper weight to the public interest here.

\*5 By providing federal reinforcement to state taxation and regulation of cigarette sales, the PACT Act's state-law-reinforcing provisions make those state laws much more effective and contribute substantially to the public interests served by those laws. In particular, the PACT Act assists the States in (a) improving public health by decreasing the incidence of smoking in general, and smoking by underage persons in particular; (b) increasing tax revenue at a time of severe budget crises and shortfalls; and (c) reducing the diversion of cigarette sale proceeds to illegal activity, including terrorism and organized crime. The failure of the district court to properly weigh the public interests protected by the PACT Act was an abuse of discretion.

2. The district court also erred in concluding that the PACT Act's state-law-reinforcing provisions violated the Due Process Clause's requirement of minimum contacts. That requirement delineates the territorial boundaries of the *States'* jurisdictional authority. But the PACT Act is a *federal* law, imposing independent federal duties that are enforced by independent federal sanctions. Although the PACT Act provisions at issue here refer to state law, it has long been established \*6 that Congress's incorporation of state law does not strip its enactments of their federal character.

Moreover, the district court's due process analysis would be flawed even if the PACT Act were a state law. The court invalidated the state-law-reinforcing provisions on the ground that those provisions impose state-law compliance on sellers whose contacts with the destination State are insufficient to satisfy due process. But in this context, due process requires only "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Meadwestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) (quotation marks omitted) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-06 (1992)). That link is plainly present here.

The plaintiff, Robert Gordon, operates an online and telephone retailer of cigarettes that expressly holds itself open to doing business with a nationwide clientele. Indeed, to its out-of-state customers, Gordon's company baldly asserts its intentional evasion of state tax laws as its chief competitive advantage over other retailers. Both the Second and the Seventh Circuits have recently held that online retailers with similar online business models purposefully avail themselves of \*7 the benefits of a State's market when they offer to sell products to residents of that State and do in fact ship products to those residents. Due process's concern with basic fairness does not prevent States from exerting their taxing jurisdiction with respect to these specific transactions.

3. Finally, the district court correctly rejected Gordon's argument that the PACT Act's state-law-reinforcing provisions commandeer the States. The PACT Act does not compel the States to do anything. Instead, the Act is the latest in a series of federal enactments that support, rather than undermine, the States' exercise of their sovereignty. Nearly every State urged Congress to enact the PACT Act, and the *Amici* States continue to support the Act's immediate enforcement here.

## \*8 ARGUMENT

### POINT I

#### **THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ADEQUATELY CONSIDERING THE SIGNIFICANT PUBLIC INTERESTS SERVED BY THE PACT ACT'S STATE-LAW-REINFORCING PROVISIONS**

A party seeking to enjoin a statutory or regulatory scheme must demonstrate, among other things, that the public interest weighs in favor of granting an injunction. See *Cobell v. Kempthorne*, 455 F.3d 301, 315 (D.C. Cir. 2006). "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), and relief should be denied, even if the movant will suffer irreparable harm, if "an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate," *Yakus v. United States*, 321 U.S. 414, 440 (1944); *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*,

289 U.S. 334, 338 (1933) (“Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.”).

The district court below concluded that enforcement of the PACT Act's state-law-reinforcing provisions would not serve the public \*9 interest, but it provided only the most cursory justification for this holding. Indeed, the district court's public-interest analysis considered only two factors: (1) the economic harm to remote cigarette retailers who will have to comply with the same tax laws as local, brick-and-mortar retailers, and (2) the federal government's goals in enacting and implementing the PACT Act. (J.A. 168-169.) Nowhere did the court mention, let alone weigh, the significant public interests that the States have in the enforcement of the PACT Act; nor did the court give proper weight to “Congress's legislative judgment” in enacting a nationwide “framework and policy” to address retailers' evasion of cigarette regulations and taxes. *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

Because the district court failed to adequately consider the harm to the public interest that would result from enjoining the PACT Act, its preliminary injunction was an abuse of discretion. A proper consideration of the significant public interests served by the state-law-reinforcing provisions of the PACT Act demonstrates that this factor weighs decidedly in favor of vacating the preliminary injunction and allowing the provisions to take immediate effect.

#### **\*10 A. The Effective Taxation and Regulation of Cigarette Sales Serves Important Public Interests.**

Tobacco use is a deadly and costly public health problem. Smoking causes a host of crippling and deadly diseases, including cardiovascular disease, coronary heart disease, emphysema, aortic aneurysms, and a wide range of cancers. See World Health Org., *WHO Report on the Global Tobacco Epidemic* 8-9 (2008).<sup>1</sup> Approximately 443,000 people in the United States die annually from tobacco-related illness - a rate of more than 1,000 deaths every day - and for each one of those deaths another twenty individuals suffer from severe tobacco-related illnesses. Ctrs. for Disease Control & Prevention (“CDC”), *Tobacco Control State Highlights, 2010*, at 1.<sup>2</sup>

Children are particularly vulnerable to the dangers of tobacco. “[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). “Nearly all tobacco use begins in childhood and adolescence.” \*11 U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 3 (2012).<sup>3</sup> And “[e]very day, approximately 4,000 children under age 18 experiment with cigarettes for the first time; another 1,500 become regular smokers. Of those who become regular smokers, about half will eventually die from a disease caused by tobacco use.” President's Cancer Panel, *Promoting Healthy Lifestyles: 2006-2007 Annual Report* 64 (2007).<sup>4</sup> Even before developing a life-long addiction, children who smoke can experience immediately harmful health effects. See *Id.* And there is evidence that tobacco functions as a “gateway drug” to use of illegal substances such as cocaine and heroin. See, e.g., Shenghan Lai et al., *The Association Between Cigarette Smoking and Drug Abuse in the United States*, *J. of Addictive Diseases*, Dec. 2000, at 11.

Because of its pernicious health impacts, tobacco is a substantial drain on the public fisc. The CDC reports that tobacco-related disease and death cost \$193 billion a year in health-care spending and loss of \*12 productivity. CDC, *Smoking-Attributable Mortality, 57 Morbidity & Mortality Weekly Rev.* 1226 (2008).<sup>5</sup> Smoking also costs the Medicaid and Medicare programs billions of dollars annually. See CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006*;<sup>6</sup> Xiulan Zhang, et al., *Cost of Smoking to Medicare Program, 1993*, *Health Care Financing Rev.*, Summer 1999, at 179.<sup>7</sup>

Given the enormous public-health and economic costs associated with tobacco, it is unsurprising that every State and the federal government have passed laws to regulate the sale, delivery, and use of tobacco. Taxes are a key part of this regulatory scheme. All States, and the District of Columbia, impose excise taxes on the sale of cigarettes. Gov't Accountability Office (“GAO”), *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* 5 (2002).<sup>8</sup> They do

so because “[i]t is well established that an increase in the price of cigarettes decreases their use and that raising tobacco \*13 excise taxes is one of the most effective policies for reducing the use of tobacco.” Inst. of Med., *Ending the Tobacco Problem: A Blueprint for the Nation* 182 (2007).<sup>9</sup>

It is estimated that a ten-percent increase in prices reduces cigarette demand among adults by three to five percent. Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use, in Changing Adolescent Smoking Prevalence* 194 (Nat'l Cancer Inst. Monograph No. 14, 2001).<sup>10</sup> Youth response to price increases is even greater. As little as a ten-percent uptick in cigarette prices is estimated to reduce the number of youth smokers by six or seven percent. *See Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and 3689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 52 (May 1, 2008) (Prepared Statement of Matthew L. Myers, President, Campaign for Tobacco-Free Kids); Jidong Huang & Frank J. Chaloupka, IV, *The \*14 Impact of the 2009 Federal Tobacco Excise Tax Increase on Youth Tobacco Use* 2 (NBER Working Paper No. 18026, Apr. 2012).<sup>11</sup>

Beyond taxing, States have regulated tobacco sales and age restrictions through mechanisms such as licensing, registration, directory laws (which allow the sale only of cigarette brands contained in a state directory), and age-verification requirements. Many States restrict internet sales of tobacco.<sup>12</sup> And some States have banned completely the shipment and delivery of cigarettes to individual customers.<sup>13</sup>

#### **\*15 B. The PACT Act Provisions at Issue Here Make an Essential Contribution to the Effective Enforcement of State Laws Relating to the Sale of Cigarettes.**

Before the enactment of the PACT Act, States faced enormous obstacles to the enforcement of their laws taxing and regulating the sale of cigarettes, and vast numbers of cigarettes were sold in violation of state law. Two developments exacerbated this problem. First, as some States began increasing local excise taxes, price disparities between States grew significantly, increasing the motivation of both buyers and sellers to evade the taxes lawfully imposed by States with higher taxes. For example, New York currently imposes a cigarette excise tax of \$4.35 per pack, the highest rate in the nation, while Virginia's rate, one of the lowest, is only \$0.30 a pack.<sup>14</sup> Disparities like these, coupled with the fact that cigarettes are compact and therefore easily mailable and transportable, provide enormous profit incentives for illegal tax evasion. Second, the development of the internet has led to the exponential \*16 growth of online cigarette sales, a majority of which are made without payment of applicable taxes. *See 15 U.S.C. § 375* note, Findings 1, 5, 9.

Previous federal enactments have attempted to support the States' efforts to curb interstate cigarette smuggling and tax evasion, but they have met with limited success in light of these recent developments. In 1949, Congress enacted the Jenkins Act, *15 U.S.C. §§ 375-378*, for the express purpose of preventing interstate cigarette sellers from evading state tax laws. *See S. Rep. No. 84-1147 (1955)*, reprinted in 1955 U.S.C.C.A.N. 2883, 2883-84. The Jenkins Act accomplishes this purpose by requiring any person who sells and ships cigarettes across a state line to report certain sales to the buyer's state tobacco administrator. States can then seek to collect taxes directly from the buyer. As originally enacted - before it was amended by the PACT Act - failure to comply with the Jenkins Act's requirements constituted a federal misdemeanor punishable by a fine and up to six months' imprisonment. *15 U.S.C. § 377 (1955)*.

In 1978, Congress enacted the Contraband Cigarette Trafficking Act (“CCTA”), *18 U.S.C. §§ 2341-2346*, which was intended to deter large-scale cigarette smuggling. The CCTA makes it a federal felony \*17 punishable by up to five years' imprisonment to ship, sell, transport, or possess more than 10,000 cigarettes that do not bear the tax stamp of the jurisdiction in which they are found. *18 U.S.C. §§ 2341(2), 2342*.

The Jenkins Act and the CCTA reflect a long-standing recognition that the public interest is served by curbing sales of cigarettes that do not comply with state and local tax laws. But these statutes have proven increasingly ineffective at ensuring compliance with such laws. Compliance with the Jenkins Act's reporting requirements has been insubstantial, and interstate cigarette sales have continued to escape state taxation and regulation. (See U.S. Br. 5-6.) According to a 2002 Report by the GAO, efforts to enforce and increase Jenkins Act compliance have had very limited success. GAO, *Internet Cigarette Sales*, *supra*, at 11; see 15 U.S.C. § 375 note, Finding 5 (reporting Congress's conclusion that a majority of internet sellers do not comply with the Jenkins Act registration and reporting requirements). Retail sellers often ignore filing requests even after being contacted by state officials, and because failure to file is only a misdemeanor, federal prosecutions are rarely brought. See GAO, *Internet Cigarette Sales*, *supra*, at 11-12. Without a Jenkins Act filing, States have limited \*18 ability to determine whether or not a filing is required and whether state taxes are being evaded. *Id.* Moreover, when Jenkins Act filings are made and States contact consumers seeking tax payments, payment requests are largely ignored, thereby requiring more extensive collection efforts. *Id.*

As a result of these limitations and enforcement obstacles, internet and other remote cigarette sales have avoided paying *billions* of dollars in state and local taxes each year. 15 U.S.C. § 375 note, Finding 1. That evasion eradicates the deterrent effect that such taxes were designed to have on smoking, and further deprives the States of substantial tax revenues - money that the States often use to fund important public-health initiatives, including efforts to address the physical harms caused by smoking. See, e.g., N.Y. Tax Law § 482(b); N.Y. Pub. Health Law § 2807-v.

And the evasion of taxes was not the only, or even the most troubling, result of the cigarette-law-enforcement obstacles faced by the state and federal governments before the PACT Act. Several studies have found that internet retailers either fail to check the age of purchasers or inadequately verify age before making cigarette sales. \*19 See, e.g., Kurt M. Ribisl, Annice E. Kim, & Rebecca S. Williams, *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?* 92 Am. J. Pub. Health 940 (2002). As a result, children have nearly unfettered access to cigarettes over the internet. See *id.*; 15 U.S.C. § 375 note, Finding 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”).

These enforcement obstacles led the Attorneys General of nearly every State and the District of Columbia to support passage of the PACT Act. Letter from the Nat'l Ass'n of Attorneys General to Members of the U.S. Senate (Mar. 9, 2010).<sup>15</sup> The state-law-reinforcing provisions of the PACT Act were designed to solve the problem that the Jenkins Act and the CCTA had not solved. The statute now requires cigarette sellers to comply with all state and local laws generally applicable to sales of cigarettes or smokeless tobacco in the place of delivery, including laws that impose taxes or restrict sales to minors. PACT Act § 2(c), 124 Stat. at 1091 (enacting 15 U.S.C. § 376a). It thus \*20 adds an independent federal enforcement mechanism to reinforce these state and local laws. And penalties for violations of the PACT Act's requirements were increased to up to three years in prison or civil monetary penalties. *Id.* § 2(d), 124 Stat. at 1100 (amending 15 U.S.C. § 377). State Attorneys General and local government law enforcement officers are authorized to bring suit against violators for injunctive relief or civil damages. *Id.* § 2(e), 124 Stat. at 1101 (enacting 15 U.S.C. § 378(c)(1)(A)).

Because the state-law-reinforcing provisions of the PACT Act have the purpose and likely effect of greatly enhancing compliance with state laws by interstate sellers of cigarettes, the public interest served by those provisions is the public interest in the enforcement of those state laws. And the harms to the public interest inflicted by the district court's preliminary injunction are precisely the harms that those state laws were designed to combat.

*First*, the state-law-reinforcing provisions of the PACT Act improve public health by decreasing the incidence of smoking. As discussed above, there is a significant correlation between raising cigarette prices and reducing the incidence of smoking. Given that \*21 increased prices reduce smoking, coupled with the fact that more than 1,000 people die every day in this country from smoking-related illness, it is plain that without the effective enforcement of federal, state, and local excise tax laws, public health is substantially harmed. Moreover, States and the public bear the financial burden that follows from the deleterious health effects of smoking.

*Second*, the state-law-reinforcing provisions of the PACT Act help States combat underage smoking, both by direct prohibition and through the enforcement of taxes. Children are particularly responsive to price increases, making the PACT Act's tax-enforcement mechanisms important to combating underage smoking. Moreover, the internet and remote sales are a significant source of supply of illegal cigarettes to children, and accordingly reducing the volume of such sales (by eliminating their tax advantage) also reduces the sale of cigarettes to children.

*Third*, to the extent deterrence fails, the state-law-reinforcing provisions of the PACT Act help States legitimately increase revenue at a time of severe budget crises and shortfalls - due at least in part to the drain on the public fisc that has resulted from healthcare costs \*22 associated with smoking. As discussed above, the insufficient enforcement tools available before the PACT Act resulted in the loss of billions of dollars of government revenue.

*Fourth*, the state-law-reinforcing provisions of the PACT Act help stop the proceeds of cigarette sales from being diverted to illegal activity including terrorism and organized crime. The significant profit margins from illegal cigarette sales have been found to be funding other criminal activities, including terrorism. *See, e.g.,* Sari Horwitz, *Cigarette Smuggling Linked to Terrorism*, Wash. Post, June 8, 2004, at A1 (“With huge profits - and low penalties for arrest and conviction - illicit cigarette trafficking now has begun to rival drug trafficking as a funding choice for terrorist groups ....”).

Accordingly, in light of the significant public health, economic, and criminal-justice benefits that flow from the enforcement of the state-law-reinforcing provisions of the PACT Act, the public interest weighs strongly against a grant of a preliminary injunction in this matter.

## \*23 POINT II

### **THE DISTRICT COURT ERRED IN FINDING A CLEAR LIKELIHOOD OF SUCCESS ON THE DUE PROCESS CLAIM**

The district court incorrectly found that Gordon had demonstrated a clear likelihood of success on his due process claim. As an initial matter, the district court's injunction improperly bars enforcement of the PACT Act *altogether*, regardless of the individual circumstances of different cigarette sellers. But such a facial ban is improper because Gordon has not proven that the statute has no conceivable constitutional application. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). It is undisputed here that a remote seller that has substantial and continuous ties to a State beyond those resulting from its website sales could constitutionally be subjected to the laws of that State - for example, New York would have unquestionable jurisdiction over Gordon as a matter of due process because his business is located within New York (J.A. 23, 57). But the district court's injunction bars enforcement of the PACT Act even with respect to such States. At the very least, the district court's broad preliminary injunction should be \*24 vacated because there are applications of the statute that would easily meet even the most stringent of due process analyses.

Even if this were an as-applied challenge involving a remote seller whose contact with a destination State involved only website sales, the due process challenge would still fail, for two independent reasons. First, due process limitations on the territorial reach of state laws do not apply to a federal enactment. Second, even ignoring the PACT Act's federal character, Gordon's deliberate online marketing of cigarettes for interstate sale properly brings him within the taxing jurisdiction of the States to which he ships his products.

#### **A. Due Process Limitations on the Territorial Reach of State Laws Do Not Restrict Congress's Power to Enact Federal Legislation.**

The district court agreed with Gordon that the PACT Act - a federal law - unconstitutionally exceeded the Due Process Clause's territorial limitations on the States' taxing jurisdiction (J.A. 154). But this analysis wrongly treated the PACT Act as if it had been enacted by a State, rather than by Congress in the exercise of its constitutional authority to regulate interstate commerce.

\*25 Contrary to the district court's analysis, the PACT Act does not ‘ ‘authorize violations of the Due Process Clause’ ’ (J.A. 155 (quoting *Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011))) because it does not purport to authorize the States to bring claims *under state law* that they otherwise could not bring. Rather, as the district court elsewhere acknowledged, the PACT Act imposes “independent” *federal* duties on cigarette sellers (J.A. 154), *see* 15 U.S.C. § 376a(a)(3)-(4), (d), backed by independent federal sanctions, *see id.* § 377. And while state attorneys general and local law enforcement officials are expressly authorized to sue cigarette sellers under the PACT Act, any such claims will rest on violations of these federal duties and will seek these designated federal remedies. *See id.* § 378(c)(1)(A). Indeed, Congress was careful to note that the PACT Act did not “expand, restrict, or otherwise modify” state and local officials' *separate* authority to seek relief directly under state and local laws. *See id.* § 378(c)(4)(B), (D).

To be sure, the PACT Act refers to state law in defining cigarette sellers' federal responsibilities. But that reference does not defeat the Act's inherently federal character. As the United States has explained (Br. 20-21), a wide range of federal laws incorporate state law by \*26 reference. For example, the Assimilative Crimes Act, 18 U.S.C. § 13, makes it a federal crime to violate certain state criminal laws in federal enclaves. But that enactment is not “a delegation by Congress of its legislative authority to the States”; rather, “it is a deliberate continuing adoption by Congress” of state law for federal purposes. *United States v. Sharpnack*, 355 U.S. 286, 294 (1958); *see also* U.S. Dep't of Justice, *United States Attorneys' Manual*, Criminal Resource Manual § 667 (1997) (“Prosecutions instituted under this statute are not to enforce the laws of the state, but to enforce Federal law, the details of which, instead of being recited, are adopted by reference.”).<sup>16</sup>

On similar reasoning, a three-judge district court panel in this Circuit - in a decision affirmed by the Supreme Court - more than sixty years ago rejected a claim that the Jenkins Act unconstitutionally “force[d] a resident of one state to submit to the jurisdiction of a second state.” *Consumer Mail Order Ass'n of Am. v. McGrath*, 94 F. Supp. 705, 712 (D.D.C. 1950), *aff'd*, 340 U.S. 925 (1951) (per curiam). The court concluded that “it is the power of Congress, not of any state, which \*27 requires” compliance with the Act. *Id.* The federal requirements of the PACT Act - which amended the Jenkins Act - are no different. Congress could have based the PACT Act's prohibitions on a uniform federal rule; on a complex schedule of regional and state-specific rules; or - as was the case - on the substance of individual States' laws. But whatever its decision, “the will which causes the prohibitions to be applicable [would be] that of Congress,” *James Clark Distilling Co. v. W. Maryland R. Co.*, 242 U.S. 311, 326 (1917), and accordingly the relevant limitations on the enactment would be those applicable to federal law, not state law, *see Kentucky Whip & Collar Co. v. Ill. Cent. R. Co.*, 299 U.S. 334, 352 (1937).

## **B. Even If the PACT Act Were a State Law, It Would Comply with the Due Process Clause.**

Even assuming that a State, rather than Congress, had enacted the PACT Act, the Due Process Clause would not bar the Act's enforcement against online cigarette sellers like Gordon. The Due Process Clause permits States to exercise jurisdiction over an out-of-state retailer so long as there is “some definite link, some minimum connection, between a state and the person, property or transaction it \*28 seeks to tax.” *Meadwestvaco Corp.*, 553 U.S. at 24 (quotation marks omitted). If a “foreign corporation purposefully avails itself of the benefits of an economic market in the forum State,” due process is met “irrespective of a corporation's lack of physical presence in the taxing State.” *Quill Corp.*, 504 U.S. at 307-08. The district court erred in concluding that the state-law-reinforcing provisions of the PACT Act fail to meet this standard.

Gordon operates a cigarette-selling business that conducts the vast majority of its sales online or over the phone (J.A. 23). Although it is now settled that cigarette sellers such as Gordon must comply with state tax laws, *see, e.g., Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), Gordon's company expressly cites tax evasion as its chief competitive advantage over other retailers: its website proclaims that the company is “a Sovereign Nation” that “do[es] not pay state taxes on cigarettes and tobacco products” and promises to “pass this savings on to all of our customers nationwide.” If one of Gordon's “nationwide” customers intends to place an order, the website recommends that he \*29 first “[i]nput [his] zip code” in a web form in order “to check if [Gordon will be] able to ship ... tobacco products to [the customer's] location.”<sup>17</sup>

In short, Gordon's business expressly holds itself out to a nationwide customer base and offers to ship its products to jurisdictions selected by Gordon - without complying with any tax laws. Both the Second and the Seventh Circuits have held that nearly identical circumstances demonstrate an online retailer's purposeful availment of the benefits of remote markets and thus permit those States to which the retailer ships products to exercise jurisdiction over the retailer.

In *Chloé v. Queen Bee of Beverly Hills, LLC*, the Second Circuit held that offering a product for sale over a website to a particular State, coupled with even a *single* act of shipping the product into the State, provides sufficient minimum contacts to satisfy due process. 616 F.3d 158, 171 (2d Cir. 2010). And in \*30 *Illinois v. Hemi Group LLC*, the Seventh Circuit similarly held that an out-of-state cigarette retailer who sold cigarettes to Illinois purchasers was subject to personal jurisdiction in Illinois for its failure to comply with Illinois laws, including a claim arising under the Jenkins Act. 622 F.3d 754, 757-58 (7th Cir. 2010). *Chloé* and *Hemi Group* thus demonstrate that, even with respect to individuals whose contacts are limited to internet sales into a destination State, the Due Process Clause permits the taxing of those specific sales under the laws of the destination State.

The district court rejected these arguments below in part because it could not “determine what, if any, ‘protection, opportunities, [or] benefits’ Gordon receives from the state into which he delivers his products, aside from the fact that his buyer resides there” (J.A. 159). But the buyer's presence in the State is hardly immaterial. The buyer's State provides the infrastructure and the protections that give remote sellers such as Gordon the assurance that their products will be safely and reliably delivered, hundreds or even thousands of miles away, to strangers they have never met. If a transaction goes sour, the buyer's State will provide the laws that sellers can invoke to obtain relief - and the courts that they would use to enforce those laws. And, as explained above, the buyer's State will bear the significant public-health and economic costs associated with the products that remote cigarette sellers such as Gordon are peddling - costs measured in millions of dollars, and thousands of lives. See \*31 *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (considering the State's regulatory interest as a factor in the due process analysis in the context of personal jurisdiction).

Gordon cannot “have [his] cake and eat it, too,” by demanding “the benefit of a nationwide business model with none of the exposure,” *Hemi Group*, 622 F.3d at 760. Thus, even if the PACT Act were a state rather than a federal law, due process would not bar its enforcement.

### POINT III

#### **THE DISTRICT COURT CORRECTLY FOUND THAT THE PACT ACT DOES NOT COMMANDEER THE STATES IN VIOLATION OF THE TENTH AMENDMENT**

The district court correctly rejected Gordon's argument that, in violation of the Tenth Amendment, the PACT Act “unlawfully commandeers states by requiring them to collect taxes” (J.A. 161). To prevail on such an argument, Gordon was required to show that the PACT Act either “compel[s] the States to enact or enforce a federal regulatory program,” *Printz v. United States*, 521 U.S. 898, 935 (1997); or else subjects the States to “[a] choice between two unconstitutionally coercive regulatory techniques,” *New York v. United States*, 505 U.S. 144, 176 (1992). But no such coercion exists here. The PACT Act \*32 imposes duties on cigarette sellers, not on the States. And because the Act incorporates state law, it does not restrict the States from unilaterally altering either the substance or their own enforcement of their laws.

Indeed, it is difficult to square Gordon's Tenth Amendment argument with the undisputed fact that nearly every State supported the PACT Act and strongly urged its passage - leaving Gordon, a private party, alone in asserting that the States' sovereignty has been infringed. The States' support of the PACT Act reflects their longstanding partnership with the federal government to ensure that cigarette sellers do not evade state taxes and regulations on tobacco products. As explained above, for more than sixty years federal law has consistently supported, rather than undermined, the States' efforts to crack down on remote sellers' evasion of state tobacco laws. The PACT Act represents the latest example of the States and the federal government acting

cooperatively to achieve regulatory objectives “which, to some extent at least, neither could accomplish in isolated exertion,” *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 (1946). The Tenth Amendment does not bar such cooperation.

### \*33 CONCLUSION

The district court's preliminary injunction should be vacated, but its dismissal of plaintiff's claims should be affirmed.

**Appendix not available.**

#### Footnotes

Authorities upon which we chiefly rely are marked with asterisks.

- 1 Available at [http://whqlibdoc.who.int/publications/2008/9789241\\_596282\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241_596282_eng.pdf).
- 2 Available at [http://www.cdc.gov/tobacco/data\\_statistics/state\\_data/state\\_highlights/2010/pdfs/highlights2010.pdf](http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2010/pdfs/highlights2010.pdf).
- 3 Available at [http://www.cdc.gov/tobacco/data\\_statistics/sgr/2012/index.htm](http://www.cdc.gov/tobacco/data_statistics/sgr/2012/index.htm).
- 4 Available at [http://deainfo.nci.nih.gov/advisory/pcp/Annual\\_Reports/pcp07rpt/pcp07rpt.pdf](http://deainfo.nci.nih.gov/advisory/pcp/Annual_Reports/pcp07rpt/pcp07rpt.pdf).
- 5 Available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5\\_745a3.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5_745a3.htm).
- 6 Available at [http://www.cdc.gov/tobacco/data\\_statistics/state\\_data/data\\_highlights/2006/pdfs/dataHighlights06rev.pdf](http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf).
- 7 Available at <http://www.tcsg.org/tobacco/99SummerHCFR.pdf>.
- 8 Available at [www.gao.gov/new.items/d02743.pdf](http://www.gao.gov/new.items/d02743.pdf).
- 9 Available at [http://www.nap.edu/catalog.php?record\\_id=11795](http://www.nap.edu/catalog.php?record_id=11795).
- 10 Available at [http://cancercontrol.cancer.gov/TCRB/monographs/14/m14\\_12.pdf](http://cancercontrol.cancer.gov/TCRB/monographs/14/m14_12.pdf).
- 11 Available at <http://www.nber.org/papers/w18026.pdf>.
- 12 See, e.g., *Ariz. Rev. Stat.* §§ 42-3222, 42-3225; *Cal. Rev. & Tax. Code* § 30101.7; *Me. Rev. Stat. tit. 22*, § 1555-B; *Okla. Stat. tit. 68*, §§ 304, 309, 317; *Wash. Rev. Code* § 70.155.140.
- 13 See, e.g., *Ariz. Rev. Stat.* § 36-798.06; *Conn. Gen. Stat.* § 12285c; *Md. Code, Bus. Reg.*, § 16-223; *N.Y. Pub. Health Law* § 1399-II; *Ohio Rev. Code* § 2927.023, *Utah Code* § 76-10-105.1; *Vt. Stat. Ann.* § 1010; *Wash. Rev. Code* § 70.155.140.
- 14 Campaign for Tobacco-Free Kids, *State Cigarette Excise Tax Rates & Rankings* (2012), at <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.
- 15 Available at [http://www.naag.org/assets/files/pdf/signons/PACT\\_Final.pdf](http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf).
- 16 Available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00667.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00667.htm).
- 17 <http://allofourbutts.com> (last visited June 8, 2012).