



Office of the Attorney General
Washington, D. C. 20530

July 2, 2012

The Honorable John A. Boehner
Speaker
United States House of Representatives
Washington, DC 20515

Re: Red Earth LLC et al. v. United States of America et al., Nos. 10-3165-CV(L),
10-3191-CV(XAP), 10-3213-CV(XAP), 657 F.3d 138 (2d Cir. Sept. 20, 2011)

Dear Mr. Speaker:

I write to advise you that on June 27, 2012, the Department of Justice determined not to petition the Supreme Court for a writ of certiorari in the above-captioned case. A copy of the decision is enclosed. The court of appeals in this case did not hold that the Act of Congress at issue is unconstitutional or otherwise decide the merits of the plaintiffs' constitutional challenge. But the court did affirm a district court order preliminarily enjoining that Act, and so I am sending this letter even though it is not clear that it is required by 28 U.S.C. 530D.

This case concerns the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (Mar. 31, 2010) (PACT Act or Act), which prohibits "delivery sales"—remote, rather than face-to-face sales—of cigarettes and smokeless tobacco into a specific State unless the seller complies with "all state, local, tribal, and other laws generally applicable to sales of cigarettes and smokeless tobacco as if the delivery sale[] occurred entirely within the specific state and place," and unless all applicable state or local excise taxes are paid in advance of the sale. § 2(c) (15 U.S.C. 376a(a) and (d) (Supp. IV 2010)).

The plaintiffs in this case consist of a group of delivery sellers who operate tobacco retail businesses from the Seneca Reservation in New York. Just before the Act went into effect, they filed this suit, challenging the Act's constitutionality on numerous grounds. As relevant here, they argued that Act violates the due process rights of delivery sellers because those sellers lack the necessary minimum contacts to be subject to personal jurisdiction in States into which they distribute their products. The plaintiffs sought a preliminary injunction against the Act's provisions requiring the payment of applicable tobacco taxes.

The Department defended the constitutionality of the Act, arguing that because the plaintiffs are regulated by an Act of Congress, rather than state law, the relevant due process question is whether the plaintiffs have the requisite contacts with the United States, not whether they have such contacts with each individual destination State. The Department argued that the plaintiffs have the requisite minimum contacts with the United States. In addition, the

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Department argued that, even if the due-process inquiry depended upon the plaintiffs' contacts with the destination States, the plaintiffs have constitutionally adequate minimum contacts with those States because they purposefully distribute their products into those States.

The district court preliminarily enjoined the PACT Act provisions that require delivery sellers to comply with the tobacco control laws of the places where they ship their products. See *Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010). Using principles of due process applicable to state legislation under the Fourteenth Amendment, the district court concluded that Congress cannot require delivery sellers to comply with the tobacco tax laws of States into which they ship their products unless the sellers have sufficient minimum contacts with those States. *Id.* at 247-252. The court rejected the notion that a sale and delivery of tobacco products into a State creates the necessary contacts for that State to collect taxes from the seller. *Id.* at 250. The government appealed to the Second Circuit.

The Second Circuit affirmed the preliminary injunction. See *Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011). The court of appeals noted that, "[u]nder the deferential abuse of discretion standard, as long as the district court did not act arbitrarily, we will overturn the preliminary injunction only if the district court made an error of law or a clearly erroneous finding of fact," and the court found that "neither" was true in this case. *Id.* at 144. On the due process question, the court stated that, "[b]ecause the district court reached a reasonable conclusion on a close question of law, there is no need for us to decide the merits at this preliminary stage." *Id.* at 145. The court therefore held that "the district court acted within its discretion in entering the injunction here." *Ibid.* At the same time, the Second Circuit upheld the district court's rejection of the plaintiffs' constitutional challenge to the PACT Act's separate prohibition against the mailing of tobacco products, and that prohibition remains in effect. *Id.* at 146-147.

The Department will continue to defend the constitutionality of Section 2(c) of the PACT Act, in future proceedings in this case and in other cases. The Department has concluded, however, that based on the particular facts of this case, the nature of the court of appeals' disposition, and the case's interlocutory posture, further review of the Second Circuit's decision is not warranted at this time. A petition for a writ of certiorari would be due on July 2, 2012.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Eric H. Holder, Jr.
Attorney General