20-1044

In the
United States Court of Appeals
For the Second Circuit

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Plaintiff-Appellant,

v.

JOHN BIELLO, ACTING COMMISSIONER, CONNECTICUT DEPARTMENT OF REVENUE SERVICES,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Connecticut

REPLY BRIEF OF PLAINTIFF-APPELLANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.

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INTRODUCTION

In his brief, the Commissioner suggests from the outset that this is a case of "national significance" that will set the course for state tobacco regulation. Brief for Defendant-Appellee ("BDA") at 26-27. The Commissioner's statement both asks and answers one of the critical issues on this appeal. If the challenged legislation is one of national significance, Connecticut should not and may not legislate in this sphere. In reality, Connecticut is one of only four states to have adopted this type of statutory provision. In all other states, a NPM does not need to reconcile nationwide tax, shipping, and inventory records (either its own or, like here, those of third parties) within a razor-thin margin (or any margin). More broadly, the ultimate fate of the Reconciliation Requirement does not hang in the balance in this appeal, as the question before the Court is whether GRE has alleged plausible claims that merit discovery and a hearing on the merits. The Commissioner also suggests that this case is just another in a line of legal challenges to the state laws that emerged from the Master Settlement Agreement ("MSA"). BDA at 27 n.1. However, GRE is challenging a new and distinct provision of Connecticut law, and it is not seeking to relitigate the implementation of the MSA.

With this context in mind, the Commissioner's arguments in defense of the dismissal of GRE's lawsuit fail. GRE demonstrated in its opening brief that the district court erred in dismissing its legal challenge to the Reconciliation Requirement. GRE plausibly alleged that the Reconciliation Requirement is an irrational regulation that violates substantive due process, controls out-of-state commerce in violation of the Commerce Clause, and conflicts with federal law. GRE is likewise entitled to a declaratory judgment that is has complied with the Reconciliation Requirement.

To begin, the Commissioner attempts to short-circuit this appeal by resurrecting its argument that GRE—a regulated party that is one of only a few NPMs that must now comply with an additional, unconstitutional regulatory burden—lacks standing to bring these claims. As GRE demonstrated in its opening brief, it undertook substantial efforts to comply with the Reconciliation Requirement and will continue to incur compliance costs associated with the provision and the threat of removal from the Tobacco Directory. GRE has Article III standing to challenge the Reconciliation Requirement because these harms represent an injury-in-fact.

When it comes to the plausibility of GRE's claims, the Commissioner fares no better.

Due Process. The Commissioner claims that GRE has no protected due process interest in the Tobacco Directory, even though its brands have been listed on the Directory for the past several years and the Reconciliation Requirement is the only apparent risk to its remaining on the Directory. When it comes to the substance of the law, the Commissioner fails to explain how the Reconciliation Requirement furthers any legitimate state interests in the detection of an illicit market for cigarettes. No such explanation exists, as the Commissioner concedes that there are "innumerable legitimate reasons" why GRE cannot reconcile the nationwide tax, shipping, and inventory records of its third-party importers. BDA at 11-12.

Commerce Clause. The Commissioner agrees that compliance with the Reconciliation Requirement requires the production and reconciliation of records concerning out-of-state transactions and held by out-of-state importers, but insists on a rigid formalism for extraterritoriality claims, where only certain types of statutes violate the dormant Commerce Clause. In reality, the lodestar for an extraterritoriality claim is whether the state law has the practical effect of

controlling out-of-state commerce, which is precisely what the Reconciliation Requirement does in this case. The Commissioner also continues to cling to this Court's decision in *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018), when GRE has advanced an entirely different theory of regulatory control.

Supremacy Clause. The Commissioner claims that Congress intended to leave room for state and local regulation of tobacco manufacturers. This is not in dispute and, in any event, irrelevant to GRE's conflict preemption claim. In a similar fashion, the Commissioner offers an expansive and misplaced reading of this Court's interpretation of the PACT Act in *New York v. Mountain Tobacco Co.*, 942 F.3d 536 (2d Cir. 2019), that has no bearing on this case. Whatever the line may be that Congress decided to draw between federal and state power over tobacco manufacturers, GRE has stated a claim under the Supremacy Clause because GRE and its importers cannot comply with the Reconciliation Requirement and the PACT Act.

Declaratory Judgment. GRE's claim for declaratory relief is not moot because its status on the Tobacco Directory will remain in doubt so long as the Reconciliation Requirement remains in place. The Commissioner offers no authority or argument to the contrary.

ARGUMENT

I. GRE HAS STANDING TO CHALLENGE THE RECONCILIATION REQUIREMENT

The standing inquiry is fundamentally a question of whether a plaintiff is the proper party to bring a particular lawsuit. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). As the regulated party that must comply with the Reconciliation Requirement or risk being excluded from the state marketplace, GRE is unquestionably the proper plaintiff to test the constitutionality of this unique statutory provision. The Reconciliation Requirement applies only to NPMs on the Tobacco Directory, with GRE being one member of this small regulated group.[1] And the Commissioner acknowledges that the statute here specifically targets NPMs by imposing on them a nationwide monitoring requirement based on an alleged, but baseless, concern that "NPM cigarettes pose a greater threat to the state's economic and social welfare than do PM cigarettes." BDA at 8-9, 47.

To establish constitutional standing under Article III, GRE must allege that it suffered an injury-in-fact that is fairly traceable to the Reconciliation

[1] The brands of only four NPMs, including GRE, are listed on the Tobacco Directory. Directory of Compliant Cigarette and Roll-Your-Own Manufacturers, https://portal.ct.gov/-/media/DRS/Cigarette/directorymanufacturers.pdf (July 1, 2020).

Requirement and likely redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In this case, the Commissioner focuses on the injury-in-fact requirement. "To qualify as a constitutionally sufficient injury-in-fact, the asserted injury must be 'concrete and particularized' as well as 'actual or imminent, not conjectural or hypothetical.'" *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (quoting *Lujan*, 504 U.S. at 560).

Even the most cursory reading of the Second Amended Complaint confirms that GRE has suffered a concrete and particularized injury, and therefore has standing to bring this lawsuit. It is well-established that a regulated entity has standing to challenge a statutory provision that imposes new burdens and compliance costs. *E.g.*, *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 85-86 (2d Cir. 2009) (ferry operator had standing to challenge passenger fee because operator was required to collect and remit the proceeds to the Bridgeport Port Authority); *City of Clarksville, Tenn. v. Fed. Energy Regulatory Comm'n*, 888 F.3d 477, 481-82 (D.C. Cir. 2018) (city had standing to challenge "new regulatory obligations" that imposed "minimal" data retention requirements); *Wyoming v. U.S. Envtl. Prot. Agency*, 875 F.3d 505, 512 n.1 (10th Cir. 2017) (farmers had standing to challenge EPA decision because

farmers would bear the "costs of complying with a new regulatory regime"). The Commissioner does not dispute that these sorts of compliance costs are a sufficient injury-in-fact for purposes of standing.

Moreover, as the Supreme Court explained in *Lujan*, when the plaintiff is the "object of the action (or forgone action) … there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." 504 U.S. at 561-62; *see also Tweed-New Haven Airport v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) (holding that airport that was target of runway length limitation suffered injury-in-fact even though state had made no overt threat to enforce statute), *cert. denied*, 206 L. Ed. 2d 463 (2020). In this case, GRE is the object of the regulation, and the Reconciliation Requirement has imposed and will continue to impose compliance costs on GRE. These compliance costs do not need to be substantial; "[a]ny monetary loss suffered by the plaintiff satisfies [the injury-in-fact] requirement." *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 534 (2d Cir. 2020) (quoting *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016)).[2]

[2] If this were not enough, GRE also has standing to press its due process and Commerce Clause claims because its constitutional rights are being violated. *See Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d at 86 (ferry company had

In particular, GRE alleged that it obtained, under protest and on a voluntary basis, the Form 5220.6 and PACT Act reports of its U.S. importers in order to comply with this new statutory requirement. JA43-45. Using these records, GRE at substantial expense calculated the total number of cigarettes for which federal excise tax was paid as reflected on the Form 5220.6 reports, and the total number of cigarettes sold in interstate commerce as reflected on the PACT Act reports. *Id*. GRE explained to the Commissioner in a lengthy letter drafted by counsel for GRE why these figures could not be reconciled within the specified margin. *Id.*

These allegations confirm what should be apparent from the text of the Reconciliation Requirement—it costs GRE money, time, and effort to comply. The Commissioner suggests that these costs might be a fiction because GRE "must already collect or generate" the data required by the Reconciliation Requirement. BDA at 30 n.5. It defies logic to suppose that GRE's compliance was costless. Indeed, GRE specifically alleged that it has spent a considerable amount of money "in seeking and obtaining approval to be listed on the Tobacco Directory" and

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standing based on violation of its "individual rights under the Commerce Clause"); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 916 (2d Cir. 1989) (noting the "general rule" that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process" (quotation marks omitted)).

"incurred and invested over $1 million to comply" with legislation related to the Tobacco Directory. JA96 ¶ 9; JA102 ¶ 32. Moreover, it is undisputed that GRE requested and obtained the Form 5220.6 and PACT Act Reports from its importers, and engaged in extensive written correspondence with the Commissioner regarding its compliance. *See* JA38-40; JA43-45. The records from GRE's importers did not appear out of thin air, and the letters to the Commissioner did not write themselves.[3] All of this came at a cost to GRE.

The Commissioner next insists that GRE must itemize these expenditures and provide a precise accounting of its compliance costs. BDA at 33. No such requirement exists to satisfy Article III standing. As this Court has explained, "[i]njury in fact is a low threshold, which … 'need not be capable of sustaining a valid cause of action,' but 'may simply be the fear or anxiety of future harm.'" *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). And "at the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Baur*, 352 F.3d at 631.

[3] The Commissioner also overlooks that GRE's injury includes *future* compliance costs, not just its past expenditures. Otherwise, GRE would not have standing to seek injunctive relief. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016).

Moreover, the Commissioner relies on inapposite cases involving indirect or tenuous claims of injury, when in reality this is a straightforward claim of injury based on regulatory burdens and compliance costs related to a new regulation that is directed at a very narrow group of manufacturers, of which GRE is one. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545-46 (2016) (plaintiff alleged that search engine violated a procedural requirement of the Fair Credit Reporting Act); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 406-07 (2013) (plaintiffs speculated they would be subject to FISA surveillance).[4]

II. GRE ALLEGED PLAUSIBLE CONSTITUTIONAL AND NON-CONSTITUTIONAL CLAIMS

The Commissioner's various attempts to dismiss GRE's claims at the pleading stage fail.

[4] To the extent this Court concludes that GRE has failed to allege injury-in-fact (and it has not), the proper remedy would be granting GRE leave to amend. *See* Fed. R. Civ. P. 15(a); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (leave to amend should be granted absent a finding of futility, bad faith, undue delay, or undue prejudice). GRE did not have a prior opportunity to amend in order to address standing, and amendment would not be futile when GRE could add additional allegations related its compliance costs.

A. GRE Has Stated a Substantive Due Process Claim

The Commissioner agrees with GRE on the basic framework for its substantive due process claim: GRE must plausibly allege that it has a protected interest in remaining on the Tobacco Directory and that the Reconciliation Requirement fails the rational basis test. But the Commissioner stumbles when applying this framework to GRE's claim.

First, GRE has a constitutionally protected interest because it has a "legitimate claim of entitlement" to its placement on the Tobacco Directory. *See* Brief of Plaintiff-Appellant ("BPA") at 29-31. The Commissioner offers several potential arguments as to why GRE lacks a legitimate claim to inclusion in the Tobacco Directory, but none are persuasive.[5]

Most notably, the Commissioner focuses on his own discretion with respect to the Tobacco Directory. BDA at 40-42. But as GRE demonstrated, the criteria

[5] The Commissioner also urges that this Court can decide on a motion to dismiss if GRE has a protected interest in remaining on the Tobacco Directory. BDA at 37 n.7. But the question on appeal is whether GRE has plausibly alleged a constitutionally protected interest. *See Ahmed v. Town of Oyster Bay*, 7 F. Supp. 3d 245, 259 (E.D.N.Y. 2014) (allegations were "sufficient to satisfy the 'property interest' requirement of a substantive due process claim at the motion to dismiss stage"). And even if this issue is typically a question of law, *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999), it would be premature to resolve it at this stage without discovery into the scope of the Commissioner's discretion.

for inclusion in the Tobacco Directory are objective and the Commissioner's discretion to exclude a manufacturer is limited. BPA at 31-32; *see also Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) ("Usually, entitlement turns on whether the issuing authority lacks discretion to deny the permit, *i.e.*, is required to issue it upon ascertainment that certain objectively ascertainable criteria have been met.").

Specifically, the Commissioner "shall not include or retain" NPMs that: (1) fail to provide the required certification; (2) provide a non-complaint certification; (3) fail to make escrow payments; or (4) fail to satisfy a state judgment related to its escrow payments. Conn. Gen. Stat. § 4-28m(a). The Commissioner does not dispute that besides the Reconciliation Requirement, these are the *only* enumerated circumstances in which the Commissioner could exclude GRE from the Tobacco Directory. The Commissioner also does not dispute that these are objective and easily verifiable criteria. The Commissioner cites his discretion under the Reconciliation Requirement, BDA at 41, but that is irrelevant because it is the alleged source of the due process violation. *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 504 (2d Cir. 2001) (entitlement turns on whether "*absent the alleged denial of due process*, there is either a certainty or a very strong likelihood that the

application would have been granted" (emphasis added) (quoting *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995)).

Accordingly, this is not a case of "nonrenewal of a government benefit where there is no entitlement to relief." BDA at 38. So long as GRE's papers are in order—and there is no allegation or suggestion that they were not—it is "a certainty or a very strong likelihood" that GRE would remain on the Tobacco Directory. *Harlen Assocs.*, 273 F.3d at 504 (quoting *Walz*, 46 F.3d at 168).

The Commissioner notes that in certain cases he has the discretion to decide whether a NPM has remedied a violation of these criteria. BDA at 41. But this discretion only comes into play in limited circumstances and the Commissioner is still applying the objective criteria for compliance set forth in the statute. For this reason, cases where officials have the discretion to apply subjective eligibility determinations are distinguishable. *See Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 107 F.3d 985, 991-92 (2d Cir. 1997) (New York Trade Waste Commission had discretion to waive termination provisions if it would be "consistent with the purposes" of local law). Moreover, the Commissioner's exercise of this type of discretion presupposes that the NPM failed to comply with the statutory

requirements, and, as already noted, there was no suggestion of non-compliance here beyond the disputed Reconciliation Requirement.[6]

The Commissioner finally asserts that the existence of administrative review should foreclose GRE's constitutional claim. BDA at 43. It does not. Such administrative review would be pointless when GRE's claim is that the Reconciliation Requirement is irrational and impossible to satisfy. Moreover, the Commissioner misreads his cited authorities. These courts were concerned about an influx of substantive due process claims arising out zoning decisions. But they never suggested that the mere availability of alternative avenues of review would defeat a substantive due process claim. *See, e.g.*, *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985) (noting that a state law violation will "*not necessarily* provide the basis for a federal claim" when the applicant has a "state law remedy") (emphasis added).[7] The floodgate concerns related to the thousands of zoning decisions issued every year also do not apply to the Tobacco Directory,

[6] For the same reason, it is irrelevant that a manufacturer's prior certification "carries no weight with respect to future certifications." BDA at 39-40. Even so, these future certifications still depend on objective criteria for eligibility, with limited opportunities for discretion.

[7] The Commissioner also cited an out-of-circuit case involving government contracting that raises similar concerns. *C&E Servs., Inc. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 200-01 (D.C. Cir. 2002).

which includes only four NPMs subject to the Reconciliation Requirement.[8] In short, regulatory burdens and requirements that violate substantive due process are not immune from review by a federal court simply because of the alleged availability of administrative review.

Second, the Reconciliation Requirement is not rationally related to a legitimate government interest. *See* BPA at 32-38. The Commissioner spends much of his argument here emphasizing that rational basis review is deferential, BDA at 44-46, a point that GRE does not dispute, BPA at 32. But deference is not the same thing as blind acceptance. And when it comes to the application of the rational basis test to Reconciliation Requirement, the Commissioner does not explain why deference should be afforded in this case.

As an initial matter, the Commissioner does not even attempt to refute GRE's demonstration that the Reconciliation Requirement is an irrational method of rooting out illicit cigarette sales. BPA at 36-38. Indeed, the Commissioner concedes that there could be "innumerable legitimate reasons why the two figures may not correlate as closely as the statute requires." BDA at 12. In his brief, the

[8] In total, the Tobacco Directory lists 20 manufacturers. Directory of Compliant Cigarette and Roll-Your-Own Manufacturers, https://portal.ct.gov/-/media/DRS/Cigarette/directorymanufacturers.pdf (July 1, 2020).

Commissioner instead claims that GRE is trying to smuggle in an equal protection claim under the guise of a due process claim. BDA at 46. But GRE has never argued that the Reconciliation Requirement was unconstitutional because it treated NPMs and PMs differently.

Rather, the differential treatment of NPMS and PMs in this case is a strong indication that the provision is not rationally related to legitimate state interests that are generally applicable to *all* cigarette manufactures. *See* BPA at 34. The Commissioner cannot refute this argument by simply asserting that Connecticut *could have* determined that NPMs pose a greater threat to health or safety and should be subject to more stringent recordkeeping requirements. BDA at 47. There is no indication that Connecticut actually thought NPM's cigarettes were more dangerous than PM's cigarettes. Nor is there any reason believe that NPM's cigarettes are more dangerous. After all, the NPMs were not the defendants in the litigation that led to the MSA.

Moreover, the Reconciliation Requirement is not tied in any way to illicit trade—let alone rationally related to combating such evils. The Reconciliation Requirement's sole purpose and effect is to qualify a manufacturer's products for inclusion on the Tobacco Directory under Connecticut's MSA laws. Thus, GRE's

products are subject to being banned in Connecticut not based on GRE's conduct or wrongdoing, but merely on the fact that GRE may not or cannot obtain and reconcile confidential federal tax returns of third parties with the national shipment records of those same third parties. The Commissioner has failed completely to demonstrate how such a ban is rationally (or otherwise) related to combating illicit trade, when the sole remedy is a ban of GRE's products. The Reconciliation Requirement, rather, has the effect of prohibiting all trade in GRE's tobacco products in Connecticut—significantly, not based on GRE's conduct or the conduct of any person doing business or trading in GRE's products in Connecticut. GRE has, thus, sufficiently pled that the Reconciliation Requirement is not rationally related to a legitimate interest in combating illicit trade in GRE's products.

The Commissioner also cites a number of distinguishable substantive due process cases, each of which involved a challenge to the escrow payments by NPMs. BDA at 47. In each case, the court concluded that the escrow statutes were rationally related to public health and insuring the availability of funds to satisfy potential future state judgments against NPMs. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 175 (2d Cir. 2005); *Grand River Enters. Six Nations,*

Ltd. v. Beebe, 574 F.3d 929, 945 (8th Cir. 2009); *KT&G Corp v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1142-43 (10th Cir. 2008); *Star Sci. Inc. v. Beales*, 278 F.3d 339, 349 (4th Cir. 2002). The substantive due process claim here involves an entirely different statutory provision and distinct state interests. Indeed, the Commissioner does not dispute that GRE is fully compliant with its escrow payment obligations in Connecticut.

B. GRE Has Stated a Commerce Clause Claim

From the outset, the Commissioner presses a narrow interpretation of the Commerce Clause that is inconsistent with precedent. In particular, the Commissioner argues that a dormant Commerce Clause claim based on "impermissible extraterritorial effects" must rigidly fit into one of three categories: (1) a claim that the Reconciliation Requirement is inconsistent with the regulatory regimes of other states; (2) a claim that the Reconciliation Requirement forces GRE to seek DRS approval before undertaking an out-of-state transaction; and (3) a claim that "adverse consequences would result" if other statues adopted a similar statute. BDA at 58.

Not so. The relevant analysis is whether the state law at issue has the *practical effect* of controlling or directing commerce occurring outside of the state. *See, e.g.*, *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The Supreme Court

has never held that there are only certain types of extraterritorial control that are actionable under the dormant Commerce Clause, and none of the Commissioner's cited authorities suggest otherwise. If anything, these cases reinforce the broad point that a state law that asserts jurisdiction over out-of-state commerce is inconsistent with our constitutional structure. *See Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) ("A state statute or regulation may violate the dormant Commerce Clause only if it … 'has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.'" (quoting *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004))); *Freedom Holdings, Inc.*, 357 F.3d at 219 ("[A] state statute will be invalid *per se* under the Commerce Clause if it has the practical effect of controlling commerce occurring wholly outside that State's borders.").

The Commissioner offers a similarly narrow view of what constitutes extraterritorial control of commerce. In particular, the Commissioner asserts that it cannot possibly be regulating out-of-state commerce conduct because the Reconciliation Requirement only applies to NPMs seeking to do business in Connecticut. BDA at 60. But this assertion overlooks GRE's well-pleaded allegations regarding how the Reconciliation Requirement violates the dormant

Commerce Clause. Contrary to the Commissioner's claim, BDA at 60-61, this is not a case where GRE is simply trying to spin the increased cost of complying with a new state regulation into a dormant Commerce Clause claim.

As set forth in GRE's brief, the Reconciliation Requirement has the practical effect of directing out-of-state commerce because GRE cannot comply the provision unless it collects and produces confidential business records that are generated and maintained by third party, out-of-state importers—most of whom have no connection to Connecticut. BPA at 44-48. This has the undeniable effect of regulating GRE's transactions with its out-of-state importers, as well as transactions between the out-of-state importers and their end customers. For example, in order to do business in Connecticut, GRE must select out-of-state importers that maintain business records responsive to the Reconciliation Requirement and are willing to turn over these records to a foreign regulator with no guarantees of confidentiality.

The Commissioner suggests on more than one occasion that this theory of extraterritoriality means that GRE is asserting a claim on behalf of its importers. BDA at 59 n.11, 62. It is not. For one, GRE is the party that has suffered an injury-in-fact because it is the party that must attempt to comply with the

Reconciliation Requirement, all the while risking expulsion from the Connecticut tobacco market. *See supra* at 5-10. Moreover, even if the Form 5220.6 and PACT Act reports are prepared by GRE's importers, GRE is the party that must collect and produce these reports.

If anything, GRE and its out-of-state importers are equally affected by the Reconciliation Requirement because they cannot transact business with each other unless there is some agreement between them concerning the production of the records—the Connecticut statute impacts both sides of the out-of-state transaction. Similarly, GRE is the party that must use these records to attempt to reconcile the figures from the Form 5220.6 and PACT Act reports. In these circumstances, it is GRE's rights under the Commerce Clause that are being violated. *See Bridgeport & Port Jefferson Steamboat Co.*, 567 F.3d at 85 (ferry company's rights under the Commerce Clause were violated by passenger fee because ferry company had to collect and remit the fee). In fact, the direct effect on GRE's rights is plainly stated in DRS's statement to GRE that, if it wished to remain on the Tobacco Directory, it could "utilize other importers or could require its importers to submit to DRS the documentary equivalent of PACT Act reports." JA54.

Finally, this Court's decision in *VIZIO* is not helpful to the Commissioner's argument and certainly does not control the outcome in this case. The plaintiff television manufacturer in *VIZIO* argued that Connecticut's recycling fee violated the dormant Commerce Clause because, among other things, the fee structure was "pegged to VIZIO's national activities, which will inevitably affect its television prices outside Connecticut." *VIZIO, Inc.*, 886 F.3d at 256.[9] This Court disagreed, noting that allegations of "upstream pricing impact" are generally insufficient to show that a state law has the practical effect of controlling out-of-state commerce. *Id.* (quoting *Spitzer*, 357 F.3d at 221).

VIZIO is distinguishable because GRE's extraterritoriality claim is based on an entirely different theory than the upstream pricing impact of the Reconciliation Requirement. *See* BPA at 50-52. The Reconciliation Requirement regulates out-of-state commerce because it requires production and reconciliation of records held by out-of-state importers relating to their out-of-state business. *See* BPA at 44-48. These are precisely the types of allegations that were lacking in *VIZIO*. *See VIZIO,*

[9] VIZIO also raised a number of other Commerce Clause arguments that have no relevance to this case. VIZIO argued that the fee structure taxed value earned outside of Connecticut, created the risk of double taxation, represented an unconstitutional user fee, and imposed an impermissible burden on interstate commerce. *VIZIO, Inc.*, 886 F.3d at 256-59.

Inc., 886 F.3d at 256 ("VIZIO has not alleged that Connecticut reaches out and directs VIZIO's decision-making apparatus or that of any other interstate commercial participant.").

The Commissioner's other attempts to salvage *VIZIO* for purposes of this case fail. The Commissioner claims that the statute at issue in *VIZIO* is analogous to the Reconciliation Requirement. BDA at 62. The statutes are not analogous—the state agency in *VIZIO* calculated a state recycling fee based on the manufacturer's national sales, while the statute here forces GRE to obtain and reconcile the tax and business records and regulatory filings made by third parties in other states. As the Commissioner candidly admitted, if these third parties refuse to produce these records, GRE must make a choice of either refusing to do business with these entities or face a prohibition on GRE's products being sold in Connecticut. JA54. Nothing in *VIZIO* remotely resembles what is now before this Court.

The Commissioner also notes that the market share data in *VIZIO* was derived "from an agglomeration of sources," including retail sales data, consumer surveys, and information from the manufacturers. BDA at 63. Even so, there was no allegation in *VIZIO* that the electronics manufacturers had to collect and

produce this data from third-party distributors or retailers who themselves had no connection to Connecticut—all under sanction of having the manufacturer's products banned in Connecticut. Nor was there any allegation that the relevant data sources were confidential business records generated and held by out-of-state parties, or that those out-of-state parties would have to provide the records to the manufacturer as a condition of doing business. Indeed, the state agency was responsible for calculating the recycling fee in *VIZIO* and there is no indication that the manufacturers were required to produce the sales data used to calculate the fee. *See* Conn. Agencies Regs. § 22a-638-1(g)(1).

C. GRE Has Stated a Supremacy Clause Claim

At the outset, much of the Commissioner's argument on the Supremacy Clause is irrelevant and directed towards a theory of preemption that GRE did not advance below. In particular, the Commissioner recites the history of the Jenkins Act and PACT Act in support of the conclusion that Congress "wanted to support, rather than displace" state and local tobacco regulation. BDA at 49-52. This argument and statutory history might have been relevant if GRE were advancing a claim based on so-called "field preemption," which exists when "Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law." *N.Y. SMSA Ltd. P'ship v. Town of*

Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005)).

But that was not GRE's argument below, and it is not GRE's argument on appeal. Rather, GRE has consistently invoked conflict preemption, which exists when "local law conflicts with federal law such that it is impossible for a party to comply with both." *Id.*; *see also* BPA at 52-54; JA126. It is irrelevant whether Congress wished to preserve a place for state and local laws regulating tobacco sales if, as is the case here, a state enacts a law that conflicts with federal law.

The Commissioner also makes much of this Court's interpretation of the PACT Act in *Mountain Tobacco*. BDA at 53-56. Before explaining how the Commissioner misreads the decision, it bears noting that even accepting the Commissioner's interpretation as true would not foreclose GRE's Supremacy Clause claim. For one thing, GRE's importers that are located outside of the Second Circuit are not bound by the decision. This means that some of GRE's importers that distribute within Indian Country may continue to decline to prepare and file PACT Act reports for these shipments.

Moreover, whether or not the PACT Act applies to reservation-to-reservation sales, the Commissioner does not (and could not) dispute that the

PACT Act would still not apply to purely intrastate sale and would still not capture cigarettes held in inventory carried over from prior years. *See* BPA at 36-38. Accordingly, GRE's importers could still fully comply with the PACT Act, but GRE would still be unable to comply with the Reconciliation Requirement. *See* BPA at 52-53. And the Commissioner would still be relying on PACT ACT reports in a manner that violates federal law. *See* BPA at 53. In both respects, the Reconciliation Requirement would still violate the Supremacy Clause.

Turning to the substance of *Mountain Tobacco*, this Court held that the PACT Act's filing requirements apply to shipments within Indian Country that cross state lines. *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019). The PACT Act applies to sales, transfers, and shipments of cigarettes in "interstate commerce." 15 U.S.C. § 376(a). The PACT Act defines "interstate commerce" as: (1) "commerce between a State and any place outside the State"; (2) "commerce between a State and any Indian country in the State"; or (3) "commerce between points in the same State but through any place outside the State or through any Indian country." 15 U.S.C. § 375(9)(A). A shipment from a reservation in one state to a reservation in another state was deemed to be

commerce "between a State and any place outside the State." *Mountain Tobacco*, 942 F.3d at 547 (quoting 15 U.S.C. § 375(9)(A)).

As GRE explained in its opening brief, this Court did not decide whether shipments between reservations that do not cross state lines are a form of interstate commerce for purposes of the PACT Act. BPA at 13 n.5 The Commissioner accuses GRE of a "fallacious representation" of the decision, BDA at 54, yet concedes just a few pages later that this Court did *not* decide whether shipments between reservations in a state "fall within the PACT Act's definition of 'interstate commerce,'" *id.* at 56.

As the Commissioner is forced to admit, its argument is that the reasoning of *Mountain Tobacco* suggests that the PACT Act applies to reservation-to-reservation shipments within a state. BDA at 56.[10] But the Commissioner never explains how this type of shipment squares with the PACT Act's definition of interstate commerce. It would not be a shipment "between a State and any place outside the State"—as was the case in *Mountain Tobacco*—because the reservations are within the same state. It is likewise unclear how this type of

[10] The Commissioner suggests that this case presents an opportunity for the Court to "clarify" the holding in *Mountain Tobacco*. BDA at 56. The scope of the PACT Act is not at issue in this case, and it is not necessary for this Court to decide the issue left open in *Mountain Tobacco*.

shipment would fit into the other two definitions of interstate commerce. Moreover, the Commissioner does not address why Congress would have provided for the anomalous result that an intrastate shipment from Bridgeport to Hartford would be exempt from the PACT ACT, while a similar intrastate shipment from the Mohegan Indian Reservation to the Mashantucket Pequot Indian Reservation would be covered.

D. GRE Has Stated a Claim for a Declaratory Judgment

The Commissioner asserts without citing any authority that there is no controversy between the parties regarding GRE's compliance with the Reconciliation Requirement. BDA at 64. GRE has remained on the Tobacco Directory during the course of this litigation—a fact that is likely attributable to the existence of the litigation, which forced the Commissioner to back down from his threat to remove GRE. *See* BPA at 55. But as GRE demonstrated, its claim is not moot because it will continue to operate under an annual threat of removal because it cannot reconcile its importers' federal tax returns with their federal PACT Act filings. BPA at 55-56. Moreover, the Commissioner does not even attempt to defend the district court's conclusion that GRE's request for a declaratory judgment had "not evaded review" in light of the dismissal of its constitutional claims. BPA at 56-57. As GRE has shown, its declaratory judgment claim—

seeking a declaration that it has complied with the State's regulatory requirement—stands separate and apart from its claims that the same regulatory requirement is unconstitutional and a violation of federal law. *Id.*

CONCLUSION

For these reasons and the reasons stated in Plaintiff-Appellant's Opening Brief, the decision of the district court dismissing GRE's claims should be reversed in its entirety.

Dated July 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,122 words as determined by Microsoft Word, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rule 32(a)(5)-(7)(B) of the Federal Rules of Appellate Procedure, as modified by Local Rule 32.

/s/ Erick M. Sandler
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2020, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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