

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2010

(Argued: November 1, 2010 Decided: September 20, 2011)

Docket Nos. 10-3165-cv(L), 10-3191-cv(XAP), 10-3213-cv(XAP)

-----x

RED EARTH LLC, D/B/A SENECA SMOKESHOP, AARON J.
PIERCE, SENECA FREE TRADE ASSOCIATION,

Plaintiffs - Appellees - Cross-Appellants,

-- v. --

UNITED STATES OF AMERICA, ERIC H. HOLDER, JR., IN HIS
OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED
STATES, UNITED STATES DEPARTMENT OF JUSTICE, JOHN E.
POTTER, IN HIS OFFICIAL CAPACITY AS POSTMASTER
GENERAL AND CHIEF EXECUTIVE OFFICER OF THE UNITED
STATES POSTAL SERVICE, UNITED STATES POSTAL SERVICE,

Defendants - Appellants - Cross-Appellees.

-----x

B e f o r e : JACOBS, WALKER, and CABRANES, Circuit Judges.

Appeal from an order of the Western District of New York
(Richard J. Arcara, Judge) granting a preliminary injunction to
stay enforcement of provisions of the Prevent All Cigarette
Trafficking Act ("PACT Act") that require mail-order cigarette
sellers to pay state excise taxes. The government argues that

1 the district court erred in concluding that plaintiffs were
2 likely to succeed on their claim that the PACT Act's provision
3 requiring out-of-state tobacco sellers to pay state excise taxes
4 regardless of their contact with that state violates due process.
5 We affirm the district court's order granting the preliminary
6 injunction.

7 AFFIRMED.

8 MICHAEL P. ABATE, Attorney,
9 Appellate Staff, Department of
10 Justice Civil Division, Washington,
11 D.C. (Tony West, Assistant Attorney
12 General, William J. Hochul, Jr.,
13 United States Attorney for the
14 Western District of New York, Mark
15 B. Stern, Alisa B. Klein,
16 Attorneys, Appellate Staff,
17 Department of Justice Civil
18 Division, on the brief), for
19 Defendants-Appellants-Cross-
20 Appellees.

21
22 LISA A. COPPOLA, Rupp, Baase,
23 Pfalzgraf, Cunningham & Coppola
24 LLC, Buffalo, NY for Plaintiffs-
25 Appellees-Cross-Appellants Red
26 Earth LLC, d/b/a Seneca Smokeshop
27 and Aaron J. Pierce.

28
29 HOWARD M. RADZELY, Morgan, Lewis &
30 Bockius LLP, Washington, D.C. (R.
31 Edward Cruz, Russell R. Bruch, Leni
32 D. Battaglia, Morgan, Lewis &
33 Bockius LLP, Washington, D.C.,
34 Daniel B. Moar, Goldberg Segalla
35 LLP, Buffalo, NY, on the brief),
36 for Plaintiff-Appellee-Cross-
37 Appellant Seneca Free Trade
38 Association.

39
40 Richard T. Sullivan, Harris Beach
41 PLLC, Buffalo, NY, for Amici Curiae

1 National Association of Convenience
2 Stores and New York Association of
3 Convenience Stores.

4
5 Allison M. Zieve (Gregory A. Beck,
6 on the brief), Public Citizen
7 Litigation Group, Washington, DC,
8 for Amici Curiae American Cancer
9 Society, American Cancer Society
10 Cancer Action Network, American
11 Heart Association, American Legacy
12 Foundation, American Lung
13 Association and Campaign for
14 Tobacco-Free Kids.

15
16 Michael A. Cardozo, Corporation
17 Counsel of the City of New York
18 (Eric Proshansky, Victoria Scalzo,
19 Aaron M. Bloom, William H. Miller,
20 Assistant Corporation Counsel, on
21 the brief), New York, NY, for
22 Amicus Curiae City of New York.

23
24 Carol E. Heckman, Harter Secrest &
25 Emery LLP, Buffalo, NY (Riyaz A.
26 Kanji, Kanji & Katzen, PLLC, Ann
27 Arbor, Michigan, on the brief), for
28 Amicus Curiae Seneca Nation of
29 Indians.

30
31 Andrew M. Cuomo, Attorney General
32 of the State of New York (Barbara
33 D. Underwood, Solicitor General,
34 Alison J. Nathan, Special Counsel
35 to the Solicitor General, Benjamin
36 N. Gutman, Deputy Solicitor
37 General, on the brief), New York,
38 NY, for Amici Curiae States of New
39 York, Alaska, Arizona, Arkansas,
40 California, Connecticut, Delaware,
41 District of Columbia, Florida,
42 Georgia, Hawaii, Idaho, Illinois,
43 Indiana, Iowa, Kansas, Louisiana,
44 Maine, Maryland, Massachusetts,
45 Michigan, Minnesota, Missouri,
46 Montana, Nebraska, Nevada, New
47 Hampshire, New Mexico, North
48 Carolina, North Dakota, Ohio,

Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming.

PER CURIAM:

The government appeals from a July 30, 2010 order of the District Court for the Western District of New York (Richard J. Arcara, Judge) granting a preliminary injunction to stay enforcement of provisions of the Prevent All Cigarette Trafficking Act ("PACT Act") requiring mail-order cigarette sellers to pay state excise taxes. The government argues that the district court erred in concluding that plaintiffs were likely to succeed on the merits of their claim that the PACT Act's provision requiring out-of-state tobacco sellers to pay state excise taxes, regardless of their contact with that state, violates the Constitution's Due Process Clause. Because we find the district court's entry of the preliminary injunction was not an abuse of discretion, we affirm.

BACKGROUND

The PACT Act, signed into law on March 31, 2010, imposes strict restrictions on the "delivery sale" of cigarettes and smokeless tobacco. Pub. L. No. 111-154, § 2(a), 124 Stat. 1087, 1088 (2010). A "delivery sale" occurs when the buyer and seller are not in each other's physical presence at the time the buyer requests or receives the cigarettes, as when cigarettes are

1 ordered over the Internet and delivered by mail. 15 U.S.C.
2 § 375(5). In order to "prevent tobacco smuggling" and "ensure
3 the collection of all tobacco taxes," the statute demands that
4 delivery sellers "comply with the same laws that apply to
5 law-abiding tobacco retailers." 124 Stat. at 1087-88. To that
6 end, the PACT Act requires delivery sellers to pay excise taxes,
7 obey licensing and tax-stamping requirements, and otherwise
8 comply with state and local tobacco laws "as if the delivery
9 sales occurred entirely within the specific State and place"
10 where the tobacco product is delivered. 15 U.S.C. § 376a(a)(3).

11 Red Earth, LLC ("Red Earth") is a tobacco retail business
12 and "delivery seller" under the PACT Act that is located on the
13 Cattaraugus Indian Reservation in the territory of the Seneca
14 Nation of Indians in New York State. The business is owned by
15 Aaron J. Pierce, an enrolled member of the Seneca Nation. Red
16 Earth is a member of the Seneca Free Trade Association ("SFTA"),
17 a non-profit organization that represents hundreds of businesses
18 licensed by the Seneca Nation. The SFTA's membership includes at
19 least 140 tobacco retailers that sell and ship cigarettes to
20 customers across the United States.

21 Red Earth and other SFTA members, as Native American
22 retailers operating in Indian country, can purchase cigarettes
23 and other tobacco products free of state and local excise taxes.
24 See Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc., 512

1 U.S. 61, 64 (1994). Prior to the PACT Act, those tax savings
2 were passed along to their customers: SFTA retailers sold tax-
3 free cigarettes to customers via phone, fax, and the Internet,
4 and shipped them by mail. For these out-of-state sales, state
5 and local governments could collect excise taxes only directly
6 from the customers, using sales reports that out-of-state tobacco
7 sellers have to file with state tobacco tax administrators under
8 the Jenkins Act of 1949.¹ See Hemi Group, LLC v. City of New
9 York, 130 S. Ct. 983, 987 (2010). Red Earth's "business model,"
10 according to Pierce, is "predicated upon" selling cigarettes
11 "free of New York State sales taxes by utilizing the Internet,
12 telephone, and mail."

13 The PACT Act does away with this business model by imposing
14 on delivery sellers the burden of collecting taxes. Cigarette
15 products cannot be sold or delivered until any state or local
16 excise tax "has been paid," with "required stamps or other
17 indicia that the excise tax has been paid . . . properly affixed
18 or applied" to the product. 15 U.S.C. § 376a(d)(1). The statute
19 bars the delivery of cigarettes or smokeless tobacco through the
20 U.S. Postal Service, 18 U.S.C. § 1716E(a)(1), and imposes strict
21 shipping, packaging, age-verification, and record-keeping
22 requirements, 15 U.S.C. § 376a(b), (c). Violators are subject to

1 ¹ The PACT Act amends the Jenkins Act. See 124 Stat. at 1088,
2 1090, 1091, 1100, 1101.

1 civil and criminal penalties, including, for the first violation,
2 up to three years' imprisonment and fines up to the greater of
3 \$5,000 or two percent of the delivery seller's gross sales of
4 tobacco products during the one-year period ending on the date of
5 the violation. See 15 U.S.C. § 377(a)(1), (b)(1).

6 On June 25, 2010, four days before the PACT Act was to go
7 into effect, Pierce and Red Earth challenged the statute's
8 constitutionality in a complaint filed in the Western District of
9 New York. The district court temporarily stayed enforcement of
10 the statute as to Pierce and Red Earth. After a similar
11 complaint was filed by the SFTA, the district court consolidated
12 the actions and expanded the stay to protect the SFTA's full
13 membership.

14 On July 30, 2010, the district court, finding that Red
15 Earth, Pierce, and the SFTA (collectively "plaintiffs") were
16 likely to succeed on the merits of their due process claim,
17 entered a preliminary injunction that stayed enforcement of the
18 PACT Act provisions requiring delivery sellers to prepay excise
19 taxes and comply with all laws "as if the delivery sales occurred
20 entirely" in the place of delivery. See 15 U.S.C. § 376a(a)(3)-
21 (4), (d). Adopting as its premise that due process requires an
22 out-of-state seller to maintain minimum contacts with a state
23 before the state can subject it to taxation, see Quill Corp. v.
24 North Dakota, 504 U.S. 298, 306-08 (1992), the district court

1 found that the PACT Act's mandate that delivery sellers pay state
2 taxes without regard to their contact with that state effectively
3 "legislate[d] the due process requirement out of the equation."
4 Red Earth LLC v. United States, 728 F. Supp. 2d 238, 252
5 (W.D.N.Y. 2010). The district court left undisturbed the
6 remainder of the PACT Act, including its non-mailability and age-
7 verification provisions. The district court further concluded
8 that plaintiffs failed to show a likelihood of success as to
9 their equal protection claims, and that they lacked standing to
10 bring a Tenth Amendment claim. The government appeals, and
11 plaintiffs cross-appeal, from that order.

12 **DISCUSSION**

13 We review a district court's entry of preliminary injunction
14 for abuse of discretion. Green Party v. N.Y. State Bd. of
15 Elections, 389 F.3d 411, 418 (2d Cir. 2004). A district court
16 abuses its discretion when its decision is arbitrary or is based
17 on "an error of law" or "a clearly erroneous finding of fact."
18 Almontaser v. N.Y. City Dep't of Educ., 519 F.3d 505, 508 (2d
19 Cir. 2008) (per curiam). To obtain a preliminary injunction, the
20 moving party must demonstrate "(1) irreparable harm absent
21 injunctive relief; (2) either a likelihood of success on the
22 merits, or a serious question going to the merits to make them a
23 fair ground for trial, with a balance of hardships tipping
24 decidedly in the plaintiff's favor; and (3) that the public's

1 interest weighs in favor of granting an injunction." Metro.
2 Taxicab Bd. of Trade v. City of New York, 615 F.3d 152, 156 (2d
3 Cir. 2010) (internal quotation marks and citations omitted).
4 When, as here, the preliminary injunction "will affect government
5 action taken in the public interest pursuant to a statutory or
6 regulatory scheme," it "should be granted only if the moving
7 party meets the more rigorous likelihood-of-success standard."
8 Id. (quoting County of Nassau v. Leavitt, 524 F.3d 408, 414 (2d
9 Cir. 2008)).

10 On appeal, the government argues that the district court
11 abused its discretion in entering the preliminary injunction
12 because plaintiffs failed to establish a likelihood of success on
13 the merits of their due process claim. Plaintiffs, in cross-
14 appeals, challenge the district court's assessment of their equal
15 protection and Tenth Amendment claims. We address each appeal in
16 turn.

17 **I. The Government's Appeal**

18 A.

19 The Due Process Clause of the Fourteenth Amendment places
20 limits on a state's ability to tax out-of-state vendors.
21 Principally, "due process requires some definite link, some
22 minimum connection, between a state and the person, property or
23 transaction it seeks to tax." Miller Bros. Co. v. Maryland, 347
24 U.S. 340, 344-45 (1954). For purposes of a delivery seller's

1 obligation to comply with state tax laws, the PACT Act creates
2 the fiction that every delivery sale occurs "entirely within the
3 specific State and place" where the tobacco product is delivered.
4 15 U.S.C. § 376a(a)(3). This action raises the question of
5 whether Congress can, consistent with constitutional due process,
6 require a vendor to submit to the taxing jurisdiction of any
7 state into which it makes at least one sale, without regard to
8 the extent of that vendor's contact with the state.

9 The district court, relying on Quill Corp. v. North Dakota,
10 504 U.S. 298 (1992), and applying the preliminary injunction
11 standard, concluded that Congress most likely cannot do so. In
12 Quill, the Supreme Court overruled its previous due process
13 holdings to the extent they "indicated that the Due Process
14 Clause requires physical presence in a State for the imposition
15 of duty to collect a use tax." Id. at 308. Twenty-five years
16 earlier, the Supreme Court had refused to obliterate "the sharp
17 distinction . . . between mail order sellers with retail outlets,
18 solicitors, or property within a State," who could be subject to
19 state taxes, "and those who do no more than communicate with
20 customers in the State by mail or common carrier as part of a
21 general interstate business," who could not. Nat'l Bellas Hess,
22 Inc. v. Dep't of Revenue, 386 U.S. 753, 758 (1967).

23 That distinction gave way in Quill. Recognizing that its
24 due process jurisprudence had "evolved substantially" since

1 Bellas Hess, "particularly in the area of judicial jurisdiction,"
2 the Court, in the area of taxation, analogized its due process
3 analysis to its jurisdictional holdings. Quill, 504 U.S. at 307-
4 08. With regard to personal jurisdiction, the Supreme Court had
5 "abandoned more formalistic tests that focused on a defendant's
6 'presence' within a State in favor of a more flexible inquiry
7 into whether a defendant's contacts with the forum made it
8 reasonable, in the context of our federal system of Government,
9 to require it to defend the suit in that State." Id. at 307.
10 The relevant inquiry asked "whether a defendant had minimum
11 contacts with the jurisdiction 'such that the maintenance of the
12 suit does not offend traditional notions of fair play and
13 substantial justice.'" Id. at 308 (quoting Int'l Shoe Co. v.
14 Washington, 326 U.S. 310, 316 (1945)). Physical presence within
15 a state was not, therefore, a prerequisite to that state's
16 exercise of personal jurisdiction over a foreign corporation,
17 provided that the corporation had "purposefully avail[ed] itself
18 of the benefits of an economic market in the forum State." Id.
19 at 307-08.

20 The Supreme Court in Quill relied on "[c]omparable
21 reasoning" to answer the question before it: whether North Dakota
22 could require an out-of-state mail-order house "engaged in
23 continuous and widespread solicitation of business" within the
24 state to collect from its customers, and remit to the state, a

1 use tax. Id. at 301, 308. Taxation in that context comported
2 with due process, the Court concluded, because it was beyond
3 dispute that the seller had "purposefully directed its activities
4 at North Dakota residents, that the magnitude of those contacts
5 [was] more than sufficient for due process purposes, and that the
6 use tax [was] related to the benefits [the seller] receive[d]
7 from access to the State." Id. at 308.

8 In the case before us, the district court observed that the
9 PACT Act "automatically subjects" delivery sellers to the laws of
10 the forum state "notwithstanding the presence or absence of any
11 other contacts with that forum." Red Earth, 728 F. Supp. 2d at
12 251. Congress, in other words, was "broadening the
13 jurisdictional reach of each state and locality without regard to
14 the constraints imposed by the Due Process Clause," which the
15 district court concluded it "cannot do." Id. at 252. On that
16 basis, the district court found that plaintiffs had shown a
17 likelihood of success on the merits of their due process claim.
18 The government, on appeal, contests this conclusion.

19 Under the deferential abuse of discretion standard, as long
20 as the district court did not act arbitrarily, we will overturn
21 the preliminary injunction only if the district court made an
22 error of law or a clearly erroneous finding of fact. We find
23 neither. The Supreme Court observed in Quill that, while
24 Congress "may authorize state actions that burden interstate

1 commerce," it "does not similarly have the power to authorize
2 violations of the Due Process Clause." Quill, 504 U.S. at 305.
3 The PACT Act requires a seller to collect state and local taxes
4 based on its making of one delivery, but the federal courts have
5 for decades steered away from the question of whether a single
6 sale is enough to satisfy the requirements of due process. The
7 Supreme Court has never found "that a single isolated sale . . .
8 is sufficient." J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct.
9 2780, 2792 (2011) (Breyer, J., concurring in the judgment). Nor
10 has it held that a single sale into a state is insufficient for
11 due process purposes, although its "previous holdings suggest" as
12 much. Id. Where "the underlying constitutional question is
13 close," a court reviewing the issuance of a preliminary
14 injunction "should uphold the injunction and remand for trial on
15 the merits." Ashcroft v. ACLU, 542 U.S. 656, 664-65 (2004).
16 Because the district court reached a reasonable conclusion on a
17 close question of law, there is no need for us to decide the
18 merits at this preliminary stage. We find that the district
19 court acted within its discretion in entering the injunction
20 here.

21 B.

22 The government also contends that the district court abused
23 its discretion by entering an injunction that is too broad in
24 scope. The injunction applies only to three provisions of the

1 PACT Act: (1) 15 U.S.C. § 376a(a)(3), which requires delivery
2 sellers to comply with all state and local laws, including those
3 imposing excise taxes, as if the delivery sales occurred entirely
4 within that state; (2) § 376a(d), which requires delivery sellers
5 to pay state and local tobacco taxes before delivering their
6 products; and (3) § 376a(a)(4), which mandates compliance with
7 § 376a(d). Although only the PACT Act's tax-collecting
8 provisions present a due process problem, the district court also
9 enjoined the mandate that delivery sellers comply with "laws
10 imposing . . . restrictions on sales to minors" and "other . . .
11 legal requirements relating to the sale, distribution, or
12 delivery of cigarettes or smokeless tobacco" as if the sales
13 occurred entirely within that state. 15 U.S.C. § 376a(3)(C)-(D).

14 As the district court noted in denying the government's
15 motion for a stay pending appeal, the injunction was crafted to
16 preserve the age verification procedures that appear elsewhere in
17 the PACT Act. Those provisions bar delivery sellers from selling
18 or delivering tobacco products to anyone under the minimum age
19 set by applicable law at the place of delivery, mandate that the
20 purchaser or another adult sign for the product upon delivery,
21 and require delivery sellers to verify the purchaser's age using
22 a database. 15 U.S.C. § 376a(b)(4). Any defect in the
23 injunction's application to one provision governing sales to
24 minors is effectively nullified by its preservation of separate

1 wherewithal to comply with the PACT Act's requirements and would
2 go out of business if the statute were enforced. Inaction by the
3 court would therefore confront delivery sellers with "the
4 Hobson's choice of ceasing what they believe to be lawful
5 business activities, or continuing to engage in those activities
6 while facing the threat of criminal prosecution if they are
7 wrong." Red Earth, 728 F. Supp. 2d at 259. The government
8 contends that these threats are overstated, as compliance with
9 the PACT Act demands, for the vast majority of states, simple
10 reliance on state-licensed stamping agents to apply tax stamps to
11 the product. Furthermore, the PACT Act serves the public
12 interest by supporting tobacco control efforts and discouraging
13 youth demand for cigarettes, goals that, in the government's
14 view, outweigh unsubstantiated claims of economic harm.

15 We agree with the district court that the equities tip in
16 the plaintiffs' favor because of the adverse economic effects
17 that will result from enforcement of the statute in violation of
18 the due process rights they may have. The district court
19 therefore did not abuse its discretion in concluding that the
20 potential for economic harm to plaintiffs tipped the scales of
21 public interest in favor of enjoining the problematic provisions.

22
23
24

1 **II. Plaintiffs' Cross Appeals**

2 A.

3 Plaintiffs allege that the PACT Act violates the Fifth
4 Amendment's equal protection guarantees because it intentionally
5 targets Native Americans, and because it exempts only residents
6 of Alaska and Hawaii from the statute's exclusion on the use of
7 the mails. The district court concluded that plaintiffs' equal
8 protection claims were unlikely to succeed on the merits. Red
9 Earth and Pierce argue that the district court erred as to the
10 intentional discrimination claim, and the SFTA asserts that the
11 district court erred as to the non-mailability claim.

12 Red Earth and Pierce allege that the PACT Act, although a
13 facially neutral statute, was motivated by discriminatory animus
14 towards Native Americans and that its application results in a
15 discriminatory effect. See Village of Arlington Heights v.
16 Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (requiring
17 proof of "racially discriminatory intent" in addition to
18 "racially disproportionate impact" to find that official action
19 violates equal protection). Discriminatory intent "implies that
20 the decisionmaker . . . selected or reaffirmed a particular
21 course of action at least in part 'because of,' not merely 'in
22 spite of,' its adverse effects upon an identifiable group."
23 Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

24 The district court recognized that the PACT Act would have a

1 disproportionate effect on Native Americans, who comprise at
2 least 80 percent of delivery sellers. The district court also
3 acknowledged plaintiffs' identification of evidence in the
4 legislative history that they characterized as evincing animus
5 towards Native Americans, such as laughter by some present when a
6 letter from the Seneca Nation was introduced into the
7 congressional record. However, the district court found that
8 Congress's intent in passing the PACT Act was to curtail what it
9 believed to be improper assertions of Native American
10 sovereignty, not to purposefully discriminate against Native
11 Americans as a group. As plaintiffs have failed to show that
12 this finding was clearly erroneous, the district court did not
13 abuse its discretion in deeming plaintiffs' intentional
14 discrimination claim unlikely to succeed on the merits.

15 The SFTA's equal protection challenge is based on an
16 exception to the PACT Act's classification of all cigarettes and
17 smokeless tobacco as "nonmailable." 18 U.S.C. § 1716E(a)(1).
18 Although the statute prohibits the U.S. Postal Service from
19 accepting cigarettes and smokeless tobacco for delivery,
20 "mailings within the State of Alaska or within the State of
21 Hawaii" are excepted from that restriction. Id. § 1716E(b)(2).
22 Plaintiffs argued that this provision irrationally favors
23 residents of Alaska or Hawaii over similarly situated residents
24 of other states. The district court rejected this challenge,

1 finding the exception was rationally designed to ensure that
2 residents of remote areas of Alaska and Hawaii could obtain
3 cigarettes.

4 On appeal, the SFTA reiterates that the exception for Alaska
5 and Hawaii is over-inclusive, in that it applies to residents of
6 cities like Anchorage and Honolulu, and under-inclusive, as it
7 excludes similarly situated residents of remote regions in other
8 states. However, "rational basis review allows legislatures to
9 act incrementally and to pass laws that are over (and under)
10 inclusive without violating" equal protection. Hayden v.
11 Paterson, 594 F.3d 150, 171 (2d Cir. 2010). A classification
12 "neither involving fundamental rights nor proceeding along
13 suspect lines is accorded a strong presumption of validity."
14 Heller v. Doe, 509 U.S. 312, 319 (1993). It will be upheld as
15 long as there is "any reasonably conceivable state of facts that
16 could provide a rational basis for the classification." Id. at
17 320 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313
18 (1993)). The district court properly concluded that this
19 exception falls well within the bounds of rationality.

20 B.

21 The Tenth Amendment provides that "[t]he powers not
22 delegated to the United States by the Constitution, nor
23 prohibited by it to the States, are reserved to the States
24 respectively, or to the people." U.S. Const. amend. X.

1 Plaintiffs claim that, by attempting to levy state and local
2 taxes, Congress is acting outside its enumerated powers in
3 violation of the Tenth Amendment. The district court, relying on
4 Brooklyn Legal Services Corporation B v. Legal Services
5 Corporation, 462 F.3d 219, 234-36 (2d Cir. 2006),
6 concluded that plaintiffs lack standing to assert a Tenth
7 Amendment claim.

8 In Brooklyn Legal Services, after deciding that the question
9 of standing under the Tenth Amendment was controlled by Tennessee
10 Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118,
11 144 (1939), we found that plaintiffs lacked standing because “no
12 plaintiff . . . represent[ed] a state or its instrumentality.”
13 See Brooklyn Legal Services, 462 F.3d at 234-35. In United
14 States v. Bond, the Third Circuit, while recognizing a circuit
15 split as to the issue of standing under the Tenth Amendment,
16 similarly relied on Tennessee Electric in concluding that the
17 individual plaintiff lacked standing to assert a Tenth Amendment
18 claim. 581 F.3d 128, 136-38 (3d Cir. 2009), cert. granted, 131
19 S. Ct. 455 (2010). But see Gillespie v. City of Indianapolis,
20 185 F.3d 693, 703-04 (7th Cir. 1999) (allowing private parties to
21 bring Tenth Amendment challenges), cert. denied, 528 U.S. 1116
22 (2000).

23 During the pendency of this appeal, the Supreme Court
24 reversed the Third Circuit, resolving this circuit split. In

1 Bond v. United States, 131 S. Ct. 2355 (2011), the Court held
2 that an individual can have standing to pursue a Tenth Amendment
3 claim. “[W]here the litigant is a party to an otherwise
4 justiciable case or controversy, she is not forbidden to object
5 that her injury results from disregard of the federal structure
6 of our Government.” Id. at 2366-67. Red Earth and the SFTA, in
7 letters filed with the court pursuant to Federal Rule of
8 Appellate Procedure 28(j), both state that Bond provides an
9 additional basis for upholding the preliminary injunction issued
10 by the district court. The government has not responded to
11 plaintiffs’ letters.

12 Bond effectively overrules Brooklyn Legal Services, and thus
13 abrogates the basis for the district court’s resolution of the
14 Tenth Amendment question. Because the district court concluded
15 that plaintiffs were unlikely to succeed on their Tenth Amendment
16 claim based on their apparent lack of standing, it did not
17 otherwise address the claim’s viability on the merits. As we
18 affirm the preliminary injunction on other grounds, and
19 plaintiffs do not contend that Bond warrants any expansion of
20 that injunction, the outcome of this appeal is unaffected by the
21 Supreme Court’s resolution of Bond. While it now appears that
22 plaintiffs have standing to raise the Tenth Amendment claim, we
23 have no need to address the likelihood that plaintiffs will
24 succeed as to their Tenth Amendment claim and decline to do so.

CONCLUSION

1
2
3
4
5

For the foregoing reasons, the district court's order entering the preliminary injunction is AFFIRMED. The government's request to lift the injunction is DENIED, and plaintiffs' request to expand the injunction is also DENIED.