

No. 21-279

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**In The  
Supreme Court of the United States**

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GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,  
*Petitioner,*

v.

MARK BOUGHTON, COMMISSIONER,  
CONNECTICUT DEPARTMENT  
OF REVENUE SERVICES,  
*Respondent.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit**

—◆—  
**RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Connecticut has enacted a statute, Conn. Gen. Stat. § 4-28m(a)(3)(C) (the “Reconciliation Statute”), to reduce the economic and societal harms posed by the trafficking of contraband cigarettes. Illicit cigarette trafficking deprives Connecticut of tax revenue and undermines the physical health of state residents by fueling addiction to cigarette smoking, particularly among minors and economically vulnerable populations. This statute applies only to a small number of cigarette manufacturers whose nationwide sales are not tracked and reported annually pursuant to the 1998 Tobacco Master Settlement Agreement, a voluntary contract in which most states and most cigarette manufacturers participate. The statute requires a nonparticipating manufacturer to monitor closely the national distribution chain of its cigarettes and, as a condition of being certified by Connecticut’s state tax commissioner to sell its cigarettes in Connecticut, to demonstrate, through the submission of sales and shipment records, that almost all the cigarettes it sells remain in legal distribution channels from point of manufacture or importation to point of retail sale.

The questions presented are:

1. Did the Second Circuit Court of Appeals correctly hold that Connecticut’s Reconciliation Statute does not violate the substantive due process protections of the United States Constitution?

**QUESTIONS PRESENTED—Continued**

2. Did the Second Circuit Court of Appeals correctly hold that Connecticut's Reconciliation Statute does not violate the extraterritoriality prong of the dormant Commerce Clause?

3. Did the Second Circuit Court of Appeals correctly hold that Connecticut's Reconciliation Statute is not preempted by the federal Prevent All Cigarette Trafficking Act?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	2
I. Connecticut’s Statutory Scheme .....	2
II. History Of GRE’s Cigarette Sales In Connecticut .....	8
REASONS FOR DENYING THE WRIT .....	10
I. GRE Asserts Nonexistent Conflicts With Prior Rulings Of This Court And Other Circuit Courts .....	10
II. This Case Presents No Federal Question Worthy Of Review .....	13
A. This Case Presents No Reviewable Issue Of Tribal Law .....	13
1. GRE Has Not Been Required To Produce Records From Sovereign Tribes .....	13
2. The Petition Asserts Arguments About Tribal Rights That Were Neither Made Nor Ruled On Below .....	16
B. GRE Makes Unsupported Contentions About The Private Nature Of Requisite Data .....	17

TABLE OF CONTENTS—Continued

	Page
III. The Court of Appeals Properly Applied Principles Of Law Enunciated By This Court.....	18
A. The Court of Appeals Correctly Held That The Reconciliation Statute Satisfies Substantive Due Process Guarantees .....	19
B. The Court Of Appeals Correctly Held That The Reconciliation Statute Does Not Violate The Extraterritoriality Prong Of The Dormant Commerce Clause .....	21
C. The Court Of Appeals Correctly Held That The Reconciliation Statute Does Not Violate The Supremacy Clause.....	24
CONCLUSION.....	26

APPENDIX

Prevent All Cigarette Trafficking Act of 2009 or PACT Act, Pub. L. No. 111-154, 124 Stat. 1087-88 (2010), Congressional Findings and Purposes .....	1a
15 U.S.C. § 376 .....	4a
Amended Notice of Determination Not to Include Grand River Enterprises Six Nations Ltd. on the Connecticut Tobacco Directory, August 24, 2016.....	7a

## TABLE OF AUTHORITIES

	Page
CASES:	
<i>American Beverage Ass'n v. Snyder</i> , 735 F.3d 362 (6th Cir.), <i>cert. denied</i> , 571 U.S. 818 (2013) .....	12
<i>American Booksellers Foundation v. Dean</i> , 342 F.3d 96 (2d Cir. 2003) .....	11
<i>American Telephone and Telegraph Co. v. Central Office Telephone, Inc.</i> , 524 U.S. 214 (1998).....	24
<i>Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.</i> , 476 U.S. 573 (1986).....	11
<i>Dean Foods Co. v. Brancel</i> , 187 F.3d 609 (7th Cir. 1999) .....	12
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982).....	11, 23
<i>F.C.C. v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993).....	21
<i>Freedom Holdings, Inc. v. Cuomo</i> , 624 F.3d 38 (2d Cir. 2010), <i>cert. denied sub nom. Freedom Holdings v. Schneiderman</i> , 563 U.S. 913 (2011).....	5
<i>Grand River Enterprises Six Nations, Ltd. v. Beebe</i> , 574 F.3d 929 (8th Cir. 2009), <i>cert. denied sub nom. Grand River Enterprises Six Nations, Ltd. v. McDaniel</i> , 559 U.S. 1068 (2010).....	5
<i>Grand River Enterprises Six Nations, Ltd. v. Pryor</i> , 425 F.3d 158 (2d Cir. 2005), <i>cert. denied sub nom. King v. Grand River Enterprises Six Nations, Ltd.</i> , 549 U.S. 951 (2006).....	3

## TABLE OF AUTHORITIES—Continued

	Page
<i>Grand River Enterprises Six Nations, Ltd. v. Pryor</i> , 481 F.3d 60 (2d Cir. 2007) ( <i>per curiam</i> ).....	3
<i>Healy v. Beer Institute, Inc.</i> , 491 U.S. 324 (1989).....	11, 21, 22
<i>In Re Methyl Tertiary Butyl Ether Products Liability Litigation</i> , 725 F.3d 65 (2d Cir. 2013), <i>cert. denied sub nom. Exxon Mobil Corp. v. New York</i> , 572 U.S. 1080 (2014) .....	24
<i>Int’l Tobacco Partners v. Kline</i> , 475 F.Supp.2d 1078 (D. Kan. 2007).....	5
<i>Kelly v. Washington</i> , 302 U.S. 1 (1937) .....	25
<i>KT&amp;G Corp. v. Att’y Gen. of Oklahoma</i> , 535 F.3d 1114 (10th Cir. 2008).....	5
<i>Lange-Kessler v. Dep’t of Educ.</i> , 109 F.3d 137 (2d Cir. 1997) .....	19
<i>Nat’l Collegiate Athletic Ass’n v. Miller</i> , 10 F.3d 633 (9th Cir. 1993), <i>cert. denied sub nom. Tarkanian v. Nat’l Collegiate Athletic Ass’n</i> , 511 U.S. 1033 (1994).....	12
<i>Nat’l Solid Waste Mgmt. Ass’n v. Meyer</i> , 63 F.3d 652 (7th Cir. 1995).....	12
<i>New York SMSA Ltd. Partnership v. Town of Clarkstown</i> , 612 F.3d 97 (2d Cir. 2010) .....	24
<i>New York v. Grand River Enterprises, Ltd.</i> , No.14-CV-00910, 2016 U.S. Dist. LEXIS 117801 (W.D.N.Y. Aug. 30, 2016) .....	15

## TABLE OF AUTHORITIES—Continued

	Page
<i>New York v. Grand River Enterprises, Ltd.</i> , No.14-CV-00910, 2019 U.S. Dist. LEXIS 21558 (W.D.N.Y. Feb. 11, 2019).....	15
<i>New York v. Mountain Tobacco Co.</i> , 942 F.3d 536 (2d Cir. 2019).....	15
<i>New York v. Mountain Tobacco Co.</i> , No.12-CV- 06276, 2016 U.S. Dist. LEXIS 95329 (E.D.N.Y. Jul. 21, 2016).....	15
<i>S&amp;M Brands, Inc. v. Caldwell</i> , 614 F.3d 172 (5th Cir. 2010), <i>cert. denied</i> , 562 U.S. 1270 (2011).....	5
<i>Seagram &amp; Sons, Inc. v. Hostetter</i> , 384 U.S. 35 (1966).....	20, 21
<i>Star Scientific, Inc. v. Beales</i> , 278 F.3d 339 (4th Cir.), <i>cert. denied</i> , 537 U.S. 818 (2002).....	5
<i>Williamson v. Lee Optical, Inc.</i> , 348 U.S. 483 (1955).....	19
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009).....	24
 CONSTITUTIONS:	
U.S. CONST. art. VI, cl. 2.....	1, 24
U.S. CONST. art. I, § 8, cl. 3.....	1, 16, 21
U.S. CONST. amend. XIV, § 1, cl. 3.....	1, 19
 STATUTES AND REGULATIONS:	
15 U.S.C. § 375 <i>et seq.</i> .....	1, 7
15 U.S.C. § 376.....	7

## TABLE OF AUTHORITIES—Continued

	Page
Prevent All Cigarette Trafficking Act of 2009 or PACT Act, Pub. L. No. 111-154, 124 Stat. 1087-88 (2010), Congressional Findings and Purposes .....	1, 7
Conn. Gen. Stat. §§ 4-28h–4-28r .....	3
Conn. Gen. Stat. § 4-28i.....	4, 7, 8
Conn. Gen. Stat. § 4-28i(b)(2) .....	5, 8
Conn. Gen. Stat. § 4-28j(b) .....	8
Conn. Gen. Stat. § 4-28j(d) .....	6
Conn. Gen. Stat. § 4-28l.....	3
Conn. Gen. Stat. § 4-28m.....	3, 5, 8
Conn. Gen. Stat. § 4-28m(a)(3)(C).....	<i>passim</i>
Conn. Gen. Stat. § 12-15.....	17
Conn. Gen. Stat. § 12-302(b) .....	3
Conn. Gen. Stat. § 12-305.....	3
Conn. Pub. Acts. 17-105, § 2 .....	6
Ark. Code Ann. § 26-57-1303(b)(3)(C) .....	6
Neb. Rev. Stat. § 69-2709(14).....	6
Nev. Rev. Stat. Ann. 370.698(2)(g).....	6
 RULES:	
Sup. Ct. Rule 10 .....	12

**CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

**U.S. CONST. amend. XIV, § 1, cl. 3**

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law;. . . .”

**U.S. CONST. art. I, § 8, cl. 3**

“[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;. . . .”

**U.S. CONST. art. VI, cl. 2**

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land;. . . .”

**Prevent All Cigarette Trafficking Act of 2009, or PACT Act, Pub. L. No. 111-154, 124 Stat. 1087 (2010), codified at 15 U.S.C. § 375 et seq.**

Pertinent sections of Congress’ Findings, Statement of Purpose and codified text are set forth at Resp. App. 1a-6a.

**Conn. Gen. Stat. § 4-28m(a)(3)(C)**

The commissioner shall not include or retain in the directory any brand family of a nonparticipating manufacturer if the commissioner concludes: . . . (C) a nonparticipating manufacturer’s total nation-wide reported sales of cigarettes on which federal excise tax is paid exceeds the sum of (i) its total interstate sales, as reported under 15 USC 375 et seq., as from time to

time amended, or those made by its importer, and (ii) its total intrastate sales, by more than two and one-half per cent of its total nation-wide sales during any calendar year, unless the nonparticipating manufacturer cures or satisfactorily explains the discrepancy not later than ten days after receiving notice of the discrepancy.

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### **STATEMENT OF THE CASE**

The Court of Appeals for the Second Circuit, in affirming the constitutionality of the Reconciliation Statute and the district court's dismissal of the complaint, provided an accurate summary of the factual background and procedural history of this case. Pet. App. 3-11. The following brief explanation of the contested statute and the history of relations between the Petitioner, Grand River Enterprises Six Nations, Ltd. ("GRE") and the Respondent, the Commissioner of the Connecticut Department of Revenue Services ("CT DRS") is included to supplement the overview already set forth by the court of appeals.

#### **I. Connecticut's Statutory Scheme**

The sale of cigarettes is highly regulated in almost all states. One of the regulatory tools used by many states, including Connecticut, is a "tobacco directory," which lists the names of cigarette manufacturers and their respective cigarette brands that the state has approved for sale in the state. Cigarette brands not

listed on a state's tobacco directory cannot legally be sold in that state and may be seized as contraband. *See, e.g.*, Conn. Gen. Stat. §§ 4-28m, 12-302(b), 12-305. If a cigarette manufacturer wants to sell its products in Connecticut, it must file a lengthy annual certification application and be vetted, according to state law, by the Commissioner of Revenue Services, who may exercise his or her discretion, to some extent, to decide whether to include a manufacturer on the Connecticut Tobacco Directory ("Directory"). Conn. Gen. Stat. § 4-28l.<sup>1</sup>

Some directory certification requirements are different for a "participating manufacturer" ("PM") than for a "nonparticipating manufacturer" ("NPM"). A PM is a tobacco product manufacturer that has joined the Tobacco Master Settlement Agreement ("MSA"), an agreement forged in 1998 by forty-six states and the major domestic tobacco companies. Most large domestic and international cigarette manufacturers that market their products in the United States have joined the agreement.<sup>2</sup> Each PM must annually deposit

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<sup>1</sup> Statutory requirements for being listed on the Directory are set forth in Conn. Gen. Stat. §§ 4-28h–4-28r.

<sup>2</sup> Excellent synopses of the history, purpose, and terms of the MSA, as well as the various forms of legislation that states have enacted to implement it, may be found in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 62-64 (2d Cir. 2007) and *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 162-64 (2d Cir. 2005). The full text of the MSA may be found at <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement>.

a payment, based on that manufacturer's nationwide sales, into a fund administered by a national accounting firm. The annual payments from all PMs are then pooled and divided among the participating states by the accounting firm, according to a formula provided in the MSA.<sup>3</sup> An NPM is a tobacco product manufacturer, like GRE, which has not joined the MSA and is not required to deposit the annual MSA payment required of each PM.

To prevent NPMs from underpricing PMs, which must incorporate MSA payments into the costs of their products, the MSA requires each participating state to enact and enforce a model "escrow" statute. The model statute mandates that if an NPM sells cigarettes in a certain state, the NPM must make deposits into an escrow account for the benefit of that state to cover any liability judgment the state may someday obtain against the manufacturer. The amount of the requisite escrow deposit is based on the volume of cigarettes the NPM sells annually in that state, and roughly approximates the amount the NPM would be required to pay, per cigarette, if it had joined the MSA. *See, e.g., Conn. Gen. Stat. § 4-28i.*

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<sup>3</sup> Since the inception of the MSA, PMs have collectively paid participating states more than \$145.5 billion. Four other states (Texas, Florida, Minnesota and Mississippi) have similar, but separate, agreements with the major tobacco companies, under which cigarette manufacturers have collectively paid those four states more than \$25 billion. *See Actual MSA Payments to States (tobaccofreekids.org)*

When states first enacted their escrow statutes, some NPMs, including GRE, resisted making escrow payments and sought to avoid the obligation. In response, states passed additional legislation to make escrow evasion more difficult. For example, all MSA states but one have legislatively closed a loophole in the MSA that allowed an NPM, under certain conditions, to recoup most of its annual escrow payment to a state (the so-called “allocable share” amendments), *see, e.g.*, Conn. Gen. Stat. § 4-28i(b)(2). Most states also established publicly available lists of authorized cigarette manufacturers as a means of excluding recalcitrant NPMs that failed to satisfy their escrow obligations (the so-called “tobacco directory” statutes). *See, e.g.*, Conn. Gen. Stat. § 4-28m.<sup>4</sup> Some states, including Connecticut, have enacted statutes making importers of cigarettes jointly and severally liable for escrow obligations imposed on the cigarettes

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<sup>4</sup> NPMs, including GRE, have mounted uniformly unsuccessful federal constitutional and antitrust challenges to states’ escrow statutes, allocable share amendments, and tobacco directory statutes. *See, e.g., Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010) (challenging New York’s escrow statute and tobacco directory statute); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172 (5th Cir. 2010) (challenging Louisiana’s escrow statute); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8th Cir. 2009) (challenging Arkansas’ allocable share amendment); *KT&G Corp. v. Att’y Gen. of Oklahoma*, 535 F.3d 1114 (10th Cir. 2008) (challenging Oklahoma’s and Kansas’ allocable share amendments); *Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (challenging Virginia’s escrow statute); *Int’l Tobacco Partners v. Kline*, 475 F.Supp.2d 1078 (D. Kan. 2007) (challenging Kansas’ escrow statute, allocable share amendment and tobacco directory statute).

that they import for foreign NPMs. *See, e.g.*, Conn. Gen. Stat. § 4-28j(d).

The Reconciliation Statute was enacted to promote compliance with Connecticut’s escrow statute as well as to protect minors and other vulnerable residents from the health hazards posed by illegally underpriced cigarettes.<sup>5</sup> It requires an NPM to reconcile the number of cigarettes it produces or imports annually with its annual nationwide interstate and intrastate sales within a margin of 2.5% or, if such reconciliation is not possible, to provide CT DRS with a satisfactory explanation for the existence of a greater discrepancy.<sup>6</sup>

The overarching purpose of this legislation is to grant state certification only to those NPMs that can effectively track the sales of their cigarettes throughout the United States, and can demonstrate, through diligent recordkeeping, that few, if any, of their cigarettes may have been diverted into an illicit market. Connecticut has a strong interest in certifying only those NPMs able to monitor the legal nationwide channels through which their cigarettes are distributed, because cigarettes purchased illegally in other states can easily be brought into Connecticut and resold

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<sup>5</sup> Three other states have enacted similar “reconciliation” statutes. *See* Ark. Code Ann. § 26-57-1303(b)(3)(C); Neb. Rev. Stat. § 69-2709(14); Nev. Rev. Stat. Ann. 370.698(2)(g).

<sup>6</sup> In 2017, during the pendency of this litigation, Connecticut enacted technical revisions to the Reconciliation Statute and revised the acceptable discrepancy margin to 2.5% from 5% or one million cigarettes, whichever was less. 2017 Conn. Pub. Acts. 17-105, § 2.

cheaply, free of any markup necessitated by state taxation or escrow deposits. By requiring each certified NPM to demonstrate annually that it can trace virtually all its cigarettes from the point of manufacture or importation to the point of legal retail sale, Connecticut seeks to reduce state tax evasion, increase compliance with the state's escrow statute and protect Connecticut residents from the many adverse public health effects, such as smoking initiation by minors, that are likely to occur when illegal, unlawfully underpriced, cigarettes enter the state.<sup>7</sup>

Compliance with Connecticut's Reconciliation Statute is not onerous for NPMs, because the requisite information is usually already in each NPM's possession. The federal Prevent All Cigarette Trafficking ("PACT") Act requires cigarette importers and distributors to submit shipping reports to the state tax administrators of the states into which interstate shipments of cigarettes are delivered. 15 U.S.C. § 376, Resp. App. 4a-5a. States' tax laws require importers and distributors to file similar reports for intrastate sales. Each NPM must routinely obtain those interstate and intrastate reports from its importers or distributors to determine how much escrow to deposit for the benefit of each MSA-participating state in which sales of its cigarettes have been made. *See, e.g.*, Conn. Gen. Stat. § 4-28i. An

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<sup>7</sup> The purpose of Connecticut's Reconciliation Statute aligns with the objectives of the United States Congress in enacting the federal Prevent All Cigarette Trafficking ("PACT") Act, 15 U.S.C. § 375 *et seq.* *See* Congress' Findings and Purposes, Pub. L. No. 111-154, 124 Stat. 1087-88 (2010), Resp. App. 1a-3a.

NPM would also need such data to establish its national market share if it wanted to obtain a partial refund of its escrow payments to Connecticut, pursuant to Conn. Gen. Stat. § 4-28i(b)(2), by proving that it deposited more in escrow for its cigarette sales in Connecticut than it would have had to pay for those same sales under the MSA, if it were a PM. *See* Pet. App. 55-56. Thus, the Reconciliation Statute simply requires an NPM to transmit to CT DRS the same data that the NPM already collects and uses for other regulatory compliance purposes.

## **II. History Of GRE's Cigarette Sales In Connecticut**

GRE is a tribally affiliated cigarette manufacturer located in Ontario, Canada. It sells many of its cigarettes into the United States through tribal importers located on tribal reservations in various states, but it also utilizes nontribal importers.

When Connecticut's tobacco directory statute, Conn. Gen. Stat. § 4-28m, became effective in 2005, GRE was not eligible for certification, because GRE had previously sold cigarettes in Connecticut without making the statutorily required escrow deposits for those sales. *See* Conn. Gen. Stat. § 4-28i. Connecticut successfully sued GRE pursuant to Conn. Gen. Stat. § 4-28j(b), obtaining a default judgment against the manufacturer for several hundred thousand dollars in unpaid escrow and civil penalties. GRE and Connecticut subsequently entered into an agreement

in which GRE fully satisfied the judgment against it. GRE was first certified to Connecticut's tobacco directory in 2011 and has remained on the Directory ever since.

Although Connecticut's Reconciliation Statute became effective on January 1, 2015, CT DRS delayed enforcement of the statute for a year to allow affected manufacturers time to prepare to comply with its provisions. In the spring of 2016, GRE submitted a Directory application that did not include adequate data to comply with the Reconciliation Statute, and GRE did not offer a satisfactory explanation for its failure to do so. CT DRS therefore denied GRE's initial application. GRE then filed its first complaint in this lawsuit on June 29, 2016. Less than two months later, CT DRS informed GRE that two federal district courts in the Second Circuit had ruled that shipments of cigarettes between tribal reservations were not subject to federal PACT Act reporting, and GRE would therefore not be required to file PACT Act reports for its sales in Indian Country. *See* Resp. App. 7a-9a, discussion and citations *infra* pp. 12-14. GRE subsequently provided data for its nontribal importers only, and on that basis, CT DRS certified GRE's cigarettes for sale in Connecticut in 2016. Pet. App. 38. In each subsequent year, CT DRS has continued to certify GRE to the Directory based on GRE's submission of PACT Act data from only its nontribal importers, Pet. App. 43, even though the two district

court decisions that spawned this arrangement have since been reversed. *See infra* p. 13.



### **REASONS FOR DENYING THE WRIT**

GRE's petition presents no legitimate basis for this Court's review. There is no conflict of law for this Court to resolve, and there are no federal issues that merit this Court's consideration. The court of appeals rendered a clear and accurate exposition of this Court's controlling precedent, and its ruling requires no correction or elaboration by this Court.

#### **I. GRE Asserts Nonexistent Conflicts With Prior Rulings Of This Court And Other Circuit Courts**

GRE contends that the Second Circuit's decision conflicts with other significant federal precedent, but it utterly fails to substantiate that claim. GRE has challenged Connecticut's Reconciliation Statute as violative of three widely interpreted federal constitutional provisions, namely, the Commerce Clause, the Supremacy Clause and the Fourteenth Amendment's right to substantive due process. However, no ruling of this Court or any circuit court interpreting any of those provisions is factually or analytically "on all fours" with the Second Circuit's opinion. Connecticut's Reconciliation Statute is one of only four such state statutes. This case is the only challenge that has been brought against any of the four statutes to date.

Therefore, GRE's bald assertion that there are direct conflicts between the court of appeals' decision and others like it is simply unsupportable.

GRE identifies, as the asserted basis for a conflict, three decisions of this Court and several circuit court decisions interpreting the extraterritoriality prong of the dormant Commerce Clause. Pet. 16, 20 at n.12, 27, 27 at n.14. The court of appeals, having closely considered *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), accurately determined that neither case involved legislation analogous to the Reconciliation Statute. Pet. App. 24-29, discussed *infra* pp. 19-21.<sup>8</sup> The court of appeals also analyzed and distinguished the first of several circuit court decisions cited in GRE's petition, *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003). Pet. App. 27. That decision, which involved Vermont's attempt to regulate sexually explicit material posted to the Internet, was a prior ruling of the Second Circuit. Thus, it would not create a circuit conflict, even if it were on point with GRE's case, which it is not. The other allegedly conflicting circuit court cases, which involve various state laws

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<sup>8</sup> The Second Circuit did not discuss the third case cited by GRE, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). *Brown-Forman* preceded *Healy*, and like *Healy*, involved a state price affirmation statute for beer. *Brown-Forman* is factually and analytically nearly identical to *Healy*; therefore, the court of appeals did not analyze *Brown-Forman* separately from *Healy*.

entirely unlike Connecticut's Reconciliation Statute, were neither cited nor relied upon by GRE below.<sup>9</sup>

GRE, instead of attempting to explain how the Second Circuit's ruling conflicts with each newly cited circuit court decision, simply moves on to argue that the court of appeals wrongly decided the case. *See* Pet. 15 ("The . . . Court of Appeals erroneously concluded . . . "); *id.* at 16 ("The . . . Court of Appeals agreed with this [Court's] statement of law, but concluded . . . "); *id.* ([T]he Court of Appeals overlooked the admissions by the State and the well-pleaded allegations of GRE's complaint . . . "); *id.* at 18 ("[T]he Court of Appeals incorrectly assumed . . . "); *id.* at 19 ("The Court of Appeals erred when it concluded . . . "). Even if GRE's criticisms of the court's ruling were valid, which they are not, the court's alleged errors would not merit this Court's attention. As the rules of this Court make clear, the misapplication of properly stated rules of law is not a basis for granting certiorari. Supreme Court Rule 10.

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<sup>9</sup> The newly cited cases are *Nat'l Solid Waste Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) (state regulation of solid waste transporters); *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993) (state regulation of procedural rules followed by national collegiate athletic associations); *American Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013) (state regulation of recyclable beverage containers) and *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999) (state regulation of prices, and other terms of sale, for milk).

## **II. This Case Presents No Federal Question Worthy Of Review**

Although GRE raises three constitutional challenges to Connecticut's Reconciliation Statute, its petition introduces no novel aspect of any of those provisions, each of which has been interpreted many times by this Court and the circuit courts. This case involves nothing more than the straightforward application of this Court's clear and settled precedents, as expanded upon by the Second Circuit in its own prior decisions interpreting foundational elements of constitutional law.

### **A. This Case Presents No Reviewable Issue Of Tribal Law**

GRE devotes much of its petition to a wish list of issues about which it urges this Court to opine, but which have no factual relation to this case and were neither raised nor decided below. This Court should reject GRE's attempt to employ the certiorari process in this manner.

#### **1. GRE Has Not Been Required To Produce Records From Sovereign Tribes**

CT DRS has not required GRE to submit sales or shipment records for any of GRE's cigarettes transported or sold in Indian Country, nor has GRE ever provided such records to CT DRS. Rather, CT DRS has evaluated GRE's compliance with the

Reconciliation Statute based exclusively on records generated by GRE's nontribal importers. Each year, CT DRS has placed GRE on Connecticut's tobacco directory of approved cigarette manufacturers. *See* Pet. App. 32-33, 38, 43. GRE does not, and cannot, contest those salient facts.

Notwithstanding that uncontested factual history, GRE argues that the Reconciliation Statute infringes in numerous ways on the rights of sovereign tribes that are not identified and are not parties to this litigation. Pet. 21, 23, 28-33. Specifically, GRE asserts that it is required to "obtain and produce to [CT] DRS tribal tax and shipping records from sovereign, federally recognized Indian tribes that import and sell their products" to comply with the Reconciliation Statute. Pet. 21. That contention, however, is directly and completely undermined by GRE's admission that "DRS notified GRE that it would not require GRE to demonstrate compliance with the Reconciliation Requirement with respect to its importers that distribute exclusively within Indian Country." Pet. 12, n.11.

Although the Reconciliation Statute does not distinguish between sales in Indian Country and nontribal sales, CT DRS determined, in the summer of 2016, that sales on tribal reservations should be excluded from NPMs' compliance analyses. CT DRS made that decision after learning about two federal district court rulings in the State of New York involving the PACT Act, the federal statute incorporated by reference in the Reconciliation Statute. Each court had

held that the PACT Act's reporting requirements do not apply to shipments of cigarettes that begin and end in Indian Country.<sup>10</sup> See Amended Notice of Determination Not to Include Grand River Enterprises Six Nations Ltd. on the Connecticut Tobacco Directory (August 24, 2016). Resp. App. 7a-9a.

The decision from the Eastern District of New York was subsequently reversed in relevant part by the Second Circuit Court of Appeals. *New York v. Mountain Tobacco Co.*, 942 F.3d 536, 547 (2d Cir. 2019) The court of appeals held that shipments of cigarettes between tribal reservations located in different states are subject to the reporting requirements of the PACT Act. The decision from the Western District of New York, which was a federal magistrate judge's report and recommendation, was similarly rejected by the district court, which held that cigarette shipments between tribal reservations located within the same state are also subject to the PACT Act. *New York v. Grand River Enterprises, Ltd.*, No.14-CV-00910, 2019 U.S. Dist. LEXIS 21558 (W.D.N.Y. Feb. 11, 2019). Because that case is still pending, however, the district court's ruling that the PACT Act applies to tribal cigarette shipments confined to the State of New York may ultimately be subject to Second Circuit review and perhaps even review by this Court. Consequently,

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<sup>10</sup> *New York v. Mountain Tobacco Co.*, No.12-CV-06276, 2016 U.S. Dist. LEXIS 95329 (E.D.N.Y. Jul. 21, 2016), *rev'd in part*, 942 F.3d 536, 547 (2d Cir. 2019); *New York v. Grand River Enterprises, Ltd.*, No.14-CV-00910, 2016 U.S. Dist. LEXIS 117801 (W.D.N.Y. Aug. 30, 2016), *Report and Recommendation Rejected*, 2019 U.S. Dist. LEXIS 21558 (W.D.N.Y. Feb. 11, 2019).

CT DRS continues to exempt GRE from having to document tribal shipments, pending further clarification of the law.

## **2. The Petition Asserts Arguments About Tribal Rights That Were Neither Made Nor Ruled On Below**

GRE makes numerous arguments, regarding alleged infringements on tribal rights, that it never raised below. These include a lengthy claim that Connecticut lacks personal jurisdiction over unnamed, out-of-state tribes that are not parties to this proceeding. Pet. 21-25. GRE also contends, for the first time, that the Reconciliation Statute effectuates an unconstitutional taking of private property from unnamed, out-of-state businesses that are not parties to this proceeding. *Id.* at 25-28. Finally, GRE makes a new assertion that the Reconciliation Statute runs afoul of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and is also preempted by unspecified “federal Indian law.” *Id.* at 28-33. GRE’s petition contains no citations to demonstrate that any of the foregoing issues were raised or considered by the court of appeals, and they were not.

The only issue related to tribal activity that was raised below, but was not ruled on, involves the scope of the PACT Act. The court of appeals understood that GRE’s commercial relations in Indian Country are not relevant to this case, because the CT DRS has not required GRE to provide sales and shipment

data to document transactions with, or among, tribal businesses. The court therefore declined to consider whether the PACT Act's reporting requirements apply to shipments of cigarettes passing between tribal reservations located within the same state. The court simply observed that CT DRS has consistently accepted that GRE's sales of cigarettes within Indian Country satisfactorily explain GRE's inability to comply with the statute's allowable 2.5% margin of discrepancy. Pet. App. 21-22, 32.

**B. GRE Makes Unsupported Contentions  
About The Private Nature Of Requisite  
Data**

GRE argues vociferously that the sales and shipping records that it must file annually with CT DRS are "private," yet GRE cites no legal authority for the proposition that CT DRS is prohibited from requiring such records. Although state laws uniformly protect tax-related documents from public disclosure, *see, e.g.*, Conn. Gen. Stat. § 12-15, there is no legal justification, and GRE cites none, for withholding tax records from a state tax administrator, like CT DRS, when their disclosure is statutorily mandated, as it is here.

Notably, GRE does not assert that it has been unable, either legally or practically, to obtain shipping and sales records from its nontribal importers. As explained above, importers must routinely submit such reports to the state tax administrators of the

states into which interstate shipments are delivered or in which intrastate sales are transacted. GRE also needs to receive such reports from its importers to determine how much escrow it must deposit for the benefit of each MSA-participating state in which it has made sales. Although GRE may prefer not to disclose details about its nationwide cigarette distribution network to CT DRS, its interests and motivations do not impugn the validity of the Reconciliation Statute.

### **III. The Court of Appeals Properly Applied Principles Of Law Enunciated By This Court**

The unanimous ruling of the Second Circuit Court of Appeals is both elegant in its simplicity and unassailable in its reasoning, particularly with respect to its application of this Court's constitutional precedents. The court relied on this Court's decisions to conclude that: (1) Connecticut's Reconciliation Statute is rationally related to a legitimate state interest in preventing tax evasion, and therefore, does not violate GRE's right to substantive due process; (2) that any burdens the statute places on interstate commerce are purely incidental, and the statute does not impermissibly control out-of-state transactions and (3) that the statute does not conflict with federal law in violation of the Supremacy Clause.

**A. The Court of Appeals Correctly Held That The Reconciliation Statute Satisfies Substantive Due Process Guarantees**

The court of appeals assumed, without deciding, that GRE has a constitutionally protected interest, pursuant to the Due Process Clause, U.S. CONST. amend. XIV, § 1, cl. 3, in remaining listed on Connecticut's tobacco directory. Pet. App. 16-17. The court recognized that state-imposed restrictions on a constitutional right must be rationally related to a legitimate state interest. *Id.* at 17, *citing Lange-Kessler v. Dep't of Educ.*, 109 F.3d 137, 140 (2d Cir. 1997) (relying on *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955)). The court therefore considered what public purpose the Reconciliation Statute may serve. In that regard, the court observed, “[i]t can scarcely be argued that Connecticut lacks a legitimate state interest in preventing smuggling and tax evasion that affects, or potentially affects, the distribution within its borders of cigarettes, an extensively taxed product with adverse health effects.” Pet. App. 17.

The court then analyzed whether the Reconciliation Statute is rationally related to Connecticut's valid state interests. The court first observed that the statute's approach to achieving its goals is inherently logical, because the Reconciliation Statute compares the number of cigarettes on which federal excise taxes are paid when cigarettes enter the flow of commerce through domestic manufacturing or importation with the number of cigarettes on which state excise taxes are paid when cigarettes leave the flow of commerce

through distribution to retail sellers. Pet. App. 18. The court concluded that such a comparison is not irrational or arbitrary. “A discrepancy between a manufacturer’s data sets, unless explained, is a potential indicator of state tax evasion involving cigarettes diverted from the legitimate flow of commerce for eventual untaxed sale.” Pet. App. 19.

The court noted that nationwide cigarette sales data is also collected from PMs pursuant to Section II(jj) of the MSA.<sup>11</sup> Pet. App. 19. The court was therefore unpersuaded by GRE’s argument that Connecticut’s collection of nationwide sales and shipment data from NPMs is an improper means of preventing illicit cigarette trafficking within the state. The court concluded, “[i]f a manufacturer’s cigarettes are diverted from the stream of legitimate commerce anywhere in the United States, it is rational, and not arbitrary, for a state legislature to anticipate that the diverted cigarettes may cause harm in that state.” *Id.* at 20.

The court also properly rejected GRE’s argument that Connecticut can only legitimize its regulation by proving that the Reconciliation Statute prevents smuggling. The court admonished that such proof is unnecessary, because “[r]ational basis review is not a post-hoc test of the effectiveness of a legislative policy.” Pet. App. 20-21, *citing Seagram & Sons, Inc. v.*

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<sup>11</sup> “Each Participating Manufacturer shall regularly report its shipments of Cigarettes in or to the fifty United States, the District of Columbia and Puerto Rico to Management Science Associates, Inc. (or a successor entity as set forth in subsection (mm)).” MSA § II(jj).

*Hostetter*, 384 U.S. 35, 50 (1966). Instead, rational basis review requires only “plausible reasons” for legislative action. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993). The court concluded, “Grand River cannot demonstrate that it is irrational or arbitrary for a state legislature to regard unexplained discrepancies between quantities of cigarettes entering, and leaving, U.S. commerce as a potential subject to investigation that could uncover illegal activity affecting that state.” Pet. App. 21. The court therefore properly held that the Reconciliation Statute does not deprive GRE of substantive due process. *Id.* at 22.

**B. The Court Of Appeals Correctly Held That The Reconciliation Statute Does Not Violate The Extraterritoriality Prong Of The Dormant Commerce Clause**

The court of appeals carefully analyzed and rejected GRE’s claim that the Reconciliation Statute violates the dormant Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, by exerting control over commerce beyond Connecticut’s boundaries. The court closely examined the two decisions of this Court on which GRE relied and determined that each was inapposite.

GRE argued below that the Reconciliation Statute is akin to the price affirmation statute that this Court struck down in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). That case involved a Connecticut statute requiring out-of-state beer shippers to affirm that the prices they charged Connecticut wholesalers for beer

were no higher than the prices they charged in bordering states. This Court held that the statute directly, and impermissibly, controlled the pricing decisions of out-of-state wholesalers with respect to sales occurring outside of Connecticut. This Court further concluded that if such a price affirmation requirement were to be enacted by neighboring jurisdictions, the result would be “just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.” Pet. App. 25-26, *quoting Healy*, 491 U.S. at 337.

The Second Circuit found the Reconciliation Statute to be easily distinguishable from the statute at issue in *Healy* and further concluded that the Reconciliation Statute does not impede interstate commerce. The court reasoned that the Reconciliation Statute, unlike the statute in *Healy*, does not dictate how out-of-state commercial activity must be conducted; instead, its reach extends only to the “post-sale reporting of transactions.” Pet. App. 26. The Reconciliation Statute does not offend the Commerce Clause, because the statute’s effect on importers, if any, is only incidental to its purpose of promoting the investigation of cigarette smuggling that could adversely affect the state. *Id.* Furthermore, the court observed, the passage of similar statutes by other jurisdictions had not, and would not, result in the kind of economic gridlock that this Court condemned in *Healy*, because the Reconciliation Statute merely “*considers*” nationwide data as a means of regulating in-state activity. Pet. App. 26-27 (emphasis in original). The statute, in the

court's view, "does not seek to, and in practical effect does not, project onto the rest of the nation a scheme to prohibit cigarette sales or regulate the commercial terms of them and instead requires reporting of those sales, regardless of the terms, after the fact." Pet. App. 27.

The court of appeals also rejected GRE's attempt to equate the Reconciliation Statute with the state law this Court invalidated in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). The statute at issue in *Edgar* permitted Illinois state officials to block corporate takeovers by regulating tender offers, even when all the affected shareholders resided in other states. This Court held that the Illinois law violated the extraterritoriality prong of the dormant Commerce Clause by preventing, unless its terms were satisfied, "interstate tender offers which in turn would generate interstate transactions." Pet. App. 28-29, *quoting Edgar*, 457 U.S. at 640. The court of appeals had no difficulty distinguishing the Reconciliation Statute from Illinois' invalid requirement. The court stated succinctly, "[w]hile [the Reconciliation Statute] requires reporting of interstate transactions, [it] neither regulates nor precludes them." Pet. App 29. The court therefore properly held that the Reconciliation Statute does not run afoul of the dormant Commerce Clause. *Id.*

**C. The Court Of Appeals Correctly Held  
That The Reconciliation Statute Does  
Not Violate The Supremacy Clause**

GRE argued below that the Reconciliation Statute violates the Supremacy Clause, U.S. CONST. art. VI, cl. 2, because compliance with both Connecticut's statute and the federal PACT Act is "impossible." Pet. App. 29. GRE also contended that the Reconciliation Statute uses cigarette shipment reports, generated by importers and distributors pursuant to the PACT Act, for purposes prohibited by federal law. *Id.* at 33. The court of appeals rejected both propositions.

The Second Circuit looked to two of its own prior cases for excellent summaries of this Court's analyses of the preemption doctrine. *See New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 103-04 (2d Cir. 2010) (describing the three general types of preemption); *In Re Methyl Tertiary Butyl Ether Products Liability Litigation ("MBTE")*, 725 F.3d 65, 96-97 (2d Cir. 2013) (tracing the evolution of the "impossibility" branch of conflict preemption). "Impossibility pre-emption is a demanding defense," *Wyeth v. Levine*, 555 U.S. 555, 573 (2009), *quoted in MBTE*, 725 F.3d at 98. To establish impossibility preemption, a plaintiff "must show that federal and state laws 'directly conflict.'" Pet. App. 31, *quoting MBTE*, 725 F.3d at 99 and *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227 (1998).

GRE, seeking to meet this heavy burden, asserted that even though it provides all its nontribal importers' PACT Act reports to CT DRS, its total annual imports still do not reconcile with its total annual sales to retailers within the Reconciliation Statute's permissible 2.5% margin. The court of appeals found GRE's argument unconvincing, because Connecticut's statute affords NPMs the opportunity to achieve compliance by satisfactorily explaining any discrepancy greater than 2.5%. Pet. App. 32. The court observed that GRE, by providing CT DRS with a satisfactory explanation for its excessive discrepancies, had remained listed on Connecticut's tobacco directory throughout the course of this litigation. The court therefore concluded that "the Reconciliation Requirement and the PACT Act can 'stand together' as reporting requirements." Pet. App. 33, quoting *Kelly v. Washington*, 302 U.S. 1, 10 (1937) (intermediate citations omitted).

The Second Circuit also summarily dispensed with GRE's additional assertion that the Reconciliation Statute employs PACT Act reports for impermissible purposes. The court observed, "PACT Act reports may be used 'solely for the purposes of the enforcement of this chapter and the collection of *any* taxes owed on related sales of cigarettes . . . ' 15 U.S.C. §376(c) (emphasis added)." Pet. App. 33. The court concluded that the Reconciliation Statute utilizes such reports for a purpose expressly contemplated by the Act, namely, "the investigation of possible tax evasion involving cigarettes." *Id.* The court, finding no merit

in either of GRE's preemption arguments, properly held that the Reconciliation Requirement does not violate the Supremacy Clause. *Id.* at 35-36.

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**CONCLUSION**

For all the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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