

10-3165-cv,
10-3191-cv, 10-3213-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RED EARTH LLC, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Western District of New York

**BRIEF OF AMICI CURIAE CAMPAIGN FOR TOBACCO-FREE KIDS,
AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY
CANCER ACTION NETWORK, AMERICAN HEART ASSOCIATION,
AMERICAN LEGACY FOUNDATION, AND AMERICAN LUNG
ASSOCIATION IN SUPPORT OF APPELLANTS AND IN SUPPORT
OF VACATUR OF THE PRELIMINARY INJUNCTION**

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DISCLOSURE STATEMENT

Amici Campaign for Tobacco-Free Kids, American Cancer Society, American Cancer Society Cancer Action Network, American Heart Association, American Legacy Foundation, and American Lung Association are non-profit organizations that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.*

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* Pursuant to Circuit Rule 29.1, amici state that no party contributed money intended to fund the preparation or submission of this brief, and the parties' counsel did not author any portion of this brief. No person other than the amicus curiae, its members, or its counsel who contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT¹

The Prevent All Cigarette Trafficking Act (PACT Act) was enacted because many sellers of cigarettes and smokeless tobacco over the Internet and through mail order do not pay applicable excise taxes and do not have sufficient safeguards to prevent sales to children. The impact of these Internet and mail-order sales on public health has been extraordinarily harmful. By making tobacco products more readily available at lower prices, such sales increase tobacco use and, therefore, tobacco-caused death and disease, and undermine efforts to curtail tobacco use by our nation's children. To combat these harms, the PACT Act seeks to ensure the collection of federal, state, and local tobacco taxes on cigarettes and smokeless tobacco sold via the Internet and other mail-order sales, and to stop Internet cigarette sales to minors.

Below, the district court issued a preliminary injunction against enforcement of certain provisions of the PACT Act. In support of the government's appeal from that injunction, amici curiae Campaign for Tobacco-Free Kids, American Cancer Society, American Cancer Society Cancer Action Network, American Heart Association, American Legacy Foundation, and American Lung Association submit this brief to highlight three related points important to consideration of the balance of harms and the public interest. First, tobacco use is this nation's number one

¹This brief is filed with the consent of all parties.

preventable cause of premature death and disease. Second, Internet and mail-order sellers who do not pay applicable tobacco taxes and do not follow rules prohibiting sales to minors significantly interfere with and undermine efforts to reduce tobacco use, especially by children. An increase in the price of cigarettes decreases their use. Raising tobacco excise taxes is one of the most effective ways of reducing tobacco use. The opposite is also true: reducing the price of cigarettes increases the number of people who smoke, especially children. Third, few websites that sell tobacco products take steps to block sales of tobacco products to minors. These considerations weigh heavily in favor of vacating the preliminary injunction.

INTEREST OF AMICI CURIAE

Amici curiae are six non-profit organizations devoted to improving the public health and are among the premier tobacco-control advocates in the country. They have long been active in research, education, and public policy advocacy to raise awareness of the health consequences of tobacco use and to limit the sale of tobacco to minors.

Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has more than 100 member

organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

The American Cancer Society (ACS) is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives lost to cancer, and diminishing suffering from cancer through research, education, advocacy, and service. Research conducted by ACS was instrumental in establishing the original link between tobacco use and cancer. ACS East Central Division includes the state of Pennsylvania. The American Cancer Society Cancer Action Network (ACS CAN) is the nonprofit, nonpartisan advocacy affiliate of ACS. ACS CAN strongly supported the PACT Act during the legislative process because the new law would make it harder for children to purchase tobacco products. Because smoking accounts for an estimated 30 percent of all cancer deaths, 87 percent of lung cancer deaths, and increased risk for many other types of cancer, effective tobacco control is critical to furthering the missions of both ACS and ACS CAN.

The American Heart Association (AHA) is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke—two of the top three causes of death among Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in

nearly 2,000 community organizations in the 50 states, Washington, DC, and Puerto Rico. AHA invested more than \$473.5 million in fiscal year 2004-05 for research, professional and public education, community service, and advocacy so that people across America can live stronger, longer lives.

The American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, research, public relations, and outreach to populations disproportionately affected by the toll of tobacco.

The American Lung Association (ALA) is the nation's oldest voluntary health organization, with 435,000 volunteers in all 50 states and the District of Columbia. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, ALA has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use, as well as efforts to regulate the marketing, manufacture, and sale of tobacco products.

ARGUMENT

The PACT Act is a new and important tool in the effort to prevent and reduce the severe and often deadly health problems caused by tobacco use in this country. Despite Appellant’s claim that the Pact Act was enacted at the “behest of Big Tobacco and the National Association of Convenience Store Operators” and has “nothing to do” with “preventing teen smoking,” Applt. Br. 3, 18, the Act was widely supported by the public health community and state attorneys general as a mechanism to block tobacco sales to minors and to help ensure that applicable tobacco taxes are paid.² The public health imperative at the heart of the PACT Act is an important factor weighing heavily against a preliminary injunction in this case.

I. Tobacco Use Causes Disease And Death, And Begins In Youth.

More than 440,000 people in this country die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease. CDC, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses –United*

²Notably, in May 2008, Matthew Myers, President of the Campaign for Tobacco-Free Kids, testified before a House committee in support of the Act. See <http://judiciary.house.gov/hearings/pdf/Myers080501.pdf>. And in March 2010, twenty-three public health organizations, including many of the amici, sent a letter to Senator Kohl, the Act’s sponsor in the Senate, expressing their support. See <http://www.tobaccofreekids.org/reports/internet/KohlLetter.pdf>.

States, 2000-2004 (2008).³ An overwhelming majority of adult smokers started smoking before age 18. President's Cancer Panel, *Annual Report* 64 (2006-2007) (President's Cancer Panel Report).⁴ And nearly one-half of the children who become regular smokers will die prematurely from a tobacco-related disease. *Id.*

Tobacco products are unique among consumer goods: they kill up to one-half of the people who use them as they are intended to be used. World Health Organization, *Report on the Global Tobacco Epidemic* 8 (2008) (WHO 2008 Report);⁵ President's Cancer Panel Report 6. More than 12 million people in the United States have died from smoking cigarettes since the first Surgeon General's report on the hazards of smoking was issued in 1964. President's Cancer Panel Report 61.

More than 125,000 people die each year from lung and bronchial cancer caused by smoking. CDC, *Smoking-Attributable Mortality*. Smoking causes cardiovascular disease (including heart attacks), coronary heart disease, emphysema, aortic aneurysms, bladder cancer, esophageal cancer, kidney cancer, laryngeal cancer, oral cancer, pancreatic cancer, acute myeloid leukemia, cervical cancer, and stomach cancer. *Id.* Among youth—even before smoking has become a lifelong

³<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

⁴*Available at* <http://deainfo.nci.nih.gov/advisory/pcp/pcp07rpt/pcp07rpt.pdf>.

⁵www.who.int/tobacco/mpower/en/.

habit—smoking causes immediate health effects such as respiratory symptoms, reduced physical fitness, and stunted lung growth and function. President’s Cancer Panel Report 64. For any given individual, long-term smoking reduces average life expectancy by 14 years. National Cancer Institute, *Smoking and Tobacco Control Monograph No. 19*, at 4 (June 2008).⁶

Quantified, in the United States, smoking costs \$193 billion per year in health care spending and loss of productivity due to disease and premature death resulting from smoking-related disease. CDC, *Smoking-Attributable Mortality*. Smoking-related health care expenditures cost an estimated \$30 billion annually in the Medicaid program and \$27 billion in the Medicare program. CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006*, at 17 (updated May 29, 2009)⁷ (Medicaid estimate); Zhang, *Cost of Smoking to the Medicare Program, 1993*, 20 *Health Care Financing Rev.* 1-19 (1999)⁸ (Medicare estimate).

Despite laws in all 50 states banning the sale of tobacco products to anyone under age 18, one in five high school students smokes cigarettes. CDC, *Cigarette Use*

⁶http://www.cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf.

⁷www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

⁸*Available at* www.tcsg.org/tobacco/99SummerHCFR.pdf.

Among High School Students—U.S., 1991-2009 (July 2010).⁹ Every day, almost 3,900 children under the age of 18 try smoking for the first time; and every day, almost 1,000 become daily smokers. Substance Abuse & Mental Health Servs. Admin., *Results from the 2008 Nat'l Survey on Drug Abuse and Health* (2009);¹⁰ see also 61 Fed. Reg. 44,396, 44568 (1996) (more than one million minors try their first cigarette each year); President's Cancer Panel Report 64 (2005 figures). Given smoking rates, in 2007, more than 6,380,000 children in the United States were projected to ultimately die from smoking. CDC, State Data Highlights, 2006, Table 1 (2007).¹¹

Moreover, quitting is very difficult and is accompanied by acute withdrawal symptoms. Inst. of Med., *Ending the Tobacco Problem: A Blueprint for the Nation* 80 (2007) (IOM Report).¹² Although about forty percent of smokers try to quit every year, the successful quit rate is only two to five percent. *Id.* at 82.

⁹www.cdc.gov/mmwr/preview/mmwrhtml/mm5926a1.htm.

¹⁰<http://oas.samhsa.gov/2k8/2k8nsduh/2k8Results.cfm>.

¹¹www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06table1.pdf

¹²Available at http://books.nap.edu/openbook.php?record_id=11795.

II. Internet Sales of Cigarettes and Other Tobacco Products Substantially Harm Tobacco-Control Efforts.

Internet purchases of tobacco products have increased rapidly over the past decade. A 2004 New York survey found that ten percent of adult smokers always or sometimes buy their cigarettes online and an additional five percent had done so in the past year. Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, N.Y. State Dep't of Health, Tobacco Control Program, Mar. 2006.¹³ Similarly, a 2004 New Jersey study found that 6.3 percent of smokers usually purchased their cigarettes from the Internet, and nineteen percent had purchased cigarettes online at some point. Kim, et al., *Smokers' Beliefs and Attitudes About Purchasing Cigarettes on the Internet*, 121 Pub. Health Reports 594 (Sept.-Oct. 2006).¹⁴

Another study reported that, in 2002, Internet vendors sold roughly two percent of all cigarettes consumed in the United States, or more than 400 million packs per year, and projected Internet cigarette sales to triple within three years. *Id.* And monitoring just a portion of the tobacco-selling websites in November 2004, another study found that 1.1 million consumers visited more than 100 Internet cigarette retail sites

¹³<http://escholarship.org/uc/item/8026w9n0>.

¹⁴Available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1564449.

in that one month alone. Tsai, *Crackdown on Otamedia Could Help U.S. Cigarette E-tailers*, Wall St. J. Online, Jan. 28, 2005.¹⁵

As these and other studies show, Internet sales of tobacco products are substantial. An important reason for this growing market is that, because, many Internet sites do not collect applicable state or local taxes, Internet and mail-order prices of tobacco products are much lower than cigarette prices in brick-and-mortar retail outlets. For example, a study of 52 Internet vendors based on Tribal lands found that online cigarette prices were as low as one-fifth of those sold at grocery stores. Hodge, et al., *American Indian Internet Cigarette Sales: Another Avenue for Selling Tobacco Products*, 94 Am. J. Pub. Health 260 (2004);¹⁶ see also Ribisl, et al., *Overview of Internet Cigarette Sales*, Internet Cigarette Sales Knowledge Asset (Oct. 2007).¹⁷ Another study showed that more than three-quarters of all websites offering mail-order cigarette sales indicated that they do not comply with the Jenkins Act, which requires reporting of sales to the State to enable collection of State sales taxes. See GAO, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve*

¹⁵ Available at <http://yesmoke.eu/wp-content/uploads/crackdown-on-otamedia-yesmoke-could-help-US-cigarette-e-tailers-the-wallstreet-journal-28-01-2005.pdf>.

¹⁶ Available at www.ncbi.nlm.nih.gov/pmc/articles/pmc1448239/.

¹⁷ Available at http://sapr.org/knowledgeassets/knowledge_detail.cfm?KAID=3.

Reporting and Enforcement GAO-02-743 at 16 (2002).¹⁸ Eighteen percent stated directly that the sales were tax-free. *Id.* at 17.

The price of tobacco products matters from a public health perspective because the cost of cigarettes has a significant effect on both adult and underage smoking. “It is well established that an increase in the price of cigarettes decreases their use and that raising tobacco excise taxes is one of the most effective policies for reducing the use of tobacco.” IOM Report 182; *see also, e.g., CDC, State Cigarette Excise Taxes-United States, 2009* 59 (2010);¹⁹ Dep’t of Health & Human Servs., *Reducing Tobacco Use: A Report of the Surgeon General* 337 (2000);²⁰ Task Force on Community Preventive Services Guide to Community Preventive Services, *Reducing Tobacco Use Initiation: Increasing Unit Price for Tobacco Products* (2000).²¹ Price elasticity estimates imply that a ten percent increase in prices reduces cigarette demand among adults by three to five percent. *See Chaloupka & Pacula, The Impact of Price on*

¹⁸Available at <http://gao.gov/new.items/d02743.pdf>.

¹⁹www.cdc.gov/mmwr/pdf/wk/mm5913.pdf.

²⁰www.cdc.gov/tobacco/data_statistics/sgr/2000/complete_report/index.htm.

²¹www.thecommunityguide.org/tobacco/initiation/increasingprice.html.

Youth Tobacco Use, National Cancer Institute Monograph No. 14, at 194 (Nov. 2001).²²

The correlation between prices and tobacco consumption by youth is even more pronounced. See The World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (1999)²³ (“Importantly, the impact of higher taxes is likely to be greatest on young people, who are more responsive to price rises than older people.”).²⁴ A ten percent price increase is estimated to reduce the number of youth that smoke by five percent or more, as well as to reduce cigarette demand by continuing smokers. Chaloupka & Pacula, *The Impact of Price on Youth Tobacco Use*, at 195. Increased taxation rates are also effective at stemming smoking rates among pregnant women, with a direct affect on improving birth outcomes. Ringel &

²²http://cancercontrol.cancer.gov/TCRB/monographs/14/m14_12.pdf.

²³ Available at www.usaid.gov/policy/ads/200/tobacco.pdf.

²⁴ See also, e.g., Tauras, *Public Policy & Smoking Cessation Among Young Adults in the U.S.*, 6 Health Policy 321 (2004), available at www.tobaccofreeair.com/METC_Smoke-FreeAirMaterials/SelectReferences/Smoking_Cessation/Tauras%20Health%20Policy%202004.pdf; Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, Nicotine and Tobacco Research (1999), abstract available at http://ntr.oxfordjournals.org/content/Suppl_2/S77.abstract.

Evans, *Cigarette Taxes and Smoking During Pregnancy*, 91 Am. J. Pub. Health 1851 (Nov. 2001).²⁵

Conversely, decreases in the prices of cigarettes and other tobacco products increase tobacco use. For example, after 15 years of declining smoking among youth in Canada, youth smoking rates rose immediately after the country lowered its cigarette taxes in February 1994. Subsequent cigarette tax increases then reduced youth smoking rates. Canadian Cancer Society, et al., *Surveying the Damage: Cut-Rate Tobacco Products and Public Health in the 1990s*, Oct. 1999.²⁶

Because of the relationship between tobacco-product prices and rates of use, the availability of non-taxed or under-taxed cigarettes translates directly into higher smoking levels and, consequently, increased harm to the public health. Thus, numerous surveys show that smokers who buy their cigarettes from sources that do not collect taxes, including Internet and other mail-order sellers, are less likely to try to quit than smokers who pay full price. Hyland, et al., *Cigarette purchase patterns in four countries and the relationship with cessation: findings from the International Tobacco Control (ITC) Four Country Survey*, 15 Tobacco Control 2006 (Supp. III)

²⁵ Available at <http://www.tobaccofreekids.org/reports/prices/ajph.pdf>.

²⁶ www.nsra-adnf.ca/cms/file/pdf/oct99taxrep.pdf.

iii59-iii64 (2006);²⁷ Kim, et al., *Smokers' Beliefs and Attitudes About Purchasing Cigarettes on the Internet*, 121 Pub. Health Reports 594-602;²⁸ Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers*; Hyland, et al., *Access to low-taxed cigarettes deters smoking cessation attempts*, 95 Am. J. Pub. Health 994-95 (June 2005).²⁹

Accordingly, the harm caused by Internet sales that do not charge state and local taxes is enormous. Ensuring that cigarette taxes are collected will save lives, reduce illness, and mitigate the social cost that tobacco addiction levies on society.

III. Few Websites Take Steps to Block Sales of Tobacco Products to Minors.

Effective safeguards to prevent minors from purchasing cigarettes via the Internet are almost non-existent. Many Internet websites post notices that sales to minors are illegal or not allowed, but very few take steps to block such sales.

- Attorneys general from at least 15 states conducted Internet “stings” and found that children as young as nine years old were able to purchase cigarettes easily. A sting operation in New York found that 24 of 26 websites sold to minors.³⁰

²⁷Available at http://tobaccocontrol.bmj.com/content/15/suppl_3/iii59.full.pdf.

²⁸Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1564449>.

²⁹Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/instance/1449296/>.

³⁰Unger, et al., *Are adolescents attempting to buy cigarettes on the Internet?*, 10
(continued...)

- In one study, minors were asked to send in orders to Internet cigarette vendors, providing a money order for the purchase but no proof of age. Only 14 percent of the orders were rejected for lack of proof of age.³¹
- Another study found that more than 96 percent of minors aged 15 to 16 could find an Internet cigarette vendor and place an order in less than 25 minutes and that many could do so within seven minutes.³²
- A 2006 study of 101 Internet websites selling into California found that *none* complied with that state's law regarding verification of age and identification.³³

³⁰(...continued)

Tobacco Control 360 (Dec. 2001), *abstract available at* <http://tobaccocontrol.bmj.com/content/10/4/360.abstract?related-urls=yes&legid=tobaccocontrol> (citing Sherer, *States crack down on Web tobacco sales*, Christian Sci. Monitor (Nov. 8, 2000); ABC News, *Kids Buy Cigarettes Online: Children Buying Cigarettes With Click of Mouse*, Mar. 6, 2001, <http://abcnews.go.com/GMA/story?id=127203&page=1>).

³¹Rubin, et al., *Online Tobacco Sales Grow, States Lose*, Forrester Research, Inc., Apr. 27, 2001; *see also* Ribisl, et al., *Internet Sales of Cigarettes to Minors*, 290 JAMA 1356 (Sept. 10, 2003), <http://jama.ama-assn.org/cgi/reprint/290/10/1356>.

³²Jensen, et al., *Availability of tobacco to youth via the Internet*, 291 JAMA 1837 (Apr. 21, 2004), <http://jama.ama-assn.org/cgi/reprint/291/15/1837>.

³³Williams, et al., *Internet cigarette vendors' lack of compliance with a California state law designed to prevent tobacco sales to minors*, 160 Archives of Peds. & Adolescent Med. 988 (2006).

Studies indicate that more than 100,000 children in the U.S. were buying tobacco products on the Internet more than nine years ago.³⁴ Since then, the number of households with Internet access has grown enormously, as has youth access to credit and debit cards. The number of minors buying tobacco products online now is, therefore, surely even higher.

As an essential part of the effort to prevent the sale of tobacco products to minors, the PACT Act is an important tool in furthering a public health effort of crucial importance.

CONCLUSION

The Court should vacate the preliminary injunction issued by the district court.

October 4, 2010

Respectfully submitted,

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³⁴CDC, *Youth Tobacco Surveillance—U.S., 2000*, Table 23 (Nov. 2, 2001), www.cdc.gov/mmwr/PDF/ss/ss5004.pdf; Substance Abuse & Mental Health Serv. Admin., *Results from the 2001 Nat'l Household Survey on Drug Abuse: Vol. III*, Table 6.59B (June 2005), www.oas.samhsa.gov/nhsda/2k1nhsda/vol3/Sect6v1_PDF_W_59.pdf.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded) contains 3,197 words.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I certify that on this 4th day of October, 2010, I caused the foregoing Brief of Amici Curiae Campaign for Tobacco-Free Kids, et al., to be filed with the Court through the Court's CM/ECF system. All counsel of record are registered ECF users

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