

2010 WL 3948676 (C.A.2) (Appellate Brief)
United States Court of Appeals, Second Circuit.

RED EARTH LLC, DBA Seneca Smokeshop, Aaron J. Pierce, 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,

and

New York Association of Convenience Stores, Defendant.

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

October 5, 2010.

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

Brief for Amici Curiae States of New York, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming

[Barbara D. Underwood](#), Solicitor General, Alison J. Nathan, Special Counsel, [Benjamin N. Gutman](#), Deputy Solicitor General, of Counsel.

[Andrew M. Cuomo](#), Attorney General of the State of New York, Attorney for Amici Curiae States of New York, et al., 120 Broadway, New York, New York 10271, (212) 416-8096.

Daniel S. Sullivan, Attorney General of Alaska, P.O. Box 110300, Juneau, AK 99811.

Dustin McDaniel, Attorney General of Arkansas, 323 Center Street, Suite 1100, Little Rock, AR 72201.

[Richard Blumenthal](#), Attorney General of Connecticut, 55 Elm St., Hartford, CT 06106.

[Peter J. Nickles](#), Attorney General for the District of Columbia, One Judiciary Square, 441 4th Street, N.W., Suite 600 South, Washington, D.C. 20001.

Thurbert [E. Baker](#), Attorney General of Georgia, 40 Capitol Square, S.W., Atlanta, GA 30334.

[Lawrence G. Wasden](#), Attorney General of Idaho, P.O. Box 83720, Boise, ID 83720-0010.

[Terry Goddard](#), Attorney General of Arizona, 1275 W. Washington, Phoenix, AZ 85007.

[Edmund G. Brown Jr.](#), Attorney General of California, Department of Justice, Office of the Attorney General, 1300 I Street, Sacramento, CA 95814.

[Joseph R. Biden, III](#), Attorney General of Delaware, Carvel State Office Bldg., 820 N. French St., Wilmington, DE 19801.

[Bill McCollum](#), Attorney General of Florida, The Capitol, PL-01, Tallahassee, FL 32399-1050.

Mark J. Bennett, Attorney General of Hawaii, 425 Queen Street, Honolulu, HI 96813.

[Lisa Madigan](#), Attorney General of Illinois, Illinois Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601.

[Gregory F. Zoeller](#), Attorney General of Indiana, 302 W. Washington Street, IGC-South, Fifth Floor, Indianapolis, IN 46204.

[Steve Six](#), Attorney General of Kansas, 120 SW 10th Ave., 2nd Floor, Topeka, KS 66612-1597.

[Janet T. Mills](#), Attorney General of the State of Maine, 6 State House Station, Augusta, ME 04333-0006.

[Martha Coakley](#), Attorney General of Massachusetts, 1 Ashburton Place, Boston, MA 02108.

Lori Swanson, Attorney General of Minnesota, 102 State Capitol, 75 Rev. Dr. Martin Luther, King, Jr. Blvd., St. Paul, MN 55155-1609.

Thomas J. Miller, Attorney General of Iowa, 1305 E. Walnut Street, Des Moines, IA 50319.

James D. "Buddy" Caldwell, Attorney General of Louisiana, Office of the Attorney General, Department of Justice, 1885 North Street, P.O. Box 94005, Baton Rouge, LA 70804.

[Douglas F. Gansler](#), Attorney General of Maryland, 200 Saint Paul Place, Baltimore, MD 21202.

Michael A. Cox, Attorney General of Michigan, P. O. Box 30212, Lansing, MI 48909.

[Chris Koster](#), Attorney General of Missouri, Supreme Court Building, 207 West High Street, Jefferson City, MO 65101.

[Steve Bullock](#), Attorney General of Montana, P.O. Box 201401, Helena, MT 59620-1401.

[Catherine Cortez Masto](#), Attorney General for the State of Nevada, 100 North Carson Street, Carson City, Nevada 89701.

[Gary K. King](#), Attorney General of New Mexico, PO Drawer 1508, Santa Fe, NM 87504-1508.

Wayne Stenehjem, Attorney General of North Dakota, 500 North 9th Street, Bismarck, ND 58501-4509.

W.A. Drew Edmondson, Attorney General of Oklahoma, 313 NE 21st Street, Oklahoma City, OK 73105.

Patrick C. Lynch, Attorney General, State of Rhode Island, 150 South Main Street, Providence, RI 02903.

Jon Bruning, Attorney General of the State of Nebraska, Nebraska Dept. of Justice, PO Box 98920, Lincoln, NE 68509.

[Michael A. Delaney](#), Attorney General of New Hampshire, 33 Capitol Street, Concord, NH 03301.

[Roy Cooper](#), Attorney General of North Carolina, Dept. of Justice, P.O. Box 629, Raleigh, NC 27602.

Richard Cordray, Attorney General of Ohio, 30 East Broad Street, 17th Fl., Columbus, OH 43215.

[Thomas W. Corbett, Jr.](#), Attorney General of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, PA 17120.

[Henry D. McMaster](#), Attorney General of South Carolina, State of South Carolina, PO Box 11549, Columbia, SC 29211.

Marty J. Jackley, Attorney General of South Dakota, 1302 E. Highway 14, Suite 1, Pierre, SD 57501-8501.

[Mark L. Shurtleff](#), Attorney General of Utah, Utah State Capitol Suite #230, PO Box 142320, Salt Lake City, UT 84114-2320.

[Robert M. McKenna](#), Attorney General of Washington, 1125 Washington Street SE, PO Box 40100, Olympia, WA 98504-0100.

[Bruce A. Salzburg](#), Attorney General of Wyoming, 123 Capitol Bldg., Cheyenne, WY 82002.

[Robert E. Cooper](#), Attorney General of Tennessee, 425 5th Avenue North, Nashville, TN 37243.

[William H. Sorrell](#), Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609.

[Darrell V. McGraw, Jr.](#), Attorney General of West Virginia, Office of the Attorney General, State Capitol, Room 26-E, Charleston, WV 25305.

***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	8
POINT I - THE DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING A PRELIMINARY INJUNCTION WITHOUT CONSIDERING THE SIGNIFICANT PUBLIC INTERESTS SERVED BY ENFORCEMENT OF THE PACT ACT'S STATE-LAW-REINFORCING PROVISIONS	8
A. The Effective Taxation and Regulation of Cigarette Sales By the States Serves Important Public Interests	10
B. The PACT Act Provisions at Issue Here Make an Essential Contribution to the Effective Enforcement of State Laws Relating to the Sale of Cigarettes	14
POINT II - THE DISTRICT COURT ERRED IN FINDING A CLEAR LIKELIHOOD OF SUCCESS ON THE DUE PROCESS CLAIM	24
CONCLUSION	29

***ii TABLE OF AUTHORITIES**

CASES

<i>Chloé v. Queen Bee of Beverly Hills, LLC</i> , No. 09-3361, — F.3d —, 2010 WL 3035495 (2d Cir. Aug. 5, 2010), vacating and remanding 630 F. Supp. 2d 350 (S.D.N.Y. 2009)	7, 8, 27
<i>Consumer Mail Order Association of America v. McGrath</i> , 94 F. Supp. 705, 710 (D.D.C. 1950), aff'd, 340 U.S. 925 (1951)	17
<i>Diaz v. Paterson</i> , 547 F.3d 88 (2d Cir. 2008)	25
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	11
<i>Illinois v. Hemi Group LLC</i> , No. 09-1407, — F.3d —, 2010 WL 3547647 (7th Cir. Sept. 14, 2010)	27, 28
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	24
<i>McGee v. International Life Insurance Co.</i> , 355 U.S. 220 (1957)	28
<i>Meadwestvaco Corp. v. Illinois Department of Revenue</i> , 553 U.S. 16 (2008)	6, 24
<i>Metropolitan Taxicab Board of Trade v. City of New York</i> , 615 F.3d 152 (2d Cir. 2010)	8
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298 (1992)	6, 25
*iii <i>United States v. Salerno</i> , 481 U.S. 739 (1987)	7, 25
<i>Virginian Railway v. System Federation No. 40</i> , 300 U.S. 515 (1937)	9
<i>Zervos v. Verizon N.Y., Inc.</i> , 252 F.3d 163 (2d Cir. 2001)	5, 9

STATUTES

Prevent All Cigarette Trafficking (“PACT”) Act, Pub. L. No. 111-154, 124 Stat. 1087 (2010)	1, 20
15 U.S.C.	
§ 375	passim
§ 376a	1
§§ 375-378 (codifying, as amended, ch. 699, 63 Stat. 884 (1949)	15
15 U.S.C. § 377 (1955)	16
18 U.S.C.	
§ 2341	17
§ 2342	17

§§ 2341-2346 (codifying, as amended, Pub. L. No. 95-575, 92 Stat. 2463 (1978))	15
Arizona Rev. Stat. Ann.	
§ 42-3222	14
§ 42-3225	14
California Rev. & Tax. Code § 30101.7	14
Connecticut Gen. Stat. Ann. § 12-285c	14
*iv STATUTES	
Maine Rev. Stat. Ann. tit. 22, § 1555B	14
New York Pub. Health Law § 1399-II	14
Oklahoma Stat. Ann. tit. 68,	
§ 304	14
§ 309	14
§ 317	14
Washington Rev. Code § 70.155.140	14
OTHER AUTHORITIES	
<i>U.S. Government Authors</i>	
CDC, Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses--United States, 2000-2004, 57 <i>Morbidity & Mortality Weekly Rep.</i> 1226 (2008), available at www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm	10, 11
CDC, Sustaining State Programs for Tobacco Control: Data Highlights 2006, available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf	12
GAO, Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement (GAO-02-743 2002), available at www.gao.gov/new.items/d02743.pdf	12, 18
President's Cancer Panel, Promoting Healthy Lifestyles (2007), available at http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp07rpt/pcp07rpt.pdf	11
*v Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and 3689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (May 1, 2008)	13
S. Rep. No. 84-1147 (1955), reprinted in 1955 U.S.C.C.A.N. 2883	16
Statement of Vice Admiral Richard H. Carmona, U.S. Surgeon General, reprinted at 155 Cong. Rec. S5999 (June 3, 2009)	10
<i>Other Authors</i>	
Campaign for Tobacco-Free Kids, State Cigarette Excise Tax Rates & Rankings (2010), at http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf	15
Chaloupka, Frank J., & Rosalie Liccardo Pacula, The Impact of Price on Youth Tobacco Use, in <i>Changing Adolescent Smoking Prevalence</i> (Nat'l Cancer Inst. Monograph No. 14, 2001), available at http://cancercontrol.cancer.gov/TCRB/monographs/14/m14_12.pdf	13
Horwitz, Sari, Cigarette Smuggling Linked to Terrorism, <i>Wash. Post</i> , June 8, 2004, at A1	23
Institute of Medicine, <i>Ending the Tobacco Problem: A Blueprint for the Nation</i> (2007)	12
Lai, Shenghan, et al., The Association Between Cigarette Smoking and Drug Abuse in the United States, <i>J. of Addictive Diseases</i> , Dec. 2000, at 11	11
*vi Letter from the National Association of Attorneys General to Members of the Senate (March 9, 2010), available at http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf	19-20
Ribisl, Kurt M., Annice E. Kim, & Rebecca S. Williams, Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors? 92 <i>Am. J. Public Health</i> 940 (2002)	19
WHO Report on the Global Tobacco Epidemic (2008), available at http://whqlibdoc.who.int/publications/2008/9789241596282_eng.pdf	10

Zhang, Xiulan, et al., Cost of Smoking to Medicare Program, 1993,
 Health Care Financing Rev., Summer 1999, available at [http:// www.tcsg.org/
 tobacco/99SummerHCFR.pdf](http://www.tcsg.org/tobacco/99SummerHCFR.pdf)

*1 INTEREST OF THE AMICI

This case concerns the constitutionality of a federal statute that requires interstate cigarette sellers to comply with the laws of the states and localities to which they ship their cigarettes, including tax laws and laws governing the sale and distribution of cigarettes. 15 U.S.C. § 376a(a)(3)-(4), (d). These provisions (hereinafter the “state-law-reinforcing provisions”) were enacted as part of the Prevent All Cigarette Trafficking (“PACT”) Act, Pub. L. No. 111-154, 124 Stat. 1087 (2010), a comprehensive federal statute aimed at reducing smoking by thwarting illegal cigarette sales. The provisions at issue in this appeal are expressly aimed at assisting States and localities by requiring compliance with their laws. Among other things, the provisions require businesses that sell cigarettes over the internet or by mail order to sell only cigarettes for which the tax of the state and locality of delivery (the “destination state”) has been paid in advance, and to comply with laws of the destination state or locality restricting sales of cigarettes to persons below a statutory minimum age.

All fifty States have enacted laws taxing cigarettes and regulating and restricting their sale, especially to children. The *Amici* States have *2 an obvious interest in enforcing *all* of their laws, and they have a particularly strong interest in enforcing the laws relating to the sale of cigarettes: their interests include reducing the adverse health effects of smoking, which directly burden state healthcare systems, and capturing the millions of dollars of revenue lost when cigarettes are sold tax-free over the internet. Because of the substantial incentives and opportunities for cigarette sellers and purchasers to evade state laws through internet or other remote sales, nearly every State and the District of Columbia wrote to Congress supporting the enactment of these provisions of the PACT Act.

The *Amici* States thus have a strong interest in overturning the decision below, which held that the state-law-reinforcing provisions of the PACT Act likely deny due process to the plaintiffs, who are interstate sellers of cigarettes, and preliminarily enjoins the enforcement of the Act against those sellers.

*3 STATEMENT OF THE CASE

The PACT Act, which was supported by nearly every State, passed Congress with overwhelming bipartisan support and was signed into law on March 31, 2010. It was scheduled to take effect on June 29, 2010. Four days prior to its effective date, plaintiffs Red Earth, LLC, d/b/a Seneca Smokeshop, and Aaron J. Pierce filed suit in the District Court for the Western District of New York. Plaintiffs sought to enjoin the PACT Act on a number of constitutional grounds. The Seneca Free Trade Association filed a second challenge to the PACT Act and the district court consolidated the two cases.

On July 30, 2010, the district court issued an opinion and order that granted in part and denied in part plaintiffs' motion for a preliminary injunction (J.A. 4-46). The district court rejected plaintiffs' challenge to the provision of the PACT Act that prohibited transportation of cigarettes in the United States mails, 18 U.S.C. § 1716E(a) (J.A. 40). But the district court granted the plaintiffs' motion for a preliminary injunction to halt enforcement of the PACT Act's requirement that all interstate shipments must comply with the state and local laws of the destination state. The district court held that this state-law- *4 reinforcing provision of the PACT Act facially violates due process because the provision does not specify that the remote cigarette seller must have minimum contacts with the taxing state (J.A. 20). The Court concluded that retailers who market their product via an internet website and ship that product to a destination state do not engage in “regular or systematic solicitation of business within [the] taxing jurisdiction” (J.A. 20), and therefore do not have sufficient contacts” with that jurisdiction for purposes of due process (J.A. 21-27). This appeal ensued.

SUMMARY OF ARGUMENT

The United States has explained that the state-law-reinforcing provisions of the PACT Act--as federal legislation similar to many other federal enactments that mandate compliance with state and local law--satisfies the "minimum contacts" test required by the Due Process Clause. We do not repeat all those arguments here. The *Amici* States submit this brief to emphasize two points of particular concern to them.

First, in considering whether to grant the extraordinary relief of a preliminary injunction, the district court was obliged to balance the *5 equities and the effect of its decision on the public interest. In making that determination, the court failed to consider, let alone weigh adequately, the harm to the public interest that will result from enjoining the enforcement of the state-law-reinforcing provisions of the PACT Act. By providing federal reinforcement to state taxation and regulation of cigarette sales, the federal statute at issue here makes those state laws much more effective than they were before its enactment, and thus makes an important contribution to the public interests served by those state laws. In particular, the state-law-reinforcing provisions of the PACT Act assist the States in (a) improving public health by decreasing the incidence of smoking, (b) reducing the incidence of underage smoking, (c) increasing tax revenue at a time of severe budget crises and shortfalls, and (d) reducing the diversion of cigarette sale proceeds to illegal activity including terrorism and organized crime. The failure of the district court to consider the public interests protected by the congressional enactment constituted an abuse of discretion. See *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (holding that a district court abuses its discretion when it applies *6 the wrong legal principle or its decision "cannot be located within the range of permissible decisions").

Second, while the validity of the statutory provisions at issue here is particularly apparent because of the federal character of the legislation and the clear power of Congress to require interstate businesses to comply with state and local laws (Brief of the United States at 23-27), the due process analysis of the district court would be incorrect even if the case had involved only a state statute imposing taxes or other requirements on out-of-state cigarette sellers. The district court invalidated the state-law-reinforcing provisions--both taxing and other critically important regulatory requirements--on the ground that the statute imposes state-law compliance on sellers whose contacts with the destination state are insufficient to satisfy due process (J.A. 20). But in this context, due process requires only "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Meadwestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) (quotation marks omitted) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-06 (1992)), and that link is plainly present here.

*7 As a preliminary matter, this facial challenge must fail because there are many applications of the statute that indisputably satisfy the due process standard--for example, applications involving cigarette sellers who conduct substantial and continuous business and solicitations beyond website sales within a destination state. See generally *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenger "must establish that no set of circumstances exists under which the [law] would be valid").

In any event, the due process challenge would fail even if this were an as-applied challenge involving a remote seller whose contact with a destination state involved only website sales. This Court recently reversed one of the decisions on which the district court relied for its contrary ruling. See *Chloé v. Queen Bee of Beverly Hills, LLC*, No. 09-3361, -- F.3d --, 2010 WL 3035495 (2d Cir. Aug. 5, 2010), *vacating and remanding* 630 F. Supp. 2d 350 (S.D.N.Y. 2009). In *Chloé*, this Court held that by offering a product for sale on a website to consumers in New York, and by selling and shipping at least one of those products to New York, the seller could--consistent with due process-- be subject *8 to the jurisdiction of New York for a claim arising out of that sale. *Id.* at *10. *Chloé* controls here.

ARGUMENT

POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING A PRELIMINARY INJUNCTION WITHOUT CONSIDERING THE SIGNIFICANT PUBLIC INTERESTS SERVED BY ENFORCEMENT OF THE PACT ACT'S STATE-LAW-REINFORCING PROVISIONS

When a moving party seeks to enjoin a statutory or regulatory scheme, the movant must demonstrate (1) irreparable harm absent injunctive relief; (2) a likelihood of success on the merits, and (3) that the public interest weighs in favor of granting an injunction. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152 (2d Cir. 2010). Although the district court below properly articulated this test, including recitation of the “public-interest” prong (J.A. 9), it failed to give *any* consideration to the public interests underlying the PACT Act, (J.A. 42-45). Indeed, the district court's public-interest analysis consisted of consideration of only two factors: (1) the economic harm to remote cigarette retailers who will be required to pay the same taxes as *9 local, brick-and-mortar retailers, and (2) the novelty of the federal taxing scheme embodied in the PACT Act (J.A. 43-44). Nowhere did the court mention, let alone weigh, the significant public interests underlying the PACT Act itself. But congressional purpose “is in itself a declaration of the public interest.” *Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). Because the district court failed even to consider the harm to the public interest that results from enjoining the PACT Act, its conclusion was not within the range of permissible decisions and it, therefore, constituted an abuse of discretion. See *Zervos*, 252 F.3d at 169 (holding that a district court abuses its discretion when it applies the wrong legal principle or its decision “cannot be located within the range of permissible decisions”).

A proper consideration of the significant public interests served by the state-law-reinforcing provisions of the PACT Act demonstrates that this factor weighs decidedly in favor of vacating the preliminary injunction and allowing the provisions to take immediate effect.

***10 A. The Effective Taxation and Regulation of Cigarette Sales By the States Serves Important Public Interests.**

Tobacco use is a deadly and costly public health problem. Smoking causes a host of crippling and deadly diseases, including cardiovascular disease, coronary heart disease, emphysema, aortic aneurysms, and a wide range of cancers. See *WHO Report on the Global Tobacco Epidemic* 8-9 (2008).¹ Approximately 440,000 people in the United States die annually from tobacco-related illness. CDC, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses--United States, 2000-2004*, 57 *Morbidity & Mortality Weekly Rep.* 1226 (2008);² Statement of Vice Admiral Richard H. Carmona, U.S. Surgeon General, *reprinted at* 155 *Cong. Rec.* S5999, S6000 (June 3, 2009). That means that smoking causes more than 1000 deaths every day.

Children are particularly vulnerable to the dangers of tobacco. “Every day, approximately 4,000 children under age 18 experiment with *11 cigarettes for the first time; another 1,500 become regular smokers. Of those who become regular smokers, about half eventually die from a disease caused by tobacco use.” President's Cancer Panel, *Promoting Healthy Lifestyles* 64 (2007).³ Even before developing a lifelong addiction, children who smoke can experience immediate deleterious health effects. See *id.* And there is evidence that tobacco functions as a “gateway drug” to use of illegal substances such as cocaine and heroin. See, e.g., Shenghan Lai, et al., *The Association Between Cigarette Smoking and Drug Abuse in the United States*, *J. of Addictive Diseases*, Dec. 2000, at 11. As the Supreme Court has observed, “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Because of its pernicious health impacts, tobacco is a substantial drain on the public fisc. The CDC reports that tobacco-related disease and death costs \$193 billion a year in health-care spending and loss of productivity. CDC, *Smoking-Attributable Mortality*, *supra*. Smoking *12 costs the Medicaid and Medicare programs billions of dollars annually. See CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006*;⁴ Xiulan Zhang, et al., *Cost of Smoking to Medicare Program, 1993*, *Health Care Financing Rev.*, Summer 1999.⁵

Given the enormous public-health and economic costs associated with tobacco, it is unsurprising that every State and the federal government have passed laws aimed at regulating aspects of the sale, delivery, and use of tobacco. State regulations take several forms. All States, and the District of Columbia, impose excise taxes on the sale of cigarettes. GAO, *Internet Cigarette Sales:*

Giving ATF Investigative Authority May Improve Reporting and Enforcement 5 (GAO-02-743 2002).⁶ They do so because “[i]t 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.” Inst. of Med., *Ending the Tobacco Problem: A Blueprint for the Nation* 182 (2007). It is estimated that a ten-percent increase in *13 prices reduces cigarette demand among adults by three to five percent. Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use, in Changing Adolescent Smoking Prevalence* 194 (Nat'l Cancer Inst. Monograph No. 14, 2001).⁷ Youth response to price increases is even greater; a ten-percent uptick in cigarette prices is estimated to reduce the number of youth smokers by six or seven percent. See Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and 3689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 52 (May 1, 2008) (Prepared Statement of Matthew L. Myers, President, Campaigning for Tobacco-Free Kids).

Beyond taxing, States have regulated tobacco sales and age restrictions through regulatory mechanisms such as licensing, registration, directory laws (which allow the sale of only cigarette brands contained in a state directory), and age-verification requirements. *14 Many States restrict internet sales of tobacco.⁸ And some States have gone so far as to ban completely the shipment and delivery of cigarettes to individual customers.⁹

B. The PACT Act Provisions at Issue Here Make an Essential Contribution to the Effective Enforcement of State Laws Relating to the Sale of Cigarettes.

Before the enactment of the PACT Act, States faced enormous obstacles to the enforcement of their laws taxing and regulating the sale of cigarettes, and vast numbers of cigarettes were sold in violation of state law. This problem was exacerbated by two developments. First, as some States began increasing local excise taxes, price disparities between States grew significantly, increasing the motivation of both buyers and sellers to evade the taxes lawfully imposed by States with higher taxes. For example, New York currently taxes cigarettes at a rate of \$4.35 per pack, the highest rate in the nation, while Virginia's *15 rate, the lowest, is only \$0.30 a pack.¹⁰ Disparities like these, coupled with the fact that cigarettes are compact and therefore easily mailable and transportable, provide enormous profit incentives for illegal tax evasion. Second, the development of the technology that supports internet commerce has led to the exponential growth of internet cigarette sales,¹¹ a majority of which are made without payment of applicable taxes, see 15 U.S.C. § 375 note, Findings 1 & 5.

Before the PACT Act, Congress had enacted two earlier statutes aimed at combating interstate cigarette smuggling and tax evasion: first the Jenkins Act, 15 U.S.C. §§ 375-378 (codifying, as amended, ch. 699, 63 Stat. 884 (1949)), and later the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. §§ 2341-2346 (codifying, as amended, Pub. L. No. 95-575, 92 Stat. 2463 (1978)).

*16 The Jenkins Act is the predecessor to the PACT Act and was amended by it. Enacted in 1949, the Jenkins Act was: enacted for three major reasons: (1) The large and increasing loss of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in interstate commerce to consumers; (2) The discrimination caused by this evasion against sellers of cigarettes in States having a higher tax than the tax of the seller States; and (3) The fact that this evasion was accomplished through the use of the United States mail.

S. Rep. No. 84-1147 (1955), reprinted in 1955 U.S.C.C.A.N. 2883, 2883-84.

The Jenkins Act attempted to assist States in enforcing their cigarette tax laws with respect to interstate purchases by providing the States with information about taxable transactions so that the States could try to collect the taxes due from the in-state consumer. The Act requires any person who sells and ships cigarettes across a state line to a buyer other than a licensed

distributor (typically a state tax “stamping agent”) to report the sale to the buyer's state tobacco administrator. States can then seek to collect taxes directly from the buyer. Failure to comply with the Act's requirements constitutes a federal misdemeanor punishable by a fine and up to six months' imprisonment. 15 U.S.C. § 377 (1955). The Jenkins Act was upheld *17 against a due-process challenge analogous to the one that the district court below erroneously found to have a likelihood of success. See *Consumer Mail Order Ass'n of Am. v. McGrath*, 94 F. Supp. 705, 710 (D.D.C. 1950) (“They (Congress and the states) were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.” (quotation marks omitted)), *aff'd*, 340 U.S. 925 (1951) (per curiam).

In 1978, Congress enacted the CCTA, which focuses on large-scale smuggling. The CCTA makes it a federal felony punishable by up to five years' imprisonment to ship, sell, transport, or possess more than 10,000 cigarettes that do not bear the tax stamp of the jurisdiction in which they are found. 18 U.S.C. §§ 2341(2), 2342.

The Jenkins Act and the CCTA reflect a longstanding recognition that the public interest is served by curbing the sale of cigarettes in violation of state and local tax laws. But these statutes have by no means eliminated such sales. Compliance with the Jenkins Act's reporting requirements has been insubstantial, and interstate cigarette *18 sales have continued to escape state taxation and regulation. According to a 2002 Report by the GAO, the efforts of the States to enforce state laws and increase Jenkins Act compliance have had very limited success. GAO, *Internet Cigarette Sales*, *supra*, at 11; see 15 U.S.C. § 375 note, Finding 5 (reporting Congress's conclusion that a majority of internet sellers do not comply with the Jenkins Act registration and reporting requirements). Retail sellers often ignore filing requests even after being contacted by state officials, and because failure to file is only a misdemeanor, federal prosecutions are rarely brought. See GAO, *Internet Cigarette Sales*, *supra*, at 11-12. Without a Jenkins Act filing, States have limited ability to determine whether or not a filing is required and whether state taxes are being evaded. *Id.* Moreover, when Jenkins Act filings are made and States contact consumers seeking tax payments, payment requests are largely ignored. *Id.* As a result of these limitations and enforcement obstacles, *billions* of dollars of tax revenue are lost each year due to internet and other remote cigarette sales. 15 U.S.C. § 375 note, Finding 1.

And the loss of tax revenue was not the only, or even the most troubling, result of the cigarette-law-enforcement obstacles faced by the *19 state and federal government before the PACT Act. Several studies have found that internet retailers either fail to check the age of purchasers or inadequately verify age before making cigarette sales. See, e.g., Kurt M. Ribisl, Annice E. Kim, & Rebecca S. Williams, *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?* 92 Am. J. Public Health 940 (2002). As a result, children have nearly unfettered access to cigarettes over the internet. See *id.* Accordingly, Congress determined that a majority of remote sales are made without adequate mechanisms to prevent sales to underage purchasers. 15 U.S.C. § 375 note, Finding 5. These enforcement obstacles led the Attorneys General of nearly every State and the District of Columbia to support passage of the PACT Act. Letter from the Nat'l Ass'n of Attorneys General to Members of the Senate (March 9, 2010) (“Virtually all online tobacco retailers engage in illegal sales by: (1) failing to verify the age of their customers; (2) failing to report shipments of cigarettes to the tobacco tax administrator of the state in which such shipments are made as required by [the Jenkins Act]; (3) violating state laws regulating and/or prohibiting the shipment of tobacco products directly to individual consumers; (4) violating state tax *20 laws; and/or (5) utilizing the Internet and the mail to complete illegal tobacco transactions...”).¹²

The state-law-reinforcing provisions of the PACT Act were designed to solve the problem that the Jenkins Act had not solved. The statute now requires cigarette sellers to comply with all state and local laws generally applicable to sales of cigarettes or smokeless tobacco in the place of delivery, including laws that impose taxes or restrict sales to minors. Pub. L. No. 111-154, § 2(c), 124 Stat. 1091 (enacting 15 U.S.C. § 376a). It thus removes any barrier that the dormant Commerce Clause might have posed to direct enforcement of these state and local laws against the out-of-state sellers. And penalties for violations of the PACT Act requirements were increased to up to three years in prison or civil monetary penalties. *Id.*, § 2(d), 124 Stat. 1100 (amending 15 U.S.C. § 377). State Attorneys General and local corporation counsels are authorized to bring suit against violators for injunctive relief or civil damages. *Id.*, § 2(e), 124 Stat. 1101 (enacting 15 U.S.C. § 378(c)(1)(A)).

***21** Because the state-law-reinforcing provisions of the PACT Act have the purpose and likely effect of greatly enhancing compliance with state laws by interstate sellers of cigarettes, the public interest served by those provisions is the public interest in the enforcement of those state laws. And the harms to the public interest inflicted by the district court's preliminary injunction are precisely the harms that those state laws were designed to combat: harm to public health from increased incidence of smoking, the specific harm to public health resulting from sales to children, the loss of legitimate state revenue from cigarette taxes, and the diversion of cigarette proceeds to support other illegal activities.

First, the state-law-reinforcing provisions of the PACT Act improve public health by decreasing the incidence of smoking. As discussed above, there is a significant correlation between raising prices on cigarettes and reduction in the incidence of smoking. This is not, as the district court suggested, simply about money. *See* J.A. 51-52 (Order Denying Motion for Stay Pending Appeal) (“At most, defendants have shown a potential claim for monetary damages (in the form of taxes owed) if they ultimately succeed on appeal.”). Given that increased ***22** prices reduce smoking, coupled with the fact that more than 1000 people die every day in this country from smoking-related illness, it is plain that without the effective enforcement of federal, state, and local excise tax laws, public health is substantially harmed. Moreover, States and the public bear the financial burden that follows from the deleterious health effects of smoking.

Second, the state-law-reinforcing provisions of the PACT Act help States combat underage smoking, both by direct prohibition and through the enforcement of taxes. Children are particularly responsive to price increases, making the PACT Act's tax-enforcement mechanisms important to combating underage smoking. Moreover, the internet and remote sales are a significant source of supply of illegal cigarettes to children, and accordingly reducing the volume of such sales (by eliminating their tax advantage) also reduces the sale of cigarettes to children.

Third, the state-law-reinforcing provisions of the PACT Act help States legitimately increase revenue at a time of severe budget crises and shortfalls--due at least in part to the drain on the public fisc that has resulted from healthcare costs associated with smoking. As ***23** discussed above, the insufficient enforcement tools available before the PACT Act resulted in the loss of billions of dollars of government revenue.

Fourth, the state-law-reinforcing provisions of the PACT Act help stop the proceeds of cigarette sales from being diverted to illegal activity including terrorism and organized crime. The significant profit margins from illegal cigarette sales have been found to be funding other criminal activities, including terrorism. *See, e.g.,* Sari Horwitz, *Cigarette Smuggling Linked to Terrorism*, Wash. Post, June 8, 2004, at A1 (“With huge profits--and low penalties for arrest and conviction--illicit cigarette trafficking now has begun to rival drug trafficking as a funding choice for terrorist groups, said William Billingslea, an ATF senior intelligence analyst who has studied the issue extensively.”).

Accordingly, in light of the significant public health, economic, and criminal justice benefits that flow from the enforcement of the state-law-reinforcing provisions of the PACT Act, the public interest weighs strongly against a grant of a preliminary injunction in this matter.

***24 POINT II**

THE DISTRICT COURT ERRED IN FINDING A CLEAR LIKELIHOOD OF SUCCESS ON THE DUE PROCESS CLAIM

The United States has explained that the district court wrongly analyzed this statute as if it reflected obligations imposed on cigarette sellers by a State, rather than by the United States in the exercise of its constitutional authority to regulate interstate commerce, and that such a regulation--similar to a host of other federal statutes that require compliance with state and local law--does not offend “traditional notions of fair play and substantial justice” that is required by the Due Process Clause. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see* Brief of the United States at 22-27. But as the United States also points out, due process would be satisfied even by a state law requiring that an out-of-state seller pay state taxes on the sale

of cigarettes before delivery of the cigarettes within the State. Brief of the United States at 29-30. In this context, due process requires only “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Meadwestvaco*, 553 U.S. at 24 (quotation marks omitted). If a “foreign corporation purposefully avails itself of *25 the benefits of an economic market in the forum State,” due process is met “irrespective of a corporation's lack of physical presence in the taxing State.” *Quill*, 504 U.S. at 307-08. For several reasons, the district court erred in concluding that this standard is not met with regard to the state-law-reinforcing provisions of the PACT Act.

As a preliminary matter, plaintiff's due process challenge should be rejected because this is a facial constitutional challenge to the state-law-reinforcing provisions of the PACT Act. In a facial challenge, the plaintiff must demonstrate that there is no conceivable applications of the statute that would be constitutional. See *Salerno*, 481 U.S. at 745 (1987); see also *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008) (citing *Salerno*, 481 U.S. at 745). The district court turned this analysis on its head--concluding that the statute was facially unconstitutional because there may be *some* unconstitutional applications of the statute. (See J.A. 22 (“Reliance upon the existence of Internet websites to establish minimum contacts is problematic [because]... not all plaintiffs in this case have websites.”); J.A. 23 (“In any event, the existence of a website for some plaintiffs does not overcome the due process problem because the statute applies even as to those plaintiffs who don't have any *26 Internet presence.”).) Under the proper analysis, the facial challenge must be rejected because there are applications of the statute that would easily meet even the most stringent of due process analyses. For example, it is undisputed here that a remote seller that has substantial and continuous ties to a State beyond those resulting from its website sales could constitutionally be subjected to the laws of that State. For this reason alone, the facial challenge should fail.

But even if this were an as-applied challenge involving a remote seller whose contact with a destination state involved only website sales, the due process challenge would still fail. In reaching its due process conclusion, the district court stated that “as far as this Court is aware, it has never been held that a single sale, without more, will automatically satisfy due process requirements. In fact, several cases have held to the contrary” (J.A. 25). The court then cited the trial-court ruling in *Chloé*, 630 F. Supp. 2d 350, for the proposition that “a single Internet-based sale of a counterfeit retail product in New York by a California defendant constituted insufficient contacts to require a California defendant to be subject to suit in New York based upon that purchase” (J.A. 25). But this Court vacated and remanded the trial *27 court's ruling in *Chloé*, and this Court's decision in that case controls here. See *Chloé*, 2010 WL 3035495.

In *Chloé* this Court held that offering a product for sale over a website to a particular State, coupled with even a *single* act of shipping the product into the State, provides sufficient minimum contacts to satisfy due process. See *id.*, 2010 WL 3035495, at *4 (holding that an employee's single act of shipping a bag to New York State gave rise to personal jurisdiction over the employee). In *Chloé*, a trademark case, this Court found that “by offering bags for sale to New York consumers on the Queen Bee website and by selling bag--including at least one counterfeit Chloé bag--to New York consumers, [the defendant] has purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.* at *10 (quotation marks and brackets omitted).

The Seventh Circuit recently reached a similar conclusion in a related context. In *Illinois v. Hemi Group LLC*, No. 09-1407, -- F.3d --, 2010 WL 3547647 (7th Cir. Sept. 14, 2010), the Seventh Circuit held that an online cigarette retailer who sold cigarettes to purchasers in the State of Illinois was subject to personal jurisdiction in Illinois for its *28 failure to comply with Illinois laws and to a claim arising under the Jenkins Act. The Seventh Circuit held that due process allowed the exercise of jurisdiction because the seller could not have “the benefit of a nationwide business model with none of the exposure.” *Id.* at *6. If an out-of-state retailer can be haled into an Illinois court for a claim involving the violation of Illinois cigarette laws, surely the same retailer can and should be subject to the cigarette excise taxes and other laws of that State.

Chloé and *Hemi Group* demonstrate that even with respect to individuals whose contacts are limited to internet sales into a destination state, the Due Process Clause permits the taxing of those cigarettes under the laws of the destination state. This conclusion is further supported by the fact that, as discussed above, destination states have such significant public interests

militating in favor of the enforcement of their local laws. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (considering the State's regulatory interest as a factor in the due process analysis in the context of personal jurisdiction).

*29 CONCLUSION

For the foregoing reasons, and for the reasons given by the appellant United States, the judgment of the district court should be reversed and the preliminary injunction vacated.

Footnotes

- 1 Available at [http:// whqlibdoc.who.int/publications/2008/9789241596282_ eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241596282_eng.pdf)
- 2 Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.
- 3 Available at [http:// deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp07rpt/pcp07rpt.pdf](http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp07rpt/pcp07rpt.pdf).
- 4 Available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf.
- 5 Available at <http://www.tcsg.org/tobacco/99SummerHCFR.pdf>.
- 6 Available at www.gao.gov/new.items/d02743.pdf.
- 7 Available at http://cancercontrol.cancer.gov/TCRB/monographs/14/m14_12.pdf.
- 8 See, e.g., *Ariz. Rev. Stat. Ann.* §§ 42-3222, 42-3225; *Cal. Rev. & Tax. Code* § 30101.7; *Me. Rev. Stat. Ann.* tit. 22, § 1555B; *Okla. Stat. Ann.* tit. 68, §§ 304, 309, 317; *Wash. Rev. Code* § 70.155.140.
- 9 See, e.g., *Conn. Gen. Stat. Ann.* § 12-285c; *N.Y. Pub. Health Law* § 1399-11.
- 10 Campaign for Tobacco-Free Kids, *State Cigarette Excise Tax Rates & Rankings* (2010), at [http:// www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf](http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf).
- 11 See 15 U.S.C. § 375 note, Finding 9 (“[T]he number of Internet vendors in the United States and in foreign countries that sell cigarettes and smokeless tobacco to buyers in the United States increased from only about 40 in 2000 to more than 500 in 2005.”).
- 12 Available at http://www.naag.org/assets/files/pdf/signons/PACT_Final.pdf.