

# 17-1993(L), 17-2107(XAP), 17-2111(XAP)

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## United States Court of Appeals *for the* Second Circuit

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THE STATE OF NEW YORK, THE CITY OF NEW YORK,

*Plaintiffs-Appellees/Cross-Appellants,*

– v. –

UNITED PARCEL SERVICE, INC.,

*Defendant-Appellant/Cross-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR *AMICI CURIAE* CAMPAIGN FOR TOBACCO-FREE  
KIDS, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,  
AMERICAN LUNG ASSOCIATION, NEW YORK STATE AMERICAN  
ACADEMY OF PEDIATRICS, CHAPTERS 2 & 3, PUBLIC HEALTH  
LAW CENTER AT THE MITCHELL HAMLINE SCHOOL OF LAW,  
AND TRUTH INITIATIVE FOUNDATION IN SUPPORT  
OF APPELLEES/CROSS-APPELLANTS**

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## **DISCLOSURE STATEMENT**

*Amici Curiae* state that they have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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## STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are six non-profit organizations (“collectively, “Amici”) devoted to improving the public health by reducing tobacco use and its deadly toll in the United States.<sup>1</sup> Amici include the following organizations: New York State American Academy of Pediatrics, Chapters 2 & 3; the American Cancer Society Cancer Action Network; the American Lung Association; the Campaign for Tobacco-Free Kids; the Public Health Law Center at the Mitchell Hamline School of Law; and the Truth Initiative Foundation.<sup>2</sup>

Amici have worked for decades to protect the public from the devastating harms caused by tobacco products, which are the leading cause of preventable death in America. Amici have long been active in research and public education about the dangers of cigarettes, as well as in advocating public policies and sponsoring activities to prevent children from smoking, help smokers quit, and protect everyone from secondhand smoke. For many years, Amici have worked in support of efforts to ensure that state and local excise taxes levied on cigarettes are

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<sup>1</sup> Pursuant to Fed. R. App. P 29(a)(4)(E) and Second Circuit Rule 29.1, Amici state that the parties’ counsel did not author any portion of this brief, and that no party contributed money that was intended to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P 29(a)(2), Amici state that all parties to the case have consented to the filing of this brief.

<sup>2</sup> Dennis A. Henigan and Mark Greenwold of Amicus Curiae Campaign For Tobacco-Free Kids are *of counsel* on this brief.

in fact paid because cigarettes that evade such taxation are sold at lower prices that increase consumption of cigarettes, especially youth consumption. Amici have also actively supported measures such as the development of track-and-trace technology for cigarette packs and effective high-technology tax stamps designed to prevent tax evasion on cigarettes and unstamped cigarettes from reaching the market.

Because the prevention of cigarette excise tax evasion is so critical to their public health missions, Amici have a strong interest in ensuring that courts assess penalties levied against shippers such as United Parcel Service, Inc. (“UPS”) to deter unlawful conduct that evades these taxes to the fullest extent authorized by law.

The penalties assessed by the district court against UPS are appropriate in light of the devastating nature and scope of the tobacco epidemic and the public health consequences of UPS’s unlawful conduct. UPS’s shipment of cigarettes on which taxes were not paid resulted in the marketing of low-priced cigarettes particularly attractive to youth. It also imperiled public health and social welfare in contravention of policies established by Congress and the New York Legislature that were intended to reduce the consumption of cigarettes and protect young people from death and disease. Such serious misconduct must be deterred by

financial penalties large enough to affect the conduct of a shipper with the massive resources and market position of UPS.

### Descriptions of Amici Curiae

New York State American Academy of Pediatrics, Chapters 2 & 3 represent more than 3,500 pediatricians across the five boroughs of New York City and the ring metro counties. We are committed to improving the health and well-being of all children. A core component of our work is assuring that infants, children, and adolescents have a clean and healthy environment in which to grow and develop. We have a history of joining the state and city in all efforts to reduce smoking and increase smoke free environments. Our participation in this suit as amicus is a natural extension of our longstanding work in assuring tobacco-free environments for all children.

The American Lung Association is the nation's oldest voluntary health organization and does business in New York as the American Lung Association in New York. Because smoking causes or makes worse many lung diseases, including lung cancer and chronic obstructive pulmonary disease, the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes

supporting increasing the price of tobacco products through tobacco tax increases or other means to reduce youth and adult use.

The American Cancer Society Cancer Action Network (ACS CAN) is the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society. ACS CAN supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem, including effective tobacco control policies at the federal, state, and local levels.

The Campaign for Tobacco-Free Kids (“Tobacco-Free Kids”) is a 501(c)(3) non-profit corporation organized under the laws of the District of Columbia with its principal place of business in Washington, D.C. As one of the nation’s leading advocacy organizations, Tobacco-Free Kids works to reduce tobacco use and its deadly consequences in the United States and around the world. For more than 20 years, Tobacco-Free Kids has fought to protect children and save lives from the number one cause of preventable death—tobacco use—and promotes the adoption of proven solutions that are most effective at reducing tobacco use.

The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law. Located at the Mitchell Hamline School of Law in Saint Paul, Minnesota, the Center helps local, state, and national leaders improve health by strengthening public policies. The Center and its national program, the Tobacco Control Legal Consortium, work with public

officials and community leaders to develop, implement, and defend effective public health laws and policies, including those that advance tobacco control. The Center has filed more than forty briefs as amicus curiae in the highest courts of the land. The Center has a strong interest in supporting the ability of state and local governments to adopt and implement evidence-based policies to improve the public's health. These policies include state and local tobacco taxation, which are among the most effective approaches to protect the health of the most vulnerable populations that have been, and continue to be, targeted by tobacco companies.

Truth Initiative Foundation, doing business as Truth Initiative, envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Truth Initiative's proven-effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences, and approaches to reducing tobacco use. Truth Initiative also develops programs to address the health effects of tobacco use, with a focus on priority populations disproportionately affected by the toll of tobacco, through alliances, youth activism, training, and technical assistance. Formerly known as the American Legacy Foundation and located in Washington, D.C.,

Truth Initiative was created in 1999 as a result of the Master Settlement Agreement between forty-six states, five U.S. territories, and the tobacco industry.

## ARGUMENT

### I. SMOKING DEVASTATES THE PUBLIC HEALTH AND BURDENS THE HEALTH CARE SYSTEM

#### A. Smoking is the Leading Cause of Preventable Death in the Nation

Despite the progress that has been made to reduce the level of cigarette smoking in the United States in recent years, tobacco-related death and disease remains the largest preventable cause of death in the United States. The 2014 U.S. Surgeon General’s report on smoking, issued on the fiftieth anniversary of the landmark Surgeon General’s report of 1964 that first identified cigarette smoking as a cause of death and disease, calls the epidemic of smoking one of the “greatest public health catastrophes of the [twentieth] century.”<sup>3</sup> Similar characterizations have been issued by countless public health authorities. Despite the efforts of public institutions to reduce the prevalence of tobacco usage over the last half-century, however, smoking remains our nation’s leading cause of preventable death, killing at least 480,000 Americans every year.<sup>4</sup> Indeed, smoking causes

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<sup>3</sup> U.S. Office of Surgeon General, *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General* (2014) (hereinafter 2014 SG Report), Exec. Summary 1, *available at* <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf>.

<sup>4</sup> 2014 SG Report, at 678–79, *available at* <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.



more annual deaths than the total deaths combined from HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders.<sup>5</sup> On average, long-term smoking reduces life expectancy by at least 10 years.<sup>6</sup>

It is estimated that over 8.6 million American suffer from smoking-related diseases.<sup>7</sup> Smoking affects nearly every organ of the body.<sup>8</sup> Scientific research has established causal links between smoking and over a dozen different cancers, including lung cancer, stomach cancer, liver cancer, and pancreatic cancer.<sup>9</sup> Smoking also causes a host of other chronic diseases, including coronary heart disease, aortic aneurysm, chronic obstructive pulmonary disease, tuberculosis, pneumonia, stroke, diabetes, reduced fertility in women, and erectile dysfunction in men.<sup>10</sup> More than 87% of lung cancer deaths, 61% of pulmonary disease deaths,

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<sup>5</sup> Center for Disease Control and Prevention (hereinafter “CDC”), Health Effects of Cigarette Smoking, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/effects\\_cig\\_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm) (last visited Feb. 25, 2018).

<sup>6</sup> Jha P, Ramasundarahettige C, Landsman V, Rostrom B, Thun M, Anderson RN, McAfee T, & Peto R., *21st Century Hazards of Smoking and Benefits of Cessation in the United States*, N Engl J Med. 2013 Jan. 24; 368(4):341-50.

<sup>7</sup> 2014 SG Report, at 670.

<sup>8</sup> Boris D. Lushniak, Preface to 2014 SG Report, Exec. Summary, at iii (2014).

<sup>9</sup> 2014 SG Report, Exec. Summary at 2.

<sup>10</sup> *Id.*

and 32% of coronary heart disease deaths are attributable to smoking and exposure to secondhand smoke.<sup>11</sup>

In the State of New York alone, 28,200 adult smokers die each year from smoking-related disease. For every person who dies from smoking, at least 30 more are suffering from serious smoking-caused disease and disability. Among all deaths caused by cancer in New York State, 26.5% can be attributable to smoking.<sup>12</sup>

**B. Curbing Youth Smoking is Essential to Further Progress Against Tobacco-Related Disease and Health**

Smoking typically begins in youth. The vast majority of adult smokers start smoking before age 18 and 98% do so by age 26.<sup>13</sup> Two-thirds of them became everyday smokers at or before age 18.<sup>14</sup> This makes youth the key battleground in

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<sup>11</sup> *Id.*

<sup>12</sup> N.Y.S. Dep't of Health, Bureau of Tobacco Control, Tobacco is the Leading Cause of Preventable Death, StatShot Vol. 8, No. 3 (Apr. 2015), [https://www.health.ny.gov/prevention/tobacco\\_control/reports/statshots/volume8/n3\\_tobacco\\_leading\\_cause.pdf](https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume8/n3_tobacco_leading_cause.pdf).

<sup>13</sup> 2014 SG Report, Exec. Summary at 17.

<sup>14</sup> Center for Behavioral Health Statistics and Quality, Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health (Sept. 2015), <http://doi.org/10.3886/ICPSR36361.v1>; SAMHSA & RTI, Key Substance Use and Mental Health Indicators in the United States: Results from the 2015 National Survey on Drug Use and Health (Sept. 2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.htm#tobacco>.

the fight against the tobacco epidemic in the United States; if young people can avoid tobacco when they are underage, it is highly unlikely that they will ever become regular smokers.

Despite the decline of youth smoking since the mid-1990s,<sup>15</sup> the percentage of high school students smoking cigarettes today is still as high as 8–10%—that is, approximately one out of every ten children is a current smoker by the time they leave high school.<sup>16</sup> Among youth—even before smoking has become a lifelong addiction—smoking causes adverse health effects such as respiratory symptoms, reduced physical fitness, and stunted lung growth and function. At current smoking rates, 5.6 million children under age 18 alive today will eventually die from smoking-related disease.<sup>17</sup>

Every year, in the State of New York, 42,400 children under age 18 try cigarettes for the first time; and every year, almost 7,000 become new regular,

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<sup>15</sup> See CDC, The 2015 Youth Risk Behavior Survey 13–15 (June 10, 2016), [https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506\\_updated.pdf](https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506_updated.pdf); CDC, The 2016 National Youth Tobacco Survey, [https://www.cdc.gov/tobacco/data\\_statistics/surveys/nyts/index.htm](https://www.cdc.gov/tobacco/data_statistics/surveys/nyts/index.htm).

<sup>16</sup> *Id.*; CDC, Youth and Tobacco Use, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm) (last visited Feb. 25, 2018);

<sup>17</sup> 2014 SG Report, Exec. Summary at 13–14.

daily smokers. At the current rates, 280,000 teenagers and adolescents alive in the State today will ultimately die prematurely from smoking.<sup>18</sup>

**C. Smoking Imposes Overwhelming Public Health Care Burdens Nationwide and in New York**

As a result of its toll on public health, smoking has a staggering economic impact, particularly on the nation's already overburdened health care system. Overall, the annual costs attributable to smoking in the United States are between \$289 billion and \$333 billion, including at least \$130 billion for direct medical care for adults, and over \$155 billion for lost productivity due to premature death resulting from smoking-related diseases.<sup>19</sup> Cigarette smoking continues to be a major contributor to annual healthcare spending in the United States. An analysis of data from 2006 to 2010 reveals that by 2010, 8.7% of the annual aggregated healthcare spending in the nation was attributable to cigarette smoking, amounting to \$170 billion per year, and more than over 60% of the attributable spending was

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<sup>18</sup> CDC & N.Y.S. Dep't of Health, Youth Tobacco Survey: Beginning 2000, <https://health.data.ny.gov/Health/Youth-Tobacco-Survey-Beginning-2000/pbq7-ddg9> (updated May 18, 2017).

<sup>19</sup> 2014 SG Report, Exec. Summary at 11.

paid by public programs, including Medicare, other federally sponsored programs, or Medicaid.<sup>20</sup>

The State of New York spends \$10.4 billion each year on health care expenditures directly caused by tobacco use, including more than \$3.3 billion in the State's Medicaid program.<sup>21</sup> That means more than one-third of the smoking-related health care expenses in New York are paid by taxpayers.<sup>22</sup> In addition, every year, the state spends approximately \$365.4 million on health care expenditures attributable to exposure to secondhand smoke and incurs \$7.33 billion

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<sup>20</sup> Xin Xu et al., *Annual Healthcare Spending Attributable to Cigarette Smoking: An Update* (2015), 48 *Am. J. Prev. Med.* 326, 326–33; CDC, *Economic Trends in Tobacco*, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/economics/econ\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm) (last visited Feb. 25, 2018).

<sup>21</sup> CDC & N.Y.S. Dep't of Health, *Youth Tobacco Survey: Beginning 2000*, <https://health.data.ny.gov/Health/Youth-Tobacco-Survey-Beginning-2000/pbq7-ddg9> (updated May 18, 2017).

<sup>22</sup> *Id.*; N.Y.S. Dep't of Health, *Cigarette Smoking and Other Tobacco Use*, [https://www.health.ny.gov/prevention/tobacco\\_control/](https://www.health.ny.gov/prevention/tobacco_control/) (last visited Feb. 25, 2018).

of lost productivity due to shortened work lives caused by smoking-related premature death alone.<sup>23</sup>

## **II. COLLECTING CIGARETTE TAXES IS THE MOST EFFECTIVE WAY OF REDUCING SMOKING, ESPECIALLY AMONG YOUTH**

### **A. The Inverse Relationship Between Cigarette Prices and Smoking is Well-Established**

The consumption of cigarettes is inversely related to their retail price. Not only is this relationship consistent with the basic law of economics, i.e., price increases reduce consumption while price cuts increase consumption, it is also well documented by numerous economic studies,<sup>24</sup> authoritative reports by the Surgeon

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<sup>23</sup> See CDC, Best Practices for Comprehensive Tobacco Control Programs (2014), [https://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/pdfs/2014/comprehensive.pdf](https://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf); CDC, Smoking Attributable Mortality, Morbidity and Economic Costs, <https://chronicdata.cdc.gov/Health-Consequences-and-Costs/Smoking-Attributable-Mortality-Morbidity-and-Econo/ezab-8sq5?> (updated November 21, 2017).

<sup>24</sup> See, e.g., Kevin Davis et al., New York State Dep't of Health, *Cigarette Purchasing Patterns Among New York Smoking: Implications for Health, Price, and Revenue* (2004), [https://www.health.ny.gov/prevention/tobacco\\_control/docs/cigarette\\_purchasing\\_patterns.pdf](https://www.health.ny.gov/prevention/tobacco_control/docs/cigarette_purchasing_patterns.pdf).; John A. Tauras, *Public Policy and Smoking Cessation Among Young Adults in the United States*, 6 Health Policy 321 (2004); Frank J. Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, 1 Nicotine Tob. Re. S105 (1999).

General,<sup>25</sup> international treaties,<sup>26</sup> judicial decisions,<sup>27</sup> and even internal tobacco company documents<sup>28</sup>.

The Surgeon General has called raising prices on cigarettes “one of the most effective tobacco control interventions.”<sup>29</sup> The general consensus among scientific researchers is that nationally, every 10% increase in the real price of cigarettes reduces adult smoking by about 2%, reduces smoking among young adults by 3.5%, reduces the number of children under age 18 who smoke by 6–7%, and

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<sup>25</sup> See U.S. Office of Surgeon General, Preventing Tobacco Use Among Young People: A Report of the Surgeon General 175–78 (1994), available at [https://www.cdc.gov/tobacco/data\\_statistics/sgr/1994/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/1994/index.htm); U.S. Office of the Surgeon General, Reducing Tobacco Use: A Report of the Surgeon General 322–56 (2000), available at [https://www.cdc.gov/tobacco/data\\_statistics/sgr/2000/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/2000/index.htm); U.S. Office of the Surgeon General, Preventing Tobacco Use Among Youth and Young Adults (2012), available at <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>; 2014 SG Report at 788–92, 869.

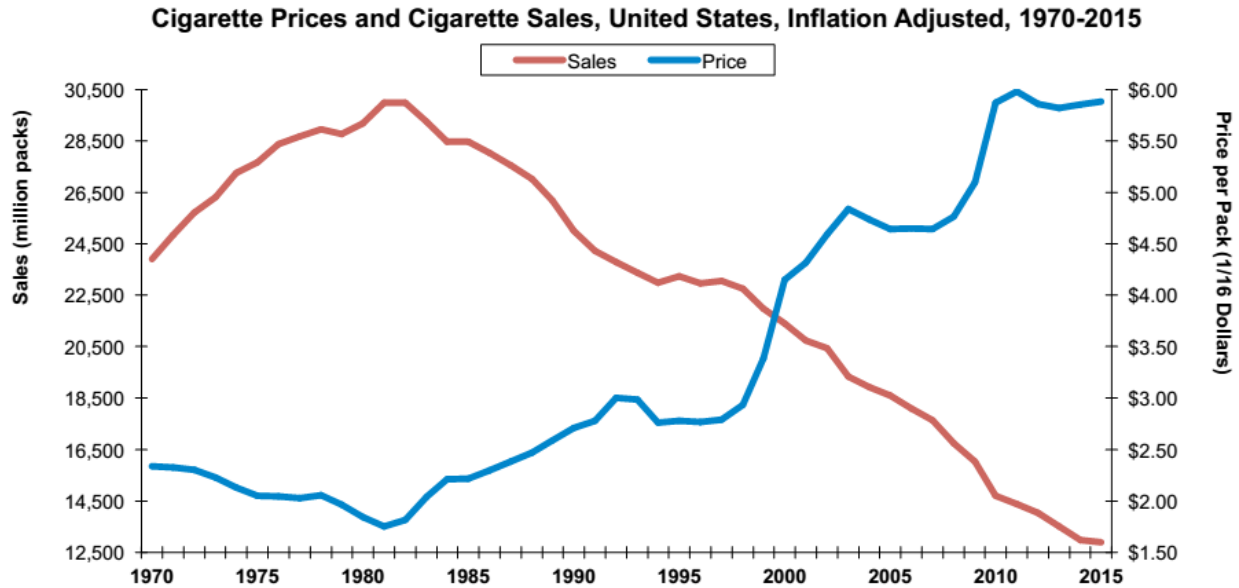
<sup>26</sup> See, e.g., WHO, WHO Framework Convention on Tobacco Control, at 6–7, available at <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1>.

<sup>27</sup> See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 639–45 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009).

<sup>28</sup> See Testimony of Frank J. Chaloupka, Ph.D., Distinguished Professor of Economics, University of Illinois at Chicago, before New York City Council Committee on health on Intros 2012 and 250A (May 1, 2013) (hereinafter the “Chaloupka Testimony”) at 14–17. See also Frank J. Chaloupka, et al., *Tax, Price and Cigarette Smoking: Evidence from The Tobacco Documents And Implications For Tobacco Company Marketing Strategies*, 11 *Tob. Control* 62 (2002).

<sup>29</sup> 2014 SG Report at 869.

reduces overall cigarette consumption by approximately 3–5%.<sup>30</sup> Indeed, as illustrated by the graph below, the trends in cigarette prices and overall U.S. cigarette consumption from 1970 to 2015 show a strong correlation between increasing prices and decreasing consumption.<sup>31</sup>



Source: Calculations by Chaloupka, FJ, and Tobacconomics, using *Tax Burden on Tobacco* monthly reports.

The correlation between prices and tobacco consumption by youth is even more pronounced: smoking among children under age 18 is almost three times

<sup>30</sup> David T. Levy et al., *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Control Scorecard*, 10 J. Pub. Health Mgmt. & Prac. 338, 339-40 (2004); 2014 SG Report at 788–87.

<sup>31</sup> Calculations by Chaloupka, FJ, and Tobacconomics, using *Tax Burden on Tobacco* monthly reports compiled by Orzechowski & Walker, available at <https://www.healthdata.gov/dataset/tax-burden-tobacco-volume-51-1970-2016-0>.



more responsive to price increase than is smoking among adults.<sup>32</sup> This is the case for several reasons, including:

- Young people have lower disposable income and their consumption is therefore more sensitive to price changes;
- The particularly strong influence of peer behavior among youth multiplies price-induced changes in smoking; and
- Short-term factors such as cost tend to have a more immediate impact on youth behavior than long-term factors such as health consequences, which take years to manifest themselves.<sup>33</sup>

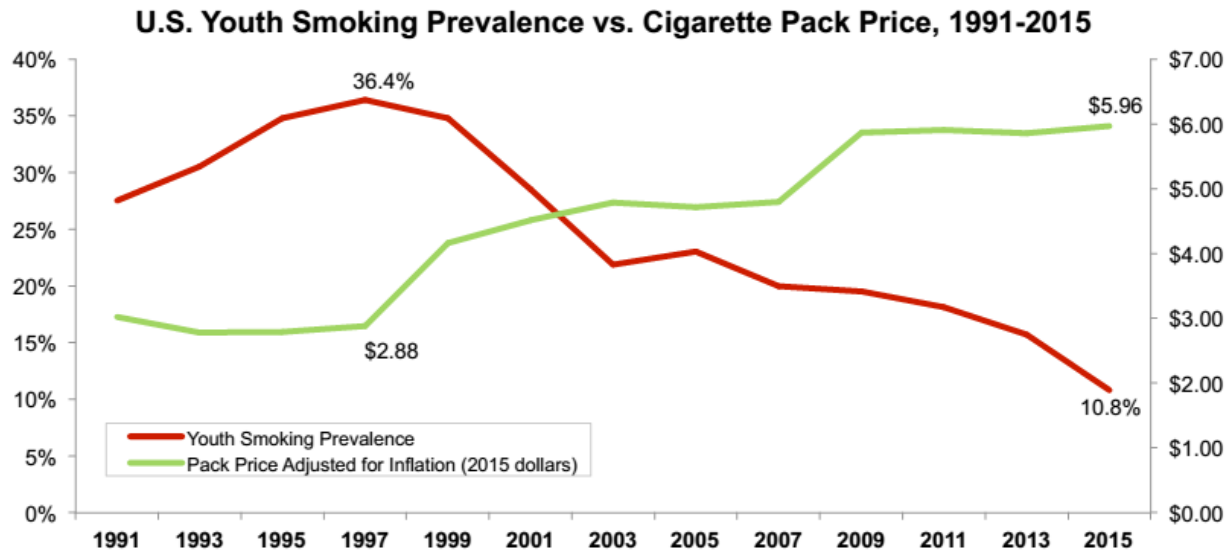
The following chart shows how closely linked youth smoking prevalence is to cigarette pack prices. As prices climbed in the late 1990s and early 2000s, youth smoking rates declined, but as the price decreased between 2003 and 2005 (along with funding for tobacco prevention programs in many states), youth rates increased. More recently, spurred in part by the large jump in price in 2009 from

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<sup>32</sup> Chaloupka Testimony at 4.

<sup>33</sup> Chaloupka Testimony at 6–7.

the many state cigarette tax increases and the large federal tobacco tax increase, youth smoking rates have fallen more rapidly.<sup>34</sup>



Sources: Orzechowski & Walker, *The Tax Burden on Tobacco*, 2015; CDC, Youth Risk Behavior Survey, 2015, Bureau of Labor Statistics. Note: Pack prices are from November 1, each year.

## **B. Imposition of High Excise Taxes on Cigarettes Has been an Effective Tobacco Control Policy**

Cigarette taxes are not imposed simply to raise revenue. They have proven to be the most effective policy tool society has to reduce smoking. Federal and state cigarette taxes have a heavy impact on the retail prices of cigarettes. The cost of producing cigarettes is very low and taxes, imposed on manufacturers and distributors of cigarettes and passed through to consumers in the retail prices of

<sup>34</sup> See Orzechowski & Walker, CDC, *The Tax Burden on Tobacco Volume 51, 1970-2016*, <https://www.healthdata.gov/dataset/tax-burden-tobacco-volume-51-1970-2016-0>; CDC, *The 2015 Youth Risk Behavior Survey* (June 10, 2016), [https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506\\_updated.pdf](https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506_updated.pdf).

cigarettes, represent a high percentage of the total cost of cigarettes.<sup>35</sup> In every single state that has significantly raised its cigarette tax rate, pack sales have gone down sharply.<sup>36</sup>

The National Cancer Institute and WHO have recently concluded that “[a] substantial body of research . . . shows that significantly increasing the excise tax and price of tobacco products is the single most consistently effective tool for reducing tobacco use.”<sup>37</sup> The Surgeon General also recommends increasing

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<sup>35</sup> The federal tax on cigarettes is imposed on manufacturers. State and local taxes are generally imposed on distributors. All such taxes are passed on to consumers in the retail prices of cigarettes.

<sup>36</sup> Orzechowski & Walker, CDC, *The Tax Burden on Tobacco Volume 51, 1970-2016*, <https://www.healthdata.gov/dataset/tax-burden-tobacco-volume-51-1970-2016-0>.

<sup>37</sup> U.S. National Cancer Institute & WHO, *The Economics of Tobacco and Tobacco Control*, National Cancer Institute Tobacco Control Monograph 21, NIH Publication No. 16-CA-8029A (2016), [https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21\\_complete.pdf](https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21_complete.pdf).

tobacco taxes to discourage tobacco use, especially among youth, in order to promote public health.<sup>38</sup>

**C. Evasion of Cigarette Taxes Increases Youth Consumption of Cigarettes and Undermines Public Policies Designed to Protect the Public Health**

Cigarette taxes achieve their purpose of reducing cigarette consumption only if they are collected. Uncollected cigarette taxes are not passed through in retail prices and result in the availability of low-priced cigarettes to consumers that undermine policies designed to protect the public health. The price difference between cigarettes on which taxes have actually been collected, and cigarettes on which taxes have not been collected, can be enormous. The consequential availability of lower-priced cigarettes has correspondingly facilitated smoking, with a particularly pronounced effect on youth.

New York State has one of the highest state tobacco taxes in the nation. Understanding the devastating effect of cigarette tax evasion on the public health, the New York State Attorney General's Office entered into agreements with the major carriers of goods, such as UPS, to ensure that they would transport cigarettes only to those licensed or registered in accordance with law to deal in tobacco

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<sup>38</sup> See 2014 SG Report at 12 (“The evidence is sufficient to conclude that increases in the prices of tobacco products, including those resulting from excise tax increases, prevent initiation of tobacco use, promote cessation, and reduce the prevalence and intensity of tobacco use among youth and adults.”).

products, and not to consumers.<sup>39</sup> The State and New York City also worked in support of federal legislation, the Prevent All Cigarette Trafficking (“PACT”) Act, which, *inter alia*, prohibits the shipment of cigarettes by the United States Postal Service. *See* 15 U.S.C. §§ 375–78. The combination of these agreements and the legislation was designed to ensure that taxes would actually be collected on all cigarettes sold in the State and that cigarettes would be available only at retail prices that reflect the collection of such taxes. This policy is of vital importance in preventing children from purchasing cigarettes that they otherwise could not afford.

By knowingly transporting cigarettes on which the payment of taxes had been evaded, UPS not only violated its agreement with the State, but also undermined the fundamental public health policies of both the State and City to reduce the availability of low-priced cigarettes that children would buy, experiment with, and become addicted to.<sup>40</sup> Contrary to UPS’s assertions, the purposes of

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<sup>39</sup> *See, e.g.*, Assurance of Compliance signed between the State of New York and FedEx in 2006, *available at* <https://ag.ny.gov/sites/default/files/press-releases/archived/FedEx%20-%20Executed%20AOC.pdf>; Assurance of Discontinuance signed between UPS and the State of New York in 2005, *available at* <https://ag.ny.gov/sites/default/files/press-releases/archived/9tiupsaodfinal.oct.pdf>.

<sup>40</sup> SG 2014 Report at 791 (“Tax avoidance and evasion undermine the efficacy of high prices in reducing consumption and initiation, especially among price-sensitive groups”).

ensuring that cigarette taxes are actually paid is not only to protect tax revenues, but also to ensure that youth would not become addicted to cigarette smoking.

UPS's misconduct undermines both purposes.

### **III. THE DISTRICT COURT'S CIVIL PENALTY AWARD AGAINST UPS IS CONSTITUTIONALLY PERMITTED**

Given the significance of UPS's misconduct in undermining the State's and the City's public health policies and endangering the lives of children, imposition of substantial civil penalties is appropriate. The district court correctly found that plaintiffs were entitled to penalties under both the PACT Act and New York State's Public Health Law § 1399–ll because UPS knowingly and systematically delivered packages for sellers of unstamped cigarettes in violation of the statutes. *State of New York v. United Parcel Serv., Inc. (UPS Damages & Penalties Opinion)*, No. 15-CV-1136 (KBF), 2017 WL 2303525, \*7–8 (S.D.N.Y. May 25, 2017). Among other remedies, the district court assessed a total sum of over \$237 million in penalties, including \$157.1 million in statutory civil penalties, against UPS. *Id.* at \*10. This ruling followed a bench trial at which the court found that UPS's conduct violated, *inter alia*, the federal PACT Act, 15 U.S.C. §§ 375–78, and the New York Public Health Law (“PHL”) § 1399–ll. *State of New York v.*

*United Parcel Serv., Inc. (UPS Liability Opinion)*, 253 F. Supp. 3d 583, 596, 700 (S.D.N.Y. May 25, 2017).

The total award of statutory civil penalties equates to roughly one-fourth of one percent of UPS's annual revenue, which the company reported in 2017 as approximately \$61 billion.<sup>41</sup> This award comprises two parts: \$78,755,000 assessed under PHL § 1399–ll; and \$78,350,000 assessed under the PACT Act. *UPS Damages & Penalties Opinion*, 2017 WL 2303525, at \*6–8.<sup>42</sup>

**A. The Amount of Civil Penalties Awarded Is Well Within the District Court's Discretion and Consistent with the Harm to Public Health Caused by UPS's Violations**

It is well established that district courts in this Circuit enjoy wide discretion in formulating civil penalties. *See United States v. J.B. Williams Co., Inc.*, 498 F.2d 414, 438–39 (2d Cir. 1974) (opining that there is an “enormous range of penalties

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<sup>41</sup> UPS Press Release, *UPS Revenue Accelerates In 4Q And Produces Record \$61 Billion For 2016* (Jan. 31, 2017), <https://pressroom.ups.com/pressroom/ContentDetailsViewer.page?ConceptType=PressReleases&id=1485809732064-540> (last visited Feb. 28, 2018).

<sup>42</sup> The district court separately imposed a penalty of more than \$80 million under the AOD, which is contractual in nature, and \$2,000 in nominal penalties under the Contraband Cigarettes Trafficking Act (hereinafter “CCTA”). *UPS Damages & Penalties Opinion*, 2017 WL 2303525, at \*6, 10. In light of the public health missions of the Amici, however, this brief is focused on the statutory penalties imposed under the PACT Act and the PHL § 1399–ll.

available to the district court in the usual civil penalty case”); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000).

This includes the discretion to impose civil penalties well beyond conventional notions of damages or loss, as civil penalties are intended to “punish culpable individuals” and “deter future violations” rather than to “extract compensation or restore the status quo.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185–86, 188 (2000); *Tull v. United States*, 481 U.S. 412, 422 (1987).

In *Advance Pharm., Inc. v. United States*, 391 F.3d 377 (2d Cir. 2004), the Second Circuit reaffirmed that the process of calculating civil penalties is “highly discretionary.” *Id.* at 399. The Court also reiterated that district courts may properly consider a number of factors in making those calculations, including“(1) the level of the defendant’s culpability, (2) the public harm caused by the violations, (3) the defendant’s profits from the violations, and (4) the defendant’s ability to pay a penalty.” *Id.*

As the court’s opinions demonstrate, in determining the size of the penalties against UPS, the district judge properly exercised its discretion by carefully analyzing, *inter alia*, each of the factors articulated in *Advance Pharm. UPS*



*Liability Opinion*, 253 F. Supp. 3d at 690; *UPS Damages & Penalties Opinion*, 2017 WL 2303525, at \*3–4.

While UPS fiercely disputes the court’s decision regarding the penalties, its brief never addresses the extent to which the penalty award was supported by the factor of public harm caused by the violations. This omission is revealing, albeit unsurprising, given the adverse consequences of UPS’s conduct for public health. Aside from other factors that support the penalties levied against UPS, where, as here, the “public harm” of defendant’s conduct is literally a matter of life and death, there is no question that the court’s award was well within its discretion.

Moreover, the penalty awarded by the district court was entirely consistent with Congress’s intent in passing the PACT Act, a statute largely directed at cigarette transporters. As Congress recognized, the ability to regulate transportation of cigarettes is key to ensuring that remote sellers of cigarette comply with the relevant federal and state tobacco-control laws, S. Rep. No. 110–153, at 7 (2007)<sup>43</sup>; unless law enforcement could prevent transportation of cigarettes on which taxes had not been paid, tobacco-control laws would have “limited impact on remote sellers.” *Id.* Congress’s concerns were well-founded. Without transporters, remote purchases of cigarettes (i.e., online, by phone, fax,

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<sup>43</sup> See Congressional Record cited *infra* III.B, at 24–25.

and mail order, etc.) simply would not be possible. Thus, by illegally delivering unstamped cigarettes, large carriers like UPS played an indispensable role in making these cigarettes available to a large portion of the population, especially youth, who would not otherwise have ready access to cigarettes. *See, e.g., City of New York v. Wolfpack Tobacco*, No. 13 Civ. 1889 (DLC), 2013 WL 5312542, at \*3 (S.D.N.Y. Sept. 9, 2013) (“The PACT Act regulates remote sales of cigarettes, and imposes a variety of requirements on sellers of cigarettes with the aim of ensuring that taxes are paid and cigarettes are not sold to children.”).

**B. The District Court Award Was Well Below Any Eighth Amendment Limitations**

Contrary to what UPS and its Amici have argued, the district court’s award of civil penalties is reasonable in light of the scale of UPS’s violations of the federal and state statutes and the importance of the public health policies undermined by the UPS’s misconduct. Such an award does not violate the Excessive Fines Clause of the Eighth Amendment.

There is no dispute that the civil penalties assessed against UPS are fines within the meaning of the Excessive Fines Clause of the Eighth Amendment. The governing standard for what constitutes “excessive” is one of “gross proportion”—that is, a fine violates the Excessive Fines Clause only if it is “*grossly disproportional* to the gravity” of the offense it intends to punish. *United States v.*

*Bajakajian*, 524 U.S. 321, 334 (1998) (emphasis added). On the other hand, a fine is “proportional” if its amount is “proper” and “normal” in light of the “gravity of the offense.” *Id.* at 335. That the standard is one of “gross” rather than “strict” disproportion, explained the Court, because “judgments about the appropriate punishment belong in the first instance to the legislature.” *Id.* at 336. Thus, in applying a statutory penalty, courts should do their best to discern the legislative policy behind such penalty and “grant *substantial deference* to the broad authority” of the legislature in setting punishments. *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)) (emphasis added).

Public health concerns are at the heart of New York State’s PHL § 1399–*ll*. See *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 626 (2009) (reviewing legislative history of PHL § 1399–*ll* for purposes of calculating statutory penalties). Indeed, the New York State legislature explicitly declared “the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of [the] state . . . a serious threat to public health, safety, and welfare, to the funding of health care . . . , and to the economy of the state.” *Id.* (quoting Legislative findings, L. 2000, ch. 262, § 1, reprinted in McKinney’s Cons Laws of

NY, Book 44, Public Health Law § 1399–ll, Historical and Statutory Notes, at 238).

The PACT Act makes it clear that the Act was intended to stop cigarette smuggling upon Congress’s ample findings of public harm. For instance, the House Committee on the Judiciary reviewing the PACT bill of 2009 found that online sales of tobacco poses “unique harms[,] . . . including the long-term health problems” associated with smoking cigarettes, and that cigarette smuggling “seriously harms public health by making cheaper tax-free cigarettes available, including to young people.” H.R. Rep. No. 111–117, at 17 (Comm. on Judiciary); *see also* H.R. Rep. No. 110-836, at 16 (Comm. on Judiciary); *Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and H.R. 3689 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1, 15 (2008) (statement of Robert C. Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Security); *id.* at 4 (statement of John Conyers, Chairman, Comm. on Judiciary).

The PACT Act also garnered wide support from the public health community. For example, in May 2008, Matthew Myers, President of Tobacco-

Free Kids, one of the Amici, testified before Congress in support of the PACT Act, stating:

[C]igarettes sold free of applicable State and Federal taxes are sold at prices far lower than legally sold cigarettes. Cheap cigarettes mean more people smoking and more people smoking more. Most importantly, what they mean is more children smoking because children are the most price-responsive.

*Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and H.R. 3689 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1, 50-51 (2008).

It is clear that the district court correctly and carefully applied the relevant legislative pronouncements in setting penalties against UPS.<sup>44</sup> *See UPS Liability Opinion*, 253 F. Supp. 3d at 690 (recognizing that “State and federal legislatures have deemed transport of cigarettes as a public health issue”); *UPS Damages & Penalties Opinion*, 2017 WL 2303525, at \*4 (opining that all “[t]he statutes at issue all undeniably seek to address the public harms caused by cigarette use and

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<sup>44</sup> Although the district court only awarded a nominal penalty under the CCTA, the court did so primarily because “[t]he CCTA more or less seeks to punish the same conduct, for the same reasons, as the other statutes,” under which significant penalties were already assessed. *UPS Damages & Penalties Opinion*, 2017 WL 2303525, at \*10.

seek to regulate the unlawful transport of cigarettes that contributes to those harms”).

Moreover, as demonstrated above, the penalties cannot be seen as excessive when measured against the public interest imperiled by UPS’s violations. It is difficult to imagine a public interest more critical than the prevention of tobacco-related disease and mortality.



## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. The foregoing brief complies with the type-volume limitation of Second Circuit Rules 29.1(a) and 32.1(a)(4) because, excluding those parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5,565 words according to the Word Count feature on Microsoft Word 2016.
2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: February 28, 2018

/s/ Heather Yu Han  
Heather Yu Han  
SHER TREMONTE LLP



## **CERTIFICATE OF SERVICE**

I hereby certify that on February 28th, 2018, I filed an electronic copy of the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Heather Yu Han

Heather Yu Han

SHER TREMONTE LLP