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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, et al.,

Defendants.

**MEMORANDUM OF AMICI CURIAE AMERICAN CANCER SOCIETY CANCER
ACTION NETWORK, AMERICAN CANCER SOCIETY EASTERN DIVISION,
AMERICAN HEART ASSOCIATION, AMERICAN LEGACY FOUNDATION,
AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION IN NEW
YORK, AND CAMPAIGN FOR TOBACCO-FREE KIDS,
IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

INTRODUCTION AND SUMMARY OF ARGUMENT ¹

New York State Tax Law §§ 471(1), (2), (5), N.Y. Tax Law § 471-e, and 20 N.Y.C.R.R. § 74.6 [the New York Tribal Sales Cigarette Tax Laws] were enacted because many sellers of cigarettes located on Tribal lands in the State of New York sell cigarettes to non-tribal members without any collection or payment of the applicable State cigarette excise tax. The impact of these untaxed sales on public health has been extraordinarily harmful. These sales at low, state-tax-free prices undermine state policies designed to reduce tobacco use among New York's citizens and directly increase overall smoking rates and tobacco-caused death and disease. To address this serious problem, the New York Tribal Sales Cigarette Tax Laws seek to ensure the

¹ In accordance with Local Rule 29.1(b), amici state that no party's counsel authored this memorandum in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amici curiae, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

collection and payment of applicable State excise taxes on cigarettes sold to persons other than members of the Indian Tribe by sellers located on Tribal lands in the State of New York.

Amici curiae American Cancer Society Cancer Action Network (ACS CAN), American Cancer Society Eastern Division (ACS Eastern), American Heart Association, American Legacy Foundation, American Lung Association, American Lung Association in New York, and Campaign for Tobacco-Free Kids submit this memorandum to highlight two related points important to consideration of the balance of harms and the public interest, considerations that guide the Court's disposition of a motion for an injunction. First, tobacco use is this nation's number one preventable cause of premature death and disease. Second, the sale of cigarettes from Tribal lands to non-tribal members at below-market prices, made possible by the failure to collect or pay applicable state excise taxes—a longstanding problem which the New York Tribal Sales Cigarette Tax Laws seek to remedy—works directly to increase overall smoking rates and harms to New York's citizens and interferes significantly with efforts to reduce smoking and its many harms and costs. These considerations weigh heavily in favor of rejecting plaintiffs' motions for preliminary injunction.

INTEREST OF AMICI CURIAE

Amici curiae are 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 support effective strategies, to prevent and reduce smoking and other tobacco use and their attendant harms and costs, including increases in cigarette and other tobacco product prices through state tobacco tax increases. ²

² Pursuant to the terms of the Master Settlement Agreement, the American Legacy Foundation may not lobby, and took no position on the New York Tribal Sales Cigarette Tax Laws as they made their way through the legislative process.

ARGUMENT

I. Smoking Causes Unnecessary Disease, Death, and Costs.

More than 440,000 people in this country die each year from smoking-related illnesses, such as cancer, respiratory illnesses, and heart disease. CDC, *Smoking and Tobacco Use: Fast Facts* (April 30, 2009)³ (smoking is responsible for more than 440,000 deaths per year). 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.* Because a preliminary injunction turns on a balancing of interests, the public health impact of the New York Tribal Sales Cigarette Tax Laws, and the impact of blocking or delaying their implementation, is an important factor weighing heavily in favor of a stay in this case.

A. The nationwide harms from smoking cigarettes are enormous.

Cigarettes 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.

A recent figure estimates that 158,000 people die each year from lung and bronchial cancer caused by smoking. CDC, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—U.S., 2000-2004* (Nov. 14, 2008).⁶ Smoking causes cardiovascular disease (including heart attacks), coronary heart disease, emphysema, aortic aneurysms, bladder

³ Available at http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm.

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

⁵ Available at www.who.int/tobacco/mpower/en/.

⁶ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

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 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. NCI Monograph 19, at 4.

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).⁷ Although about 40 percent of smokers try to quit every year, the overall success rate for all smoker quit attempts is only two to five percent. *Id.* at 82.

Every day, more than 3,800 children under the age of 18 try smoking for the first time; and, every day, close to 1,000 other children under age 18 become brand new daily smokers. Substance Abuse & Mental Health Servs. Admin., *Results from the 2008 Nat’l Survey on Drug Use and Health*, Table 4.10A (2009) (presenting data only on children ages 12 to 17).⁸ Given existing smoking rates, more than 6,380,000 of all children under the age of 18 alive in the United States today will ultimately die prematurely from smoking. CDC, *State Data Highlights, 2006*, Table 1 (2007).⁹

In the United States, smoking costs more than \$190 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

⁷ Available at http://books.nap.edu/openbook.php?record_id=11795.

⁸ Available at <http://www.oas.samhsa.gov/NSDUH/2K8NSDUH/tabs/Sect4peTabs10to11.pdf>.

⁹ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

(updated May 29, 2009)¹⁰ (Medicaid estimate); Zhang, *Cost of Smoking to the Medicare Program, 1993*, 20 Health Care Financing Rev. 1-19 (1999)¹¹ (Medicare estimate) (all estimates in 2004 dollars).

B. Smoking-caused harms in New York State are enormous.

The severe and preventable health problems caused by tobacco use will lead to the death of approximately 25,400 adult smokers in New York this year. CDC, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*, 58 (Jan. 22, 2009).¹² In addition, more than 20,000 young New Yorkers are expected to become smokers this year, adding to the state's nearly 162,000 high school students who smoke. Substance Abuse & Mental Health Servs. Admin., *Summary Findings from the 2008 Nat'l Survey on Drug Use and Health, 2009*; CDC, *Projected Smoking-Related Deaths Among Youth—United States 971-74* (Nov. 8, 1996);¹⁴ CDC, *Youth Risk Behavior Surveillance—United States, 2009*, 59 (June 4, 2010).¹⁵ Of the state's present population of children under the age of 18, it is expected that 1,216,000 of them will become smokers, and that 389,000 of them will die from smoking-related causes. CDC, *State Data Highlights, 2006*, Table 1, (2007).¹⁶

The cost of treating tobacco related illness in New York State alone is approximately \$8.17 billion per year, of which \$5.4 billion is paid by the state Medicaid program. *Id.* The total per-pack cost from smoking-caused disease and productivity losses in New York State is \$21.91 *Id.*

II. There is a strong correlation between the price of cigarettes and smoking rates.

¹⁰ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

¹¹ Available at www.tcs.org/tobacco/99SummerHCFR.pdf.

¹² Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>.

¹³ Available at <http://www.oas.samhsa.gov/NSDUH/2K8NSDUH/tabs/Sect4peTabs10to11.pdf>.

¹⁴ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00044348.htm>.

¹⁵ Available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf>.

¹⁶ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

One scientifically proven method of lowering tobacco use is to increase the cost of cigarettes by imposing or raising applicable taxes. Increases in the cost of cigarettes lead to substantial reductions to smoking by: (1) deterring smoking initiation among youth; (2) prompting adult smokers to quit; and, (3) reducing the numbers of cigarettes consumed by many of those who continue to smoke. *See, e.g.,* Dep't of Health & Human Servs., *Reducing Tobacco Use: A Report of the Surgeon General* (2000) (2000 Surgeon General's Report).¹⁷ The corollary is also true: Decreases in cigarette tax rates or prices increase smoking levels. Bo Zhang, et al., *The Impact of Tobacco Tax Cuts on Smoking Initiation Among Canadian Adults*, *American Journal of Preventive Medicine* 474-79 (June, 2006).¹⁸ Accordingly, higher cigarette tax rates – when collected and paid and reflected in cigarette prices – save lives, reduce illness and related suffering, and directly mitigate the tremendous social cost that tobacco addiction levies on society.

A. Cigarette price increases reduce smoking levels, and price reductions increase smoking levels.

The United States Surgeon General, the National Academy Institute of Medicine, the U.S. Centers for Disease Control and Prevention and many others have examined the scientific evidence and all have concluded that increases to cigarette prices is the single most powerful, most immediate and most predictable factor influencing smoking patterns. *See, e.g.,* 2000 Surgeon General's Report 337, 359;¹⁹ IOM Report 182;²⁰ CDC, *State Cigarette Excise*

¹⁷ Available at http://www.cdc.gov/tobacco/data_statistics/sgr/2000/complete_report/index.htm.

¹⁸ After 15 years of youth smoking declines in Canada, youth smoking rates immediately began to climb after the country lowered its cigarette taxes in February 1994; but subsequent cigarette tax rate increases reduced the youth smoking rates again. Canadian Cancer Society, et al., *Surveying the Damage: Cut-Rate Tobacco Products and Public Health in the 1990s*, Oct. 1999, available at <http://www.nsra-adnf.ca/cms/file/pdf/oct99taxrep.pdf>.

¹⁹ Available at http://www.cdc.gov/tobacco/data_statistics/sgr/2000/complete_report/index.htm.

²⁰ Available at http://books.nap.edu/openbook.php?record_id=11795.

Taxes—United States, 2009, 59 (Apr. 29, 2010);²¹ Task Force on Community Preventive Services Guide to Community Preventive Services, *Reducing Tobacco Use Initiation: Increasing Unit Price for Tobacco Products* (2000).²² In addition, scientific study after scientific study has demonstrated that price plays a major role in determining how many young people will start smoking, how many who experiment will become regular addicted smokers and thus profoundly influences long term consumption trends. In 2003, a meta-analysis of available studies and data found that this causal relationship between cigarette price and smoking levels has already been examined by no fewer than 523 peer reviewed studies of price elasticity. Craig A. Gallet & John A. List, *Cigarette Demand: A Meta-Analysis of Elasticities*, 12 *Health Economics* 821 (2003). That meta-analysis found a median short run price elasticity for cigarettes of 0.4, and a median long-run elasticity of 0.44. *Id.* at Table 2. These elasticity findings mean that for every 10 percent increase in cigarette taxes, there is, on average, a near term four percent reduction in cigarette consumption and a 4.4 percent decline over the longer term. See, also, David T. Levy et al., *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Scorecard*, 19 *Journal of Public Health Management Practice* 338-53 (2004) (citing studies finding adult demand elasticities ranging between -0.3 and -0.5).²³

Similarly, another study found that the consensus for the overall price elasticity of youth cigarette demand centers in the range from -0.9 to -1.5. Hank Ross and Frank Chaloupka, *The Effect of Cigarette Prices on Youth Smoking*, 12 *Health Economics* 217-20 (2003).²⁴ That means that for every ten percent increase in cigarette prices, the total amount of cigarettes consumed by youth declines by nine to 10.5 percent.

²¹ Available at <http://www.cdc.gov/mmwr/pdf/wk/mm5913.pdf>.

²² Available at <http://www.thecommunityguide.org/tobacco/initiation/increasingprice.html>.

²³ Available at <http://www.rwjf.org/pr/product.jsp?id=14664>.

²⁴ Available at <http://onlinelibrary.wiley.com/doi/10.1002/hec.709/abstract>.

Studies have also found an inverse correlation between cigarette tax and price increases and the number or percentage of smokers. The impact on youth is strongest, with a ten percent increase in price producing a more than five percent decrease in the number of teen smokers. Frank J. Chaloupka & Rosalie Pacula, *The Impact of Price on Youth Tobacco Use*, Chapter 12 in National Cancer Institute, Smoking and Tobacco Control Monograph 14, *Changing Adolescent Smoking Prevalence* (November 2001).²⁵ But the impact on adults is also substantial, (especially given the larger number of adult compared to youth smokers) with a ten percent price increase reducing the number of adult smokers by one to two percent. *Id.*

The average price of a pack of cigarettes sold in New York State with full payment of applicable State taxes is approximately \$9.20. Orzechowski and Walker, *44 Tax Burden on Tobacco: Historical Compilation, 2009* (2010). Without payment of the current \$4.35 per pack State tax, the average price would be only \$4.85 per pack, a price reduction of more than 45 percent.

These relationships between higher cigarette tax rates and cigarette prices and lower smoking levels has long been known and studied by the tobacco industry. Internal cigarette company documents produced in tobacco-related litigation identify price as the largest determinant for quitting by consumers and initiation of youth smoking. Frank J. Chaloupka, et al., *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 *Tobacco Control* 62 (2002). Annual filings by the largest cigarette companies with the U.S. Securities and Exchange Commission also note the adverse effect of higher taxes on cigarette sales and consumption. *See, e.g.*, R.J. Reynolds Tobacco Holdings, Inc., Quarterly Report (Form 10-Q) (Oct., 24, 2008); Lorillard, Inc., Quarterly Report (Form 10-Q) (Nov. 4, 2008); Phillip Morris International, Inc., Quarterly Report (Form 10-Q) (Nov. 3, 2008).

²⁵ Available at <http://www.cancercontrol.cancer.gov/tcrb/monographs/14/index.html>.

B. Excise Taxes are Particularly Effective in Reducing Smoking Among Youth, Pregnant Women and Lower-Income Households.

One out of every three children who become regular users of cigarettes will die from a tobacco-related disease. *Regulations Restricting Sale & Distribution of Tobacco*, 61 Fed. Reg. at 44,396, 44,399 (Aug. 28, 1996), *codified at* 21 C.F.R. pts. 801, 803, 804, 807, 820 and 897.

A compelling justification for increasing cigarette excise tax rates is that the subsequent cigarette price increases reduce the incidence of smoking among young adults and deters potential new smokers from adopting the habit. Jonathan Sirois, *Remote Vendor Cigarette Sales, Tribal Sovereignty and the Jenkins Act: Can I Get a Remedy?*, 42 Duq. L. Rev. 27 (2003).

“[S]tudies have shown that if a smoker begins to smoke before the age of eighteen, then that individual has a much greater chance of remaining a smoker for life, but if a smoker begins later in adulthood, there is more of a chance that he or she will quit.” *Id.* at 51 (quoting David Bourne, et al., *The Effect of Raising State and Federal Tobacco Taxes*, 38 J. Fam. Prac. 300 (1994)²⁶).

Indeed, while the correlation between a ten percent price increase and a four percent reduction in adult consumption is documented in numerous peer-reviewed studies, so too is the even more pronounced effect on tobacco consumption by youth and pregnant women, for whom the same price increase achieves a reduction of approximately six to seven percent. CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006* (2006);²⁷ Leonard Miller, et al., *State Estimates of Medicaid Expenditures Attributable to Cigarette Smoking*, 113 Public Health Reports 140, 140-151, (1998);²⁸ C. Tracy Orleans, et al., *Helping Pregnant Smokers Quit: Meeting the Challenge in the Next Decade*, 9 Tobacco Control 6, 6-11 (2000);²⁹ CDC, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses-United States 2000-2004* (Nov. 14, 2008).³⁰ Increased taxation rates are also effective at stemming rates

²⁶ Available at http://findarticles.com/p/articles/mi_m0689/is_n3_v38/ai_15168855.

²⁷ Available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights.

²⁸ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1308653>.

²⁹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766312/pdf/v009p0iii6.pdf>.

of consumption by pregnant woman, with a direct effect improving birth outcomes. Jeanne S. Ringel & William N. Evans, *Cigarette Taxes and Smoking During Pregnancy*, 91 Am. J. of Public Health, 1851 (Nov. 2001).³¹

In the 1999 report, *Curbing The Epidemic: Governments and the Economics of Tobacco Control*, the World Bank carefully evaluated existing research and data, worldwide, and concluded that “raising taxes does significantly reduce the consumption of tobacco. Importantly, the impact of higher taxes is likely to be greatest on young people, who are more responsive to price rises than older people.” World Bank Organization, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, (1999).³² See also John A. Tauras, et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis* (Apr. 2001), http://www.impactteen.org/generalarea_PDFs/AccessLaws.pdf; Jeffrey E. Harris & Sandra W. Chan, *The Continuum-of Addiction: Cigarette Smoking in Relation to Price Among Americans Aged 15-29*, 8 Health Econ. 81, 81-86 (Feb. 1998).³³

Youth, minorities, and low-income smokers are two to three times more likely to quit or smoke less than other smokers in response to price increases. Dr. Judith Mackay & Dr. Michael Eriksen, *The Tobacco Atlas* (World Health Organization 2002);³⁴ see also CDC, *Steady Increases in Tobacco Taxes Promote Quitting, Discourage Smoking*;³⁵ TobaccoFreeKids.org, *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids*;³⁶ Institute of Medicine, *Taking Action to Reduce Tobacco Use* (Nat. Acad. Press, 1998).³⁷

³⁰ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

³¹ Available at <http://www.tobaccofreekids.org/reports/prices/ajph.pdf>.

³² Available at <http://www.usaid.gov/policy/ads/200/tobacco.pdf>.

³³ Available at <http://stuff.mit.edu/people/jeffrey/HarrisChanHEL98.pdf>.

³⁴ Available at <http://www.who.int/tobacco/eniatlas35.pdf>.

³⁵ Available at <http://www.cdc.gov/features/secondhandsmoke>.

³⁶ Available at <http://www.tobaccofreekids.org/researchfactsheets/pdf/O146.pdf>.

³⁷ Available at http://www.nap.edu/openbook.php?record_id=6060.

C. Access to lower-taxed or non-taxed cigarettes increases smoking levels.

The availability of non-taxed or under-taxed cigarettes translates directly into higher smoking levels and, consequently, higher smoking-caused harms and costs. For example, a survey of New York smokers done by the State Department of Health found that smokers buying their cigarettes from various tax-evading sources, including from sellers based on Tribal lands, were less likely to have tried to quit in the past six months or to intend to try to quit in either the next thirty days or the next six months. K. Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, New York State Department of Health, Tobacco Control Program (Mar. 2006).³⁸ In another study of New York smokers, 68 percent who paid full price reported they had attempted to quit, compared to only 44 percent of smokers who paid lower-tax prices by purchasing cigarettes from sellers based on Tribal lands. A. Hyland, et al., *Access to low-taxed cigarettes deters smoking cessation attempts*, 95 Am. J. of Public Health 994-95 (June 2005).³⁹ Similarly, the International Tobacco Control Survey, which includes data collection in the United States, found that purchasing cigarettes from low-tax or untaxed sources decreases the likelihood of making a quit attempt. A. Hyland, A., F. L. Laux, et al., *Cigarette purchase patterns in four countries and the relationship with cessation: findings from the International Tobacco Control (ITC) Four Country Survey*, *Tobacco Control* 15 Suppl. 3: 59-64 (2006).⁴⁰ And a New Jersey study found that smokers who purchased cheaper cigarettes from lower-taxed sources significantly increased their consumption over time, compared to smokers who reported paying full-tax prices. A. Kim, et al., *Smokers' Beliefs and Attitudes About Purchasing Cigarettes on the Internet*, 121 Public Health Reports 594-602 (Sept-Oct, 2006).⁴¹

³⁸ Available at <http://escholarship.org/uc/item/8026w9n0>.

³⁹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/instance/1449296/>.

⁴⁰ Available at http://tobaccocontrol.bmj.com/content/15/suppl_3/iii59.full.pdf.

⁴¹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1564449>.

The New York study done for the State Department of Health also found that 37 percent of New York smokers were purchasing their cigarettes from low price, mainly state-untaxed, sources, either all the time or sometimes in 2004 (when the state tax was \$1.50 per pack), with 25 percent purchasing state-untaxed cigarettes from sellers based on Indian reservations either all the time or sometimes. K. Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers, supra*. The study also estimated that the number of smokers in New York State would be two to three percent lower if all smokers were subject to the full retail prices that included the \$1.50 per pack State excise tax. Another New York study, also looking at smoker purchasing patterns when the state excise tax was only \$1.50 per pack, found that two-thirds of all smokers in the western New York State counties of Erie and Niagara (all residing within 30 miles of Indian reservations) regularly purchased cigarettes from sellers based on Tribal lands. Andrew Hyland et al., *Cigarette Purchasing Behaviors When Prices Are High*, *Journal of Public Health Management and Practice* 10(6): 497–500 (2004).⁴²

New York State currently has a state cigarette tax rate of \$4.35 per pack of 20, however, which means that the negative public health impacts now, among smokers evading that much higher state tax through purchases on Tribal lands, are likely much more severe than found in the previously cited studies in terms of both reducing cessation and increasing smoking levels and harms. In addition, the large State cigarette tax increases since those studies were done has sharply increased the financial incentives for smokers to seek out and purchase the state-tax-free cigarettes being sold on Tribal lands in New York State.

CONCLUSION

The sale of cigarettes free of applicable State excise taxes to non-Tribal New York residents by retailers based on Tribal lands within the State of New York directly increases smoking levels in the State and interferes with State efforts to prevent and reduce smoking and

⁴² Available at <http://www.ncbi.nlm.nih.gov/pubmed/15643371>.

related harms and costs. The result is more illness, suffering, and premature death to New York State residents. The implementation of the New York Tribal Sales Cigarette Tax Laws would directly address this problem by making it much more difficult for retailers based on Tribal lands to sell cigarettes to non-Tribal consumers without proper payment of applicable State cigarette excise taxes – and any further delay would directly translate into unnecessary additional smoking harms and costs in the State. Accordingly, plaintiffs' motions for preliminary injunction should not be granted.

Dated: September 1, 2010

Respectfully submitted,

CANTOR, LUKASIK, DOLCE & PANEPINTO

/s/ Marc C. Panepinto

Marc C. Panepinto
*Counsel for Amici Curiae American Cancer
Society Cancer Action Network, et al.*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, et al.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2010, I electronically filed the foregoing +with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

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And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

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/s/Marc C. Panepinto
Marc C. Panepinto, Esq.

DATED: Buffalo, New York
September 1, 2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, et al.,

Defendants.

**MOTION OF AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,
AMERICAN CANCER SOCIETY EASTERN DIVISION,
AMERICAN HEART ASSOCIATION,
AMERICAN LEGACY FOUNDATION,
AMERICAN LUNG ASSOCIATION,
AMERICAN LUNG ASSOCIATION IN NEW YORK,
AND
CAMPAIGN FOR TOBACCO-FREE KIDS,
FOR LEAVE TO FILE A MEMORANDUM AS AMICI CURIAE
SUPPORTING DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTIONS FOR PRELIMINARY INJUNCTION**

American Cancer Society Cancer Action Network, American Cancer Society Eastern Division, American Heart Association, American Legacy Foundation, American Lung Association, American Lung Association in New York, and Campaign for Tobacco-Free Kids, hereby move for leave to file a memorandum as amici curiae supporting defendants' opposition to the motions for preliminary injunction of plaintiff Seneca Nation of Indians and intervening plaintiff Cayuga Indian Nation of New York. The motions were filed on August 20, 2010 and August 25, 2010, respectively, and defendants' opposition to plaintiffs' motions were filed on August 25 and August 27, 2010. A copy of the proposed amicus curiae memorandum is attached to this motion.

Defendants and plaintiff Seneca Nation of Indians have consented to the filing of this motion and the proposed memorandum. Attorneys for plaintiff Cayuga Indian Nation of New York have not responded to messages seeking consent left by email on August 31, 2010 and by telephone on the morning of September 1, 2010.

DISCUSSION

Movants are non-profit organizations devoted to improving the public health and are among the most prominent tobacco-control advocates in the country. They seek to file a memorandum as *amicus curiae* to highlight two related points important to considerations that guide the Court's disposition of plaintiffs' motions for preliminary injunction, but which do not stand out in the parties' moving papers. First, smoking and other tobacco use is this nation's number one preventable cause of premature death and disease, producing enormous harms and costs nationwide and in the State of New York. Second, the sale of cigarettes on or from Tribal lands in New York at prices that do not reflect applicable State cigarette excise taxes sharply increases overall smoking rates and harms in the State and significantly interferes with State efforts to reduce smoking and its many harms and costs. These considerations weigh heavily in favor of rejecting plaintiffs' motions for preliminary injunction and allowing New York State Tax Law §§ 471(1), (2), (5), N.Y. Tax Law § 471-e, and 20 N.Y.C.R.R. § 74.6 to go into full effect as soon as the Court's Order Granting Temporary Restraining Order of August 31, 2010 expires or is terminated.

The American Cancer Society Cancer Action Network (ACS CAN), the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, Inc., supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem. ACS CAN works in partnership with the American Cancer Society to encourage government officials to support effective tobacco control policies, including tobacco tax increases. American Cancer

Society research was instrumental in establishing the original link between tobacco use and cancer, and nationwide the American Cancer Society's three million volunteers work to fight cancer. Because smoking is associated with increased risk for cancer of the cervix, esophagus, kidney and renal pelvis, larynx, lung and bronchus, oral cavity and pharynx, pancreas, stomach, urinary bladder and acute myeloid leukemia, furthering the American Cancer Society and ACS CAN missions depends largely on effective tobacco control.

The American Cancer Society Eastern Division, Inc. is the American Cancer Society's chartered division for New York and New Jersey, headquartered in White Plains, NY, and governed by a Division board of volunteer directors. The organization works to eliminate cancer as a major health problem in New York and New Jersey by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy, and service. To this end, the American Cancer Society Eastern Division has for many years advocated for higher New York state cigarette excise taxes and for collection of the excise tax on cigarettes sold from Indian reservations in New York.

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 is the nation's oldest voluntary health organization, with 435,000 volunteers in all 50 states and the District of Columbia. The American Lung Association in New York is the American Lung Association's chartered association for New York. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease (COPD), the American Lung Association and the American Lung Association in New York have 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.

Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies, including tobacco tax increases, 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.

CONCLUSION

For the foregoing reasons, movants ACS, et al. request that the Court grant leave to file the attached amicus curiae memorandum.

DATED: September 1, 2010

Respectfully submitted,

CANTOR, LUKASIK, DOLCE & PANEPINTO

/s/ Marc C. Panepinto
Marc C. Panepinto
Counsel for Amici Curiae ACS CAN, et al.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, et al.,

Defendants.

**MEMORANDUM OF AMICI CURIAE AMERICAN CANCER SOCIETY CANCER
ACTION NETWORK, AMERICAN CANCER SOCIETY EASTERN DIVISION,
AMERICAN HEART ASSOCIATION, AMERICAN LEGACY FOUNDATION,
AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION IN NEW
YORK, AND CAMPAIGN FOR TOBACCO-FREE KIDS,
IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

INTRODUCTION AND SUMMARY OF ARGUMENT ¹

New York State Tax Law §§ 471(1), (2), (5), N.Y. Tax Law § 471-e, and 20 N.Y.C.R.R. § 74.6 [the New York Tribal Sales Cigarette Tax Laws] were enacted because many sellers of cigarettes located on Tribal lands in the State of New York sell cigarettes to non-tribal members without any collection or payment of the applicable State cigarette excise tax. The impact of these untaxed sales on public health has been extraordinarily harmful. These sales at low, state-tax-free prices undermine state policies designed to reduce tobacco use among New York's citizens and directly increase overall smoking rates and tobacco-caused death and disease. To

¹ In accordance with Local Rule 29.1(b), amici state that no party's counsel authored this memorandum in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amici curiae, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

address this serious problem, the New York Tribal Sales Cigarette Tax Laws seek to ensure the collection and payment of applicable State excise taxes on cigarettes sold to persons other than members of the Indian Tribe by sellers located on Tribal lands in the State of New York.

Amici curiae American Cancer Society Cancer Action Network (ACS CAN), American Cancer Society Eastern Division (ACS Eastern), American Heart Association, American Legacy Foundation, American Lung Association, American Lung Association in New York, and Campaign for Tobacco-Free Kids submit this memorandum to highlight two related points important to consideration of the balance of harms and the public interest, considerations that guide the Court's disposition of a motion for an injunction. First, tobacco use is this nation's number one preventable cause of premature death and disease. Second, the sale of cigarettes from Tribal lands to non-tribal members at below-market prices, made possible by the failure to collect or pay applicable state excise taxes—a longstanding problem which the New York Tribal Sales Cigarette Tax Laws seek to remedy—works directly to increase overall smoking rates and harms to New York's citizens and interferes significantly with efforts to reduce smoking and its many harms and costs. These considerations weigh heavily in favor of rejecting plaintiffs' motions for preliminary injunction.

INTEREST OF AMICI CURIAE

Amici curiae are 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 support effective strategies, to prevent and reduce smoking and other tobacco

use and their attendant harms and costs, including increases in cigarette and other tobacco product prices through state tobacco tax increases. ²

ARGUMENT

I. Smoking Causes Unnecessary Disease, Death, and Costs.

More than 440,000 people in this country die each year from smoking-related illnesses, such as cancer, respiratory illnesses, and heart disease. CDC, *Smoking and Tobacco Use: Fast Facts* (April 30, 2009)³ (smoking is responsible for more than 440,000 deaths per year). 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.* Because a preliminary injunction turns on a balancing of interests, the public health impact of the New York Tribal Sales Cigarette Tax Laws, and the impact of blocking or delaying their implementation, is an important factor weighing heavily in favor of a stay in this case.

A. The nationwide harms from smoking cigarettes are enormous.

Cigarettes 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.

² Pursuant to the terms of the Master Settlement Agreement, the American Legacy Foundation may not lobby, and took no position on the New York Tribal Sales Cigarette Tax Laws as they made their way through the legislative process.

³ Available at http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm.

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

⁵ Available at www.who.int/tobacco/mpower/en/.

A recent figure estimates that 158,000 people die each year from lung and bronchial cancer caused by smoking. CDC, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—U.S., 2000-2004* (Nov. 14, 2008).⁶ 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 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. NCI Monograph 19, at 4.

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).⁷ Although about 40 percent of smokers try to quit every year, the overall success rate for all smoker quit attempts is only two to five percent. *Id.* at 82.

Every day, more than 3,800 children under the age of 18 try smoking for the first time; and, every day, close to 1,000 other children under age 18 become brand new daily smokers. Substance Abuse & Mental Health Servs. Admin., *Results from the 2008 Nat’l Survey on Drug Use and Health*, Table 4.10A (2009) (presenting data only on children ages 12 to 17).⁸ Given existing smoking rates, more than 6,380,000 of all children under the age of 18 alive in the United States today will ultimately die prematurely from smoking. CDC, *State Data Highlights, 2006*, Table 1 (2007).⁹

⁶ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

⁷ Available at http://books.nap.edu/openbook.php?record_id=11795.

⁸ Available at <http://www.oas.samhsa.gov/NSDUH/2K8NSDUH/tabs/Sect4peTabs10to11.pdf>.

⁹ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

In the United States, smoking costs more than \$190 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)¹⁰ (Medicaid estimate); Zhang, *Cost of Smoking to the Medicare Program, 1993*, 20 Health Care Financing Rev. 1-19 (1999)¹¹ (Medicare estimate) (all estimates in 2004 dollars).

B. Smoking-caused harms in New York State are enormous.

The severe and preventable health problems caused by tobacco use will lead to the death of approximately 25,400 adult smokers in New York this year. CDC, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*, 58 (Jan. 22, 2009).¹² In addition, more than 20,000 young New Yorkers are expected to become smokers this year, adding to the state's nearly 162,000 high school students who smoke. Substance Abuse & Mental Health Servs. Admin., *Summary Findings from the 2008 Nat'l Survey on Drug Use and Health, 2009*;¹³ CDC, *Projected Smoking-Related Deaths Among Youth—United States 971-74* (Nov. 8, 1996);¹⁴ CDC, *Youth Risk Behavior Surveillance—United States, 2009*, 59 (June 4, 2010).¹⁵ Of the state's present population of children under the age of 18, it is expected that 1,216,000 of them will become smokers, and that 389,000 of them will die from smoking-related causes. CDC, *State Data Highlights, 2006*, Table 1, (2007).¹⁶

¹⁰ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

¹¹ Available at www.tcsg.org/tobacco/99SummerHCFR.pdf.

¹² Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>.

¹³ Available at <http://www.oas.samhsa.gov/NSDUH/2K8NSDUH/tabs/Sect4peTabs10to11.pdf>.

¹⁴ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00044348.htm>.

¹⁵ Available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf>.

¹⁶ Available at www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

The cost of treating tobacco related illness in New York State alone is approximately \$8.17 billion per year, of which \$5.4 billion is paid by the state Medicaid program. *Id.* The total per-pack cost from smoking-caused disease and productivity losses in New York State is \$21.91 *Id.*

II. There is a strong correlation between the price of cigarettes and smoking rates.

One scientifically proven method of lowering tobacco use is to increase the cost of cigarettes by imposing or raising applicable taxes. Increases in the cost of cigarettes lead to substantial reductions to smoking by: (1) deterring smoking initiation among youth; (2) prompting adult smokers to quit; and, (3) reducing the numbers of cigarettes consumed by many of those who continue to smoke. *See, e.g., Dep't of Health & Human Servs., Reducing Tobacco Use: A Report of the Surgeon General (2000) (2000 Surgeon General's Report).*¹⁷ The corollary is also true: Decreases in cigarette tax rates or prices increase smoking levels. Bo Zhang, et al., *The Impact of Tobacco Tax Cuts on Smoking Initiation Among Canadian Adults, American Journal of Preventive Medicine* 474-79 (June, 2006).¹⁸ Accordingly, higher cigarette tax rates – when collected and paid and reflected in cigarette prices – save lives, reduce illness and related suffering, and directly mitigate the tremendous social cost that tobacco addiction levies on society.

A. Cigarette price increases reduce smoking levels, and price reductions increase smoking levels.

The United States Surgeon General, the National Academy Institute of Medicine, the U.S. Centers for Disease Control and Prevention and many others have examined the scientific

¹⁷ Available at http://www.cdc.gov/tobacco/data_statistics/sgt/2000/complete_report/index.htm.

¹⁸ After 15 years of youth smoking declines in Canada, youth smoking rates immediately began to climb after the country lowered its cigarette taxes in February 1994; but subsequent cigarette tax rate increases reduced the youth smoking rates again. Canadian Cancer Society, et al., *Surveying the Damage: Cut-Rate Tobacco Products and Public Health in the 1990s*, Oct. 1999, available at <http://www.nsra-adnf.ca/cms/file/pdf/oct99taxrep.pdf>.

evidence and all have concluded that increases to cigarette prices is the single most powerful, most immediate and most predictable factor influencing smoking patterns. See, e.g., 2000 Surgeon General's Report 337, 359;¹⁹ IOM Report 182;²⁰ CDC, *State Cigarette Excise Taxes—United States, 2009*, 59 (Apr. 29, 2010);²¹ Task Force on Community Preventive Services Guide to Community Preventive Services, *Reducing Tobacco Use Initiation: Increasing Unit Price for Tobacco Products* (2000).²² In addition, scientific study after scientific study has demonstrated that price plays a major role in determining how many young people will start smoking, how many who experiment will become regular addicted smokers and thus profoundly influences long term consumption trends. In 2003, a meta-analysis of available studies and data found that this causal relationship between cigarette price and smoking levels has already been examined by no fewer than 523 peer reviewed studies of price elasticity. Craig A. Gallet & John A. List, *Cigarette Demand: A Meta-Analysis of Elasticities*, 12 *Health Economics* 821 (2003). That meta-analysis found a median short run price elasticity for cigarettes of 0.4, and a median long-run elasticity of 0.44. *Id.* at Table 2. These elasticity findings mean that for every 10 percent increase in cigarette taxes, there is, on average, a near term four percent reduction in cigarette consumption and a 4.4 percent decline over the longer term. See, also, David T. Levy et al., *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Scorecard*, 19 *Journal of Public Health Management Practice* 338-53 (2004) (citing studies finding adult demand elasticities ranging between -0.3 and -0.5).²³

¹⁹ Available at http://www.cdc.gov/tobacco/data_statistics/sgr/2000/complete_report/index.htm.

²⁰ Available at http://books.nap.edu/openbook.php?record_id=11795.

²¹ Available at <http://www.cdc.gov/mmwr/pdf/wk/mm5913.pdf>.

²² Available at <http://www.thecommunityguide.org/tobacco/initiation/increasingprice.html>.

²³ Available at <http://www.rwjf.org/pr/product.jsp?id=14664>.

Similarly, another study found that the consensus for the overall price elasticity of youth cigarette demand centers in the range from -0.9 to -1.5. Hank Ross and Frank Chaloupka, *The Effect of Cigarette Prices on Youth Smoking*, 12 *Health Economics* 217-20 (2003).²⁴ That means that for every ten percent increase in cigarette prices, the total amount of cigarettes consumed by youth declines by nine to 10.5 percent.

Studies have also found an inverse correlation between cigarette tax and price increases and the number or percentage of smokers. The impact on youth is strongest, with a ten percent increase in price producing a more than five percent decrease in the number of teen smokers. Frank J. Chaloupka & Rosalie Pacula, *The Impact of Price on Youth Tobacco Use*, Chapter 12 in National Cancer Institute, *Smoking and Tobacco Control Monograph 14, Changing Adolescent Smoking Prevalence* (November 2001).²⁵ But the impact on adults is also substantial, (especially given the larger number of adult compared to youth smokers) with a ten percent price increase reducing the number of adult smokers by one to two percent. *Id.*

The average price of a pack of cigarettes sold in New York State with full payment of applicable State taxes is approximately \$9.20. Orzechowski and Walker, 44 *Tax Burden on Tobacco: Historical Compilation, 2009* (2010). Without payment of the current \$4.35 per pack State tax, the average price would be only \$4.85 per pack, a price reduction of more than 45 percent.

These relationships between higher cigarette tax rates and cigarette prices and lower smoking levels has long been known and studied by the tobacco industry. Internal cigarette company documents produced in tobacco-related litigation identify price as the largest determinant for quitting by consumers and initiation of youth smoking. Frank J. Chaloupka, et al., *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications*

²⁴ Available at <http://onlinelibrary.wiley.com/doi/10.1002/hec.709/abstract>.

²⁵ Available at <http://www.cancercontrol.cancer.gov/tcrb/monographs/14/index.html>.

for Tobacco Company Marketing Strategies, 11 Tobacco Control 62 (2002). Annual filings by the largest cigarette companies with the U.S. Securities and Exchange Commission also note the adverse effect of higher taxes on cigarette sales and consumption. *See, e.g.*, R.J. Reynolds Tobacco Holdings, Inc., Quarterly Report (Form 10-Q) (Oct., 24, 2008); Lorillard, Inc., Quarterly Report (Form 10-Q) (Nov. 4, 2008); Phillip Morris International, Inc., Quarterly Report (Form 10-Q) (Nov. 3, 2008).

B. Excise Taxes are Particularly Effective in Reducing Smoking Among Youth, Pregnant Women and Lower-Income Households.

One out of every three children who become regular users of cigarettes will die from a tobacco-related disease. *Regulations Restricting Sale & Distribution of Tobacco*, 61 Fed. Reg. at 44,396, 44,399 (Aug. 28, 1996), *codified at* 21 C.F.R. pts. 801, 803, 804, 807, 820 and 897.

A compelling justification for increasing cigarette excise tax rates is that the subsequent cigarette price increases reduce the incidence of smoking among young adults and deters potential new smokers from adopting the habit. Jonathan Sirois, *Remote Vendor Cigarette Sales, Tribal Sovereignty and the Jenkins Act: Can I Get a Remedy?*, 42 Duq. L. Rev. 27 (2003).

“[S]tudies have shown that if a smoker begins to smoke before the age of eighteen, then that individual has a much greater chance of remaining a smoker for life, but if a smoker begins later in adulthood, there is more of a chance that he or she will quit.” *Id.* at 51 (quoting David Bourne, et al., *The Effect of Raising State and Federal Tobacco Taxes*, 38 J. Fam. Prac. 300 (1994)²⁶).

Indeed, while the correlation between a ten percent price increase and a four percent reduction in adult consumption is documented in numerous peer-reviewed studies, so too is the even more pronounced effect on tobacco consumption by youth and pregnant women, for whom the same price increase achieves a reduction of approximately six to seven percent. CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006* (2006);²⁷ Leonard Miller, et al., *State Estimates of Medicaid Expenditures Attributable to Cigarette Smoking*, 113 Public Health Reports 140, 140-151, (1998);²⁸ C. Tracy Orleans, et al., *Helping Pregnant Smokers Quit: Meeting the Challenge in the Next Decade*, 9 Tobacco Control 6, 6-11 (2000);²⁹ CDC, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses-United States 2000-2004* (Nov. 14, 2008).³⁰ Increased taxation rates are also effective at stemming rates

²⁶ Available at http://findarticles.com/p/articles/mi_m0689/is_n3_v38/ai_15168855.

²⁷ Available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights.

²⁸ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1308653>.

²⁹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766312/pdf/v009p0iii6.pdf>.

of consumption by pregnant woman, with a direct effect improving birth outcomes. Jeanne S. Ringel & William N. Evans, *Cigarette Taxes and Smoking During Pregnancy*, 91 Am. J. of Public Health, 1851 (Nov. 2001).³¹

In the 1999 report, *Curbing The Epidemic: Governments and the Economics of Tobacco Control*, the World Bank carefully evaluated existing research and data, worldwide, and concluded that “raising taxes does significantly reduce the consumption of tobacco. Importantly, the impact of higher taxes is likely to be greatest on young people, who are more responsive to price rises than older people.” World Bank Organization, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, (1999).³² See also John A. Tauras, et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis* (Apr. 2001), http://www.impactteen.org/generalarea_PDFs/AccessLaws.pdf; Jeffrey E. Harris & Sandra W. Chan, *The Continuum-of Addiction: Cigarette Smoking in Relation to Price Among Americans Aged 15-29*, 8 Health Econ. 81, 81-86 (Feb. 1998).³³

Youth, minorities, and low-income smokers are two to three times more likely to quit or smoke less than other smokers in response to price increases. Dr. Judith Mackay & Dr. Michael Eriksen, *The Tobacco Atlas* (World Health Organization 2002);³⁴ see also CDC, *Steady Increases in Tobacco Taxes Promote Quitting, Discourage Smoking*;³⁵ TobaccoFreeKids.org, *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids*;³⁶ Institute of Medicine, *Taking Action to Reduce Tobacco Use* (Nat. Acad. Press, 1998).³⁷

³⁰ Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

³¹ Available at <http://www.tobaccofreekids.org/reports/prices/ajph.pdf>.

³² Available at <http://www.usaid.gov/policy/ads/200/tobacco.pdf>.

³³ Available at <http://stuff.mit.edu/people/jeffrey/HarrisChanHEL98.pdf>.

³⁴ Available at <http://www.who.int/tobacco/eniatlas35.pdf>.

³⁵ Available at <http://www.cdc.gov/features/secondhandsmoke>.

³⁶ Available at <http://www.tobaccofreekids.org/researchifactsheets/pdf/O146.pdf>.

³⁷ Available at http://www.nap.edu/openbook.php?record_id=6060.

C. Access to lower-taxed or non-taxed cigarettes increases smoking levels.

The availability of non-taxed or under-taxed cigarettes translates directly into higher smoking levels and, consequently, higher smoking-caused harms and costs. For example, a survey of New York smokers done by the State Department of Health found that smokers buying their cigarettes from various tax-evading sources, including from sellers based on Tribal lands, were less likely to have tried to quit in the past six months or to intend to try to quit in either the next thirty days or the next six months. K. Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, New York State Department of Health, Tobacco Control Program (Mar. 2006).³⁸ In another study of New York smokers, 68 percent who paid full price reported they had attempted to quit, compared to only 44 percent of smokers who paid lower-tax prices by purchasing cigarettes from sellers based on Tribal lands. A. Hyland, et al., *Access to low-taxed cigarettes deters smoking cessation attempts*, 95 Am. J. of Public Health 994-95 (June 2005).³⁹ Similarly, the International Tobacco Control Survey, which includes data collection in the United States, found that purchasing cigarettes from low-tax or untaxed sources decreases the likelihood of making a quit attempt. A. Hyland, A., F. L. Laux, et al., *Cigarette purchase patterns in four countries and the relationship with cessation: findings from the International Tobacco Control (ITC) Four Country Survey*, *Tobacco Control* 15 Suppl. 3: 59-64 (2006).⁴⁰ And a New Jersey study found that smokers who purchased cheaper cigarettes from lower-taxed sources significantly increased their consumption over time, compared to smokers who reported paying full-tax prices. A. Kim, et al., *Smokers' Beliefs and Attitudes About Purchasing Cigarettes on the Internet*, 121 Public Health Reports 594-602 (Sept-Oct, 2006).⁴¹

³⁸ Available at <http://escholarship.org/uc/item/8026w9n0>.

³⁹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/instance/1449296/>.

⁴⁰ Available at http://tobaccocontrol.bmj.com/content/15/suppl_3/iii59.full.pdf.

⁴¹ Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1564449>.

The New York study done for the State Department of Health also found that 37 percent of New York smokers were purchasing their cigarettes from low price, mainly state-untaxed, sources, either all the time or sometimes in 2004 (when the state tax was \$1.50 per pack), with 25 percent purchasing state-untaxed cigarettes from sellers based on Indian reservations either all the time or sometimes. K. Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers, supra*. The study also estimated that the number of smokers in New York State would be two to three percent lower if all smokers were subject to the full retail prices that included the \$1.50 per pack State excise tax. Another New York study, also looking at smoker purchasing patterns when the state excise tax was only \$1.50 per pack, found that two-thirds of all smokers in the western New York State counties of Erie and Niagara (all residing within 30 miles of Indian reservations) regularly purchased cigarettes from sellers based on Tribal lands. Andrew Hyland et al., *Cigarette Purchasing Behaviors When Prices Are High*, *Journal of Public Health Management and Practice* 10(6): 497–500 (2004).⁴²

New York State currently has a state cigarette tax rate of \$4.35 per pack of 20, however, which means that the negative public health impacts now, among smokers evading that much higher state tax through purchases on Tribal lands, are likely much more severe than found in the previously cited studies in terms of both reducing cessation and increasing smoking levels and harms. In addition, the large State cigarette tax increases since those studies were done has sharply increased the financial incentives for smokers to seek out and purchase the state-tax-free cigarettes being sold on Tribal lands in New York State.

CONCLUSION

The sale of cigarettes free of applicable State excise taxes to non-Tribal New York residents by retailers based on Tribal lands within the State of New York directly increases smoking levels in the State and interferes with State efforts to prevent and reduce smoking and

⁴² Available at <http://www.ncbi.nlm.nih.gov/pubmed/15643371>.

related harms and costs. The result is more illness, suffering, and premature death to New York State residents. The implementation of the New York Tribal Sales Cigarette Tax Laws would directly address this problem by making it much more difficult for retailers based on Tribal lands to sell cigarettes to non-Tribal consumers without proper payment of applicable State cigarette excise taxes -- and any further delay would directly translate into unnecessary additional smoking harms and costs in the State. Accordingly, plaintiffs' motions for preliminary injunction should not be granted.

Dated: September 1, 2010

Respectfully submitted,

CANTOR, LUKASIK, DOLCE & PANEPINTO

/s/ Marc C. Panepinto

Marc C. Panepinto
*Counsel for Amici Curiae American Cancer
Society Cancer Action Network, et al.*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

Civil Action No. 10-cv-00687-RJA

v.

DAVID PATERSON, et al.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2010, I caused the foregoing motion for leave to file memorandum as amici curiae, and the attached amicus curiae memorandum, to be filed with the Court electronically by CM/ECF, which will automatically send notice of the filing to all parties registered in the CM/ECF system for this matter.

Dated: September 1, 2010

Respectfully submitted,

CANTOR, LUKASIK, DOLCE & PANEPINTO

Marc C. Panepinto
Counsel for Amici Curiae ACS CAN, et al.