

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____)	
RED EARTH, LLC, d/b/a SENECA)	
SMOKESHOP, AARON J. PIERCE, and)	
SENECA FREE TRADE ASSOCIATION)	
Plaintiffs-appellees,)	
)	No. 10-3165
v.)	[Civil Action Nos. 10-530,
)	10-550 (W.D.N.Y.)]
UNITED STATES, <i>et al.</i> ,)	
Defendants-appellants.)	
_____)	

**MOTION OF AMERICAN CANCER SOCIETY,
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,
AMERICAN LEGACY FOUNDATION,
AMERICAN LUNG ASSOCIATION,
AMERICAN HEART ASSOCIATION, AND
CAMPAIGN FOR TOBACCO-FREE KIDS,
FOR LEAVE TO FILE A MEMORANDUM AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY
MOTION TO STAY
PRELIMINARY INJUNCTION PENDING APPEAL
AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY**

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202-588-1000

August 10, 2010

Counsel for Movants
American Cancer Society, et al.

INTRODUCTION

American Cancer Society, American Cancer Society Cancer Action Network, American Heart Association, American Legacy Foundation, American Lung Association, and Campaign for Tobacco-Free Kids, hereby move for leave to file a memorandum as amici curiae in support of defendants-appellants' emergency motion to stay preliminary injunction pending appeal and request for immediate administrative stay. The motion to stay was filed on August 6, 2010, and the appellees' responses are due on August 13. A copy of the proposed amicus curiae memorandum is attached to this motion.

All parties have consented to the filing of this motion and the proposed memorandum.

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 a motion for a stay, but which do not stand out in the decision below or in the appellees' moving papers. First, tobacco use is this nation's number one preventable cause of premature death and disease. Second, evading taxes payments and prohibitions on the sale of tobacco products to minors through Internet sales—which the Prevent All Cigarette

Trafficking Act seeks to remedy—interfere significantly with efforts to reduce tobacco use, especially among children. These considerations weigh heavily in favor of granting the United States’s motion for an emergency stay of the preliminary injunction entered by the district court in this case

The American Cancer Society, Inc. (ACS) has more than three million volunteers nationwide, including 50,000 physicians. The organization works to eliminate cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy, and service. Since its founding in 1913, ACS has conducted groundbreaking research to identify the use of tobacco products as a major cause of cancer and worked to educate the public about its deadly effects. The ACS Cancer Action Network is the advocacy affiliate of ACS, helping to educate public officials on ACS’s views on public policy.

The American Heart Association (AHA) is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke—two of the top three causes of death among Americans. AHA is one of the world’s premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states, Washington, DC, and Puerto Rico. AHA invested more than \$473.5 million in fiscal year 2004-05 for research,

professional and public education, community service, and advocacy so that people across America can live stronger, longer lives.

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

The American Lung Association (ALA) is the nation's oldest voluntary health organization, with 450,000 volunteers and affiliates in all 50 states and the District of Columbia. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, ALA has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use

and policy decisions are made. Tobacco-Free Kids has more than 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

CONCLUSION

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

Respectfully submitted,

/s/

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August 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2010, I caused the foregoing motion for leave to file memorandum as amici curiae to be filed with the Court electronically by CM/ECF. The following counsel will be automatically served via the ECF system:

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**MEMORANDUM OF AMICI CURIAE
AMERICAN CANCER SOCIETY,
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,
AMERICAN HEART ASSOCIATION,
AMERICAN LEGACY FOUNDATION,
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INTRODUCTION AND SUMMARY OF ARGUMENT¹

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

Amici curiae American Cancer Society (ACS), ACS Cancer Action Network, American Heart Association, American Legacy Foundation, American Lung Association, 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 a stay. First, tobacco use is this nation's number one preventable cause of premature death and

¹In 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.

disease. Second, evading taxes and prohibitions on the sale of tobacco products to minors through Internet sales—which the PACT Act seeks to remedy—interfere significantly with efforts to reduce tobacco use, especially among children. These considerations weigh heavily in favor of granting the United States’s motion for an emergency stay of the preliminary injunction entered by the district court in this case.

INTEREST OF AMICI CURIAE

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

ARGUMENT

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

The PACT Act is a new and important tool in the fight against the severe and often deadly preventable health problems caused by tobacco use in this country. More than 400,000 people in this country die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease. CDC, *Smoking and Tobacco Use:*

Fast Facts (May 2009)² (smoking is responsible for 443,000 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).³ 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 imperative at the heart of the PACT Act is an important factor weighing heavily in favor of a stay in this case.

A. Tobacco products are unique among consumer goods: They kill up to one-half of the people who use them as they are intended to be used. World Health Organization, *Report on the Global Tobacco Epidemic* 8 (2008) (WHO 2008 Report);⁴ 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*

²www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm.

³Available at <http://deainfo.nci.nih.gov/advisory/pcp/pcp07rpt/pcp07rpt.pdf>.

⁴www.who.int/tobacco/mpower/en/.

of Potential Life Lost, and Productivity Losses—U.S., 2000-2004 (Nov. 14, 2008).⁵ 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.

Quantified, in the United States, smoking costs \$193 billion per year in health care spending and loss of productivity due to disease and premature death resulting from smoking-related disease. CDC, *Smoking-Attributable Mortality*. Smoking-related health care expenditures cost an estimated \$30 billion annually in the Medicaid program and \$27 billion in the Medicare program. CDC, *Sustaining State Programs for Tobacco Control: Data Highlights 2006*, at 17 (updated May 29, 2009)⁶ (Medicaid estimate); Zhang, *Cost of Smoking to the Medicare Program, 1993*, 20

⁵www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

⁶www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/index.htm.

Health Care Financing Rev. 1-19 (1999)⁷ (Medicare estimate).

B. Despite laws in all 50 states banning the sale of tobacco products to anyone under age 18, one in five high school students smokes cigarettes. CDC, *Cigarette Use Among High School Students—U.S., 1991-2009* (July 2010).⁸ Every day, almost 3,900 children under the age of 18 try smoking for the first time; and every day, almost 1,000 become daily smokers. Substance Abuse & Mental Health Servs. Admin., *Results from the 2008 Nat'l Survey on Drug Abuse and Health* (2009);⁹ see also 61 Fed. Reg. at 44568 (more than one million minors try their first cigarette each year); President's Cancer Panel Report 64 (2005 figures).

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).¹⁰ Although about 40 percent of smokers try to quit every year, the successful quit rate is only two to five percent. *Id.* at 82.

⁷Available at www.tcs.org/tobacco/99SummerHCFR.pdf.

⁸www.cdc.gov/mmwr/preview/mmwrhtml/mm5926a1.htm.

⁹<http://oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.cfm>.

¹⁰Available at http://books.nap.edu/openbook.php?record_id=11795.

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

A. Internet purchases of tobacco products have increased rapidly over the past decade. A 2004 New York survey found that ten percent of adult smokers always or sometimes buy their cigarettes online and an additional five percent had done so in the past year.¹¹ Similarly, a 2004 New Jersey study found that 6.3 percent of smokers usually purchased their cigarettes from the Internet, and 19 percent had purchased online at some point.¹²

Another study reported that, in 2002, Internet vendors sold roughly two percent of all cigarettes consumed in the United States, or more than 400 million packs per year, and projected Internet cigarette sales to triple within three years.¹³ And monitoring just a portion of the tobacco-selling websites in November 2004, another study found that 1.1 million consumers visited more than 100 Internet cigarette retail sites

¹¹Davis, et al., *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue*, N.Y. State Dep't of Health, Tobacco Control Program, Mar. 2006, <http://escholarship.org/uc/item/8026w9n0>.

¹²Kim, et al., *Smokers' Beliefs and Attitudes About Purchasing Cigarettes on the Internet*, 121 Pub. Health Reports 594 (Sept.-Oct. 2006), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1564449.

¹³Campagnino, *Buying Cigarettes Over the Internet*, Prudential Fin. (Sept. 24, 2002).

in that one month alone.¹⁴

B. Because many internet sites, including the sites operated by plaintiff Red Earth, LLC, do not collect applicable state or local taxes, Internet and mail-order prices of tobacco products are much lower than cigarette prices in brick-and-mortar retail outlets. For example, a study of 52 Internet vendors based on Tribal lands found that online cigarette prices were as low as one-fifth of those sold at grocery stores.¹⁵

The price of tobacco products matters from a public health perspective because the cost of cigarettes has a significant effect on both adult and underage smoking. Every ten percent increase in the real price of cigarettes reduces overall cigarette consumption by approximately three to five percent and reduces the number of kids who smoke by six or seven percent.¹⁶ Similarly, raising taxes on smokeless tobacco

¹⁴Tsai, *Crackdown On Otamedia Could Help U.S. Cigarette E-tailers*, Wall St. J. Online, Jan. 28, 2005, available at <http://yesmoke.eu/wp-content/uploads/crackdown-on-otamedia-yesmoke-could-help-US-cigarette-e-tailers-the-wallstreet-journal-28-01-2005.pdf>

¹⁵Hodge, et al., *American Indian Internet Cigarette Sales: Another Avenue for Selling Tobacco Products*, 94 Am. J. of Pub. Health 260 (2004), <http://www.ncbi.nlm.nih.gov/pmc/articles/pmc1448239/>; see also Ribisl, et al., *Overview of Internet Cigarette Sales*, Internet Cigarette Sales Knowledge Asset (Oct. 2007), http://sapr.org/knowledgeassets/knowledge_detail.cfm?KAID=3.

¹⁶See, e.g., Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, Nicotine and Tobacco Research (1999), abstract available at <http://tigger.uic.edu/~fjc/>; Emery, et al., *Does* (continued...)

products reduces their use, particularly among young males.¹⁷ The corollary is also true: Decreases in the prices of cigarette and other tobacco product increase tobacco use.¹⁸ For this reason, the harm caused by Internet sales that do not charge state and local taxes is enormous.

C. Effective safeguards to prevent minors from purchasing cigarettes via the Internet are almost non-existent.¹⁹ Many Internet websites post notices that sales to

¹⁶(...continued)

Cigarette Price Influence Adolescent Experimentation?, 20 J. of Health Econ. 261 (2001); Tauras, Pub. Policy & Smoking Cessation Among Young adults in the U.S., 6 Health Policy 321 (2004), http://www.tobaccofreeair.com/METC_Smoke-FreeAirMaterials/SelectReferences/Smoking_Cessation/Tauras%20Health%20Policy%202004.pdf; Tauras, et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A Nat'l Longitudinal Analysis*, Bridging the Gap Research, ImpacTeen, Apr. 24, 2001, www.impacteen.org/researchproducts.htm.

¹⁷Chaloupka, et al., *Public Policy and Youth Smokeless Tobacco Use*, 64 So. Econ. J. 503 (Oct. 1997).

¹⁸For example, after 15 years of youth smoking declines in Canada, youth smoking rates rose immediately after the country lowered its cigarette taxes in February 1994. Subsequent cigarette tax increases then reduced youth smoking rates. Canadian Cancer Society, et al., *Surveying the Damage: Cut-Rate Tobacco Products and Public Health in the 1990s*, Oct. 1999, <http://www.nsra-adnf.ca/cms/file/pdf/oct99taxrep.pdf>.

¹⁹ See, e.g., Ribisl, et al., *Sales and Marketing of Cigarettes on the Internet: Emerging Threats to Tobacco Control and Promising Policy Solutions*, in IOM Report, *supra*, at Appendix M; Connolly, *Smokes and cyberspace: a public health disaster in the making*, 10 Tobacco Control 299 (Dec. 2001), <http://tobaccocontrol.bmj.com/content/10/4/299.extract>; Cohen, et al., *Tobacco commerce on the Internet: a threat to comprehensive tobacco control*, 10 Tobacco Control 364 (Dec. 2001), <http://www.ncbi>.

minors are illegal or not allowed, but very few take steps to block such sales.

- Attorneys general from at least 15 states conducted Internet “stings” and found that children as young as nine years old were able to purchase cigarettes easily.

A sting operation in New York found that 24 of 26 web sites sold to minors.²⁰

- In one study, minors were asked to send in orders to Internet cigarette vendors, providing a money order for the purchase but no proof of age. Only 14 percent of the orders were rejected for lack of proof of age.²¹

- Another study found that more than 96 percent of minors aged 15 to 16 could find an Internet cigarette vendor and place an order in less than 25 minutes and that many could do so within seven minutes.²²

- A 2006 study of 101 Internet websites selling into California found that *none*

(...continued)

nlm.nih.gov/pmc/articles/PMC1747600/pdf/v010p00364.pdf.

²⁰Unger, et al., *Are adolescents attempting to buy cigarettes on the Internet?*, 10 Tobacco Control 360 (Dec. 2001), *abstract available at* <http://tobaccocontrol.bmj.com/content/10/4/360.abstract?related-urls=yes&legid=tobaccocontrol> (citing Sherer, *States crack down on Web tobacco sales*, Christian Sci. Monitor (Nov. 8, 2000); ABC News, *Kids Buy Cigarettes Online: Children Buying Cigarettes With Click of Mouse*, Mar. 6, 2001, <http://abcnews.go.com/GMA/story?id=127203&page=1>).

²¹Rubin, et al., *Online Tobacco Sales Grow, States Lose*, Forrester Research, Inc., Apr. 27, 2001; *see also* Ribisl, et al., *Internet Sales of Cigarettes to Minors*, 290 JAMA 1356 (Sept. 10, 2003), <http://jama.ama-assn.org/cgi/reprint/290/10/1356>.

²²Jensen, et al., *Availability of tobacco to youth via the Internet*, 291 JAMA 1837 (Apr. 21, 2004), <http://jama.ama-assn.org/cgi/reprint/291/15/1837>.

complied with that state's law regarding verification of age and identification.²³

Studies indicate that more than 100,000 children in the U.S. were buying tobacco products on the Internet more than nine years ago.²⁴ Since then, the number of households with Internet access has grown enormously, as has youth access to credit and debit cards. The number of minors buying tobacco products online now is, therefore, surely even higher.

CONCLUSION

The United States's motion to stay the district court's preliminary injunction pending appeal should be granted.

Respectfully submitted,

/s/

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August 10, 2010

²³Williams, et al., *Internet cigarette vendors' lack of compliance with a California state law designed to prevent tobacco sales to minors*, 160 Archives of Peds. & Adolescent Med. 988 (2006).

²⁴CDC, *Youth Tobacco Surveillance—U.S., 2000*, Table 23 (Nov. 2, 2001), www.cdc.gov/mmwr/PDF/ss/ss5004.pdf; Substance Abuse & Mental Health Serv. Admin., *Results from the 2001 Nat'l Household Survey on Drug Abuse: Vol. III*, Table 6.59B (June 2005), www.oas.samhsa.gov/nhsda/2k1nhsda/vol3/Sect6v1_PDF_W_59.pdf.