

No. 08-969

IN THE
SUPREME COURT OF THE UNITED STATES

HEMI GROUP, LLC and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE THE CAMPAIGN FOR TOBACCO-
FREE KIDS AND ACCOMPANYING BRIEF
IN SUPPORT OF RESPONDENT**

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE THE CAMPAIGN FOR TOBACCO-
FREE KIDS**

The Campaign for Tobacco-Free Kids (“the Campaign”) respectfully moves for leave to file the attached *amicus curiae* brief in this case. The consent of the Petitioners was requested, but has been withheld.

The Campaign is a non-profit organization dedicated to reducing tobacco use and its devastating consequences in the United States and around the world. The Campaign has an interest in the curbing of tax-evading Internet cigarette sales because such sales have been shown to increase overall tobacco use, leading directly to higher levels of tobacco-caused disease, disability and deaths, and increased government and private-sector smoking-caused expenditures. The availability of cigarettes for purchase over the Internet also makes it easier for minors to obtain cigarettes and increases the use of cigarettes by children under the age of 18. The Campaign supports efforts to prevent illegal Internet tobacco sales and to promote the enactment and enforcement of state laws imposing higher tobacco taxes, because such taxes reduce smoking and save lives.

In the instant case, Petitioners have argued that state and local governments do not have standing under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), because tax revenue lost as a direct consequence of tobacco bootlegging does not constitute an injury to “business

or property” in accord with the statute and relevant authority. *See* Petitioners’ Br. at 9-27.

Respondents have noted that in enacting the Contraband Cigarette Trafficking Act (“CCTA”) Congress made violations of that law a predicate offense under RICO, thereby creating a private right of action for those injured by cigarette trafficking in contravention of state and local tax laws. *See* Respondent’s Br. at 16, 23. Respondents argue that this in turn serves as evidence that Congress intended that tax losses suffered by state and local governments as a result of cigarette trafficking would be treated as “injury to business or property” under RICO. *See id.*

The attached *amicus curiae* brief expands upon this argument and demonstrates that it is thoroughly supported by the legislative histories of the CCTA and RICO. In doing so, the attached *amicus curiae* brief provides the Court with useful material not already brought to its attention by the parties.

Amicus curiae The Campaign for Tobacco-Free Kids therefore respectfully requests that the Court grant its motion and accept the attached *amicus curiae* brief for filing in this case.

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INTEREST OF *AMICUS CURIAE*
THE CAMPAIGN FOR TOBACCO-FREE KIDS¹

The Campaign for Tobacco-Free Kids (“the Campaign”) is a non-profit organization dedicated to reducing tobacco use and its devastating consequences in the United States and around the world. The Campaign strives to deter kids from smoking, help smokers quit and protect everyone from secondhand smoke. The Campaign supports efforts to prevent illegal Internet tobacco sales because they produce substantial public health harms and related costs. The Campaign does not accept government funding, but it supports the enactment and enforcement of state laws imposing higher tobacco taxes because such taxes reduce smoking and save lives.

The vast majority of Internet tobacco sales are done without proper payment of applicable taxes. For example, a 2002 U.S. General Accounting Office report found that more than three quarters of all Internet-selling websites explicitly indicated that they did not comply with the Federal Jenkins Act, which requires Internet sellers to register with each state and provide monthly reports of their sales into the state.²

¹ In accordance with United States Supreme Court Rule 37(6), *amicus curiae* The Campaign for Tobacco-Free Kids states that no counsel for any party either authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

² U.S. GENERAL ACCOUNTING OFFICE, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE

The GAO report also found that state efforts to compel compliance by Internet tobacco sellers had not been successful.³ As discussed in the argument section of this brief, Congress first attempted to address the historic difficulty state and local governments have faced in preventing unlawful interstate cigarette sales in 1978 by enacting the Contraband Cigarette Trafficking Act (“CCTA”) and creating a civil cause of action for its violation under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). The legislative history of the CCTA indicates Congress intended that state and local governments would be able to use civil RICO actions to recover tax revenues lost to cigarette sellers who unlawfully evade state and local cigarette taxes.

Internet cigarette sales are the latest and in some ways most pernicious vehicle for cigarette bootleggers to evade state and local tax laws. For the reasons summarized below, the Campaign has an interest in this Court making clear, as Congress intended, that state and local governments are entitled to resort to civil RICO actions in response.

I. The Unlawful Sale of Cigarettes on the Internet Produces Substantial Health Harms and Related Costs.

REPORTING AND ENFORCEMENT, GAO-02-743 (Aug. 9, 2002), <http://www.gao.gov/new.items/d02743.pdf>.

³ *Id.*

The direct economic harms from Internet sales of cigarettes and other tobacco products without proper payment of applicable taxes are clear. First, such sales steal revenues away from all levels of government, especially from state governments and from those local governments, such as New York City's, that have their own taxes on cigarettes.⁴ For example, for every pack-a-day smoker in New York City who purchases cigarettes from an Internet vendor that sells tax-free cigarettes, the New York State and City governments lose more than \$1,500 per year in excise tax revenue alone.⁵

Second, by conducting their sales without collecting or facilitating the collection of applicable taxes, Internet sellers can sell their tobacco products at much lower prices, giving them an unfair competitive advantage over legally-operating Internet and bricks-and-mortar retailers that act

⁴ There are no current estimates of how much tax revenue state and local governments are losing because of Internet tobacco product sales; but a 2001 Forrester Research report projected losses of as much as \$1.4 billion in 2005. See Robert Rubin et al., *Online Tobacco Sales Grow, States Lose* (Forrester Research, Inc.), Apr. 27, 2001.

⁵ Tobacco tax increases always bring in significant amounts of new revenue beyond what state or local governments would obtain without raising their rates, but tax-evading Internet cigarette sales and other contraband tobacco product trafficking can reduce the magnitude of these revenue increases. See, e.g., Orzechowski and Walker, *The Tax Burden on Tobacco: Historical Compilation 2008*, Vol. 43, Tbls. 7, 8, 9 (Orzechowski and Walker, 2009).

responsibly to ensure that all applicable taxes on the tobacco products they sell are collected and paid.⁶

Tax-evading tobacco product sales over the Internet also cause a number of less frequently recognized serious harms to public health. Most importantly, the much lower prices charged for under-taxed tobacco products sold over the Internet translate directly into increased tobacco use and larger related harms and costs. Studies show that every 10 percent increase in real cigarette prices reduces overall use by approximately three or four percent and reduces the number of youth smokers by six or seven percent.⁷ Moreover, just as tobacco product price increases reduce tobacco use, decreased or lower cigarette prices increase tobacco use.⁸

⁶ For example, a study of 52 Native American Internet sellers found that their online cigarette pack prices were as low as one-fifth the prices charged for cigarettes sold at grocery stores. See Felicia S. Hodge, et al., *American Indian Internet Cigarette Sales: Another Avenue for Selling Tobacco Products*, AM. J. PUB. HEALTH 94(2):260-261 (2004), available at <http://www.ajph.org/cgi/reprint/94/2/260.pdf>.

⁷ See, e.g., John A. Taurus, *Public Policy and Smoking Cessation Among Young Adults in the United States*, 68 HEALTH POL'Y 321-32 (Vol. 3, 2004); 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 SUPP. 1 i62-i72 (2002); Frank J. Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, 1 NICOTINE AND TOBACCO RES. S105 (1999).

⁸ See, e.g., Bo Zhang et al., *The Impact of Tobacco Tax Cuts on Smoking Initiation Among Canadian Young Adults*, 30 AM. J.

Accordingly, the availability of substantially cheaper tobacco products increases overall tobacco use, leading directly to higher levels of tobacco-caused disease, disability and deaths, and increased government, private-sector and household smoking-caused expenditures. Indeed, a recent study found that smokers who purchased tax-free cigarettes from the Internet significantly increased their consumption over time compared to smokers who reported paying full-price at traditional bricks-and-mortar retail stores.⁹

Another key public health problem from Internet sales of tobacco products is that such sales are typically made without any effective safeguards against sales to kids. For example, a 2002 *American Journal of Public Health* study of cigarette-selling websites reported that almost 20 percent did not say anything about sales to minors being prohibited; more than half required only that the buyer say they are of legal age (*e.g.*, by clicking on a “I am Over Age 18” button); another 15 percent required only that

PREVENTIVE MED. 474-479 (2006); Luk Joossens et al., *Issues in the smuggling of tobacco products*, Tobacco Control in Developing Countries 393-406 (World Health Organization and World Bank), 2002, <http://www1.worldbank.org/tobacco/tcdc/393TO406.PDF>.

⁹ Annice E. Kim et al., *Smokers Beliefs and Attitudes about Purchasing Cigarettes on the Internet*, 121 PUB. HEALTH REP. 594-602 (Sept./Oct. 2006). See also Andrew Hyland et al., *Access to Low-Taxed Cigarettes Deters Smoking Cessation Attempts*, 95 AM. J. PUB. HEALTH 994-95 (June 2005).

the buyer type in their date of birth; and only 7 percent required any driver's license information.¹⁰

As a result, minors who find it hard to purchase cigarettes from bricks-and-mortar retailers in localities that have cracked down on illegal sales to minors can simply go to the Internet. This problem is compounded by the fact that Internet sellers typically require minimum purchases of at least one or two cartons, and also offer bulk discounts, which can turn youth who buy cigarettes over the Internet into suppliers for other underage smokers as well.¹¹

Internet sales of contraband tobacco products and other tobacco products on which no taxes have been paid further hurts public health by directly

¹⁰ Kurt M. Ribisl et al., *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 92 AM. J. PUB. HEALTH 940-41 (June 2002), available at <http://www.ajph.org/cgi/reprint/92/6/940>. See also Jennifer A. Jensen et al., *Availability of Tobacco to Youth Via the Internet*, 291 JAMA 1837 (Apr. 21, 2004), available at <http://jama.ama-assn.org/cgi/reprint/291/15/1837>; Kurt M. Ribisl et al., *Internet Sales of Cigarettes to Minors*, 290 JAMA 1356-59 (Sept. 10, 2003), abstract available at <http://jama.ama-assn.org/cgi/content/full/290/10/1356> (last visited Sept. 21, 2009).

¹¹ See, e.g., Kurt M. Ribisl et al., *Web sites selling cigarettes: how many are there in the USA and what are their sales practices?*, 10 TOBACCO CONTROL 352-359 (Dec. 2001), abstract available at <http://tc.bmjournals.com/cgi/content/abstract/10/4/352> (last visited Sept. 21, 2009); Mark Stehr, *Cigarette Tax Avoidance and Evasion*, 24-2 J. HEALTH ECON. 277-97 (2005).

reducing the amount of government tobacco tax revenues available to fund tobacco prevention programs and other public health initiatives.

For all of these reasons, effective policing of Internet sales of cigarettes and other tobacco products produces significant public health benefits.

II. The Problem of Unlawful Internet Cigarette Sales Is Substantial.

In 1978, when the CCTA was enacted, cigarette bootlegging already was recognized as an established problem. The advent of the Internet has exacerbated the situation. Because of the unreported nature of most Internet tobacco sales, it is impossible to know exactly how many cigarettes are sold over the Internet each year; but there are a number of estimates that show the figure is substantial.

A study by Forrester Research, Inc. estimated that two percent of all cigarette sales in the Untied States in 2001 were made over the Internet, accounting for \$750 million in sales and \$200 million in reduced state tobacco tax revenues.¹² Similarly, a Prudential Securities report found that, in 2002, Internet vendors sold roughly two percent of all cigarettes consumed in the United States, or more

¹² Robert Rubin et al., *Online Tobacco Sales Grow, States Lose* (Forrester Research, Inc.), Apr. 27, 2001.

than 400 million packs per year.¹³ Monitoring just a portion of all tobacco-selling websites, comScore Networks Inc. reportedly found that in the single month of November 2004, 1.1 million consumers visited more than 100 Internet cigarette retail sites.¹⁴

In 2006, a research study counted more than 770 different websites selling cigarettes to smokers in the United States – up from approximately 88 domestic and foreign Internet sellers serving U.S. customers in early 2000.¹⁵ No recent nationwide data on the portion of adult smokers who purchase their cigarettes over the Internet are available, but past surveys show the portion of adult smokers buying cigarettes online rising from 0.6 percent in 2002 to 1.3 percent in 2003 (amounting to well over half a million smokers).¹⁶ This percentage has likely

¹³ Robert T. Campagnino, *Buying Cigarettes Over the Internet* (Prudential Financial Research), Sept. 24, 2002.

¹⁴ Michelle Tsai, *Crackdown On Otamedia Could Help U.S. Cigarette E-tailers*, WALL ST. J. ONLINE (Jan. 28, 2005).

¹⁵ Kurt M. Ribisl et al., *Sales and marketing of cigarettes on the Internet: Emerging threats to tobacco control and promising policy solutions*, Ending the Tobacco Problem: A Blueprint for the Nation 653-78 (Richard J. Bonnie, et al., eds., Nat'l Academy Press 2007); see also Kurt M. Ribisl et al., *Internet Cigarette Sales Knowledge Asset* (Robert Wood Johnson Foundation Substance Abuse Policy Research Program), Oct. 2007/updated May 2009, available at http://sapr.org/knowledgeassets/knowledge_results.cfm?KAID=3.

¹⁶ Andrew Hyland et al., *Cigarette purchase patterns in four countries and the relationship with cessation: findings from the*

increased substantially as, since 2002, the number of people in the United States with Internet access has increased by more than 60 percent and consumer purchases over the Internet have increased by more than 50 percent.¹⁷

In New York, a 2004 survey found that 10 percent of adult smokers often buy their cigarettes online, with another five percent having done so in the past year.¹⁸ As cigarettes have become even more expensive, both from cigarette company price hikes and increases to tobacco tax rates, there are stronger financial incentives both for smokers to turn to cheaper cigarettes available online and for illicit

International Tobacco Control (ITC) Four Country Survey, 15 TOBACCO CONTROL SUPP. 3, 59-64, Tbl. 2 (2006), available at http://tobaccocontrol.bmj.com/cgi/content/full/15/suppl_3/iii59 (last visited Sept. 21, 2009).

¹⁷ See Press Release, Nielson//NetRatings, "Three Out of Four Americans have Access to the Internet According to Nielsen//NetRatings" (Mar. 18, 2004), available at http://www.nielsen-online.com/pr/pr_040318.pdf; U.S. Census Bureau, quarterly releases of retail e-commerce data, available at <http://www.census.gov/mrts/www/mrts.html> (last visited Sept. 21, 2009); see also, e.g., T. Chen, *Smoke2U: Tobacco Sales Take Off in Cyberspace* (Center for Public Integrity), Dec. 19, 2008, available at <http://www.publicintegrity.org/investigations/tobacco/articles/entry/1085> (last visited Sept. 21, 2009).

¹⁸ Ken Davis et al., *Cigarette Purchasing Patterns among New York Smokers: Implications for Health, Price, and Revenue*, (New York State Dep't of Health, New York State Tobacco Control Program, Paper NY2006), Mar. 2006, available at <http://repositories.cdlib.org/context/tc/article/1226/type/pdf/view/content/>.

Internet sellers to try to circumvent ongoing government efforts to prevent and reduce such tax-evading sales.

There are no recent surveys on how many teenagers and other youth are buying cigarettes and other tobacco products over the Internet. But a study from 2000 found that, at that time, approximately 1.4 percent of high school smokers purchased their last pack from the Internet, as did one percent of middle school smokers.¹⁹ A year later, another study found that more than three percent of smokers aged 12 to 17 had recently purchased cigarettes online.²⁰ These dated findings indicate that, more than five years ago, well over 100,000 children in the United States were buying tobacco products on the Internet.

As the number of households with Internet access has grown enormously, as has youth access to credit and debit cards and youth familiarity with making Internet purchases, the number of children buying tobacco products online can only have grown.

¹⁹ U.S. Centers for Disease Control and Prevention (CDC), *Youth Tobacco Surveillance – United States, 2000*, CDC Surveillance Studies, *MMWR* 50(SS-4), Tbl. 23 (Nov. 2, 2001), available at <http://www.cdc.gov/mmwr/PDF/ss/ss5004.pdf>

²⁰ Office of Applied Studies, Substance Abuse and Mental Health Services Admin., Dep't of Health and Human Servs., *Results from the 2001 National Household Survey on Drug Abuse: Vol. III, Detailed Tables*, Tbls. 6.59A, 6.59B, available at http://www.oas.samhsa.gov/nhsda/2k1nhsda/vol3/Sect6v1_PDF_W_59.pdf.

A 2005 Kaiser Family Foundation survey found not only that Internet access among youth has increased from 47 to 74 percent from 1999 to 2004, but also that 96 percent of all seventh to twelfth graders have gone online, 38 percent have purchased something online, and almost a third have pretended to be older to gain access to an age-restricted website.²¹ While new nationwide data on total youth purchases of tobacco products online is not yet available, a study in New York found that Internet purchases just by ninth graders (14 and 15-year-olds) increased from 1.6 percent in 2001 to 5.2 percent in 2004-2005 – and online purchases are even more frequent among older youth smokers.²²

SUMMARY OF THE ARGUMENT

Cigarette bootlegging that exploits state cigarette tax differentials is decades-old and costs states and municipalities many hundreds of millions of dollars in unpaid taxes each year. In 1978, Congress passed the Contraband Cigarette Trafficking Act (“CCTA”) to create federal criminal sanctions for large-scale cigarette bootlegging. The

²¹ Donald F. Roberts et al., *Generation M: Media in the Lives of 8-18 Year-olds*, at 10 (Tbl. 3-A), 78, 95 (Henry J. Kaiser Family Foundation Study), Mar. 9, 2005, available at <http://www.kff.org/entmedia/entmedia030905pkg.cfm> (last visited Sept. 21, 2009).

²² Brian V. Fix et al., *Internet Cigarette Purchasing Among 9th Grade Students in Western New York: 2000-2001 vs. 2004-2005*, 43 PREVENTIVE MED. 191-195 (Sept. 2006).

legislative history of the CCTA, including its amendment of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), strongly suggests a congressional intent that state and local governments sustaining tax losses as a result of cigarette bootlegging would have standing to sue under RICO.

At the time of the CCTA’s enactment, Congress recognized the substantial tax losses state and local governments suffered as a result of cigarette bootlegging. Congress also recognized that state and local authorities were not able to stop the illegal movement of cigarettes into their states without federal aid. By enacting the CCTA, Congress created a federally-enforceable criminal statute barring cigarette bootlegging in contravention of state cigarette tax laws. At the same time, Congress amended the United States Code to make any violation of the CCTA a predicate offense under RICO. In doing so, Congress transformed an otherwise purely criminal statute (the CCTA) into a statute providing a civil cause of action to those harmed in their business or property by cigarette bootlegging.

Given the clear intent of Congress for the CCTA to aid state and local entities in enforcing their tax laws, and given that state and local governments suffering tax losses are by far the parties most significantly and directly injured by cigarette bootlegging, it is reasonable to conclude that Congress intended its amendment of RICO

would provide RICO standing to recover tax losses as a result of cigarette bootlegging.

ARGUMENT

I. The Legislative Histories of the CCTA and RICO Demonstrate a Congressional Intent for Tax Losses Sustained by State and Local Governments as a Result of Cigarette Bootlegging To Be Treated as Injury to Business or Property Under RICO.

Cigarette bootlegging has long been a problem for state and local governments and the citizens whose interests they serve. In 1978, the United States Congress enacted the Contraband Cigarette Trafficking Act (“CCTA”) to help address the problem of large-scale cigarette bootlegging, which it described as follows:

The base cause of this growing problem has been the increased disparity of tax rates for cigarettes among the various States. In 1965 the maximum range of tax differentials was 11 cents By 1976 this range has been expanded from 2 cents in North Carolina to a maximum of 23 cents in New York City and 21 cents in Connecticut and Massachusetts. Translated into a profit margin, this differential meant that more than \$2.00 per carton could be made by

smuggling cigarettes from a low-tax State to a high-tax State, which makes cigarette bootlegging both an attractive and highly profitably [sic] venture when carried out on a large scale.²³

S. REP. NO. 95-962 at 4 (1978) (hereinafter, “S. REP.”), as reprinted in 1978 U.S.C.C.A.N. 5518, 5519.

Under the CCTA, anyone who knowingly ships, transports, receives, possesses or distributes in excess of 10,000 cigarettes that do not bear required evidence of payment of applicable state or local cigarette taxes is guilty of a crime punishable by imprisonment for no more than five years and/or the imposition of a fine. *See* 18 U.S.C. §§ 2341(2), 2342(a), 2344(a).

When Congress enacted the CCTA, it made clear that cigarette bootlegging aimed at exploiting state cigarette tax differentials already was a well-

²³ The State of New Mexico, where Petitioner Hemi Group is incorporated and located, imposes a state cigarette tax of \$0.91 cents per pack. *See* N.M. Stat. § 7-12-3 (2007). The State of New York and the City of New York impose taxes of \$2.75 and \$1.50 per pack respectively. *See* N.Y. Tax Law § 471 (2008); N.Y.C. Admin. Code § 11-1302 (2002). Thus, the tax differential between cigarettes sold in New Mexico and New York City is \$3.34 per pack. The differential per carton of \$33.40 is 16 times higher than the approximately \$2.00 differential that Congress found had created a serious cigarette bootlegging problem in 1978.

established and intractable problem. As Congress emphasized then, “Since 1965 cigarette bootlegging has become a serious problem for a number of States in the areas of tax administration and law enforcement.” S. REP. at 4, 1978 U.S.C.C.A.N. at 5519. Congress estimated that state and local governments in high-tax states already were losing approximately \$391 million in cigarette tax revenues each year.²⁴ See S. REP. at 5, 1978 U.S.C.C.A.N. at 5520; see also STAFF OF J. COMM. ON TAXATION, 95TH CONG., DESCRIPTION OF BILLS RELATING TO CIGARETTE TAXATION AND CIGARETTE SMUGGLING 4 (COMM. PRINT. 1978) (hereinafter “COMM. PRINT”) (“The most visible consequence of cigarette smuggling is the revenue loss to State and local governments in high-tax States – about \$391 million each year.”).

Congress also acknowledged the far-reaching ill effects of those state and local tax losses. In addition to the problem of organized crime’s pervasive involvement in cigarette bootlegging, Congress recognized that because of bootlegging, “taxpayers pay higher taxes or receive fewer services, cigarette wholesalers and retailers are driven out of business and jobs are lost”²⁵ COMM. PRINT at 4;

²⁴ Of that total estimated loss of \$391 million in annual cigarette tax revenues, the State of New York alone was estimated to have lost \$72.3 million – the highest annual cigarette tax revenue loss of all the high-tax states. S. REP. at 5.

²⁵ Because Congress was concerned about organized crime’s heavy involvement in large-scale bootlegging, it cited associated

see also Cigarette Bootlegging: A State and Federal Responsibility, Report of Advisory Commission on Intergovernmental Relations (May 1977) (hereinafter, “ACIR Report”), reprinted in *Racketeering in the Sale and Distribution of Cigarettes: Hearing on S. 1487 Before the S. Comm. on the Judiciary, Subcomm. on Crim. Laws and Procedure*, 95th Cong. 25 (1977).

At the same time, Congress repeatedly stressed its strong belief “that primary efforts to stop cigarette smuggling must rest with the States” and that the enactment of the CCTA should not cause states to relax their own enforcement efforts because of “the serious nature of the problem and the recognition of the vital role the States must play if the effort is to be successful.” S. REP. at 9, 1978 U.S.C.C.A.N. at 5524; *see also* H.R. CONF. REP. NO. 95-1778, at 7 (1978) (hereinafter, “H.R. CONF. REP.”), as reprinted in 1978 U.S.C.C.A.N. 5518, 5536. (“[A] Federal role in the fight against cigarette smuggling . . . will be undertaken with the recognition that primary enforcement responsibility remains with the individual States.”).

Although noting that some states, like New York, already had launched major programs aimed

crimes and political corruption as additional adverse consequences of cigarette bootlegging. *Id.* In 2006, Congress amended the CCTA in part to address the then-emerging use of cigarette bootlegging as a means for funding terrorist activities. H.R. REP. NO. 3199 at H6282, H6284 (2006); PUB. L. NO. 109-177 § 121 (2006), 2006 U.S.C.C.A.N. (120 STAT. 221, 223).

at stanching the flow of taxpayer dollars into the pockets of bootleggers, Congress acknowledged that, as a whole, states lacked the tools necessary to address the problem on their own. *See* H.R. CONF. REP. at 7, 1978 U.S.C.C.A.N. at 5536. (“[T]he conferees acknowledge . . . that the States are not adequately able to stop the movement into their States and the sale of cigarettes in violation of their tax laws through the exercise of police power”); S. REP. at 11, 1978 U.S.C.C.A.N. at 5526 (“[W]e recognize that federal legislation in aid of state enforcement efforts may be desirable, if not essential, in light of the interstate nature of the problem.”); COMM. PRINT at 3 (“[T]he interstate nature of the problem hampers State and local law enforcement efforts.”); *id.* at 14 (“[G]iven the limited resources they have to work with and the difficult nature of the problem, it is questionable whether [state tax and law enforcement authorities] can be much more effective without greater support from all branches of State government and additional federal assistance.”) (quoting ACIR Report).

To address the problem of cigarette bootlegging, Congress acted to enhance the federal government’s ability to address cigarette bootlegging and aid state efforts to enforce state tax laws. By enacting the CCTA, Congress made it a federal crime “to knowingly ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.” 18

U.S.C. § 2342(a).²⁶ At the same time, Congress amended the Racketeer Influenced and Corrupt Organization Act (“RICO”) to include this new offense as a specifically enumerated offense under 18 U.S.C. § 1961(1)(B). *See* Contraband Cigarette Trafficking Act, PUB. L. NO. 95-575, § 3(c), 92 STAT. 2465-66 (1978).

By designating a violation of the CCTA as a RICO predicate offense, Congress transformed the CCTA from a purely criminal statute into a statute that also could serve as the basis for civil liability under RICO. As a RICO predicate, an act of bootlegging in violation of the CCTA gives rise to a civil cause of action by which “any individual or entity capable of holding a legal or beneficial interest in property” could recover for any injury to “their business or property” caused by that act of bootlegging. 18 U.S.C. §§ 1961(3), 1964(c).

Given the legislative history set forth above – including the clearly-stated intention of Congress to aid state and local governments in addressing a problem it saw as primarily a state responsibility – it

²⁶ Congress initially defined “contraband cigarettes” to include only cigarettes sold without bearing required evidence showing the payment of state cigarette taxes, such as tax stamps. *See* PUB. L. NO. 95-575, 92 STAT. 2463. Congress subsequently amended the definition of “contraband cigarettes” specifically to include cigarettes sold without bearing required evidence of the payment of local taxes as well. *See* 120 STAT. 222; 109 CONG. REC. H6283 (daily ed. July 21, 2005) (amending 18 U.S.C. § 2341(2)).

is reasonable to conclude that by creating this civil cause of action, Congress intended to provide the states and their municipalities with an additional vehicle for combating cigarette bootlegging and recovering lost tax revenues.²⁷ Indeed, it is hard to imagine any other persons or entities who could be expected to suffer injuries directly inflicted by violations of the CCTA that would come close to approaching the magnitude of the injuries suffered by state and local governments.²⁸

²⁷ Congress took additional steps in aid of state and local enforcement when it amended the CCTA to give state and local governments direct enforcement powers under the statute. Those powers include the right to bring actions in United States district courts to prevent and restrain violations of the CCTA and to obtain appropriate relief, including money damages. *See* 18 U.S.C. §§ 2346(1)-(2). In doing so, Congress specifically emphasized that it did not intend to restrict the right of local government officials to seek remedies or take enforcement actions under other federal laws. *See* 18 U.S.C. §§ 2346(3)-(5).

²⁸ Indeed, the other persons and entities that Congress identified as being harmed as a result of cigarette bootlegging – cigarette wholesalers and retailers who suffer lost sales due to the lower cost of bootlegged cigarettes, and taxpayers who must pay higher taxes or receive fewer services as a result of lost tax revenues – suffer injuries that clearly are too attenuated and indirect to be redressed by RICO. For example, this Court’s decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), specifically held that business losses allegedly caused by competitors who used the proceeds from tax fraud to lower prices and attract customers failed to satisfy RICO’s proximate cause requirement. Taxpayer injuries are similarly attenuated, being entirely derivative of the direct tax losses suffered by the state and local governments who serve them. *See, e.g., Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985) (Easterbrook, J.) (holding that taxpayers lacked standing under RICO because

In acting to provide state and local governments with a civil cause of action under RICO for recovery of losses suffered as a result of cigarette bootlegging under the CCTA, all of which necessarily come in the form of lost tax revenues, Congress must have considered such losses to constitute injuries to the “business or property” of state and local governments under RICO.

Thus, the legislative histories of the CCTA and RICO support the position of Respondent, the City of New York, and counsel in favor of affirming the order below.

their injuries due to fraudulently reduced property tax assessments were merely derivative of injuries to county, but that county had RICO standing as the “directly injured party” whose lost tax revenues constituted injury to “business or property.”).

CONCLUSION

For all the aforementioned reasons, the order below should be affirmed.

Respectfully submitted,

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