

No. 08-969

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**In The  
Supreme Court of the United States**

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HEMI GROUP, LLC, and KAI GACHUPIN,  
*Petitioners,*

v.

CITY OF NEW YORK,  
*Respondent.*

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*On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit*

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**PETITIONERS' SUPPLEMENTAL BRIEF IN  
RESPONSE TO THE BRIEF OF AMICUS CURIAE  
THE CAMPAIGN FOR TOBACCO-FREE KIDS**

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October 28, 2009

**RULE 29.6 STATEMENT**

The corporate disclosure statement at page iv of the  
Petition for Writ of Certiorari remains accurate.

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## INTRODUCTION

Petitioners Hemi Group, LLC and Kai Gachupin (“Petitioners”) file this Supplemental Response Brief to the Brief of *Amicus Curiae* Campaign for Tobacco-Free Kids (“the Campaign”) pursuant to Supreme Court Rule 25.5 (permitting a party up to the time the case is called for oral argument, or by leave of the Court thereafter, to “present . . . other intervening matter that was not available in time to be included in a brief”).

The Campaign filed a motion for leave to file its *amicus curiae* brief on September 23, 2009. Petitioners filed their Brief in Opposition to the Campaign’s motion on October 5, 2009, and their Reply Brief to Respondent’s Response Brief on October 16, 2009. Four days later, on October 20, 2009, the Court granted the Campaign leave to file its *amicus* brief. At the time Petitioners filed their Reply Brief, the Court had not ruled on the Campaign’s motion for leave to file its *amicus* brief.

The Campaign’s *amicus* brief raises new issues regarding public health and Internet cigarette sales, as well as additional argument regarding the Contraband Cigarette Tax Act, 18 U.S.C. § 2341 *et seq.* Plaintiffs respond to this intervening matter as follows.

## ARGUMENT

### **I. Health Impacts of Cigarette Smoking Do Not Justify Disregarding RICO's Civil Standing Requirements.**

The *amicus curiae* brief of the Campaign for Tobacco-Free Kids raises only one legal argument – that by including violation of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* (“CCTA”), as a RICO predicate offense, Congress intended to confer standing upon state and local governments for civil RICO actions to recover tax losses sustained by violation of the CCTA. Yet half of the brief is dedicated to a discussion of the alleged harmful public health effects of Internet cigarette sales. Amicus implies that the problem is so severe that Congress must have intended to cast CCTA’s net of liability as widely as possible, thus lending support to Amicus’ argument for expanding RICO’s civil standing requirements.

That implication is undermined, however, by Amicus’ inability to point to any evidence in the CCTA or its legislative history that in passing the Act Congress was concerned about the health effects of smoking in general or their exacerbation by Internet sales in particular. To the contrary, Amicus acknowledges that both the CCTA and its legislative history demonstrate that Congress was solely concerned with the *revenue* effects created by the disparity of cigarette tax rates among the various States. *See* Amicus Brief at 12 – 17. Faced with that reality, Amicus embarks upon an unsuccessful effort to tie those revenue effects to the health impacts argued by Amicus.

Amicus relies upon twenty-seven academic papers to support the idea that cigarette “smuggling” and “tax avoidance” lead to critical health problems relevant to the issue before the Court. Yet, Amicus contradicts this argument in its own publications:

In fact, research shows that smuggling and tax evasion not only fails to eliminate revenue gains from cigarette tax increases but is also a much smaller problem than the cigarette companies and their allies claim . . . .

*Campaign for Tobacco Free Kids, Raising State Cigarette Taxes Always Increases State Revenues 2, available at <http://tobaccofreekids.org/research/factsheets/pdf/0098.pdf> (last visited Oct. 26, 2009).* In that same publication, Amicus notes:

After a cigarette tax increase, many smokers who initially try to avoid the higher rate soon use up their stockpile of cigarettes purchased right before the increase or tire of driving across state border or going to the Internet to buy cheaper cigarettes, and return to the convenience of normal full-tax purchases in their own state. Indeed, the vast majority of smokers prefer to buy cigarettes by the pack, but cross-border and Internet purchases involve multiple cartons. For example, New York state’s taxable pack sales decreased sharply in the year after the state’s 55-cent tax increase in March 2000, beyond what consumption declines might explain, but then increased in the following year – most likely because of smokers’ depleted pre-increase stockpiles of cigarettes, smoker tax-evasion fatigue, and the strong appeal of

convenient single-pack purchases from nearby sales outlets.

*Id.*<sup>1</sup>

Moreover, the material cited by Amicus is inconclusive, at best. For example, Amicus claims that “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.”<sup>2</sup> Review of the cited study, however, confirms that Amicus overstates its results by implying that the study found that the consumption of all smokers increased as a result of purchasing online. Instead, the authors themselves note that the results of this study should be interpreted with caution, as they cannot be generalized to the population of New Jersey adult smokers (much less to the general online purchasers of cigarettes).

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<sup>1</sup> Amicus continues: “It is also worth noting that any real or imagined problems with smuggling and tax evasion after New York state’s cigarette tax increase in 2000 were not significant enough to stop the state from increasing its cigarette tax to \$1.50 per pack in 2002, and, more recently, to \$2.75 per pack. Nor did it stop the state from permitting New York City to increase its supplementary local cigarette tax from 8 cents to \$1.50 per pack in 2002. The levels of cigarette smuggling and tax evasion in New York City are supposedly among the highest in the country; but in the first year after its 2002 rate increase revenues increased nine-fold, to \$250 million, significantly more than the city had expected.” *Id.*

<sup>2</sup> Amicus Brief at 5, citing Annice E. Kim et al., *Smokers Beliefs and Attitudes about Purchasing Cigarettes on the Internet*, 121 PUB. HEALTH REP. 594-602 (Sept./Oct. 2006).

The authors also noted several other limitations, including that the researchers had a low response rate with regard to the follow-up survey. Further, the consumption analysis of the study was a post-hoc decision, not its primary focus. Finally, the study states that changes in consumption might be due to other factors besides smokers switching to purchasing online cigarettes. The authors of the study state that the results regarding consumption are “exploratory,” and they note that factors that deter online cigarette purchases have not been studied, including the fact that smokers prefer immediate gratification and therefore most do not want to wait for cigarettes through the mail.<sup>3</sup>

Other material cited by Amicus demonstrates that the numbers of alleged youthful smokers claiming to obtain cigarettes from the Internet is not significant, with Amicus itself claiming only three percent of youthful smokers “had recently purchased cigarettes online.” Amicus Brief at 10. Assuming that number was true in 2001 as claimed, it confirms that ninety-seven percent of youthful smokers did not get their cigarettes online. Notably, these are not percentages of all young people, but only of that limited number who smoke. Additionally, other studies call into question whether increased taxes have any significant impact on the number of youth who start smoking:

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<sup>3</sup> Other examples include Amicus’ claims regarding age verification limitations on websites, citing 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). That article confirmed that its study was limited because the researchers noted that actual age verification methods would differ once orders were placed.

[I]t is not so surprising that taxes and regulations are relatively ineffective prevention policies. Instead of using taxes or regulations to drive up the costs youth incur to smoke, it may be more effective to emphasize policies such as health education programs and media campaigns that shift youth cigarette demand.

Putting Out the Fires: Will Higher Taxes Reduce Youth Smoking? Philip DeCicca, Donald Kenkel, Alan Mathios; Department of Policy Analysis & Management Cornell University 26, *available at* <http://www.hha.dk/nat/wper/00-3.pdf> (last visited Oct. 26, 2009).<sup>4</sup>

This Court, although recognizing the health problems associated with cigarettes, has held those health concerns alone do not allow states to impose advertising restrictions pre-empted by federal law or prohibited by the First Amendment to the United States Constitution. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (“The *First Amendment* also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information”). The Court also has held that public health concerns were insufficient to allow

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<sup>4</sup> See also News from the National Academies, May 24 2007, from *Ending the Tobacco Problem: A Blueprint for the Nation*, *Institute of Medicine* (“the rate of daily smoking among high school seniors has hovered around 20 percent for most of the past two decades”) *available at* <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11795> (last visited Oct. 26, 2009).

restrictions on common carriers otherwise prohibited under federal law. *Rowe v. New Hampshire Motor Transp. Ass'n*, 522 U.S. 364 (2008)(state held without authority to require use of delivery companies that provide recipient age verification). Similarly, the Court held that the health impact of cigarettes alone is an insufficient basis upon which to extend legislation beyond its statutory terms or the intent of its drafters. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)(FDA held not to have authority to regulate cigarettes). Indeed, as one New York court has noted:

Tax Law § 1814 (a) and (d), and the provisions of article 20 to which they refer, are what they purport to be, “Tax Laws,” designed to raise revenue. There is nothing that suggests a legislative purpose or intent to protect “the safety or health of a considerable number of persons.” One can hardly contend that the harmful effects of cigarette smoking are somehow ameliorated when the cigarettes have been taxed. Any suggestion that, by increasing the purchase price of cigarettes, the tax provides a disincentive to purchase and use them would be speculative, tenuous, and remote, and worthy of no more weight than a suggestion that the tax on fast food products shown to present health risks is a public health measure.

*City of New York v. Land & Bldg. Known as 283 Ralph Ave.*, 848 N.Y.S.2d 835, 840 (N.Y. Sup.Ct. 2007).

This case is not about smoking or Internet cigarette sales, both of which are legal.<sup>5</sup> Instead, it is about RICO's requirement that a person be injured in the person's "business or property" to have standing to bring a civil action, and how that standing requirement is not met by a municipality's allegations of injury to its non-proprietary, sovereign interests.

## **II. The Inclusion of the CCTA as a RICO Predicate Offense Does Not Confer Standing Upon State and Local Governments For Civil RICO Actions to Recover Lost Opportunity to Tax.**

The sole legal argument raised by Amicus is that by including violation of the CCTA as a RICO predicate offense, Congress intended to confer standing upon state and local governments for civil RICO actions to recover tax losses sustained from violation of the Act. Once again, however, Amicus can point to no evidence in the CCTA itself or in its legislative history that in passing the Act and including violation of it as a predicate act in RICO, Congress intended to affect civil RICO standing requirements. As a result, Amicus is left to argue only that "it is reasonable to conclude that by creating this civil cause of action, Congress intended to provide the states and their municipalities

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<sup>5</sup> Although laws have been passed restricting shipment and delivery of cigarette purchases, Petitioners are unaware of any law that prohibits the Internet sale of cigarettes. *See, e.g.*, NY CLS Pub Health § 1399-ll (which regulates shipment and delivery of cigarettes, not Internet sales); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003). For example, NY CLS Pub Health § 1399-ll does not restrict Internet sales made by companies in New York to customers located outside of that state.

with an additional vehicle for combating cigarette bootlegging and recovering lost tax revenues.” Amicus Brief at 18-19.

The argument is plausible only if one assumes that Congress could have had no other reason for including a violation of the CCTA as a predicate act in RICO *other than* to provide a civil remedy for states and municipalities to recover lost tax revenue.<sup>6</sup> To the contrary, however, Congress could, and in fact did, have a variety of other reasons, chief among them to provide “additional statutory basis for the Department of Justice to interdict organized cigarette racketeering.” S. Rep. No. 95-1629 at 5 (1978). RICO is, after all, primarily a criminal statute, and by including a violation of the CCTA as a predicate offense, Congress made available to the Federal government a range of criminal penalties not available under the CCTA.<sup>7</sup> And, as Amicus notes, Congress also gave state and local governments direct criminal enforcement powers under the CCTA. Amicus Brief at

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<sup>6</sup> Ironically, the negative implication of that assumption is that Congress must have seen a need to do so because existing RICO predicate acts, including mail and wire fraud, do not provide states and municipalities with such a remedy. If that is the case, the remedy Respondent seeks is unavailable here, where the predicate acts alleged are not violation of the CCTA but of the mail and wire fraud statutes.

<sup>7</sup> Whereas CCTA violations are punishable by up to five years in prison and forfeiture of the contraband cigarettes (18 U.S.C. § 2344), RICO violators can be imprisoned for up to 20 years with forfeiture of all property derived from the activity and a fine of up to twice the gross profits or other proceeds from the offense (18 U.S.C. § 1963). Significantly, § 2344 does *not* impose payment of taxes due as a penalty.

19 n.27; *see* 18 U.S.C. § 2346(b)(1) and (2). In addition, including violation of the CCTA as a RICO predicate act provides Federal law enforcement with a way to reach traffickers under RICO who may not be amendable to prosecution under the CCTA.<sup>8</sup>

Thus, there are many other reasons why Congress might have included a violation of the CCTA as a RICO predicate act other than to provide governmental entities a Federal remedy for collection of lost tax revenue.<sup>9</sup> There is no indication, however, either in the CCTA itself or in its legislative history, that Congress intended to modify the civil RICO standing requirement that a plaintiff must be “injured in his business or property.” 18 U.S.C. § 1964(c).

Stripped of its underlying assumption, Amicus’ argument amounts to no more than the unfounded assertion that an injury suffered from a violation of the predicate act, such as a government’s loss of tax revenues from a CCTA violation, necessarily constitutes an injury to the government’s “business or

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<sup>8</sup> *See, e.g., U.S. v. Fiander*, 547 F.3d 1036 (9th Cir. 2008)(Native American defendant whose prosecution under the CCTA is barred by a treaty with his tribe may be prosecuted for conspiracy under RICO).

<sup>9</sup> Even with respect to civil RICO actions, Congress might well have had in mind enabling non-governmental “private attorney generals” to enforce the CCTA by way of a civil RICO action. For an example of the use of civil RICO based on a CCTA violation in a commercial context, *see, e.g., R.J. Reynolds Tobacco Co. v. Market Basket Food Stores, Inc., et al.*, No. 5:05CV-253-V, 2006 U.S. Dist. LEXIS 61927 (W.D. N.C. Aug. 21, 2006). In any event, Congress did *not* choose to include tax evasion as a RICO predicate offense.

property.”<sup>10</sup> That proposition ignores, however, the fact that in passing RICO, Congress included an *independent* standing requirement, wholly apart from the standing requirements of the predicate acts. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 283 (1992)(O’Conner, J., concurring)(“Section 1961(1)’s list of racketeering offenses provides the RICO predicates for both criminal prosecutions and civil actions. . . . Although not everyone can qualify as an appropriate ‘private attorney general,’ the prerequisites to the role are articulated, not in the definition of the predicate act, but in the civil action provisions of § 1964(c) – a plaintiff must allege ‘injury in his business or property’ by reason of a RICO violation”); *see also*, *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987)(the statute of limitations for civil RICO actions is the four-year limit of the Clayton Act, 15 U.S.C. § 15b, rather than the limit imposed by the underlying statute establishing the predicate act).

Hence, while the inclusion of a CCTA violation as a RICO predicate act might provide state and local governments a civil RICO remedy for lost tax revenues *if* the tax has been assessed and is a choate property interest,<sup>11</sup> it does *not* convert a sovereign opportunity

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<sup>10</sup> Amicus’ argument that civil standing under § 1964(c) is a derivative of the predicate act is a variation upon Respondent’s position that the meaning of “property” in that section is dependent upon the meaning of “property” in the statute defining the predicate offense. *See* Respondent’s Brief at 16, 21-22, construing *Pasquantino v. United States*, 544 U.S. 349 (2005).

<sup>11</sup> *See* extended discussion in Petitioner’s Reply Brief at 10-18.

to tax into an interest in “business or property” for the purpose of civil RICO standing.

**CONCLUSION**

The holding of the Second Circuit Court of Appeals that the City of New York has standing to pursue its RICO claims should be reversed.

Respectfully submitted,

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