Nos. 17-3198

17-3222 (cross-appeal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK,

Plaintiff-Appellee-Cross-Appellant,
v.

MOUNTAIN TOBACCO COMPANY, DBA KING MOUNTAIN TOBACCO COMPANY INC.,

Defendant-Appellant-Cross-Appellee,

MOUNTAIN TOBACCO DISTRIBUTING COMPANY, INC., DELBERT WHEELER, SR.,

Defendants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF *AMICUS CURIAE* THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE KING MOUNTAIN TOBACCO COMPANY INC.

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CORPORATE DISCLOSURE STATEMENT

The National Congress of American Indians is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

Dated: July 27, 2018

s/ John M. Peebles
John M. Peebles

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INTEREST OF THE NATIONAL CONGRESS OF AMERICAN INDIANS[1]

Amicus curiae, the National Congress of American Indians ("NCAI"), is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan native villages. Since 1944, NCAI has advised tribal, federal, and state governments on a range of Indian issues.

NCAI's members represent a cross-section of tribal governments. Considerable variations exist among them, including with respect to their lands, economic bases, populations, and histories. All tribes, however, share common interests when they seek and ensure protections to tribal sovereignty and self-determination.

One common interest our members share is opposing the State of New York's effort to seize greater authority over Indian affairs than has been authorized by Congress. The State of New York's approach to the application of the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act") to Indian tribes threatens to halt, or even undo, the advances in modern tribal self-determination and economic

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[1] This brief is filed with the consent of all the parties. FRAP 29(a)(2).

In accordance with FRAP 29(a)(4)(E) and 2d Cir. LR 29.1(b), NCAI and its counsel represent that no parties' counsel authored this brief in whole or part. No party or party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

development by undermining commerce with Indian tribes in Indian country through unlawful state regulation.

For more than twenty years, NCAI has offered considerable testimony, analysis, and advice to Congress on proposed amendments to the Jenkins Act as well as to regulatory agencies concerning the implementation of cigarette taxation, the PACT Act, the Contraband Cigarette Trafficking Act ("CCTA"), as well as these statutes' accompanying regulations. During this time-period, NCAI counseled the U.S. Congress to ensure that the final PACT Act provisions reflected that principle, rooted in the U.S. Constitution, that the federal government, not the states, regulates commerce on Indian. In that vein, NCAI and its membership have a thoroughgoing interest in the PACT Act's proper interpretation by federal and state administrative agencies and this Court.

NCAI is especially concerned that the State of New York is encouraging this Court to interpret the PACT Act inconsistently with long-established Supreme Court precedent. In doing so, the State of New York is urging this Court to find that states hold greater authority in Indian country than expressly granted by Congress or recognized by the Supreme Court.

The promotion and defense of tribal rights to regulate commerce on their own reservations is at the core of NCAI's membership goals. During the congressional discussions which began in 2003 to amend the original Jenkins Act (Act of Oct. 19,

1949, ch. 699, 63 Stat. 884 (as amended in 1953 and 1955)) – which resulted in the 2010 Jenkins Act amendments, known as the PACT Act – NCAI has strongly opposed any provisions authorizing state enforcement against Indians within Indian country. Over a number of congressional sessions, NCAI counseled the U.S. Congress to ensure that the final PACT Act provisions reflected that principle, rooted in the U.S. Constitution, that the federal government, not the states, regulates commerce on Indian reservations and within Indian country.

Over a period of almost a decade, prior to the passage of the PACT Act, *amicus* NCAI and its members opposed any legislation delegating authority to states to enforce the Act in Indian country. NCAI and its members' discussions with the Senate Committees on Indian Affairs and Judiciary as well as the House of Representatives worked to include language that protected tribal sovereign authority to the exclusion of states in Indian country. This language to NCAI's satisfaction was included in Congress' proposed revisions to the Jenkins Act in the 108th, 109th, and 110th Congresses, and in the PACT Act, as enacted by the 111th Congress. The legislative history shows that the provisions protecting Indian sovereignty were repeatedly introduced in the early bills and would eventually become law with the enactment of the PACT Act. Moreover, each time Congress proposed revisions to the PACT Act, it repeatedly reaffirmed its responsibility under the U.S. Constitution and longstanding principles of federal Indian law to protect tribal sovereignty.

NCAI is able to provide this Court with critical context on the Jenkins Act amendments as well as the PACT Act's practical implementation and effect on Indian tribes in Indian country. Given the significance of commerce to Indian country across the nation, *amicus*'s long-standing goals of tribal self-determination and economic self-sufficiency depend in significant part on interpreting the PACT Act so that the Act respects, and does not interfere with, tribal rights to regulate commerce within their own jurisdictions.

Amicus has a critical interest in ensuring that the Court's opinion does not inadvertently find a delegation of authority to states to enforce the PACT Act where Congress made no such express delegation, as would be required for such a finding under the applicable principles of federal Indian law.

INTRODUCTION

Indian tribes' government-to-government relationship with the United States is part of a shared history and legal context. Any application of precedent related to taxation authority alone is merely part of the analysis required to determine when states may regulate in Indian country. The delimitation of any state's authority in Indian country, in a civil-regulatory context, turns on whether Congress unmistakably granted that authority to states.

The purpose and intent of the PACT Act did not remotely purport to delegate authority to states to enforce federal law in Indian country nor target commerce of

the type at issue here: business-to-business Indian commerce between two reservations.. In fact, the legislative history and the plain text of the statute indicates that Congress chose not to grant states authority to enforce the PACT Act in Indian country, and Congress carefully crafted the Act to ensure Indian commerce would continue to operate outside of state regulatory oversight in favor of the federal government. Moreover, Congress carefully defined "interstate commerce" to include only specific "reportable" types of non-Indian commerce, thus excluding exclusively Indian commerce.

The congressionally stated purpose directly addressed substantial concerns about illegal sale of cigarettes on the internet, and similar "mail order"-like means, not sales at on-reservation Indian brick and mortar enterprises. In fact, in 2003, NCAI initially opposed the first proposed version of the PACT Act because it contained a provision that expressly delegated authority to states to enforce the PACT Act in Indian country. Following NCAI's discussions with Congress in 2003, subsequent versions of the PACT Act consistently omitted any such provision to delegate to states any enforcement of the Act against Indians in Indian country, and consistently included express interpretive provisions protecting Indian independence from State authority, and NCAI supported the passage of the PACT Act in 2010.

In short, the PACT Act provides no requisite express authorization to states to regulate tribal point-to-point commerce between the tribe's Indian country and

another tribe's Indian country. Such commerce, therefore, cannot be reportable "interstate commerce" under the PACT Act. This Court should affirm the lower court's order because the PACT Act contains no such express provisions.

BACKGROUND

New York State's and *amicus* the United States' interpretation of the PACT Act raises concerns regarding long-established United States law and Indian policy. Indian tribal governments occupy a well-established and unique political status under United States law. The Supreme Court recognizes that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (*quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

For instance, "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *See Rice v. Olson*, 324 U.S. 786, 789 (1945); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (laying the cornerstone of the relationship of Indian tribes to the United States and its constituent states). As a rule, therefore, Indian country is not subject to state authority.[2] "Absent

[2] Fundamentally, this rule derives from a long line of cases that begins with Chief Justice Marshall's opinion in *Worcester v. Georgia*, laying out the principles underlying the presumptive rule that state law is inapplicable within Indian country, arising in part from the preemptive effect of Congress' sole authority under the Constitution to regulate commerce with Indian tribes and the resulting congressional enactments. *See, e.g., Bryan v. Itasca County, Minn.*, 426 U.S. 373, 376 & fn.2 (1976).

explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." *Okla. Tax. Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993).

"Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (*citing Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976)).

Furthermore, the Federal Constitution, a body of federal statutes, and regulations dating back more than two centuries ground Indian jurisprudence and guide this Court's interpretation of the PACT Act. Article I's Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The three commerce powers—over foreign commerce, interstate commerce, and Indian commerce—have very different applications, but they were all "given in the same words, and in the same breath, as it were." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,

228 (1824) (Johnson, J., concurring). All three clauses "grant … authority to the Federal Government at the expense of the States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996). All three clauses respect the dignity of sovereign governments: foreign Nations, States, and Indian Tribes. The Territory Clause, U.S. Const. art. IV, § 3, cl. 2, provides further federal authority over Indian affairs, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting Territory or other property belonging to the United States." *See also* John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, Amer. U. L. Rev. (*forthcoming* Fall 2018), *available at* https://ssrn.com/abstract=3182631 (last visited July 19, 2018).

Thus, the fundamental presumption is that Indian tribes retain inherent authority over Indian commerce and their territory in Indian country, *see Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 155-157 (1980), and no state has regulatory authority over tribes in Indian country unless expressly granted by Congress. *See, e.g., Williams v. Lee*, 358 U.S. at 219-222 ("federal territory principles are deeply embedded in federal Indian law principles including that state action may not infringe upon the purposes of an Indian reservation without congressional acquiescence").

It is also axiomatic when this Court considers the interpretation of the PACT Act that statutes enacted for the benefit of Indians must be liberally construed in

favor of Indian interests, and to the extent that there might exist any ambiguity, any such ambiguity itself is required to be resolved in favor of Indian interests. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("[i]f there [is] ambiguity … the doubt would benefit the tribe, for ambiguities in federal law have been construed generously in order to comport with … traditional notions of sovereignty and with the federal policy encouraging tribal independence.").

The PACT Act itself expressly commands application of such interpretive principles. Notwithstanding, this Court is asked interpret the PACT Act to find that Congress granted states authority to enforce the PACT Act with respect to Indian commerce between places in Indian country. However, the plain language of the statute provides no express authorization to states to enforce the PACT Act in Indian country for trade between parts of Indian country, and provides that any ambiguity or uncertainty should be resolved favorably for tribes.

ARGUMENT

I. Section 5 of the PACT Act governs the interpretation and application of the Act's other provisions.

As discussed above, numerous principles and precedent assist in the interpretation of statutes involving Indian tribes. One such principle states, "[t]he basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor." Cohen's Handbook of Federal Indian

Law § 2.02[1], at 113 (Newton, ed., 2012) (footnotes omitted). While this canon of statutory construction is useful and has persuasive value for courts historically, Congress chose to integrate this principle directly into the PACT Act, and therefore, this Court is obligated to apply it to the interpretation of the provisions at issue. *See* H.R. Rep. No. 110-836, at 25 (2008) (section by section analysis of H.R. 4081, 110th Cong. (2008), a bill similar to the PACT Act enacted in 2010).

Section 5 of the PACT Act, Pub. L. No. 111-154, § 5, 124 Stat. 1087, 1109-1110 (2010), *codified at* 15 U.S.C. § 375 Note, fundamentally guides the interpretation and application of other substantive provisions of the PACT Act in relation to Indian and Indian tribal governmental interests including Indian enterprises. Several provisions are of importance.

First, section 5(a) provides in part that:

> Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect—
>
> . . .
>
> (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
>
> (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes; or

> (5) any State or local government authority to bring enforcement actions against persons located in Indian country.

Second, section 5(e) provides that "Any ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in favor of this section."

The plain and unambiguous language of sections 5(a) and 5(e) command that all other sections of the PACT Act are subject to the limitations contained in section 5. In other words, section 5 restricts all state jurisdiction, including state and local tax, regulatory, and enforcement authority, under all other provisions of the PACT Act to that authority a state *might otherwise* possess under federal law, independent of the PACT Act.

In short, Congress ensured by express legislative command that all existing limitations on a state's authority under federal law continue to apply. The State of New York has not and cannot point to any provision of the statute or other federal law where Congress authorizes the exercise by a state of authority over Indians, Indian tribes or Indian country that would allow it to enforce the PACT Act against the transactions at issue in this case. *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute (quote omitted)).

Finally, section 5 itself must be liberally construed in favor of Indian interests, and to the extent that there might exist any ambiguity in the express commands of section 5, any such ambiguity is required to be resolved in favor of Indian interests and interpreted in accordance with the traditional Indian law canons of construction. *See* Cohen, *supra*, at 113. Such reading of Section 5 is consistent with, and reinforces, the lower court's interpretation of the PACT Act's application in this matter.

II. The legislative history shows the overriding purpose of the PACT Act was to address internet sales of cigarettes, and Congress purposefully avoided granting authority to states to enforce the Act in Indian country.

The PACT Act's congressionally stated purpose was to directly address substantial concerns about illegal sale of cigarettes on the internet (and similar older-technology means of remote sales already addressed in the original Jenkins Act), not at brick and mortar enterprises in Indian country.

Congress's purpose was to regulate such internet and similar sales of cigarettes to consumers, and to provide law enforcement tools to combat terrorist financing through the use of internet and mail delivery sales to consumers.[3] The

[3] The legislative history shows that this was the consistent purpose for the PACT Act. During the 110th Congress, the House Judiciary Committee report, to accompany H.R. 4081, stated the proposed legislation's goals and objectives to ensure the collection of tobacco taxes and introduce new law enforcement tools to combat illegal remote sales of cigarettes, such as those conducted over the internet. H.R. Rep. No. 110-836, at 16 (2008). *See also* S. Rep. No. 110-153 at 1-7

PACT Act's "Findings and Purposes" section states, for instance, the purpose is to "require Internet and other remote sellers of cigarettes to comply with the same laws that apply to law-abiding tobacco retailers." PACT Act, Pub. L. No. 111-154, § 1(c), 124 Stat. 1087, 1088 (2010), *codified at* 15 U.S.C. § 375 Note. The congressional findings recited in the Act and reported in the previous session of Congress specifically focus on internet sales, state collection of consumer tax, and significant concerns related to the role of cigarette sales in funding international terrorism. *See* PACT Act, Pub. L. No. 111-154, § 1(b), 124 Stat. 1087, 1087 (2010), *codified at* 15 U.S.C. § 375 Note; *see also* S. Rep. No. 110-153 at 1-7 (2007).

Section 8 of the Act makes no mention of legal Indian commerce, including trade conducted between Indian country, as it further clarifies the legislation's purpose:

> It is the sense of Congress that *unique harms are associated with online cigarette sales*, including problems with verifying the ages of consumers in the digital market and the long-term health problems associated with the use of certain tobacco products. This Act was enacted recognizing the longstanding interest of Congress in urging compliance with States' laws regulating remote sales of certain products to citizens of those States, including the passage of the Jenkins Act over 50 years ago, which established reporting requirements for out-of-State companies that sell certain tobacco products to citizens of taxing States, and which gave authority to the Department of Justice and the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the Jenkins Act. *In light of the unique harms and circumstances surrounding the online sale of certain tobacco products, this Act is intended to* collect cigarette excise taxes, to stop tobacco sales to

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(2007)(including the same impetus but emphasizing the need for improvements to the Jenkins Act to combat international terrorist organizations financing).

> underage youth, and to *help the States enforce their laws that target the online sales of certain tobacco products only*. This Act is in no way meant to create a precedent regarding the collection of States sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State entities that do not have a physical presence within the taxing State.

PACT Act, Pub. L. No. 111-154, § 8, 124 Stat. 1087, 1111 (2010), *codified at* 15 U.S.C. § 375 Note (emphasis added). Remarks made on the floor of the House of Representatives stated that the PACT Act "addresses the short-comings in the current law [the Jenkins Act] by targeting delivery systems for illegal Internet tobacco sales". 156 Cong. Rec. H1533 (daily ed. Mar. 17, 2010) (statement of Rep. Cohen).

At the time the PACT Act was first introduced in 2003, *see* S.1177, 108th Congress (passed Dec. 9, 2003), and in subsequent sessions of Congress, *amicus* NCAI supported the effective enforcement of the Jenkins Act, but advised lawmakers that ensuring compliance should not come at the expense of compromising tribal governmental rights. *See, e.g.*, H.R. Rep. No. 110-836, at 17-18 (2008) (stating, "existing laws are inadequate in the Internet Age"). *See also* S. Rep. No. 110-153, at 16-17 (2007) (section-by-section analysis reporting that the provisions would not affect Indian tribal sovereignty or modify state jurisdiction over tribal governments, members, or reservations.)

Specifically, NCAI emphasized that the legislation needed to protect tribal sovereignty and tribal immunity as well as ensure that states do not gain any

expanded jurisdiction in Indian country or over Indian commerce and that federal authority in Indian country remained *status quo*. *See* Letter, NCAI to U.S Senate, "RE: Proposed Amendments to S. 1177 to Address Tribal Concerns," Dec. 8, 2003.[4] In floor remarks in the United States Senate upon passage of the PACT Act in 2010, Senator Kohl stated,

> It is important to point out that this bill has been carefully drafted, following negotiations with numerous interested parties including … tribal groups to ensure that it would be strictly neutral in regards to tribal sovereignty and tribal immunity rights. The PACT Act would neither expand or contract the current scope of tribal sovereignty and immunity, as determined by Federal statute and judicial interpretations. Also, the bill makes clear that it cannot be used to expand, contract, or otherwise change the scope of tribal sovereignty and immunity.

156 Cong. Rec. S1487 (daily ed. Mar. 11, 2010) (statement of Sen. Kohl). Thus, as enacted, Congress expressly provided no authority to states to enforce the PACT Act in Indian country.

In 2003, NCAI initially expressed its concern to the U.S. Senate Committee on Indian Affairs noting that, as drafted, the proposed legislation would give state attorneys general and cigarette manufacturers' authority to enforce the Jenkins Act in Indian country. *See* Letter, NCAI to U.S Senate, "RE: Proposed Amendments to S. 1177 to Address Tribal Concerns," Dec. 8, 2003; *see also* Letter, NCAI to Chairman Sensenbrenner, Jr., U.S. House Committee on the Judiciary, "RE H.R.

[4] The three letters referenced herein are appended to the brief.

2824 – Reiterating NCAI Support for Federal Enforcement and Opposition to State-Driven Enforcement in Indian country," March 4, 2004. At the time, NCAI told the House Committee the proposed amended Jenkins Act provisions constituted a significant state intrusion into the jurisdiction reserved to tribes and could give state governments the ability to withdraw from existing cigarette tax compacts and agreements.

In 2003, *amicus* eventually supported S. 1177, and H.R. 2824 never passed the House. At that time, after months of delicate negotiation, with NCAI and its members' advocacy, S. 1177, as passed by the Senate, ensured through careful delineation that enforcement of the Jenkins Act by states would take place outside Indian country, while enforcement in Indian country promoted a federal focus. *See* Letter, from Ben Nighthorse Campbell, Chairman and Daniel K Inouye, Vice Chairman, Senate Committee on Indian Affairs, Mar. 3, 2004 (noting that the companion bill in the House, H.R. 2824 "fails to recognize and preserve" tribal rights and legal principles and "would substantially impair tribal authority under current law" and requested the House adopt the language in S. 1177 "affecting tribal authority and sales on tribal lands."). Specifically, S. 1177 contained new definitions for "delivery sale" and "delivery seller" to ensure that the focus was on consumer sales outside Indian country. In addition, S. 1177 defined "interstate commerce" in

three ways, to ensure that legal trade between tribes in Indian country would be to the exclusion of state authority. S. 1177, § 2(a)(10) stated:

> The term "interstate commerce" means commerce between a State and any place outside the State, commerce between a State and any Indian lands in the State, or commerce between points in the same State but through any place outside the State or through any Indian lands.

S. 1177, 108th Cong. § 2(a)(10) (passed Dec. 9, 2003).[5] Most significantly, both houses would eventually enact the PACT Act of 2010 containing the hard fought gains in these original 2003 provisions as passed by the Senate in S. 1177.

Also persuasive is comparing amendments to the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §§ 2341-2346, made contemporaneously to the revision of the Jenkins Act. *See* S. Rep. No. 110-153, at 8 (2007) (committee recounting the history of the amendments to the Jenkins Act and CCTA in the 108th, 109th, and 110th Congress). In the 2006 revisions to the CCTA, Congress defined "interstate commerce" to "mean[] commerce between a State and any place outside the State, or commerce between points in the same State but through any place outside the State." 18 U.S.C. § 2343(f); *see also* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 121, 120 Stat. 192, 223 (2006). Proposed revisions to the Jenkins Act during the same session of Congress reflect

[5] By the 110th Congress, the definition of "interstate commerce" for purposes of the PACT Act remained substantially the same, merely substituting "Indian country" for "Indian lands" in H.R. 4081, § 2(a)(9). *See* H.R. Rep. No. 110-836, at 22 (2008).

the different definition ultimately found in the PACT Act of 2009. For instance, S. 3810, defines "interstate commerce" as:

> commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

S. 3810, § 1(9), 109th Cong. (2006). Congress' choice to define interstate commerce differently in federal cigarette statutes shows purposeful intent to work a legislative result. The CCTA provides no state-based enforcement authority and therefore the definition was purposefully broader. The PACT Act provides authority to states to enforce provisions of the PACT Act, but only in specifically defined interstate commerce transactions, defined by Congress to exclude the application of state enforcement to Indian commerce in Indian country.

Section 2(e) of the PACT Act, "Enforcement," also shows Congress' intent to exclude states from enforcement of the Act in Indian country, when read with sections 5 and 8. Section 2(e) (codified at 15 U.S.C. § 378), authorizes the federal government to enforce the Act but contemplates local, state, and tribal enforcement on equal footing. *See* 15 U.S.C. § 378(b), (c) & (e)(2).The PACT Act also amended the definition of "person" to include "state government," "local government," "Indian tribal government," or "governmental organization of such a government." PACT Act, § 2(a); 15 U.S.C. § 375(10). These sections, read with section 8 (Congress's sense of the Act) and section 5 (Congress' admonition that Indian tribal

relations and self-governance will remain undisturbed), reinforces the conclusion that Congress was mindful of each government's role, and that it intended enforcement of the PACT Act in Indian country to exclude a role for the states.

The statutory scheme, therefore, is the benefit of the bargain that NCAI and its members worked for: to ensure that Indian commerce and its regulation would remain within the authority of the tribes themselves and Congress. Part of that bargain, as clearly seen in section 2(e), is the contemplation of tribes' inherent authority to regulate commerce between themselves to the exclusion of the states, and Congress' recognition that tribes would regulate and enforce the PACT Act.

The legislative history shows the overriding purpose of the PACT Act was to address internet, mail or and other direct sales of cigarettes to consumers as well as provide law enforcement tools to battle international terrorist financing. Most importantly, the Act purposefully avoids granting authority to states to enforce the Act in Indian country.

III. The plain language and legislative history of the PACT Act carefully distinguishes reportable interstate commerce provisions from Indian commerce in Indian country.

Indian commerce between locations within Indian country is not interstate commerce for purposes of the PACT Act. Therefore, the PACT Act does not grant the State of New York authority to enforce the Act against such commerce in Indian country. It was Congress' intent to preserve Indian commerce within Indian country

by not extending the definition of reportable interstate commerce transactions to such Indian country transactions.

The U.S. Constitution provides that Congress has authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.[6] The language used in the PACT Act reflects Congress' intent to exercise this constitutional authority to regulate purely Indian commerce, while simultaneously distinguishing how it intends to exercise its authority to regulate interstate and foreign commerce, as well as Indian commerce that begins or ends in a state and outside of Indian country, for purposes of the PACT Act. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring).

The PACT Act distinguishes between the terms "State" and "Indian country." In defining the term "interstate commerce," Congress intended "States" and "Indian country" to refer to separate places, to be treated differently.

The Act defines the term "State" as: "each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States." 15 U.S.C. § 375(11).

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[6] The committee report to accompany H.R. 4081 for the 110th Congress, reporting the proposed PACT Act findings of the House Judiciary Committee, stated that Congress' constitutional authority for this bill was the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *See* H.R. Rep. No. 110-836, at 22 (2008).

"Indian country" is defined in the Act (in relevant part) as having the meaning given under the Indian country statute, 18 U.S.C. § 1151:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151; *see* 15 U.S.C. § 375(7).

The Act's carefully crafted definition of "interstate commerce" contemplates three *specific* types of commercial transactions:

- Commerce between a state and any place outside of a state;
- Commerce between a state and any Indian country in a state; or
- Commerce between points in the same state but through any place outside of the state or Indian country.

See 15 U.S.C. § 375(9)(A). The definition does not include Indian commerce from Indian country to Indian country. This distinctive definition indicates that Congress understood its constitutional responsibility to regulate commerce among tribes, and that it chose to retain that authority exclusively.

The legislative history reinforces this interpretive approach, which begins with the PACT Act's original introduction in the 108th Congress and continues through its enactment in the 111th Congress. As discussed *supra*, Senator Kohl, in

floor remarks introducing final passage of the PACT Act in the U.S. Senate, stated that the bill was written to be "strictly neutral in regards to tribal sovereignty and tribal immunity rights. The PACT Act would neither expand nor contract the current scope of tribal sovereignty and immunity, as determined by Federal statute and judicial interpretations." 156 Cong. Rec. S1487.

In short, Congress intended to ensure that the historical legal *status quo* was preserved: that states have no authority to regulate this type of commerce by Indians in Indian country without express authorization. In other words, Senator Kohl's statement provides clear evidence that Congress did not intend the PACT Act to give such authority to the states. As a result, Congress chose to define "interstate commerce" to exclude transactions beginning and ending at locations in Indian country.

Notably, no provision of the PACT Act prohibits New York from enforcing the Act with respect to any of the three specific "interstate commerce" transactions defined as reportable and enforceable by a state. Congress authorizes New York to enforce PACT Act provisions when shipments occur from reservations located within New York's exterior boundaries to off-reservation points within New York. Thus, New York urges this Court to imply greater authority than the statute plainly provides due to their impatience to take enforcement action.

Also persuasive is a separate yet related provision in the amendments to the CCTA, 18 U.S.C. §§ 2341-2346, made contemporaneously to the efforts to amend the Jenkins Act. S. Rep. No. 110-153, at 6 (2007) (noting "amendments strengthening the CCTA were included in earlier versions of the PACT Act"). Congress also prioritized the preservation of Indian sovereignty and continued federal enforcement authority in Indian country in the amendments to the CCTA. For instance, in 2006, amendments to the CCTA provided that no civil action may be commenced by a state or local government against an Indian tribe or Indian in Indian country for violations of the CCTA. 18 U.S.C. § 2346(b)(1); *see also City of New York v. Milheim Attea & Bros., Inc.*, 55 F. Supp. 2d 332, 346 (E.D.N.Y. 2008). (The CCTA, like the PACT Act, also defines "Indian country" by reference to 18 U.S.C. § 1151. *See* 18 U.S.C. § 2346(b)(1).)

New York and the United States, as *amicus*, argue that that the statute's definition of "interstate commerce" is ambiguous on its face. They resolve the claimed ambiguity with an interpretation that provides states more authority than the plain meaning of the statute expressly granted, because they urge this Court to ignore the legislative history that tribal sovereignty and immunities remain *status quo*. This Court should be unpersuaded. The legislative history shows the overriding purpose of the PACT Act was to address internet, mail, and other consumer sales of cigarettes and provide law enforcement more tools to combat international terrorism. In this

context, the Act purposefully avoids granting authority to states to enforce the Act between Indians in Indian country.

For these reasons, the plain language of the PACT Act, as well as its legislative history, show that the Act carefully distinguishes reportable interstate commerce from Indian commerce in Indian country and favors federal enforcement in this commerce setting, rather than delegating new, intrusive authority to states.

IV. The interpretation offered by the State of New York and the United States leads to absurd Indian policy results and fails to consider Congress' authority to regulate Indian affairs and Indian commerce in the context of Indian territories.

The Court might also consider the natural and logical conundrum of New York's and the United States' interpretive approach to "interstate commerce" in the PACT Act, an approach that *creates* ambiguity and uncertainty. This ambiguity and uncertainty will lead to further challenges to the scope and meaning of interstate commerce under the PACT Act, especially for tribes whose Indian country straddles state boundaries or whose Indian country and reservation lands are scattered or checkerboarded.

For example, the Navajo Nation occupies a large territory in the southwestern United States. The Navajo Treaty of 1868, 15 Stat. 667, *ratified* July 25, 1868, created the Navajo Indian Reservation from unceded lands in what later became Arizona and New Mexico. Many of the ceded lands were later restored to the Navajo Nation, such that the New Mexico and Arizona as well as Arizona and Utah

boundaries cross the Navajo Reservation. New York's interpretation of interstate commerce under the PACT Act raises substantial questions related to the intent of Congress to regulate commerce in Indian country when an *intra*-tribal commercial transaction occurs across a state boundary. Could New Mexico or Arizona or Utah seek PACT Act enforcement of Indian commerce, by Navajo Indians, between places within the Navajo territory that might cross these State boundaries? What if that intra-tribal Indian commerce never leaves Indian country? NCAI believes the plain language of the statute and its legislative history reflect that Congress did not intend states to regulate Indian commerce within Indian country that intersects state boundaries.

New York's interpretation of interstate commerce under the PACT Act also raises substantial questions related to the intent of Congress to regulate commerce in Indian Country when an *inter*-tribal commercial transaction occurs across a state boundary. For instance, the Cheyenne River and the Standing Rock Sioux Reservations are located directly adjacent to one another within the State of South Dakota, and the Standing Rock Sioux Reservation extends across the border into the State of North Dakota. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980) (recounting the history of the Great Sioux Reservation and describing the history of the Treaty of Fort Laramie of April 29, 1868, 15 Stat. 635).

Under New York's reading of the PACT Act's definition of interstate commerce, did Congress intend North Dakota to have authority to enforce the PACT Act when Indian commerce arrives on the North Dakota portion of the Standing Rock Reservation directly from the Cheyenne River Reservation? Did Congress intend for South Dakota to have enforcement authority for Indian commerce between the Cheyenne River Reservation and the South Dakota portion of the Standing Rock Reservation?

The United States argues that interstate commerce under the Act would allow PACT Act enforcement of Indian commerce between two reservations that are coterminous or are within the interior boundaries of a state. *See* Doc. 113 at 10. NCAI believes the plain language of the statute and its legislative history reflect that Congress did not intend to grant states enforcement authority over Indian commerce among coterminous tribes within the borders of a state or through Indian country to Indian country coterminous with a state boundary. *See* Doc. 113 at 8, 10-15.

Perhaps more complex are implications concerning how a state may enforce the PACT Act when Indian commerce by a single Indian tribe occurs between checkerboarded Indian country. For instance, two Presidential Executive Orders issued in 1876 and 1877 formally established the Agua Caliente Reservation in California. The Agua Caliente Band of Cahuilla Indians' reservation consists of approximately 31,396 acres interspersed in a checkerboard pattern amidst several

cities within Riverside County, including Palm Springs, Cathedral City, and Rancho Mirage. *See Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971). Given New York's and the United States' approach to interstate commerce, would the State of California have PACT Act enforcement authority if a tribe whose lands are checkerboarded legally manufactured cigarettes in one place with Indian country status and transported those cigarettes to another Indian country location?[7]

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[7] In addition to the examples discussed, there are countless situations throughout Indian country that present similar problems. Over a dozen reservations cross state borders, including the Colorado River Indian Reservation (California and Nevada), Duck Valley Reservation (Nevada and Idaho), Fort McDermitt Reservation (Nevada and Oregon), Fort Mojave Indian Reservation (California, Arizona and Nevada), Fort Yuma Reservation (California and Arizona), Goshute Reservation (Nevada and Utah), Iowa Tribe of Kansas and Nebraska Reservation (Kansas and Nebraska), Sac and Fox Reservation (Kansas and Nebraska), Sisseton Wahpeton's Lake Traverse Reservation (South Dakota and North Dakota), St. Croix Chippewa Reservation (Wisconsin and Minnesota), Ute Mountain Ute Reservation (Colorado, New Mexico and Utah), Washoe Reservation (California and Nevada), Winnebago Reservation (Nebraska and Iowa), and Zuni Pueblo (Arizona and New Mexico). The Quapaw Tribe of Oklahoma operates a gaming facility on its trust land that crosses the Kansas-Oklahoma border. Some reservations share international boundaries, including the Blackfeet Indian Reservation in Montana (bordering Canada), St. Regis Mohawk Reservation in New York (bordering Canada), and Tohono O'odham Nation Reservation in Arizona (bordering Mexico). Some reservations were conceived as checkerboarded Indian country (such as Agua Caliente and the Torres-Martinez Indian Reservation), while other parts of Indian country have become riddled with non-Indian land or divided into islands of Indian country through diminishment of reservations, allotments of reservation land, or off-reservation allotments over which a tribe has control. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 446-47 (1975) (explaining that tribal government possesses jurisdiction over "retained allotments" but not over unallotted lands of "terminated" reservation); *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1135-38 (10th

New York's and the United States' arguments have significant policy implications to the PACT Act's application nationwide and throughout Indian country. Their interpretative approach to the PACT Act's specific definition of interstate commerce creates additional ambiguity and uncertainty for tribes whose Indian Country crosses state boundaries and whose lands are checkerboarded. This Court should reject New York's approach and affirm the lower court.

CONCLUSION

Traditional Indian law principles and precedent, as well as the directives of section 5 of the PACT Act guide this Court to interpret the PACT Act in favor of Indian sovereignty and Indian immunities and affirm the lower court's ruling.

The legislative history shows the overriding purpose of the PACT Act was to address internet sales (and similar remote sales) of cigarettes to consumers and to provide law enforcement tools to battle international terrorist financing. Most importantly, the Act purposefully avoids granting authority to states to enforce the Act in Indian country, providing no express authorization to states to regulate tribal point-to-point Indian commerce between a tribe's Indian country and another tribe's Indian country.

Cir. 2010) (outlining various origins of checkerboarding of parts of the Navajo Indian Reservation); *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385-86 (10th Cir. 1996) (holding that off-reservation allotted lands constitute Indian country over which Cheyenne-Arapaho Tribes of Oklahoma have jurisdiction).

Hence, the Act's plain language and its legislative history show Congress has carefully distinguished reportable interstate commerce, where state enforcement authority exists, from Indian commerce in Indian country, where the Act favors federal enforcement. This Court should affirm this aspect of the lower court's judgment.

Respectfully submitted,

Dated: July 27, 2018

s/ John M. Peebles
John M. Peebles

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 29(a)(5) and Fed. Rule App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. According to the word count of Microsoft Word, the brief contains 6,971 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

s/ John M. Peebles
John M. Peebles

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ John M. Peebles
John M. Peebles

APPENDIX

A-1

NATIONAL CONGRESS OF AMERICAN INDIANS

EXECUTIVE COMMITTEE

PRESIDENT
Tex G. Hall
Mandan, Hidatsa, and Arikara Nation

FIRST VICE-PRESIDENT
Joe A. Garcia
Ohkay Owingeh
(Pueblo of San Juan)

RECORDING SECRETARY
Juana Majel
Pauma-Yuima Band of Mission Indians

TREASURER
W. Ron Allen
Jamestown S'Klallam Tribe

REGIONAL VICE-PRESIDENTS

ALASKA
Edward K. Thomas
Tlingit and Haida Tribes

EASTERN OKLAHOMA
Jefferson Keel
Chickasaw Nation

GREAT PLAINS
Harold Frazier
Cheyenne River Sioux Tribe

MIDWEST
Gordon Adams, Jr.
Bois Forte Band of Chippewa Indians

NORTHEAST
Kevin Seneca
Seneca Nation

NORTHWEST
Ernie Stensgar
Coeur d'Alene Tribe

PACIFIC
Leslie Lohse
Paskenta Band of Nomlaki Indians

ROCKY MOUNTAIN
Geri Small
Northern Cheyenne Tribe

SOUTHEAST
Eddie Tullis
Poarch Band of Creek Indians

SOUTHERN PLAINS
Zach Pahmahmie
Prairie Band Potawatomi Nation

SOUTHWEST
John F. Gonzales
San Ildefonso Pueblo

WESTERN
Arlan Melendez
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12/08/2003

The Honorable Bill Frist
Majority Leader

The Honorable Tom Daschle
Minority Leader

The Honorable Orin Hatch
Chairman

Committee on the Judiciary

The Honorable Herbert Kohl
Ranking Member, Subcommittee on Antitrust
Competition Policy and Consumer Rights
Committee on the Judiciary

The Honorable Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs

United States Senate
Washington, DC 20510

The Honorable Daniel K. Inouye
Vice Chairman
Committee on Indian Affairs

United States Senate
Washington, DC 20510

Re: Proposed Amendments to S. 1177 to Address Tribal Concerns

Dear Senators:

I write on behalf of the National Congress of American Indians to provide our views on the S. 1177, the Prevent All Cigarette Trafficking Act ("PACT Act"), as it is proposed for amendment. The Senate Committees on Judiciary and Indian Affairs, along with the National Association of Attorneys General, Campaign for Tobacco Free Kids, tribal governments and NCAI have worked together to develop changes in the bill language to address a number of tribal concerns raised since the bill was originally reported. These efforts have resulted in improvements to the bill and we want to thank all of these parties for their efforts to address tribal concerns in S. 1177.

As you know, the sponsors want to move quickly on the legislation and may seek unanimous consent to pass the amended version of S. 1177 this week. NCAI has continued to respond to the legislation, but tribes remain concerned that this legislation has not had the benefit of hearings or the opportunity to develop a legislative record. Internet sales of cigarettes and enforcement of state and tribal taxing authority in interstate commerce are complex issues that deserve thorough consideration from the Senate.

NCAI member tribes passed a recent resolution opposing S. 1177, but before the new tribal amendments were developed (see attached). It is important to emphasize that our resolution does not object to more effective federal enforcement of the Jenkins Act and the Contraband Cigarette Trafficking Act. Instead, in the resolution tribes expressed concerns about (1) new provisions for state enforcement that would violate fundamental principles of federal Indian law, (2) impairment of tribal governments ability to collect revenue from cigarette taxes in order to provide services to their communities, and (3) protecting the tax compacts and agreements that tribes and states have worked so hard to create in each state.

After having an opportunity for review of the proposed Manager's amendments, we have found two important but readily fixable issues that should be addressed before the legislation receives consideration by the Senate.

First, all of the parties have agreed that this legislation should not extend any new state enforcement authority over Indian tribes and tribal members. The proposed amendment leaves room for uncertainty that was not intended. We would like to add a provision to the legislation to the effect that this Act "does not extend state enforcement authority within Indian country."

Second, the bill authorizes state, tribal and local governments to create lists of compliant and non-compliant delivery sellers -- with penalties for common carriers who make deliveries to consumers from non-compliant delivery sellers. The listing provisions do not contain due process protections for sellers or remedies for erroneous lists. We would propose a new Section 2(e)(3): "Delivery sellers not listed as compliant or listed as non-compliant shall have the right to appeal that determination to the federal district courts."

With these two changes to the proposed tribal amendments, NCAI will not oppose passage of S. 1177. However, we continue to ask that Congress take the time to hold hearings to consider this bill fully. We hope for a more considered process so that we can address underlying issues of dual taxation and public health in Indian country. As always, we greatly appreciate your support for Indian country, and your efforts on our behalf.

Sincerely,

Jacqueline L. Johnson

A-2

NATIONAL CONGRESS OF AMERICAN INDIANS

EXECUTIVE COMMITTEE

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March 4, 2004

Chairman F. James Sensenbrenner Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Ranking Member John Conyers Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Representative Mark Green
1314 Longworth Building
U.S. House of Representatives
Washington, D.C. 20515

Representative Marty Meehan
2229 Rayburn Building
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2824 - Reiterating NCAI's Support for Federal Enforcement and Opposition to State-Driven Enforcement in Indian Country

Dear Gentlemen:

On behalf of the National Congress of American Indians, I write regarding what appears to be a significant misunderstanding of our letter of January 20, 2004 on H.R. 2824. In that letter, I stated NCAI's support for more effective federal enforcement of the Jenkins Act, and strong opposition to state enforcement against an Indian nation or within a reservation. The federal government fulfills the responsibility of regulating commerce on Indian reservations under the U.S. Constitution and longstanding principles of federal Indian law that protect tribal sovereignty and preserve the culture and traditions of Indian communities. As the Supreme Court stated in *U.S. v. Kagama*, 118 U.S. at 383-384: "Indian tribes…owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."

Understanding the concern of the sponsors that the federal government has not adequately enforced the Jenkins Act either inside or outside of Indian country, in our January 20 letter we catalogued solutions that will ensure federal enforcement of the Jenkins Act without compromising tribal government rights. One of the solutions we listed is found in existing law:

> 28 U.S.C. 543 grants the U.S. Attorney General broad authority to appoint Special Assistant United States Attorneys ("SAUSA") any time "public interest so requires." State attorneys are designated as SAUSAs on a regular basis, particularly for drug enforcement programs. This is an enforcement alternative for the Jenkins Act that has not been utilized but is available under current law and would retain federal enforcement in Indian country. H.R. 2824 could assist states in working with the U.S. Attorneys offices to gain SAUSA positions for Jenkins Act enforcement.

Specifically, our idea was that the Congressional report on H.R. 2824 could reference 28 U.S.C. 543. Please see the attached memorandum where this concept first surfaced in October of 2003. This is an enforcement option that is available under current law so no new legislation is needed.

We have definitely not supported anything like the concept that is currently being floated by Congressman Green:

> (b) NOTICE – No attorney general of a state may commence an action pursuant to subsection (a) against any governmental entity unless such attorney general first gives notice of his intent to commence the action to the Attorney General of the U.S. and the AG of the US has deputized such attorney general as a special assistant US Attorney for the limited purpose of commencing and prosecuting actions to enforce this Act on behalf of the U.S. Within 30 days of such notice, the AG of the US shall either:
>
> (i) commence an action against the persons named in the notice for the violations described in the notice; or
>
> (ii) deputize the AG of the state as a special assistant US attorney for the limited purpose of commencing and prosecuting action to enforce this Act on behalf of the U.S. If the AG of the US deputizes the AG of the state pursuant to this subsection, in any subsequent actions to enforce this Act the state AG shall also be entitled to establish and collect, on behalf of his state, all State damages.

Under this provision, a State Attorney General would provide notice to the U.S. Attorney General, and within 30 days of such notice, the U.S. Attorney General would be required to either commence an action or deputize the State Attorney General as a Special Assistant United States Attorney.

The legislation is unconstitutional as it would seriously infringe on powers conferred on the Executive Branch. The President has the exclusive power under the Constitution to "take care that the laws be faithfully executed, and shall Commission all the Officers of the United States.". U.S. Const. art. II, § 3. Congress does not have the authority to create its own enforcement officers or to interfere in the Attorney General's exercise of prosecutorial discretion. *See*, *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2142-2146 (1992).

Nor could we ever support legislation that would single tribal governments out for disparate treatment as this proposal does. Right now, the U.S. Attorney General has the authority to appoint Special Assistant United States Attorneys whenever the "public interest so requires." It is blatantly discriminatory to target Indian tribes for a special level of prosecution above all others.

We believe that the Committee may be overlooking solutions that will ensure compliance with the Jenkins Act without compromising tribal government rights:

1) In a report released in August 2002, the Government Accounting Office pointed out that the FBI has taken on increased responsibility for Homeland Security and has little incentive to enforce misdemeanor Jenkins Act violations. The GAO recommended that the penalties for the Jenkins Act be increased from a misdemeanor to a felony, and that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE) be given the responsibility for administering and enforcing the Jenkins Act. We believe – as does the Senate – that ATFE will enforce the Jenkins Act if these remedies are put in place.

2) State enforcement provisions outside of Indian country will promote a federal focus on enforcing in Indian country. The Senate bill also includes provisions in Section 2(e) that give 50 percent of any criminal and civil penalties collected in enforcing the Jenkins Act to the Department of Justice for purposes of enforcing the Jenkins Act, and half of this goes specifically to the agency responsible for the enforcement action. This provides both resources, incentive and focus to ensure federal enforcement of the Jenkins Act. . These revenue provisions are not included in H.R. 2824.

3) The federal government is currently enforcing the Jenkins Act in Indian Country. Just last year, in *U.S. v. 1,920,000 Cigarettes*, 2003 WL 21730528 (W.D.N.Y. 2003), the U.S. brought forfeiture proceedings against cigarettes bound for an Indian owned retailer on the Seneca Cattaraugus Reservation. The government alleged that the cigarettes were subject to seizure and forfeiture because they were traceable to the proceeds of a wire fraud scheme involving Jenkins Act violations. Jenkins Act violations served as the basis for alleging violations of the federal wire fraud statutes, and resulted in enforcement.

4) Although the proponents of H.R. 2824 use concerns about sales to minors as a primary argument, nothing in the bill addresses age verification. Tribes support age verification procedures for cigarettes sales.

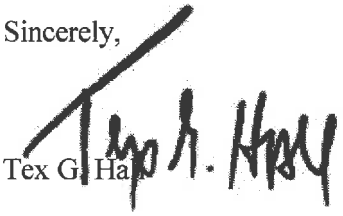
5) Finally, tribes would prefer to ban all cigarette sales over the internet or through the mails, rather than establish a precedent that allows state governments to exercise jurisdiction over tribes.

As mentioned in our letter of February 25, 2004, we continue to be concerned with bill's definitions of the terms "person," "interstate sale of cigarettes or smokeless tobacco," and "interstate and foreign commerce." Because there seem to be so many misunderstandings about the effect of this bill in Indian country, we strongly support the referral of this bill to the House Resources Committee so that these issues can be fully addressed by the Committee with jurisdiction and expertise on Indian tribal matters.

NCAI is supporting changes in the law to strengthen federal enforcement of the Jenkins Act so long as it does not discriminate unfairly against reservation-based retailers. We ask that you

share our goal to protect the status of tribal governments that Congress has upheld under the laws of the United States for over 200 years. We look forward to continuing this important dialogue.

Sincerely,



Tex G. Hall

cc: Richard Pombo, Chairman, House Resources Committee
Nick Rahall, Ranking Member, House Resources Committee
J.D. Hayworth, Co-Chair, House Native American Caucus
Dale Kildee, Co-Chair, House Native American Caucus

A-3

United States Senate

COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510–6450
http://indian.senate.gov

March 3, 2004

The Hon. Orrin Hatch
Chairman
Judiciary Committee
U.S. Senate
Washington, D.C. 20510

The Hon. Patrick Leahy
Ranking Member
Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Chairman Hatch and Senator Leahy:

On December 9, 2003, the Senate passed the *Prevent All Cigarette Trafficking Act* (S.1177) to end the use of the Internet for cigarette trafficking and tobacco tax avoidance, and to prevent minors from obtaining tobacco they otherwise cannot purchase in person.

You will recall that our support for the bill was forthcoming only after months of delicate negotiations on the issues of tribal authority, fundamental tribal rights, and long-standing principles of Federal Indian law and policy. We supported passage of S.1177 and remain committed to the goals of the bill.

We are concerned, however, about the House counterpart to S.1177, the *Internet Tobacco Sales Enforcement Act* (H.R.2824) because it fails to recognize and preserve these same tribal rights and legal principles and, in fact, would substantially impair tribal authority under current law.

We find no sound basis in law or fact to reject the legal and policy framework contained in S.1177 in favor of the significant departures from current law

contained in H.R.2824 and for these reasons we strongly encourage you and the House - Senate Conference to retain the language of S.1177 affecting tribal authority and sales on tribal lands.

Thank you in advance for your consideration of our concerns on this important matter.

Sincerely,

Ben Nighthorse Campbell
CHAIRMAN

Daniel K. Inouye
VICE CHAIRMAN