No. 00-709

In the Supreme Court of the United States

B&G ENTERPRISES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 42 U.S.C. 300x-26(a)(1), a State that receives a federal block grant for the purpose of substance abuse prevention and treatment must "ha[ve] in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." The State of California had such a law in effect before Section 300x-26 was enacted in 1992. In 1995, California enacted a statutory provision that restricts the location of cigarette vending machines. Petitioner sued the United States, alleging that the California provision works an unconstitutional taking of its vending machine contracts and that the alleged taking should be attributed to the federal government. The question presented is as follows:

Whether, assuming *arguendo* that the California provision effects a taking of property requiring the payment of just compensation, the taking may be attributed to the federal government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 220 F.3d 1318. The opinion of the Court of Federal Claims (Pet. App. A13-A23) is reported at 43 Fed. Cl. 523.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2000. A petition for rehearing was denied on August 22, 2000 (Pet. App. A24). The petition for a writ of certiorari was filed on November 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress amended the Public Health Service Act, 42 U.S.C. 201 *et seq.*, and established the Substance Abuse and Mental Health Services Administration (SAMHSA) as an agency of the Department of Health and Human Services (HHS) and the Center for Substance Abuse Treatment as an agency of SAMHSA. See ADAMHA Reorganization Act, Pub. L. No. 102-321, § 101(a), 106 Stat. 324 (42 U.S.C. 290aa). That law gave the Secretary of HHS, acting through the Center for Substance Abuse Treatment, authority to provide block grants to States for the purpose of substance abuse prevention and treatment. See 42 U.S.C. 300x-21(b).

The law places various conditions on a State's entitlement to a block grant, see 42 U.S.C. 300x-22 to 300x-32, including the requirement that the State "ha[ve] in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," 42 U.S.C. 300x-26(a)(1). The law further requires the State to enforce its ban in a manner that can reasonably be expected to reduce the extent to which tobacco is available to persons under the age of 18. See 42 U.S.C. 300x-26(b)(1). If a State does not comply with that enforcement requirement, the law directs the Secretary to reduce the amount of the State's grant by up to 40%, depending upon the duration of a State's noncompliance with that requirement. See 42 U.S.C. 300x-26(c).

In 1993, HHS issued a notice of proposed rulemaking (NPRM), seeking comments on proposed regulations to implement Section 300x-26. HHS proposed to implement that provision by "requiring States to have in

place a law which prohibits the sale or distribution of any tobacco product to persons under the age of 18 through any sales or distribution outlet." 58 Fed. Reg. 45,156 (1993). The NPRM explained that "[t]his would include such sales or distribution from any location which sells at retail or otherwise distributes tobacco products to consumers including (but not limited to) locations that sell such products over-the-counter or through vending machines." *Ibid.* The NPRM made clear that "[b]eyond this, the Secretary does not propose specifying the provisions of the States' laws." *Ibid.* However, "a copy of a model law the States may wish to consider" was appended to the NPRM. *Ibid.*

The proposed regulation provided that to qualify for a block grant, a State must have in effect "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18 through any sales or distribution outlet." 58 Fed. Reg. at 45,173. That regulation included locations selling tobacco products over-the-counter or through vending machines within its definition of "outlet." *Ibid.* Thus, the proposed regulation tracked the language of the statute and clarified that the statutory restriction applied to tobacco products sold through vending machines. The proposed regulation did not make federal funding contingent upon a vending machine ban or restriction.

The "model" act, appended to the NPRM, banned all vending machine sales of tobacco. See 58 Fed. Reg. at 45,165. Also appended to the NPRM was a report by the HHS Office of Inspector General that discussed some of the ways in which States and localities had previously restricted minors' access to tobacco. See *id.* at 45,170-45,171. The report stated in relevant part

that "[r]estricting tobacco vending machines is the most commonly observed way States and localities limit youth access to tobacco." *Id.* at 45,170. The report observed that "[i]n addition to their State laws prohibiting the sale of tobacco to minors, 21 States and Washington DC have passed laws that restrict vending machines in some manner." *Ibid.*

The final rule implementing Section 300x-26 was promulgated in 1996. See 61 Fed. Reg. 1492. Like the proposed rule, the final rule did not make restrictions on tobacco vending machines a condition of the receipt of a federal block grant. See 45 C.F.R. 96.130.

2. When Section 300x-26 was enacted in 1992, California already had in place a law prohibiting the sale or distribution of tobacco to persons under the age of 18. See Cal. Penal Code § 308(a) (West 1999) ("Every person, firm, or corporation which knowingly sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco * * * is subject to either a criminal action for a misdemeanor or to a civil action."). In 1994, California enacted the Stop Tobacco Access to Kids Enforcement Act (STAKE). See Cal. Bus. & Prof. Code §§ 22950-22959 (West 1997). As originally enacted, STAKE did not place restrictions on the location of vending machines. The law supplemented California's existing prohibition on sales of tobacco to minors by (*inter alia*) providing authorization and funding for increased enforcement activities. STAKE included the following finding and declaration:

> The Legislature finds and declares that reducing and eventually eliminating the illegal purchase and consumption of tobacco products by minors is

> critical to ensuring the long-term health of our state's citizens. Accordingly, California must fully comply with federal regulations, particularly the "Synar Amendment," that restrict tobacco sales to minors and require states to vigorously enforce their laws prohibiting the sale and distribution of tobacco products to persons under 18 years of age.

Cal. Bus. & Prof. Code § 22951 (West 1997).[1]

In a 1995 amendment to STAKE, California enacted a restriction (but not a ban) on the placement of cigarette vending machines. The amendment made it unlawful for cigarettes and other tobacco products to be sold, offered for sale, or distributed from vending machines and similar appliances unless the machines were located within an establishment that was licensed to sell alcoholic beverages and the machines were located at least 15 feet from the establishment's entrance. See Cal. Bus. & Prof. Code § 22960 (West 1997).

3. Petitioner B&G Enterprises, Ltd., alleges that it owns and operates cigarette vending machines in business establishments in Los Angeles, California, and elsewhere in the Los Angeles metropolitan area pursuant to contracts with the establishments' owners. Pet. 6. Petitioner sued the United States in the Court of Federal Claims, alleging that it had lost vending machine placement contracts when California's vending machine restrictions went into effect on January 1, 1996, and that the loss amounted to a taking of property by the federal government.[2] Pet. App. A5.

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[1] The "Synar Amendment" is the popular name for Section 300x-26. See 144 Cong. Rec. S5728 (daily ed. June 5, 1998); 142 Cong. Rec. 1441 (1996).

[2] Petitioner also alleged that certain regulations promulgated by the Food and Drug Administration governing the location of

The Court of Federal Claims granted summary judgment for the United States on the takings claim. Pet. App. A13-A23. The court concluded that any taking that the California law might be thought to effect could not be attributed to the federal government. The court explained:

> The Government may establish conditions or standards for the states to meet to qualify for federal grants. The states are free to reject or meet those conditions. Absent some affirmative act by the Government, or compulsion or coercion, no state action that results in a taking may be attributed to the United States. HHS regulations did not compel the State of California to ban cigarette vending machines. The state made this decision on its own. The model statute created by HHS was just that—a model. The model offered suggestions that the states might wish to consider or to implement.

Id. at A23.[3]

4. The court of appeals affirmed. Pet. App. A1-A12. The court explained that California had chosen to exercise its sovereign powers to regulate cigarette vending machine locations; the State had not exercised federal power in enacting the vending machine restrictions and had not been compelled to enact such restrictions by federal law. See *id.* at A8-A10. Relying in part on this Court's decision in *Griggs* v. *Allegheny*

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cigarette vending machines constituted a taking of property by the federal government. That count was stayed pending this Court's decision in *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), and is now being litigated in the Court of Federal Claims. See Pet. App. A13 n.1.

[3] The Court of Federal Claims entered final judgment on the takings claims pursuant to that court's Rule 54(b).

County, 369 U.S. 84 (1962), the court of appeals held that any taking of property caused by the California law could not be attributed to the federal government. See Pet. App. A6-A11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court is not warranted.

1. The court of appeals correctly applied this Court's decision in *Griggs*. The petitioner in *Griggs* sued Allegheny County, Pennsylvania, alleging that the county had designed the Greater Pittsburgh Airport in a manner that took an air easement over the petitioner's private home. 369 U.S. at 84-85. The county urged that the federal government, rather than the county, should be held responsible for the taking. See *id.* at 89. The county explained that the federal grant used to develop the airport was made contingent upon the county's compliance with federal requirements, including a requirement that the county acquire such easements as might be necessary to conform to other federal specifications. See *id.* at 85-86.

This Court rejected the county's argument. The Court explained that the county had "decided, subject to the approval of the [Civil Aeronautics Administration], where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed." *Griggs*, 369 U.S. at 89. The Court explained that the United States could not be held responsible for any taking that had occurred because "[t]he Federal Government takes nothing; it is the local authority which

decides to build an airport *vel non*, and where it is to be located." *Ibid.*

Similarly here, the court of appeals correctly held that "California did not act as an agent of the United States by enacting the section 22960 vending machine restrictions and that the United States is therefore not responsible for that law's interference with [petitioner's] vending machine contracts as a matter of law." Pet. App. A8. That is so both because California was not compelled by federal law to restrict sales of tobacco products to minors, see *South Dakota* v. *Dole*, 483 U.S. 203, 209-211 (1987) (provision of federal funds to State as an inducement to enact drinking age of 21 did not amount to federal compulsion), and because even under the terms of the federal block grant program, California retained substantial latitude to devise appropriate means of preventing sales to persons under age 18.

2. Petitioner does not allege a circuit conflict, and indeed the decision below is consistent with the Fifth Circuit's decision in *Adolph* v. *FEMA*, 854 F.2d 732 (5th Cir. 1988). In *Adolph*, Louisiana property owners sued the Federal Emergency Management Agency (FEMA), alleging that flood-plain ordinances passed by the Plaquemines Parish Commission Council amounted to a taking of property. See *id.* at 733. They argued that the federal government should be held responsible for the taking because the parish had enacted the ordinances in order to be eligible to receive federally-subsidized insurance. See *id.* at 733-735.

The Fifth Circuit disagreed. The court explained that "[b]y conditioning the availability of federally-subsidized insurance upon enactment of local flood-plain management ordinances in accordance with federal standards, the [National Flood Insurance Program (NFIP)] represents a voluntary federal program." 854

F.2d at 735. The court held that "the parish was not compelled to participate in the NFIP," and that FEMA therefore "could not be charged with an unconstitutional taking of property, even if, *arguendo*, the elevation requirements otherwise could be shown to constitute an actual deprivation without compensation." *Id.* at 736. The same analysis applies here.

3. Petitioner argues that decisions within the Federal Circuit are "in a state of confusion on this issue." Pet. 9. Even if an intra-circuit conflict did exist, such a conflict is ordinarily not a basis for this Court's review because the court of appeals can reconcile its own decisions in an en banc proceeding. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, the decision below is entirely consistent with the two Federal Circuit decisions on which petitioner relies.

In *Hendler* v. *United States*, 952 F.2d 1364 (Fed. Cir. 1991), the court held that the Environmental Protection Agency, acting pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, had authorized federal and state officials to install wells on the plaintiffs' land. See 952 F.2d at 1378-1379. Based on its conclusion that "California state officials who entered onto plaintiffs' land did so under the authority granted by CERCLA," *id.* at 1379, the court held that the actions of those officials were attributable to the federal government. See *ibid.* In *Preseault* v. *United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc), the plurality applied *Hendler* and concluded that the City of Burlington had similarly made a "physical entry upon the private lands of the Preseaults, acting under the Federal Government's authority pursuant to" an order

of the Interstate Commerce Commission. *Id.* at 1551. Here, by contrast, there was no physical occupation of land and no order by a federal agency purporting to authorize California to take action under the aegis of the United States. California exercised its own sovereign power to legislate when it enacted restrictions on cigarette vending machines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

JANUARY 2001