No. 00-3410

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A.D. BEDELL WHOLESALE CO., INC.,
and **TRIANGLE CANDY & TOBACCO CO.,**
on behalf of themselves and all others similarly situated**,**

Plaintiffs-Appellants,

v.

PHILIP MORRIS, INC., R.J. REYNOLDS TOBACCO CO., INC., and **BROWN & WILLIAMSON TOBACCO CORP.**,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE NATIONAL SMOKERS ALLIANCE IN SUPPORT OF APPELLANTS

Sam Kazman
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connnecticut Ave., N.W., Ste. 1250
Washington, D.C. 20036
(202) 331-1010

Of Counsel:
Erik S. Jaffe
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Thomas C. O'Brien
36 W. 5th Street
Corning, N.Y. 14830
(607) 936-8737

Roger Pilon
Robert A. Levy
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
Counsel for Amici Curiae

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INTEREST OF *AMICI*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government and

[1] This brief is filed pursuant to the consent of all parties.

the rule of law. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely State violations of the Commerce Clause, the Compacts Clause, and the rule of law; and thus is of central interest to Cato and the Center.

The Competitive Enterprise Institute (CEI) is a nonprofit organization founded in 1984 for the purpose of advancing free market solutions to regulatory issues. CEI has focused its efforts on analyzing and publicizing the often-unrecognized effects of over-regulation, in areas ranging from antitrust law to environmental policy and public safety. CEI has been involved in the issue of tobacco regulation for over a decade and views the Master Settlement Agreement at issue in this case as an unwarranted restriction on the ability of adults to knowingly assume the risks of smoking.

The National Smokers Alliance (NSA) is a nonprofit organization founded in 1993 for the purpose of protecting the rights and defending the interests of individual adult smokers. NSA pursues this purpose through advocacy and litigation opposing unduly burdensome restrictions on smoking, disproportional and confiscatory taxes on tobacco products, and discrimination against adults who choose to smoke. NSA views the Master Settlement Agreement as a scheme to collect additional revenue for the States at the direct expense of current smokers

who are in no way responsible for the supposed wrongdoing alleged in the now-settled state lawsuits.

STATEMENT

In the midst of an aggressive and, some might say, extortionate spate of coordinated litigation against the major tobacco companies by numerous state attorneys general and their contingency-fee lawyers, the defendants in this case apparently decided to make a rather lucrative deal with their antagonists. Defendants thus agreed, with various state attorneys general and with each other, that they would pay exorbitant damages in perpetuity in exchange for assistance in cartelizing the national cigarette market. That deal was embodied in the Master Settlement Agreement (MSA), described at length in the Brief of Plaintiffs-Appellants. Simply put, the MSA is a massive conspiracy in restraint of interstate trade and violates the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq*.[2]

[2] Defendants may well have been driven to the bargaining table by the questionable legal tactics of the States. Levy, Tobacco Medicaid Litigation: Snuffing Out the Rule of Law, Cato Institute, Policy Analysis No. 275, June 20, 1997 (describing legal principles under siege by politicians willing to deny due process to industry targeted because of deep pockets, not legal culpability). But once at that table, Defendants appear to have bargained for themselves a sweetheart deal. Whatever sympathy *Amici* may have for the difficult position Defendants found themselves in, that sympathy cannot excuse the damage done to consumers and to competing tobacco companies by the resulting cartel Defendants negotiated for themselves.

Plaintiffs, independent tobacco wholesalers, sued the defendant major tobacco companies alleging various antitrust violations arising from the MSA. The district court dismissed the complaint, relying upon the state-action immunity doctrine originated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and the *Noerr-Pennington* doctrine immunizing petitioning of the government, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Slip op. at 6-10 (discussing *Noerr-Pennington*) and 10-13 (discussing *Parker*).

Regarding the *Parker* state-action doctrine, the district court held that "the conduct of entering into, executing and implementing the MSA was undertaken by the settling states functioning in their sovereign capacities," that liability for such "conduct by the states would be subject to *Parker* state action immunity," and that the coordinated conduct of Defendants in negotiating, executing, and operating under the MSA "similarly is protected under the state action immunity doctrine." Slip op. at 11-12. As for the *Noerr-Pennington* doctrine, the district court followed the example of *Hise* v. *Philip Morris, Inc.*, 46 F. Supp.2d 1201 (N.D. Okla. 1999), *aff'd*, 2000 WL 192892 (10th Cir. Feb. 18, 2000) (unpub.), and held that "Defendants' actions in negotiating and executing the MSA … fall within the category of conduct protected by the *Noerr-Pennington* immunity doctrine and are not subject to the 'sham' exception" to that doctrine. Slip op. at 10.

This brief will focus on a basic error in applying the *Parker* and *Noerr-Pennington* immunity doctrines to Defendants: The doctrines do not immunize private parties acting pursuant to or promoting supposed state action *that is itself unlawful and beyond the sovereign powers of the States*. In this case, the MSA unconstitutionally encroaches upon the enumerated federal power to regulate interstate commerce, it interferes with federal legislation, and it constitutes an unapproved, and hence unconstitutional, interstate compact or agreement. Such invalid state action confers no immunity under *Parker* and is not a valid object of any supposed petitioning activity under *Noerr-Pennington*.

ARGUMENT

I. THE MSA IS NOT VALID STATE ACTION IMMUNIZED BY *PARKER* V. *BROWN*.

The state-action immunity doctrine formulated in *Parker* v. *Brown* maintains that the Sherman Act was not intended "to restrain state action or official action directed by a state." 317 U.S. at 351. Thus, where California had established a regulatory program designed to stabilize agricultural prices, the *Parker* Court found that the State "made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign*, imposed the restraint *as an act of government* which the Sherman Act did not undertake to

prohibit." *Id*. at 352 (emphasis added).[3] Subsequent cases recognize that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

As a corollary to the *Parker* state-action doctrine, the Supreme Court has allowed private parties acting under compulsion or direction of a sovereign act of a state government to claim the immunity bestowed upon the governmental act itself. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56-57 (1985). It was this form of derivative immunity that was asserted by Defendants and found by the district court. But a predicate to derivative *Parker* immunity is that the supposed "state" action anchoring the immunity actually be a valid "act of government" within the power of the State "as sovereign." Action that exceeds a State's "sovereign" authority does not implicate *Parker*'s concern with protecting state sovereignty. Immunizing otherwise illegal conduct based on such invalid action undermines the boundaries of the dual federal/state system.

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[3] Significantly, the MSA involved the making of a "contract or agreement … in restraint of trade," which *Parker* presumably would deem invalid. *See Parker*, 317 U.S. at 351-52 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, … and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade").

In discussing a Commerce-Clause challenge to the state program at issue in *Parker*, the Supreme Court described the familiar bounds of state sovereignty in a manner equally relevant to the state-action doctrine:

> The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution, or as this action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.

317 U.S. at 360-361. In this case, the multi-state action embodied by the MSA exceeds the bounds of state sovereignty in a variety of ways: It constitutes extraterritorial action encroaching upon Congress's enumerated power to regulate interstate commerce; it interferes with congressional legislation governing the interstate tobacco trade; and it violates the constitutional prohibition against interstate compacts or agreements not approved by Congress. For each of these reasons, the MSA is not a valid "act of government" imposed by a State "as sovereign," and thus cannot immunize the conduct of Defendants in violation of the Sherman Act.

A. THE MSA ENCROACHES ON ENUMERATED NATIONAL POWERS.

The MSA cannot confer *Parker* state-action immunity because it unduly encroaches upon the enumerated federal power over interstate commerce. U.S. Const., art. I, sec. 8, cl. 3. In reaching beyond the valid scope of "sovereign" state

action, state involvement in the MSA cannot protect Defendants' anti-competitive conduct.

The MSA is a regulation of interstate commerce in tobacco. The Supreme Court "long has recognized that [the Commerce Clause's] affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy* v. *Beer Institute*, 491 U.S. 324, 326 n. 1 (1989). And one of the core tenets of this limitation on state authority is the Supreme Court's "established view that a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id*. at 332.

The MSA constitutes "extraterritorial regulation of interstate commerce," *id*., by the settling States that interferes with such commerce in several ways. First, the MSA prohibits any non-participating tobacco company from selling tobacco products in any settling State unless it joins the MSA or makes substantial payments into a 25-year escrow as "security" against possible liabilities in the future. *See* MSA Exhibit T. [JA 244.] This squarely conflicts with the Commerce Clause, which "dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337.

Second, each settling State effectively collects money from consumers in other States. At the outset, it requires Defendants and others to pay "damages" based on their national, rather than local, market share. *See* MSA §§ II(mm), IX(b), and IX(c). [JA 104, 125-27.] Such damage costs, calculated on sales in all States combined, will be passed on to consumers in every State, including consumers in States that do not participate in the MSA. Indeed, by including the vast majority of States in the agreement, the MSA is able to create a national tobacco cartel that will have little problem controlling prices and output even in a non-participating jurisdiction. Consumers in non-participating States thus will be charged the same monopoly prices as in the settling States.[4] Even in the settling States themselves, the supposed consent of each State to such cross-border "taxation" does not lessen the encroachment on federal prerogatives regarding interstate commerce.

Third, the MSA essentially limits sales and market share, with damages imposed on companies for exceeding such limits. MSA §§ IX(i)(1) and IX(i)(2).

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[4] The damages effectively imposed by the MSA on consumers in each State are, as a practical matter, the same as national sales taxes. In addition to posing a Commerce-Clause problem, that *de facto* national taxation treads upon Congress's taxing power. U.S. Const., art. I, sec. 8, cl. 1.

[JA 137-38.][5] Those damages, in turn, are received by all settling States, regardless of the distribution of sales or market share in particular States. MSA § XI [JA 150-51.] That provision starkly illustrates how the settling States can affect conditions not only "within their own territory," *Parker*, 317 U.S. at 360, but also in other States and the national tobacco market as a whole.

Fourth, the MSA penalizes States that do not adopt so-called Qualifying Statutes that "effectively and fully neutralize[] the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers … as a result of" the agreement. MSA § IX(d)(2)(E), §§ IX(d)(2)(B) & (D). [JA 131; 130-31.] That remarkable provision, having the express purpose of raising the costs of – and hence the prices charged by – Defendants' potential competitors anywhere in the nation, illustrates once again how the MSA is a direct effort to regulate the national market. At a minimum, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" and bars a State from adopting "legislation that has the practical effect of establishing a scale of prices for use in other states," *Healy*, 491 U.S. at 336 (citations and

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[5] The formula for damages also precludes price competition because any gain in market share due to lower prices increases a company's damage payments. A loss in market share reduces such payments by an even greater percentage than the loss of share. MSA §§ IX(c), IX(d). [JA 126-36.]

quotation marks omitted). Yet the MSA burdens interstate commerce in both of these forbidden manners. Quite clearly, the MSA is more than a local regulation having some merely incidental effect on interstate commerce. *Edgar* v. *MITE Corp*., 457 U.S. 624, 641 (1982) (plurality opinion) (state statute invalid because it "directly regulates transactions which take place across state lines, even if wholly outside the State").

Overall, the MSA represents an extraterritorial regulation of interstate trade, with each settling State attempting to direct conduct in all other participating and non-participating States. Whatever the scope of a State's sovereignty within its own borders, state action projecting beyond those borders into other States, and usurping Congress's authority to regulate interstate commerce, is not properly classified as a "sovereign" act entitled to *Parker* immunity.

B. THE MSA CONFLICTS WITH CONGRESSIONAL LEGISLATION.

The MSA also exceeds state sovereignty in that it interferes with federal legislation. For example, in the Federal Cigarette Labeling and Advertising Act, Congress provided that "the purpose of this Chapter [is] to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. §1331. The Act further provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or

promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334. Notwithstanding those provisions, the MSA imposes multiple "prohibition[s]" with respect to the advertising and promotion of cigarettes. *See* MSA § III. [JA 107-16.] The MSA thus runs contrary to the requirements, and interferes with the overall purpose, of that federal legislation.

The MSA also interferes with the Sherman Act itself, by purporting to extend state-action immunity to the conduct of virtually an entire multi-billion dollar industry. The sheer magnitude and reach of the immunity asserted cuts a broad swath through the Sherman Act's protection of the national economy. While the drafters of the Sherman Act may not have contemplated restricting individual State action governing local commerce, they could never have imagined allowing the States to band together and attempt to control such a significant component of the national economy.

C. THE MSA VIOLATES THE COMPACTS CLAUSE.

Not only is the MSA a contract between the States and Defendants, it is also an agreement among multiple States. Such a multistate agreement violates the Compacts Clause of the U.S. Constitution, which states that "[n]o State shall, without the Consent of Congress…enter into any Agreement or Compact with another State." U.S. Const., art. I, sec. 10.

The Supreme Court has interpreted the Compacts Clause as prohibiting the States from forming, without the consent of Congress, "'any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.'" *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978) (quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893)); *id*. at 471 (same). Under this construction of the Clause, the "relevant inquiry must be one of impact on our federal structure." 434 U.S. at 471. In a number of ways, therefore, the analysis under the Compacts Clause tracks the analysis of state acts under other constitutional provisions or the various forms of preemption by federal laws and the Supremacy Clause. The Compacts-Clause analysis differs, however, in an important respect: While an individual State's action is invalid only if it *actually* violates other parts of the Constitution or is preempted by federal law, a compact or agreement between States requires congressional consent if it "tend[s] to the increase" of state power or if it "may" encroach upon or interfere with federal powers. 434 U.S. at 468. As the Supreme Court agreed, "the pertinent inquiry is one of potential, rather than actual, impact on federal supremacy." *Id*. at 472.[6]

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[6] Placing the burden on the States to obtain approval of constitutionally suspect action when done through compact or agreement – rather than the usual presumption of validity for individual state action – makes considerable sense given that interstate agreements necessarily implicate matters beyond any given

There is no dispute that the MSA lacks congressional consent. Congress was not asked to consent to the MSA and specifically declined to consent to its precursors. As described in Plaintiffs-Appellants' Brief, the States and Defendants requested congressional approval of two predecessor agreements to the MSA – the "Resolution" and the McCain Bill. Both requests were rejected. Indeed, not only did Congress not consent to the MSA and its immediate precursors, but in the Tobacco Control Act, which permits selected compacts among tobacco-producing States, Congress expressly disavowed consent to "any compact for regulating or controlling the production of, or commerce in, tobacco for the purpose of fixing the price thereof, or to create or perpetuate monopoly, or to promote regimentation." 7 U.S.C. § 515.

Nonetheless, without congressional approval, the settling States and Defendants went forward with the MSA. In assessing compliance with the Compacts Clause, therefore, the question remaining is whether the MSA tends "to the increase of political power in the states, which may encroach upon or interfere

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State's sovereign interests. And there is a long history in our law of viewing collective action such as agreements, combinations, and conspiracies with greater concern than we view individual action.

with the just supremacy of the United States." Applying that test, the MSA unambiguously violates the Compacts Clause.[7]

First, the MSA enhances the political power of the settling States by effectively taxing consumers in other States, as described above. And unlike the situation in *Multistate Tax Commission*, the MSA "purport[s] to authorize the member States to exercise … powers they could not exercise in its absence." 434 U.S. at 473. Indeed, the very restriction on state power that induced the Multistate Tax Compact – requiring state taxation of income from interstate operations to be fairly apportioned to the local activities of a corporation, 434 U.S. at 456 – is effectively circumvented by the MSA's provisions awarding damages and requiring payments based on activities occurring, in some instances, entirely in other States and not fairly apportionable to the State receiving payments.

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[7] There is no credible question that the MSA constitutes joint multistate action, as opposed to coincidentally parallel individual state action. The state attorneys general themselves recognize that they are acting pursuant to an agreement among the States as well as with Defendants. *See* Brief of *Amici Curiae* State Attorneys General, *A.D Bedell Wholesale Co.* v. *Philip Morris, Inc.*, No. 99-558, at 1-2 (W.D. Penn. Sept. 17, 1999) ("the tobacco defendants and the States concluded their cases with an historic settlement, embodied in a Master Settlement Agreement"). Furthermore, the Supreme Court has recognized that "the mere form of the interstate agreement cannot be dispositive" because "[a]greements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.'" *Multistate Tax Comm'n*, 434 U.S. at 470 (footnote omitted).

Second, the MSA enhances the political power of the settling States by collectivizing their enforcement mechanisms and providing them with a national litigating arm that in essence competes with the Department of Justice and the various U.S. Attorneys' Offices. In *Multistate Tax Commission*, the Court expressly noted that there was no "delegation of sovereign power to the Commission" because "each State retains complete freedom to adopt or reject the rules and regulations of the Commission." 434 U.S. at 473. Here, by contrast, the settling States delegate power to the Firm, MSA § IX(d)(1)(C) [JA 128-29], to set the level of damage payments if a company loses market share, and to adjudicate whether each State has enacted a satisfactory Qualifying Statute that entitles the State to its full share of monopoly profits, MSA § IX(d)(2)(G) [JA 131-32]. *Cf.* 434 U.S. at 479 ("it is only the individual State, not the Commission, that has the power to issue an assessment"). The Settling States also delegate to the National Association of Attorneys General (NAAG) the power to determine how to use the $50,000,000 enforcement fund. MSA § VIII(c). [JA 124-25.][8]

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[8] The MSA also differs from the Multistate Tax Compact in that participation in the MSA by each State is not entirely voluntary. Severe penalties are assessed against any settling State that does not adopt a Qualifying Statute in conformity with the MSA, § IX(d)(2)(E) [JA 131], or that does not participate in the MSA at all, MSA § II (qq). [JA 105.]. A settling State whose Qualifying Statute is unsatisfactory may be penalized by loss of up to 65% of its damages payments, pursuant to a determination made by the Firm. MSA § IX(d)(2)(F). [JA 131.] And a non-participating State still has its citizens "taxed," via monopoly pricing, to

Third, as described in Part IA, *supra* at 7-11, the MSA encroaches upon and interferes with federal prerogatives by regulating interstate commerce in tobacco. Even if the court were to find that the MSA does not facially violate the Commerce Clause, there can be no dispute that, at a minimum, the MSA raises a potential or possible interference with federal constitutional powers. In the context of the Compacts Clause, that potentiality is sufficient to trigger the requirement of congressional approval. 434 U.S. at 472. Absent such approval, even a borderline act, if undertaken pursuant to a compact or agreement between States, is unconstitutional.

Fourth, the MSA may encroach upon and interfere with federal prerogatives by purporting to immunize a multibillion-dollar industry from the reach of the antitrust laws. It does that by creating what amounts to an interstate public utility in tobacco, with – if one is to believe defendants regarding the degree of state supervision and control under the MSA – substantial state control over pricing, market share, and numerous other aspects of business conduct.

Fifth, as described *supra* at 11-12 & 14, the MSA encroaches upon federal legislative policies embodied in, *inter alia*, the Cigarette Labeling and Advertising Act and the Tobacco Control Act. Once again, the court need not find any actual

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pay damages to other States. Yet the non-participating State does not receive revenue commensurate with such "taxation." MSA § XI(g). [JA 150-51.]

preemption by those legislative acts in order to trigger the approval requirement of the Compacts Clause – the mere potential for such preemption or the possibility of interference is enough.

* * * *

The district court in this case merely asserted, without support, that the MSA was a sovereign act of government by the settling States. It then discussed whether that act was immune from the Sherman Act and whether such immunity extended to Defendants. But the court's asserted premise, it turns out, is wrong. The MSA is not a valid sovereign act of government, but rather an invalid instance of state overreaching.[9] Consequently, questions regarding the adequacy of state supervision or authorization of the private conduct of Defendants need never arise – an invalid state act cannot confer immunity no matter how closely that act is tied to the conduct of Defendants.

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[9] The status of the MSA as sovereign State action is particularly unpersuasive given that the MSA was negotiated and entered into by state officers, who are subject to the long-established rule set out in *Ex Parte Young*. Where a state officer acts in violation of the Constitution,

> the use of the name of the state to enforce an unconstitutional act … is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official ….

Ex Parte Young, 209 U.S. 123, 159 (1908).

II. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE PRIVATE CONDUCT PURSUANT TO OR SEEKING INVALID STATE ACTION.

The *Noerr-Pennington* immunity doctrine provides a limited exemption from antitrust liability for political activities that constitute petitioning the government. Defendants' activity likely did not constitute protected "petitioning" at all, as Plaintiffs' brief amply addresses. Still, even assuming that Defendants were petitioning the States, that activity does not immunize the *resulting* MSA. The decision in *Noerr* itself was predicated upon – and cited *Parker* for – the determination that there can be no Sherman Act violation "where a restraint upon trade or monopolization is the result of *valid* government action." 365 U.S. at 136 & n. 15 (emphasis added). And *Noerr* expressly recognized that the cases insulating government action "rest upon the fact" that the government prerogative to pass and enforce an anti-competitive law exists only "so long as the law itself does not violate some provision of the Constitution." *Id*. at 136. Thus, if the state action resulting from the petition is itself invalid, and hence unable to confer *Parker* immunity, the mere fact that it was procured through petitioning the government does not independently confer immunity. *See also, Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (immunity where

petitioning results in "'valid governmental action'" (quoting *Noerr*)). At best the *Noerr-Pennington* doctrine immunizes the request for action, not the result.[10]

CONCLUSION

The MSA is an anti-competitive contract among the States and the defendants that is destructive of competition and damaging to consumers and small tobacco companies such as Plaintiffs-Appellants. The approach used in the MSA is not merely an attack on tobacco; it will undoubtedly establish a pattern for future state compacts that address other supposed problems with the promise to fill state coffers. But the mechanism for collective state action targeted at national problems was set up over two hundred years ago, and that mechanism is the federal government – acting according to its enumerated powers and within the constraints of the Constitution. There is no room in our federal system for the States to set up

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[10] The supposed petitioning activity itself may not be immune if it was a "mere sham." *Noerr*, 365 U.S. at 144. Because Congress rejected both the Resolution and the McCain Bill, and because the Compacts Clause mandates that Congress consent to the MSA, any supposed petition to the States for MSA approval would seek unconstitutional action beyond the power of the States, and hence would be a sham. P. Areeda & H. Hovenkamp, Antitrust Law § 206(a), at 242 (rev. ed. 1997) (request "to do something that is clearly unconstitutional or unlawful is in effect filing a 'baseless' petition, which is then" treated as a sham). While the sham exception is rarely applied, it remains part of the *Noerr-Pennington* doctrine in order "to leave a safety route for condemning highly anticompetitive activities that are unjustified by the necessities of political life." *Id*. § 203, at 199. The MSA is just such a highly destructive and unjustified attempt to circumvent the Constitution and the antitrust laws for which the "sham" exemption is appropriate.

competing confederations to address each issue on which they are not satisfied with national policy.

Because the MSA is not a valid sovereign state act of government, it does not immunize Defendants' conduct under either *Parker* or *Noerr-Pennington*. The decision of the district court therefore should be reversed.

Respectfully Submitted,

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Sam Kazman
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connnecticut Ave., N.W., Ste. 1250
Washington, D.C. 20036
(202) 331-1010

Of Counsel:
Erik S. Jaffe
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Thomas C. O'Brien
36 W. 5th Street
Corning, N.Y. 14830
(607) 936-8737

Roger Pilon
Robert A. Levy
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
Counsel for Amici Curiae

July 12, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of July, 2000, I caused two copies of the foregoing Brief of *Amici Curiae* to be served by First Class Mail, postage pre-paid, on:

Alan R. Wentzel, Esq.
Windels Marx Lane & Mittendorf
156 West 56th Street
New York, NY 10019
(212) 237-1000
Counsel for Plaintiffs-Appellants

Gregory G. Katsas, Esq.
Jones, Day, Reavis & Pogue
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3463
Counsel for R.J. Reynolds Co.

Douglas L. Wald, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Counsel for Philip Morris, Inc.

Marjorie Press Lindblom, Esq.
Kirkland & Ellis
153 East 53rd Street, 39th Floor
New York, NY 10022
(212) 446-4800
Counsel for Brown & Williamson Tobacco Corp.

_____
Erik S. Jaffe

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* complies with the 7,000 word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains _____ words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word 97. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

I further certify, pursuant to 3rd Cir. LAR 28.3(d), that at least one of the attorneys whose name appear on this brief is a member or a bar of this Court, or has filed an application for admission pursuant to 3rd Cir. LAR 46.1. In particular, attorneys Thomas C. O'Brien and Erik S. Jaffe have filed applications for admission (under separate cover) in connection with this brief.

_____
Erik S. Jaffe