No. 09- 09-810

IN THE

Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Petitioner,

v.

MIKE BEEBE, in his official capacity as Attorney General, State of Arkansas,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 2002, Petitioner, Grand River Enterprises Six Nations, Ltd. ("Grand River"), commenced a lawsuit against the Attorneys General of thirty-one (31) States in federal district court in New York, challenging model legislation adopted by their respective States to implement the Tobacco Master Settlement Agreement ("MSA"). The Second Circuit Court of Appeals has twice held that Petitioner's antitrust and Commerce Clause challenges to the model legislation state a claim for relief under Fed. R. Civ. P. 12(b)(6). Although the State of Arkansas adopted the same model legislation, the Arkansas Attorney General was not included in that lawsuit, because, at that time, the State of Arkansas had not enforced, nor threatened enforcement of, the model legislation against Petitioner. In this later-filed action against the Arkansas Attorney General, the Court of Appeals for the Eighth Circuit, with one Judge dissenting, has held that challenges to the model legislation in Arkansas — challenges identical to those permitted by the Second Circuit — fail to state a claim. As such, the question presented is whether, despite the decisions of the Second Circuit holding and acknowledging that Petitioner has stated a claim pursuant to Fed. R. Civ. P. 12(b)(6) that model legislation enacted by thirty-one (31) States to implement the MSA violates the Sherman Act, the Eighth Circuit erred in affirming dismissal of Petitioner's Sherman Act challenge to the same model legislation enacted by the State of Arkansas, pursuant to Fed. R. Civ. P. 12(b)(6).

2. Whether, despite the decisions of the Second Circuit holding and acknowledging that Petitioner has stated a claim pursuant to Fed. R. Civ. P. 12(b)(6) that model

legislation enacted by thirty-one (31) States to implement the MSA violates the Commerce Clause, the Eighth Circuit erred in affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of Petitioner's Commerce Clause challenge to the same model legislation enacted by the State of Arkansas.

3. Whether the Eighth Circuit erred in ruling that the Petitioner has not pled a *prima facie* claim for violation of the Equal Protection Clause of the Fourteenth Amendment, as it alleges that the Arkansas legislation requires Petitioner to undertake the payment obligations of an MSA class of tobacco manufacturers, but does not extend to Petitioner certain benefits that inure to that same class pursuant to the terms of the MSA.

4. Whether the Eighth Circuit erred in ruling that the Petitioner has not pled a *prima facie* claim with respect to the Arkansas legislation violating substantive and procedural due process by requiring Petitioner to enter into a settlement with forty-five (45) other States and fund an escrow account for Arkansas' benefit based on Petitioner's share of the national cigarette market, and by not providing for a hearing prior to Petitioner being required to make deposits into the escrow account, with said deposits being held for twenty-five years.

5. Whether the Eighth Circuit erred in ruling the Petitioner has not pled a *prima facie* claim with respect to the Arkansas legislation violating the First Amendment by granting financial concessions and exemptions only to certain manufacturers that joined the MSA and agreed to restrict their freedoms of speech, petitioning, and association pursuant to the terms of the MSA.

LIST OF PARTIES

Southwestern Trading Co., Inc. and The Ritchie Grocer Co. were dismissed by the district court and Heber Springs Wholesale Grocery, Inc. was dismissed by the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Grand River Enterprises Six Nations, Ltd., does not have any parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock.

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OPINION BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit are reported at *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929 (8^{th} Cir. 2009) ("*Grand River II*"). That court subsequently entered an order denying Grand River's petition for a rehearing and rehearing *en banc*. The Eighth Circuit, with one judge dissenting, affirmed the decision of the United States District Court for the Western District of Arkansas, Fayetteville Division, reported at 418 F.Supp. 1082 (W.D. Ark. 2006). *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eighth Circuit's Opinion was rendered on August 4, 2009, with the order denying the petition for rehearing and rehearing *en banc* being dated, and entered on, October 1, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 15 United States Code, Section 1

Sherman Anti-Trust Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

United States Constitution, Article 1, Section 9, Clause 3

The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ark. Code Ann. § 26-57-261

See Appendix D.

STATEMENT OF THE CASE

1. *The MSA*

In November 1998, forty-six States ("MSA States") and five U.S. Territories entered into the MSA with the nation's four largest cigarette manufacturers (Original Participating Manufacturers or "OPMs").[1] The MSA settled more than forty lawsuits arising out of the OPMs' alleged fraudulent, deceitful and anticompetitive conduct. The MSA provides for the OPMs to make settlement payments to the MSA States in the aggregate amount of $206 billion over a 25 year period, and $9 billion annually thereafter. The OPMs agreed to share the cost of the settlement payments amongst themselves, based on their aggregate sales volume and respective shares of the United States market. The purpose and effect of this agreement, according to Petitioner, was and is to tie the cost and resulting pricing decisions of each OPM to the national output of the group as a whole, as well as their relative output vis-à-vis other members of the group. The OPMs also agreed permanently to cease outdoor advertising, sponsorship of certain public events, specified brand name and product promotions, lobbying for, or support of, any legislation that would abrogate MSA States' rights under the MSA, and associating through trade groups, except to the extent permitted by the MSA.

1. The OPMs are Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company.

The MSA payments are divided among the MSA States pursuant to percentages set forth in an exhibit to the MSA, which delineates each state's percentage of the payments. Each MSA State's share of the payments is commonly referred to as its "allocable share."

The OPMs refused to enter into the MSA unless the MSA payment requirements were also imposed on all other manufacturers whose cigarettes are sold in the United States. The OPMs contended that such a payment obligation was required because once they raised their prices to fund the settlement, they anticipated losing market share to manufacturers that were not subject to the MSA's payment requirements and marketing restrictions. As such, the MSA was drafted to apply to all manufacturers whose cigarettes are sold in the United States, without regard to whether a manufacturer has ever been sued for, or accused of, the conduct that give rise to the claims against the OPMs that were released by the MSA.[2]

Specifically, the MSA provides that manufacturers that are not original parties to the MSA may join the MSA as a Subsequent Participating Manufacturer ("SPM"). SPMs that joined the MSA within 90 days of its execution date ("Exempt SPMs") are exempted from making any MSA payments based on the greater of

2. No state has ever filed an action against Grand River alleging that cigarette smoking has caused the state to expend public funds on health care costs (which is the gravaman of the MSA States' actions against the OPMs) and seeking recovery of those costs.

(1) their 1998 market share or (2) 125% of their 1997 market share. A manufacturer that becomes a SPM after the 90-day deadline is not afforded any exemption and must make MSA payments on each and every cigarette it sells.

The MSA contemplates that not all manufacturers will join the MSA, and addresses their non-participation through model legislation that is an exhibit to the MSA and defined as a "Qualifying Statute." The MSA defines a Qualifying Statute as legislation "that effectively and fully neutralizes the cost disadvantages that [OPMs and SPMs] experience vis-à-vis Non-Participating Manufacturers within [the MSA] State[s] as a result of the provisions of th[e MSA]." In essence, the Qualifying Statute requires a manufacturer that is not a party to the MSA (a Non Participating Manufacturer or "NPM") to either: (1) join the MSA as a party (*i.e.*, as an SPM) and make the payments required of an SPM, or (2) remain a NPM and maintain an escrow bank account in every state in which the NPM's cigarettes are sold, into which annual payments must be made and held for the MSA State's benefit. Each annual escrow deposit is held in escrow for 25 years, and then returned to the manufacturer, unless the funds are used to satisfy a judgment or settlement against the manufacturer in a litigation brought by the state.

The MSA penalizes an MSA State that fails to enact and enforce a Qualifying Statute if, and based on the extent to which, the OPMs lose national market share. The MSA accomplishes this penalty, by providing for the loss of up to 100% of the MSA payments the State would otherwise receive (notably, even if the OPMs do not lose market share in that MSA State). By 2001, every MSA State had enacted a Qualifying Statute ("Escrow Statutes") identical to the one in the MSA. Arkansas' statute is codified at Ark. Code Ann. § 26-57-260 *et seq.* (the "Arkansas Statute").

Under the original, model form of the Arkansas Statute (and all of the Escrow Statutes), an NPM was entitled to an immediate release of escrowed funds that exceeded the amount that the MSA State would have received from that manufacturer under the MSA as an SPM.[3] *See, e.g.*, Ark Code Ann. § 26-57-261; N.Y. Pub. Health Law § 1399-pp. Accordingly, the maximum amount that an NPM was required to hold in escrow for the benefit of Arkansas due to sales in that state in any given year could not exceed the amount the State would have received from the NPM had the NPM joined the MSA – Arkansas' "allocable share."

Significantly, the Arkansas Statute also imposes escrow payment obligations on NPMs even if retailers and wholesalers independently elect to sell the NPMs'

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3. The specific provision of the Arkansas Statute provided in pertinent part:

> To the extent that [an NPM] establishes that the amount it was required to place into escrow in a particular year was greater than the allocable share for the state of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement . . . had it been an [SPM], the excess shall be released from escrow and revert back to such [NPM].

Ark Code Ann. § 26-57-261.

products in the state, and the NPM had no involvement in the sale and does not transact business in Arkansas. Thus, even if the sale of a NPM's product in Arkansas results from the actions of a third party with which the NPM has no relationship and over which it exercises no control, the sale of cigarettes within the MSA State by those third parties obligates the NPM to make the escrow deposit.

2. *The OPMs Raise Prices and Lose Market Share*

Subsequent to the execution of the MSA and enactment of the Escrow Statutes, the OPMs significantly increased their prices (by approximately 300% of that required to fund their MSA payments), which boosted their revenues to record levels, but caused them to lose approximately 7% of their market share to NPMs.[4]

However, the OPMs' declining market share adversely affected the amount of the MSA payments that the MSA States received under the MSA, as the payments are tied directly to the sales volumes and market shares of OPMs, not their profit or revenue. Hence, when OPMs sold fewer cigarettes at higher prices and lost market share, the MSA States received lower MSA payments.

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4. Prophetically, in advising Congress not to adopt the MSA in its precursor form, the Federal Trade Commission specifically warned that the anticompetitive features and consequences of that agreement would likely lead to collusive or more coordinated pricing behavior among the OPMs, with price increases being passed on to consumers as high as 300% of the settlement's costs.

3. *Amendment of the Escrow Statutes & The Arkansas Amendment*

Due to this loss of revenue, all of the MSA States (save for Missouri) enacted identical amendments to the Escrow Statutes, which are generally referred to as "allocable share amendments". In 2005, the Arkansas General Assembly enacted such an Amendment to the Arkansas Statute, Act 384 of 2005 (the "Arkansas Amendment"). As explained below, the Arkansas Amendment does not simply "neutralize" the cost disadvantages that the OPMs and SPMs supposedly experience as a result of the MSA – it effectively bars competition from the NPMs altogether, as its raises their escrow obligations to such an extent that they cannot compete with the OPMs and SPMs.

As discussed *supra*, under the original Arkansas Statute, Grand River's escrow obligation in any given year could not exceed the amount Arkansas would have received from Grand River had it joined the MSA, *i.e.*, Arkansas' allocable share. This "cap" in Grand River's escrow payments permitted Grand River to reduce its escrow payment burden in Arkansas to a point that allowed Grand River's products to compete with those of the OPMs as well as the SPMs that were given payment exemptions under the MSA.

However, due to enactment of the Arkansas Amendment (and the amendments in other MSA States) Grand River's ultimate escrow liability in Arkansas is now measured by the amount Grand River would have paid as an SPM *to all MSA States* (not just Arkansas), on account of the number of Grand River's cigarettes sold in Arkansas.[5] Thus, the Amendment incorporates the SPM payment provisions of the MSA (without the state allocable share limitation) and makes them binding on NPMs.

Significantly, SPM payments under the MSA are based on formulas that are tied to the total sales volumes of OPMs and OPM market share. Thus, if OPMs raise their prices, sell fewer cigarettes, and lose market share to SPMs and NPMs that do not similarly raise their prices, the MSA payments of SPMs and "virtual" SPM payments of NPMs (*i.e.*, the minimum escrow payments required under the Amendment) increase, both in the aggregate and on a per carton basis. Further, the increased escrow payments required of NPMs under the Arkansas Amendment provide Exempt SPMs with the power to price their products profitably at a level below Grand River's costs, which the Exempt SPMs have done.

The Arkansas Amendment increased Grand River's escrow obligation to Arkansas by nearly 3,000% (over $3.00 per carton), and its total escrow cost per carton

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5. The relevant language of the Amendment reads:

> To the extent that [an NPM] establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the [MSA] payments . . . that the manufacturer would have been required to make on account of such units sold had it been [an SPM], the excess shall be released from escrow and revert back to [NPM].

Ark Code Ann. § 26-57-261.

immediately upon passage of the Arkansas Amendment was approximately $4.10, which is nearly one hundred times greater than the amount Arkansas received for each carton of an OPM's or SPM's cigarettes sold in Arkansas. The Arkansas Amendment forces NPMs, including Grand River, to raise their prices to meet the new, increased escrow burdens and to levels that effectively foreclose them from competing in the Arkansas market against members of the cartel-like MSA scheme.

Grand River had complied fully with the Arkansas Statute in Arkansas until the Arkansas Amendment was enacted, which it then challenged in the District Court.

REASONS FOR GRANTING THE PETITION

As discussed *infra*, there is a direct split between the Eighth Circuit and the Second and Third Circuits with respect to whether the allegations made by Grand River constitute *prima facie* claims for violations of the Sherman Act and Commerce Clause. This issue demands resolution by the Court, as it is not tenable for the *same litigant* to make the *same allegations* in different Circuits, and be permitted to litigate its claims in one Circuit (and to obtain relief if its case is proven) and for its claims to be dismissed pursuant to Rule 12(b)(6) in another Circuit, particularly where the claims involve fundamental issues under the Constitution and the Sherman Act.

Grand River alleges that Arkansas (and the other MSA States) adopted a two-part regulatory system that regulates interstate commerce. First, that system enlists private parties to enter into an agreement that fixes costs (a component of price) among them, based on complicated formulas that make the cost and price of each party dependent on the output and pricing decisions of all other parties. Second, Arkansas enacted legislation that makes the MSA's financial terms binding on manufacturers who do not wish to be bound by that agreement. As such, this system of restraint is not a unilateral act of Arkansas alone.

Grand River alleges that, as a matter of law, such a system, which, on its face and in its effect, ties the costs and price of one group of competitors to the pricing and output decisions of another group, at the behest of the latter, while granting yet another group the discretionary pricing power to exclude their competitors from the market, is a *per se* or unreasonable restraint of trade. Thus, Grand River contends it has set forth a *prima facie* claim for a violation of the Sherman Act.

With respect to the Commerce Clause, requiring a regulated entity to make payments for the benefit of a State based on the amount the entity would have otherwise paid to all States, under an agreement that has the effect of imposing a *de facto* national tax, constitutes an impermissible, interconnected and interdependent attempt to regulate interstate commerce in violation of the Commerce Clause. Moreover, imposing those payment obligations on a manufacturer that has no nexus with the State but, rather, simply based on the fact that the manufacturer's products are sold in the State by independent third parties remotely situated in the chain of distribution, impermissibly encroaches upon the federal government's jurisdiction and authority over interstate commerce under the Commerce Clause. As such, Grand River contends it has pleaded a *prima facie* claim for violation of the Commerce Clause.

With respect to the Equal Protection, Due Process and First Amendment claims, Grand River submits that it has alleged *prima facie* claims, and that due to the regulatory system described herein, of which the Amendment is an integral part, those claims implicate important question of federal constitutional law that should be settled by this Court.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT COCERNING WHETHER GRAND RIVER HAS ALLEGED A *PRIMA FACIE* CLAIM FOR A SHERMAN ACT VIOLATION.

The Arkansas Statute requires Grand River to comply with its provisions in one of two ways. The first option for a manufacturer whose cigarettes are sold in Arkansas is to join the MSA — an agreement that imposes a cost of doing business that has been fixed by the manufacturer's competitors, with said cost being determined annually based on the aggregate sales volume of those competitors, as well as the manufacturer's national market share relative to those competitors. The second option is to not enter into the MSA, in which case the Arkansas Statute and Amendment impose a cost burden on the manufacturer that is ultimately derived from formulas and terms set forth in the MSA. Ark. Code Ann. §§ 26-57-261.

The issue that was presented to the Eighth Circuit has previously been considered by the Second and Third Circuits, both of which held that a *prima facie* claim for relief under the Sherman Act had been pleaded. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 164 (2d Cir. 2005) ("*Grand River I*"); *Freedom Holdings v. Spitzer*, 357 F.3d 205, 226 (2d Cir.), *rehearing denied*, 363 F.3d 149, *on remand*, 447 F. Supp.2d 230 (S.D.N.Y. 2004); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001).

In *Freedom Holdings*, the Second Circuit held the plaintiffs had stated a claim that the MSA structure violates the Sherman Act:

> In short, plaintiffs allege that the combination of the MSA, the Escrow Statutes, and the Contraband Statutes, allows OPMs to set supracompetitive prices that effectively cause other manufacturers either to charge similar prices or to cease selling. NPMs are forced to charge these prices to cover the costs imposed by the Escrow and Contraband Statutes or go out of business in New York.
>
> The alleged arrangement, even without the protection of the Contraband Statutes as enforced by wholesalers, would be a *per se* violation because *it is a naked restraint on competition, albeit one subject to erosion by NPMs. With the Contraband Statutes in force, the scheme as alleged threatens to become a permanent, nationwide cartel.*

> Had the executives of the major tobacco companies entered into such an arrangement without the involvement of the States and their attorneys general, those executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines. We therefore hold that appellants have sufficiently alleged a *per se* violation of the Sherman Act.

Freedom Holdings, 357 F.3d at 226 (citations omitted) (emphasis added). The allegations referenced by the Second Circuit were, in substance, made in Grand River's Complaint in the Arkansas litigation.

Similarly, the Third Circuit found that the MSA structure was not immune from Sherman Act scrutiny under the state action doctrine, which was first espoused by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). *A.D. Bedell*, 263 F.3d at 255-56.

The Eighth Circuit, however, affirmed the District Court's dismissal of Grand River's Sherman Act claim based upon the *Parker* state action doctrine. *Grand River II*, 574 F.3d at 939-41. Hence, the Eighth Circuit's opinion conflicts with decisions of the Second and Third Circuits, as those courts found Sherman Act claims under similar allegations.

Notably, Judge Limbaugh, a member of the Eighth Circuit Panel, in a dissenting and concurring opinion, noted his agreement with the *Freedom Holdings* and *A.D. Bedell* opinions, stating "[t]he ultimate question then, is the degree to which the Allocable Share Amendment – the state statute – places "pressure' on plaintiffs to engage in restraint of trade in order to comply with the Amendment" and that he would afford plaintiffs the opportunity to prove the coercive effect of the Amendment. *Grand River II*, 574 F.3d at 947. Judge Limbaugh continued "[m]y concern is that the Amendment may well operate, consistent with plaintiff's allegations, *to place irresistible pressure on plaintiffs to increase their cigarette prices to match those of the OPMs and SPMs which will correspondingly reduce plaintiffs' current market share.*" *Id.* (emphasis added).

This direct conflict between the Circuits presents a substantial issue justifying Supreme Court review, particularly as the split concerns a fundamental issue concerning what constitutes a *prima facie* cause of action under the Sherman Act.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AS TO WHETHER GRAND RIVER'S ALLEGATIONS SET FORTH A *PRIMA FACIE* CLAIM FOR A COMMERCE CLAUSE VIOLATION

It is fundamental that a state statute or regulation violates the Commerce Clause when it directly regulates interstate commerce. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Extraterritorial application of a state law or regulation to commerce occurring outside the state's borders is a form of direct regulation of interstate commerce that has long been prohibited. *Id.*

Grand River alleges that the Amendment, in combination with the MSA, violates the Commerce Clause, because, as recognized by the Second Circuit, Grand River's escrow obligations are tied to, and ultimately determined based on, its nationwide sales, as well as the nationwide sales of OPMs and SPMs. The effect of this system of regulation, Grand River alleges, is to control and establish uniform (higher) prices nationally.

Under a virtually identical set of allegations, the Second Circuit ruled that Grand River had alleged a Commerce Clause claim, holding "appellants have successfully stated a possible claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting states by tying both the SPM settlement and NPM escrow payments to national market share, which in turn affects interstate pricing decisions." *Grand River I*, 425 F.3d at 173.

Conversely, the Eighth Circuit held that the Amendment did not have an extraterritorial effect because it was not based on sales outside Arkansas and a NPM's escrow payments were entirely a function of the NPM's sales in Arkansas. *Grand River II*, 574 F.3d at 944. Judge Limbaugh again dissented, stating that "[t]he escrow obligations of NPMs under the Allocable Share Amendments are merely a component of the larger MSA scheme – a component that is designed to reign in non-MSA cigarette producers in order to perfect the goals of the MSA." *Id.* at 950. Judge Limbaugh continued "I would hold that plaintiffs have made sufficient allegations . . . to establish that the 'practical effect' of the Allocable Share Amendments (and the

MSA) is to directly regulate interstate commerce, and for that reason, plaintiffs have stated a cause of action for a Commerce Clause violation." *Id.*

The Court has consistently struck down State regulatory schemes like those identified by the Second Circuit in *Grand River* and Judge Limbaugh in the decision below, which have extraterritorial effects on pricing:

> [A] State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in other states" . . . . Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Healy v. The Beer Inst., 491 U.S. 324, 336-37 (1989). State legislation that directly regulates commerce or transactions occurring wholly outside a state's borders violates the Commerce Clause *per se*, as states are only permitted to engage in "*incidental* regulation of interstate commerce . . . direct regulation is prohibited." *Edgar*, 457 U.S. at 640 (emphasis in original). Similarly, "'a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.'" *Id.* at 642.

In *Brown-Forman*, this Court reiterated the rules that prohibit a State from directly regulating interstate commerce or commerce occurring wholly outside its borders. 476 U.S. at 579-80 (state violates Commerce Clause when its regulation causes "producers or consumers in other States [to] surrender whatever competitive advantages they may possess"). Three years later, the Court made clear that the "practical effect" of a challenged regulation is the "critical inquiry" in determining whether it directly regulates interstate commerce and should be struck down:

> First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, . . . and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other States. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extra-territorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

Healy, 491 U.S. at 336 (quotations and citations omitted).

The Amendment directly regulates interstate commerce under the criteria discussed in *Edgar*, *Brown-Forman* and *Healy*. A manufacturer whose cigarettes are sold in Arkansas faces two requirements under the Amendment. The manufacturer must either enter into a national settlement with *all* 46 MSA States, pursuant to which annual "settlement" payments are calculated based on its national sales volume; or, it must annually fund an escrow account for the State's benefit in an amount that is also ultimately calculated and determined based on the MSA and the amount that the manufacturer would have paid to all MSA States on account of its sales in Arkansas. *In either event, the manufacturer's liability to or for the benefit of Arkansas does not rest solely on its in-state sales but, rather, a national payment scheme that depends ultimately on national sales — demonstrating a direct, extraterritorial application of the Amendment that regulates and burdens interstate commerce.*

By requiring manufacturers to make payments to or for the benefit of Arkansas based ultimately on nationwide sales and market shares as calculated under the MSA (including in non-MSA States), the Amendment establishes, implements, and supports an interdependent and interconnecting system of regulation, the practical effect of which is to set uniform (higher) prices nationwide. *In re Beer Institute*, 849 F.2d 753, 760-61 (2d Cir. 1988) (under Connecticut statute, shipper could not, as practical matter, independently set prices in other states based on market conditions in those states, without factoring in effects those sales would have on shipper's obligations in Connecticut), *aff'd*, 491 U.S. 324 (1989) ("Court of Appeals correctly concluded that the Connecticut statute ha[d] the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State"); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935) (projection of legislation outside state's borders violates Commerce Clause).

In addition, Grand River has alleged that the Arkansas Statute and Amendment require Grand River – a manufacturer with no jurisdictional nexus to Arkansas – to comply with Arkansas law, based solely on the fact that Grand River's products are sold in Arkansas. Imposing regulatory payment obligations on Grand River – a Canadian corporation that does not do business in Arkansas – simply because its products are sold in Arkansas by independent third parties violates the extraterritoriality proscriptions of the Commerce Clause.

Accordingly, as the Eighth and Second Circuits have rendered diametrically opposed opinions relative to whether Grand River has alleged a *prima facie* cause of action for violation of the Commerce Clause, the Court should review this basic constitutional issue.

III. THE EIGHTH CIRCUIT'S RULING THAT GRAND RIVER'S EQUAL PROTECTION RIGHTS ARE NOT VIOLATED BY THE AMENDMENT WARRANTS REVIEW

In relevant part, the Fourteenth Amendment provides that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 346 (1989); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). Distinctions or classifications that do not burden, infringe, or differentiate based upon constitutionally protected rights survive scrutiny under the Equal Protection clause if they rationally further a legitimate State interest. *Cleburne*, 473 U.S. at 439-440. Classifications that relate to, or are based on, the exercise of constitutional rights, however, are subject to strict scrutiny. *Id.* at 440.

The Arkansas Statute and Arkansas Amendment violate these basic equal protection precepts by requiring Grand River to join the MSA (*i.e.*, become a member of a class of manufacturers defined by the MSA), but not extending to Grand River certain benefits afforded to MSA classes pursuant to the terms of the MSA, such as the exemptions afforded to Exempt SPMs that are discussed *supra*. *See Xcaliber International Limited, LLC v. Foti*, 442 F.3d 233, 235 (5th Cir. 2006). In short, there is no rational basis, and Arkansas maintains no legitimate interest, in offering or providing the foregoing reductions and exemptions to certain manufacturers but not Grand River. "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper v. Bernalillo County*, 472 U.S. 612, 618 (1985) (State could not provide tax exemption to some veterans but not others based on whether they were resident in State during statutorily prescribed periods). *See also Williams v. Vermont*, 472 U.S. 14 (1985).

Moreover, Grand River has alleged that Arkansas and the MSA States granted the Exempt SPMs the exemptions mentioned above, as an incentive to join the MSA and relinquish their First Amendment rights. The granting of such exemptions under these circumstances makes clear that the Escrow Statute and Arkansas Amendment enjoy no deferential review, but should instead be subjected to heightened scrutiny. *See Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (where legislation affected free speech rights on discriminatory basis, burden was on State to come forth with sufficient proof to sustain regulation; State failed to show "compelling interest"); *Perry v. Los Angeles Police Dept.*, 121 F.3d 1365, 1368 (9^{th} Cir. 1997) (State required to show legislation was "'finely tailored to serve substantial state interests'").

The Eighth Circuit determined that while the Arkansas Amendment treats NPMs differently from OPMs and SPMs, that difference was justifiable because: (1) it is rationally related to Arkansas' interest in collecting future medical costs related to tobacco use and (2) because NPMs are not parties to the MSA, they can sell their products without Arkansas interfering in their choice of advertising. *Grand River II*, 574 F.3d at 944-45.

In short, Grand River submits that the Complaint states a claim that the Arkansas Amendment denies equal protection guaranteed by both the Fourteenth Amendment, an important issue of federal constitutional law should be settled by the Court.

IV. THE EIGHTH CIRCUIT'S RULING THAT GRAND RIVER'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY THE AMENDMENT WARRANTS REVIEW

No State shall deprive "any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1.[6]

Arkansas has no legitimate interest in mandating that Grand River enter into a settlement with 45 other States that requires Grand River to pay Arkansas (and all other MSA States) a "settlement" amount that is based on Grand River's national market share, or, alternatively, requiring Grand River to fund an escrow account for Arkansas' benefit that is ultimately based on that agreement and its payment requirements. *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965); *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 582-83 (8th Cir. 1981), *aff'd*, 454 U.S. 1071 (1981).

Moreover, there is no rationale for Arkansas to retain Grand River's funds for twenty-five years. *See Krimstock v. Kelly*, 306 F.3d 40, 53 (2d Cir. 2002). Simply manufacturing and selling cigarettes is not, and has never been, a legal basis for holding a cigarette manufacturer liable for damages arising from the use of its product.

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6. The Escrow Statutes deprive NPMs of property. *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972) ("it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment").

The Arkansas Amendment also lacks a rational relation to the purported State interest it serves. There is no proof, fact or analysis *anywhere* as to either the quantification of the claims that might be asserted by the States against Grand River or the conduct upon which the extent of that liability is to be measured. The only basis for the $4.00 per carton charge currently assessed against NPMs is that this is the amount the OPMs and Arkansas agreed to under the MSA. Accepting Grand River's allegations as true, there was no legally sufficient basis for rejecting, as a matter of law, Grand River's due process claims. In short, there is no basis for requiring Grand River to pay an amount 10,000% greater than OPMs and SPMs pay Arkansas, on account of selling an identical number of cigarettes in the State.

Finally, the Amendment provides no notice or hearing prior to the escrow payment, or any mechanism for judicial review of the lawfulness of the State's retention of the escrow payment after the seizure. The Supreme Court has "described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original); *see also Xcaliber*, 442 F.3d at 235.

The Eighth Circuit held that Grand River was not denied substantive due process as Arkansas had a "legitimate interest in collecting future medical costs related to tobacco," but failed to address why Grand River should be burdened with escrow obligations even though it had never been accused of the wrongful conduct purportedly engaged in by the OPMs. *Grand River II*, 574 F.3d at 945. With respect to procedural due process, the court found that because NPMs are paid interest on the escrow payments, the payments being supposedly linked to cigarettes sold in Arkansas and Arkansas' interest in reducing smoking related healthcare costs, procedural due process was not implicated. *Id.* at 945-46. However, the court did not address *how these factors relate to procedural due process*, or why they warrant Grand River being forced to make escrow payments without ever being afforded a hearing. *Id.*

Thus, Grand River submits that its Complaint states a claim that the Amendment violates substantive and procedural due process guaranteed by the Fourteenth Amendment, and, therefore, the Court should resolve this constitutional issue.

V. THE EIGHTH CIRCUIT'S HOLDING THAT THE AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT WARRANTS REVIEW

As mentioned, *supra*, the MSA treats First Amendment speakers differently, by favoring the OPMs and early signing SPMs. Thus, the OPMs and, to an even greater extent, Exempt SPMs have been given a financial benefit (or "incentive") for their agreement to restrict their First Amendment rights, which is not similarly afforded to other manufacturers if they join the MSA or remain NPMs. In effect, the MSA States rewarded early signing SPMs for agreeing to the First Amendment restrictions at issue.

An NPMs' right to petition, associate, advertise and market its products free from the MSA's restrictions are undeniably guaranteed and protected rights under the First Amendment. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-67 (2001) (advertising and marketing of tobacco is protected free speech); *Xcaliber*, 442 F.3d at 235. In short, Arkansas has enacted a fare for the exercise of those rights, in the form of an exemption to those who agree to limit their exercise and the denial of an exemption to those who do not, violates the First Amendment to the United States Constitution.

In a somewhat obscure passage, the Eighth Circuit ruled that Grand River was actually complaining about is the loss of a competitive advantage that existed prior to the passage of the Amendment. *Grand River II*, 574 F.3d at 946. In actuality, as discussed above, what Grand River alleges is that Arkansas has dangled rewards for those manufacturers who are willingly to bargain away their First Amendment right, and not extended those same benefits to manufacturers that elect to exercise those rights.

Yet again, Grand River respectfully submits that this important issue of constitutional law should be resolved by the Court.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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