IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1792

MASSACHUSETTS SCHOOL OF LAW
AT ANDOVER, INC.,

Plaintiff-Appellant,

v.

AMERICAN BAR ASSOCIATION, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2, and has recently brought an action against the American Bar Association (ABA), challenging some of its accreditation rules.[1] The district court decision on appeal turns on the plaintiff's ability to establish private antitrust injury, an issue that does

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[1] A consent decree was entered on June 25, 1996, in the government's case, pursuant to the Tunney Act, 15 U.S.C. 16. MSL, which participated as amicus in the Tunney Act proceedings, has filed two appeals challenging the entry of the consent decree and the district court's denial of MSL's motion to intervene.

not arise in government antitrust cases. Nonetheless, the government has a strong interest in ensuring that decisions in this area accurately state the law and do not limit inappropriately the scope of public or private antitrust enforcement.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in holding that the Noerr doctrine (see Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)) exempts from the antitrust laws private standard setting by economically interested parties that directly injures market participants, on the ground that the challenged conduct is "incidental" to the formulation of standards that may be adopted by state governments.

2. Whether the district court erred in holding that the First Amendment immunizes from antitrust liability all concerted conduct involving no implementing act except the joint publication of a standard or other statement even if the purpose and effect of the conduct are to impair the ability of rivals to compete on the merits.

STATEMENT OF THE CASE

Defendant American Bar Association's (ABA) Section of Legal Education and Admission to the Bar adopts and amends law school accreditation standards, grants accreditation to those law schools that comply with the standards, and denies or withdraws

accreditation status of schools that do not comply.[2] The ABA's Standards for the Approval of Law Schools set forth the minimum requirements for ABA approval. The standards relate to almost every aspect of a law school program, including curriculum, faculty, administration, admissions, library resources, and physical facilities.

Within the Section of Legal Education and Admission to the Bar, the Accreditation Committee recommends provisional or full approval of a new law school and oversees the inspection of schools. A majority of the members of the Accreditation Committee are legal educators, including current and former law school faculty, administrators, and librarians.

Most states require a candidate for admission to the state bar to have graduated from an ABA-approved law school. The Commonwealth of Massachusetts has no such requirement, however, and plaintiff, Massachusetts School of Law at Andover, Inc. (MSL), was accredited by the Massachusetts Board of Regents in 1990. MSL graduates are thus eligible to take the state bar examination and practice law in that state.

In 1992, MSL applied for ABA accreditation. Accreditation was denied, however, on the ground that several aspects of MSL's program failed to comply with ABA standards. MSL then filed suit

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[2] The statement of facts is taken from plaintiff's Complaint, defendants' Motion for Summary Judgment, and the district court's Opinion and Order of August 29, 1996. None of these statements appears to be in dispute.

under sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, naming as defendants the ABA as well as various individuals and organizations that participate in the ABA's standard-setting and accreditation process. The complaint alleged that the defendants had conspired to adopt and enforce accreditation criteria which have the anticompetitive purpose and effect of, inter alia, maintaining, raising, and fixing salaries and fringe benefits of law school faculties, increasing law school tuition, and "economically benefitting organizations affiliated with members of the ABA's Section of Legal Education that provide services for fees to persons interested in becoming lawyers." Complaint ¶ 25. MSL alleged that it does not meet the challenged standards because it has adopted "numerous policies and practices which promote efficiency and reasonable tuitions" but "which are in direct conflict with the ABA's anticompetitive policies and practices." Complaint ¶ 15. Defendants' conduct has allegedly injured MSL by causing it to suffer a "loss of prestige" and economic damage in the form of decreased enrollments and lost tuition. Complaint ¶ 41.

The ABA moved for summary judgment, contending, inter alia, (1) that plaintiff's alleged injuries are the result of state governmental action immune from the federal antitrust laws under Parker v. Brown, 317 U.S. 341 (1943) and Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); and (2) that the ABA's exercise of its First Amendment rights to provide

information and to "express its educated opinion" about the quality of MSL's program does not violate the Sherman Act. Defendant American Bar Association's Motion for Summary Judgment (filed February 8, 1995)("Motion for Summary Judgment").

The district court granted the ABA's motion, and entered judgment in its favor on all counts, because it concluded that MSL had suffered no injury cognizable under the antitrust laws. The court held that any competitive disadvantage that MSL suffers "because some sovereign states preclude graduates of non-accreditated law schools from taking their bar examinations cannot be the basis for antitrust liability" under Noerr. Opinion and Order of August 29, 1996 (appended as Tab 29 to Brief for Appellant) (hereafter "Slip op.") at 10. To the extent that a stigma associated with its non-accredited status injures MSL directly, the court held, that injury also falls within the scope of the Noerr doctrine because it is "incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations." Slip op. at 13 (footnote omitted).

The district court further held that MSL's claim would fail even if injury flowing directly from the stigma associated with non-accredited status were not deemed incidental to Noerr-protected conduct, because the ABA has done nothing more than state its position:

Publication of an association's views, without more, is

> protected speech. Only ABA conduct can trigger antitrust liability. Abstract stigma that flows from the publication of speech protected by the First Amendment is not enough.

Slip op. at 19. Although MSL's complaint identified ABA rules restricting the ability of students at unaccredited schools to transfer their credits to or enter graduate programs at ABA-accredited law schools, the court found that MSL had failed to produce any evidence that it had actually suffered injury because of these rules. Slip op. at 20 n.20. Moreover, the court asserted, "these ABA rules are essentially extensions of the protected speech. ABA's speech would be meaningless if students of unaccreditated schools could shoe-horn their unaccreditated credits into an ABA accreditated law school." Ibid.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States takes no position on the ultimate merits of this litigation. We express no view as to the legality of the ABA's conduct under the Sherman Act, to the extent that MSL's allegations fall outside the scope of our own complaint (see page 1, supra); nor do we take a position on the likelihood that MSL would be able to establish that it suffered antitrust injury

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[3] The court also noted that MSL had raised its professors' salaries and bought more books for its library for the purpose of improving morale and to "have any chance of accreditation." Slip op. at 9 n.10. But MSL alleged that it had maintained high standards without paying the salaries required by the ABA rules, the court noted, and so ABA rules artificially inflating costs at other schools should provide MSL with a competitive advantage. Any injury resulted from MSL's unilateral decisions, the court held.

under the appropriate legal standard. And we take no position on the district court's ruling that plaintiff may not seek redress under the antitrust laws for injury caused by state laws requiring that only students graduating from an ABA-accredited school can sit for the bar examination.

We are concerned, however, that the district court's articulated reasons for holding that MSL failed to raise a triable issue of fact as to antitrust injury, even with respect to alleged injuries resulting directly from the stigma associated with non-accredited status, rest on a flawed legal analysis. A decision affirming on the basis of the district court's reasoning could be read to endorse a broad and unwarranted exemption from the antitrust laws for all "speech," or at least for all accreditation-related activities by economically interested parties, even when those activities are not undertaken in good faith and have the purpose and effect of maintaining or enhancing market power.

The first source of our concern is the district court's holding that Noerr precludes MSL from challenging defendants' conduct, even to the extent that it injured MSL directly, on the ground that "that injury is incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations." Slip op. at 13. The Noerr doctrine shields private parties who petition the government to take anticompetitive action from antitrust

liability on account of any action taken by the government. And, because the immunity for petitioning would mean little if it were necessarily lost whenever such conduct also had any direct effect on the market, there are circumstances in which private parties may claim exemption under Noerr for legitimate petitioning that causes anticompetitive effects apart from any government action that may result. The district court's opinion gives no indication, however, that defendants were engaged in petitioning; indeed, the ABA made no such claim in its Motion for Summary Judgment. We express no view as to whether the record would provide a basis for a finding that the defendants' conduct in formulating and applying accreditation standards in fact constituted petitioning. But a holding that the Noerr doctrine immunizes defendants from liability for any competitive injury to MSL simply because that conduct also had an effect on governmental action, whether or not the private conduct constituted petitioning, represents a serious and unwarranted expansion of Noerr.

The district court also swept too broadly with its alternative holding that MSL cannot show injury flowing from the stigma of non-accreditation on the ground that accreditation decisions are statements of opinion protected by the First Amendment. The First Amendment does not provide blanket protection to restraints of trade effectuated through speech. Nor is there any basis in the language of the Sherman Act or the

case law for a broad ruling that anticompetitive agreements whose effect comes about through speech are necessarily exempt from the antitrust laws.

We do not suggest that MSL can establish a violation of the Sherman Act simply by showing that the ABA adopted and adhered to accreditation standards that affect MSL adversely. Legitimate, good-faith standard-setting, even by economically interested parties, routinely passes muster under the Sherman Act's rule of reason because it serves the important procompetitive function of providing consumers with information. Thus, it would not be sufficient for MSL to prove that it suffered direct injury from its non-accredited status; MSL would also have to show, inter alia, that the standards it challenges were adopted and enforced pursuant to a scheme whose purpose and effect were to injure marketplace competition. We express no view on the likelihood that MSL could do so or on whether it has raised a triable issue of fact. But this Court should not affirm on the ground that the Sherman Act, as a matter of law, does not apply to agreements whose anticompetitive effects are brought about through speech.

ARGUMENT

I. THE DISTRICT COURT ERRED TO THE EXTENT THAT IT HELD THAT ACCREDITATION STANDARDS THAT DIRECTLY INJURE MSL ARE IMMUNE FROM ANTITRUST SCRUTINY UNDER THE NOERR DOCTRINE, EVEN IF THE DEFENDANT WAS NOT PETITIONING THE GOVERNMENT

We take no position on the district court's holding that MSL cannot recover for any injury it suffered as a result of state

decisions to adopt ABA standards. The district court further held, however, that the Noerr doctrine shields the defendants from liability to MSL, even for injury flowing directly from the stigma of non-accreditation, rather than from the states. Slip op. at 11-14. The latter type of injury, the court asserted, cannot give rise to an antitrust cause of action because it is "incidental to the primary, protected injury resulting from governmental decisions." Id. at 13. We are concerned that this holding may be understood to recognize an unjustifiably broad exemption unrelated to the rationale of Noerr.

The Noerr doctrine protects private parties who petition the government to take anticompetitive action. Noerr involved a publicity campaign allegedly intended to promote governmental action favorable to the railroads and detrimental to trucking interests. It was already well established that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136 (citing United States v. Rock Royal Coop., 307 U.S. 533 (1939)); Parker v. Brown, 317 U.S. 341 (1943). In Noerr, the Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136. Emphasizing the importance of allowing "the people to make their

wishes known to their representatives" (id. at 137), the court construed the Sherman Act in this fashion largely because of its concern that to read it otherwise would raise important constitutional questions. Id. at 137-138.

The Court in Noerr also noted that the "truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen." Id. at 143. That fact did not take the case "out of the category of those that involve restraints through government action" (id. at 142) because it was clear that the challenged conduct of the defendants focused on the efforts to petition the government. "[A]ll of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws." Id. at 142-43. In that circumstance, imposing antitrust liability because the railroads desired to have and did in fact have some incidental direct effect on the market would be "tantamount to outlawing all such campaigns." Id. at 143-144; accord Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 505 (1988) ("The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business.").

In short, the Noerr doctrine is intended to protect the right of the populace to petition the government. Antitrust defendants are thus not liable for any anticompetitive effects of

legitimate petitioning efforts, even if those efforts have an incidental or derivative effect on private market behavior because, to construe the Sherman Act otherwise, would unduly chill important First Amendment activities. Because this statutory construction must be coextensive with its rationale, however, Noerr does not exempt conduct that directly injures plaintiff from liability unless that conduct constitutes petitioning of the government. It therefore does not immunize from antitrust scrutiny all conduct that happens to influence, or even predictably influences, government action. Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 482 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) (no Noerr protection for collaboration that "may have been calculated to provoke a judicial response" to the collaborators' grievances); Mid-Texas Communications v. American Tel. & Tel. Co., 615 F.2d 1372, 1382-1384 (5th Cir.), cert. denied, 449 U.S. 912 (1980) (fact that conduct will be brought before FCC which has authority to regulate the conduct under federal law does not bring it within Noerr; only direct dealings with FCC are Noerr-protected); Agritronics Corp. v. National Dairy Herd Ass'n, 914 F. Supp. 814, 823 (N.D.N.Y. 1996) (no Noerr protection afforded for defendants' milk-testing policies, although states adopted those policies, because defendants failed to show "that the policy arose from any 'lobbying efforts' by the defendants").

The district court's opinion does not indicate that the

defendants were engaged in petitioning or, more importantly, that the alleged injury to the market was a by-product of any such petitioning; indeed, the ABA did not even argue in its Motion for Summary Judgment that it was engaged in petitioning activities.[4] To the extent that the district court extended Noerr immunity to conduct that did not constitute petitioning, it erred.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE FIRST AMENDMENT IMMUNIZES FROM ANTITRUST LIABILITY ANY AGREEMENT THAT IS IMPLEMENTED BY NO CONDUCT OTHER THAN SPEECH

The district court's alternative ground for holding that MSL could not establish antitrust injury resulting from the stigma associated with non-accredited status was that any such injury would be the result only of the "speech component" of the ABA's activities (slip op. at 15) and is therefore protected by the First Amendment. In the district court's view, although an agreement to penalize nonconforming rivals or to undertake other overt acts could lead to antitrust injury, slip op. at 20, an

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[4] In its Motion for Summary Judgment, the ABA relied on Parker v. Brown and Noerr to argue that all of the injury MSL alleged to have suffered resulted "exclusively from the bar admissions rules of the sovereign states, not the ABA Standards." Motion for Summary Judgment at 11-14; Defendant's Reply Mem. in Support of Summary Judgment at 2-3. Although the ABA conceded that MSL also alleged injury resulting directly from its failure to secure ABA accreditation, the ABA claimed that this allegation failed as a factual matter (id. at 4), not a legal matter. And it never claimed immunity as a result of Noerr's exemption for injury "incidental to petitioning." We express no view as to whether the record would nonetheless support a finding that the ABA was engaged in petitioning when it promulgated the challenged standards.

agreement among competitors whose anticompetitive effects are brought about solely by speech can never cause antitrust injury.[5] This analysis is overly simplistic and, if accepted, could immunize activities falling within the proper scope of the Sherman Act.

It is clearly possible, as a general matter, for economically interested market participants to enter into an agreement that has the purpose and effect of maintaining or enhancing their market power, effectuated purely by means of speech -- in this case, for example, by promulgating and publishing a purported "standard" or "statement of opinion" that is designed to exclude rivals. There is no basis in the First Amendment for a rule exempting all such schemes from the Sherman Act.

A. The First Amendment Does Not "Trump" The Sherman Act Merely Because A Restraint is Effectuated Through Speech

The district court offered virtually no explanation of its sweeping conclusion that the ABA's accreditation decisions are "protected under the First Amendment and cannot be the basis for

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[5] The court also acknowledged implicitly that an agreement among competitors to adhere to standards in their own dealings might be an antitrust offense, although it saw no injury to MSL in any such agreement by the ABA. Slip op. at 9 n.10. Thus, for example, the district court would presumably not have disputed the right of the United States to challenge particular standards on the basis that they artificially inflated faculty salaries and benefits, and raised the cost of a law school education, as the government alleged in its suit against the ABA.

Sherman Act liability." Slip op. at 22. Most of the cases it cited do not discuss the First Amendment.[6] And the court's description of its reasoning came down to a simple assertion that speech is protected by the First Amendment while conduct is not:

> It is axiomatic that the First Amendment protects speech, not action. Thus, the speech component involved in ABA's promulgation of standards is protected by the First Amendment, and because the Constitution trumps the Sherman Act, this speech component cannot be the basis for antitrust liability. However, any conduct associated with the standards is not entitled to First Amendment protection.

Slip op. at 15.

First Amendment law does not support this overly broad generalization. It simply is not true that labeling an activity as "speech" affords it absolute protection from government regulation unless it is coupled with some other overt act.

It is beyond debate, for example, that untruthful speech enjoys no absolute constitutional protection. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." Virginia State Board of Pharmacy v. Virginia Citizens

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[6] One exception is Zavaletta v. American Bar Association, 721 F. Supp. 96, 98 (E.D. Va. 1989), cited in Slip op. at 15. The district court in that case dismissed a complaint by law students at an unaccredited law school, accepting the ABA's argument that its activities imposed no restraint on trade. It also asserted that the ABA has a "First Amendment right to communicate its views on law schools to governmental bodies and others," citing Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) (discussed at pages 21-23, infra), and Supreme Court cases involving the right to petition without any further analysis. As we have noted, reliance on petitioning cases is inapposite where, as here, the ABA did not argue that it was engaged in petitioning.

Consumer Council, 425 U.S. 748, 771 (1976); see also MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1129 (7th Cir.) (endorsing standard propounded by Professors Areeda and Turner that in pre-announcing a new product, a "knowingly false statement designed to deceive buyers" could qualify as an exclusionary practice violative of the Sherman Act), modified, 1983-2 Trade Cas. (CCH) ¶ 65,520 (7th Cir.), cert. denied, 464 U.S. 891 (1983). An agreement among competitors to publish false information, for the purpose and with the effect of excluding rivals and thereby enhancing or maintaining market power, would thus enjoy no First Amendment immunity from the Sherman Act.

Nor does the fact that speech is denominated as "opinion" automatically entitle it to absolute protection under the First Amendment. "[E]xpressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (statements that are couched as "opinion" but "imply a[] [false] assertion of objective fact" may be actionable libel); Washington v. Smith, 80 F.3d 555, 556 (D.C. Cir. 1996) ("There is no categorical First Amendment immunity against defamation suits for statements of opinion").

Moreover, even speech that is not demonstrably false may not qualify for absolute First Amendment protection. Cf. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-386 (1992) ("fighting words" can be proscribed). In the area of commercial speech, in particular, the message need only be deceptive or misleading to

permit government restrictions. Va. Pharmacy Board, 425 U.S. at 771-772. Indeed, commercial speech that is not misleading may be regulated if the restriction directly advances a substantial state interest and is in proportion to that interest. Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 564 (1980). It is difficult to see how the First Amendment could pose an automatic bar, therefore, to enforcing the Sherman Act in a case involving a conspiracy among competitors to maintain or enhance their market power by publishing commercial information designed to interfere with competition on the merits (whatever the outcome of the case under the Sherman Act).

Even speech enjoying a greater degree of protection than purely commercial speech can be regulated by the government in appropriate circumstances.[7] "'[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater

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[7] Whether the speech involved in accreditation standards should be characterized as commercial may depend on the facts of a particular case and on the motivations and procedures of the accreditation body. A group of competitors that creates and advertises a "seal of approval" that is merely a cover for excluding competitors by inducing suppliers or customers not to trade with them might be considered to be engaging in commercial speech. See Lawrence A. Sullivan, Handbook of the Law of Antitrust § 88, at 248 (1977) (discussing legality of industry self-regulation that has the effects of a boycott).

than is essential to the furtherance of that interest.'" NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 n.47 (1982), quoting, United States v. O'Brien, 391 U.S. 367, 376-377 (1968); see also, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 428-430 & n.13 (1990) (applying O'Brien); Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2385 (1996) (plurality opinion).

The antitrust laws are content-neutral, generally applicable statutes that meet these traditional constitutional requirements; they may be enforced even if they effect a prohibition on "speech" in certain circumstances. See, e.g, Larry V. Muko, Inc. v. SouthWestern Pennsylvania Bldg. And Construction Trades Council, 609 F.2d 1368, 1375 (3d Cir. 1979). There is no question of Congress' power under the Commerce Clause to enact antitrust laws, and the government interest in promoting competition and regulating restraints on trade is unrelated to the suppression or regulation of free expression. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(regulation is content-neutral as long as it is justified without reference to the content of the regulated speech). Indeed, the Supreme Court "has recognized the strong governmental interest in certain forms of economic regulation," including legislation regulating anticompetitive restraints, "even though such regulation may have an incidental effect on rights of speech and association." Claiborne Hardware, 458 U.S. at 912, citing Giboney v. Empire

Storage & Ice Co., 336 U.S. 490 (1949)(nothing in constitutional guaranties of speech or press prohibits state from enforcing its anti-trade-restraint law against picketers; state interest in enforcement is significant). The incidental regulation of speech involved when the Sherman Act is enforced against a scheme to preclude competition on the merits is "narrowly tailored to serve the government's legitimate, content-neutral interests," for it "promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 798-799 (internal quotations omitted).

Accordingly, the Supreme Court has approved application of the Sherman Act to restraints of trade effectuated through conduct of the sort normally protected by the First Amendment. In Giboney, supra, a state court enjoined picketing intended to induce a business to agree not to sell ice to a third party, a violation of a state anti-trade-restraint statute. The Court rejected a First Amendment challenge to application of the state statute to the picketers:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade . . . .

336 U.S. at 502 (citations omitted).[8] And the Court has held that the First Amendment cannot be invoked to protect petitioning that is only a sham, designed in reality to harass and deter competitors from obtaining effective access to agencies and courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-515 (1972).

We do not suggest that the First Amendment has no application to statements of opinion affecting a market, including statements of opinion by economically interested persons. Indeed, the purposes of the First Amendment and the Sherman Act are both served by protecting the flow of information to consumers. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977). But the district court's broad holding that the First Amendment bars any enforcement of the Sherman Act as to agreements whose anticompetitive effects come about through speech should not be affirmed.

B. The Antitrust Cases Relied On By The District Court Do Not Support Its Conclusions About The First Amendment and Do Not Justify the Conclusion That An Antitrust Violation Can Never Be Effectuated By Speech Or Purported Expressions Of Opinion

The district court relied primarily on two cases to support its conclusion that the speech component of an agreement by

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[8] The Court has also held that Sherman Act remedies may be crafted to restrict the defendant's "range of expression" without offending the First Amendment. National Society of Professional Engineers v. United States, 435 U.S. 679, 697 & n.26 (1978)(collecting cases).

economically interested parties cannot be the basis for antitrust liability: Allied Tube, 486 U.S. 492, and Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989). Neither decision relied upon or even discussed the First Amendment.

The district court cited Allied Tube to support a distinction between pure standard setting and standard setting accompanied by conduct "requiring [association] members not to deal with manufacturers [not complying with standard]." Slip op. at 19-20. It is true that the Supreme Court saw in the facts of Allied Tube an implicit agreement not to deal in non-complying products. But it did not say that that factor was necessary to antitrust liability.[9] Indeed, there is dictum in the Allied Tube opinion suggesting the contrary. See 486 U.S. at 506-507 ("private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits"); id. at 501 n.6 ("concerted efforts to enforce private product standards face more rigorous antitrust scrutiny") (second emphasis added); id. at 498 n.2 (noting that damages had been awarded for injury flowing from the "stigma of not obtaining

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[9] The issue of antitrust liability was not before the Court; its grant of certiorari as to this issue was vacated as improvidently granted. Allied Tube, 486 U.S. at 499 n.3.

[Code] approval . . . and [the] 'marketing' of that stigma").

Schachar involved a press release by the American Academy of Ophthalmology that described a relatively new surgical procedure as "experimental," called for more research, and urged patients and physicians to approach the procedure with caution until the research was completed. Eight ophthalmologists sued the Academy, alleging that the press release was a restraint of trade in violation of section 1 of the Sherman Act. Judgment was entered on a jury verdict for the defendants, and plaintiffs appealed. The Seventh Circuit affirmed, noting that plaintiffs did not allege that the Academy had prevented any of them from doing what he wished or imposed sanctions on those who facilitated the work and that there were thousands of providers in the intensely competitive market for ophthalmological services. 870 F.2d at 399.

There are dicta in the Seventh Circuit's opinion that could be read to support the district court's decision in this case (e.g., if the Academy's statements were false or misleading, "the remedy is not antitrust litigation but more speech -- the marketplace of ideas") (id. at 400). But that language should be read in the context of that case and should not be understood to establish a broad principle that speech can never be the basis for antitrust liability. Numerous other cases have made clear that, under appropriate circumstances, speech can violate the antitrust laws. See, e.g., MCI Communications v. AT&T, 708 F.2d

at 1129 ("These cases suggest that AT&T's early announcement of Hi-Lo must be found to be knowingly false or misleading before it can amount to an exclusionary practice."); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 442 (N.D. Cal. 1978) (declining to find antitrust liability on a product preannouncement theory because "there was nothing knowingly false about the . . . announcement"), aff'd sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287-288 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (absent actual deception, a monopolist's advertising of a new product or service does not constitute anticompetitive conduct violative of the Sherman Act).

Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988), is to the same effect. The Schachar court relied on that case for the proposition that "when a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws." 870 F.2d at 399. But Consolidated Metal Products held only that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate section 1." 846 F.2d at 292. Indeed, the court in Consolidated Metal expressly went on to determine, on the basis of the particular facts presented in that case, that the association's conduct did

not violate the Sherman Act's "rule of reason," id. at 293, because there was no evidence of any anticompetitive purpose or effect and hence no "unreasonable restraint." Id. at 294; see Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 998 F.2d 391, 396 (7th Cir. 1993), cert. denied, 510 U.S. 1111 (1994).

The plain language of section 1 broadly outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. 1. Nothing in the statute suggests any requirement that the conspiracy be effectuated in any particular manner or indeed that it be carried out; it is sufficient if there is an agreement that unreasonably restrains trade. Thus, in the case of an agreement of the sort deemed illegal per se, such as horizontal price fixing, it is sufficient to prove that the defendants reached such an agreement; there need be no overt act at all. Nash v. United States, 229 U.S. 373, 378 (1913); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (1940); United States v. United States Gypsum Co., 600 F.2d 414, 417 (3d Cir.), cert. denied, 444 U.S. 884 (1979).[10] Where the agreement is not of the sort that

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[10] The district court was simply wrong in stating that proof of a section 1 price-fixing violation requires proof of an overt act. Slip op. at 17 n.15. The court erroneously relied on United States Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986 (11th Cir. 1993), cert. denied, 114 S. Ct. 2710 (1994). Anchor Mfg., however, distinguished a section 1 Sherman Act violation from a section 2 claim involving attempted monopolization. While the court held that the latter required

is inherently anticompetitive, the court must evaluate its effect under the rule of reason -- an inquiry that may be informed by evidence of the defendant's purposes and actions. See National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 103 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979); 7 Phillip E. Areeda, Antitrust Law ¶ 1505 (1986). But there is no requirement that the plaintiff prove any particular kind of overt act in furtherance of the conspiracy if the agreement, on balance, suppresses competition.

III. THE DISTRICT COURT SHOULD HAVE EVALUATED MSL'S "STIGMA" CLAIM UNDER AN APPROPRIATE SHERMAN ACT RULE OF REASON ANALYSIS

Because of its conclusion that anticompetitive agreements effectuated solely through application and publication of accreditation standards are immune from Sherman Act scrutiny, the district court pretermitted its inquiry and did not reach a number of the issues that would have to be addressed in order to assess MSL's "stigma" claim under the Sherman Act. Although there is no general antitrust exemption for accreditation-related conduct, it does not follow that MSL would be entitled to recover simply by showing that defendants denied it accreditation and thereby placed it at a disadvantage.

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proof of an overt act, a conspiracy under section 1 requires only "an agreement . . . designed to achieve an unlawful objective." 7 F.3d at 1001.

Accreditation is normally procompetitive, for it increases the flow of information central to the functioning of a competitive economy. E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763, 765 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977); FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459, 463 (1986); National Society of Professional Engineers v. United States, 435 U.S. 679, 694-695 (1978). Accreditation standards can also benefit consumers in helping them to make judgments about the desirability of particular goods or services or the competence of certain suppliers, and quality standards can improve the caliber of products and services. Clark C. Havighurst & Peter M. Brody, Accrediting and the Sherman Act, 57 Law & Contemp. Prob. 199, 200, 219 (1995) ("Havighurst & Brody"); see also Allied Tube, 486 U.S. at 501.

When consumers lack sophistication to evaluate information on their own, accreditation standards can be especially useful. See Bates v. State Bar of Arizona, 433 U.S. at 383; 3 Phillip E. Areeda & Donald F. Turner, Antitrust Law ¶ 738 (1978); Harry S. Gerla, Federal Antitrust Law and the Flow of Consumer Information, 42 Syracuse L. Rev. 1029, 1078 (1991). And because there may not be sufficient reliable information available to consumers from other sources, they may need to rely on economically interested actors. Industry participants, therefore, may be the best sources of technical expertise and the

best judges of product safety or quality, even when they are setting standards for their rivals' products. James J. Anton & Dennis A. Yao, Standard-Setting Consortia, Antitrust, and High Technology Industries, 64 Antitrust L.J. 247 (1995).

Nevertheless, there is a potential for abuse when accreditation standards are promulgated and applied by economically interested parties who possess the ability to raise barriers to entry or to destroy a rival's ability to compete by misleading consumers. Allied Tube, 486 U.S. at 500 n.5. Accordingly, although "the antitrust laws do not give every producer denied certification a right to review in the federal courts," Consolidated Metal Products v. American Petroleum Institute, 846 F.2d at 292 n.22, "private standard-setting associations have traditionally been objects of antitrust scrutiny." Allied Tube, 486 U.S. at 500; see also Havighurst & Brody at 224 ("an accrediting program that grossly manipulates public or consumer ignorance for the competitive and economic advantage of the collaborators is a good candidate for antitrust attention").[11]

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[11] Standards may "deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices", Allied Tube, 486 U.S. at 500 n.5, quoting Areeda at ¶ 1503; Havighurst & Brody at 208 n.37. In addition, individual firms may subvert or abuse an otherwise neutral accreditor's processes to harm a competitor. Allied Tube, 486 U.S. 492; American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

Because accreditation may have important procompetitive effects, such conduct is properly evaluated for purposes of section 1 of the Sherman Act under a rule of reason analysis. FTC v. Indiana Federation of Dentists, 476 U.S. at 458-459 (rules of professional association evaluated under rule of reason); Consolidated Metal Products, 846 F.2d at 293. Such an analysis requires the court to weigh any anticompetitive effects of the challenged conduct against any procompetitive justifications for them and to determine whether, on balance, the challenged conduct promotes or suppresses competition. See National Society of Professional Engineers v. United States, 435 U.S. at 690-691. And such a balancing should be conducted with special care where First Amendment values are implicated.

In a case involving only the adoption and application of accreditation standards, the rule of reason standard would require the plaintiff to prove, at the very least, that the standards were not promulgated and applied in good faith pursuant to fair and reasonable procedures in order to provide information or legitimate opinion, but rather were a part of a scheme intended to limit rivals' ability to compete on the merits. And there could be no unreasonable restraint of trade unless the challenged conduct actually impairs competition by materially hindering the ability of one or more rivals to compete and thereby materially diminishing competition in the market as a whole. Mere injury to a rival is not alone sufficient, for the

Sherman Act protects competition rather than competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Havighurst & Brody at 217 (adverse effects on individual competitors are not an antitrust concern because competition is expected to yield losers as well as winners).

CONCLUSION

The Court should not affirm the district court's holding that the stigma effect of defendant's failure to accredit MSL is protected from antitrust scrutiny by the First Amendment. Unless the Court believes that the record is sufficient to enable it to resolve the antitrust issues raised by plaintiff's claims, it should remand to the district court for further consideration.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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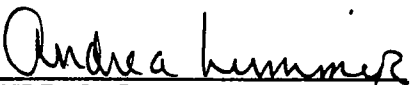
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