No. 07-995

# In The Supreme Court of the United States

STEVE SANDERS, Individually
and as Class Representative,

*Petitioner,*

v.

EDMUND G. BROWN JR., in his official capacity as Attorney General of the State of California; PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; and LORILLARD TOBACCO COMPANY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF ATTORNEY GENERAL BROWN IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether California state laws requiring tobacco manufacturers which do not settle certain liabilities through the Master Settlement Agreement ("MSA") to fund a reserve account for such liabilities are preempted on their face by the Sherman Act.

2. Whether tobacco manufacturers which settled certain liabilities through the MSA enjoy *Noerr-Pennington* immunity from Sherman Act liability for negotiating and complying with the MSA.

3. Whether California's acts of agreeing to the MSA and enacting related state laws are sovereign state acts that enjoy immunity from Sherman Act liability pursuant to the *Parker v. Brown* state action doctrine.

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## STATEMENT OF THE CASE

1. In November 1998, the attorneys general of California and most other states entered into the Master Settlement Agreement ("MSA"), the states' settlement of their litigation against the tobacco industry.[1] The states had sued the leading domestic tobacco manufacturers on the ground that they had illegally conspired to conceal the health risks of smoking and the addictiveness of nicotine, and for other alleged wrongs, including illegally marketing to minors. Through the MSA, the signatory states resolved their claims in exchange for commitments from the settling manufacturers to take steps to reduce the incidence of smoking, particularly among minors, and to assume significant financial responsibility for the public cost of past, present and future smoking.

The MSA's "public health" provisions include bans on advertising targeted at youth, the use of cartoons in advertising, and most outdoor advertising, as well as restrictions on brand name sponsorships and free sampling.[2] MSA § III(a)-(d) & (g). The

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[1] The four nonsignatory states – Florida, Minnesota, Mississippi, and Texas – already had settled their claims against the tobacco industry.

[2] The nationwide drop in youth smoking from 36.4% in 1997 to 23% in 2005 is an encouraging sign that the MSA's public health provisions are having a positive effect. *MMWR Weekly*, 55(26), July 7, 2006; http://www.cdc/mmwr/preview/mmwrhtml/mm5526a2.htm.

financial provisions require various payments, including annual payments which continue in perpetuity. MSA §§ VI(b), VIII(b) & (c), IX(b), (c) & (e) & XVII. The annual payments total $4.5 billion in 2000 and rise incrementally until they reach $9 billion in 2018. The signatory states are called the "Settling States" and the four manufacturers which negotiated the MSA are called the "Original Participating Manufacturers" or "OPMs."

Under the MSA, each OPM's share of the annual payment is determined by its "Relative Market Share" – i.e., its share of the OPM market in the year preceding the one in which the payment is due. MSA §§ II(mm) & IX(c)(1). This formula assures that each OPM pays the same amount per cigarette as every other OPM, and that each OPM's payment is commensurate with its sales volume and attendant harm to public health.

The MSA permits other tobacco manufacturers to sign the agreement and thereby settle their potential liabilities. MSA § II(tt). These companies are called "Subsequent Participating Manufacturers" or "SPMs." SPMs must comply with all of the MSA's public health provisions and with some of its financial provisions. MSA § IX(i)(1). Their annual payments correspond in amount to the OPMs' payments. To encourage prompt agreement, SPMs which sign the MSA within 90 days are obligated to make settlement payments only with respect to sales that exceed their 1998 market share or 125% of their 1997 market share, whichever is higher. MSA § IX(i).

Settling manufacturers are called "Participating Manufacturers" or "PMs." Non-settling manufacturers are called "Non-Participating Manufacturers" or "NPMs." NPMs are not subject to any obligations under the MSA and do not enjoy its liability release.

The MSA's annual payment is subject to various potential adjustments, including the NPM Adjustment. MSA § IX(c)(1). This adjustment, which is designed to protect the public health gains achieved by the MSA, reduces the annual payment under certain conditions. MSA § IX(d)(1). The adjustment, however, does not apply to any Settling State that enacts and diligently enforces the Model Statute, Exhibit T to the MSA, or some other "Qualifying Statute." MSA § IX(d)(1) & (2); Exh. T. California, like all other Settling States, has enacted the Model Statute as its Qualifying Statute. Cal. Health & Safety Code §§ 104555-104557.

California's Qualifying Statute establishes the policy that the public cost of smoking should be borne by tobacco manufacturers rather than the state to the extent that they either settle their liabilities with the state or are found culpable by the courts. *Id.* § 104555(d). The statute implements this policy by requiring every tobacco manufacturer to either: (a) become a Participating Manufacturer and generally perform its financial obligations under the MSA, or (b) deposit certain funds into an escrow account. *Id.* § 104557(a). The amount which must be deposited is based on the manufacturer's sales in California and is guaranteed not to exceed what the manufacturer

would have to pay as a PM. *Id.* § 104557(b)(2). Deposits not used to pay a tobacco-related liability to the state are released to the manufacturer after 25 years. *Id.* § 104557(b). This statute thus provides California with security for potential liabilities of non-settling tobacco manufacturers, and significantly reduces their MSA-related cost advantage.

In 2003 California strengthened its Qualifying Statute when it enacted additional legislation, sometimes called its "Contraband Amendment." This law requires each tobacco manufacturer to annually certify that it is in compliance with the Qualifying Statute and bans the sale of cigarettes produced by non-compliant manufacturers. Cal. Rev. & Tax Code § 30165.1(b), (c) & (e)(2).

2. According to the complaint, Petitioner Steve Sanders is a smoker and a California resident. Petitioner alleges that the OPMs are using the MSA, the Qualifying Statute and the Contraband Amendment to maintain an anti-competitive cartel and to charge supra-competitive prices. He alleges that the MSA is an "anticompetitive hybrid agreement" that allows PMs to raise prices without fear of losing sales or market share. He does not allege, however, that the MSA is an agreement to fix prices or restrict output. He also alleges that during the four years immediately after the MSA was signed, the OPMs raised prices by $12.20 a carton and their market shares did not "appreciably change."

Petitioner further alleges that California's Qualifying Statute and Contraband Statute should be declared invalid, and their enforcement enjoined, because they are preempted on their face by the Sherman Act. He alleges that his antitrust injury, which consists of illegally inflated cigarette prices, is "directly traceable" to these laws. Finally, Petitioner seeks damages from the tobacco manufacturer defendants under state antitrust law.

3. Both the California Attorney General and the tobacco manufacturer defendants timely moved to dismiss the action for failure to state a claim upon which relief could be granted. The district court granted the Attorney General's motion in the first instance on the ground that California's conduct was state action, insulated from Sherman Act liability under *Parker v. Brown*, 317 U.S. 341 (1943). App. B9-14. It found that the MSA is a sovereign act of the state of California and its MSA-related legislation is direct legislative activity. App. B11. It also ruled that *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), does not apply because "the *Midcal* analysis is neither appropriate nor required for direct acts of the sovereign." App. B12.

The district court dismissed Petitioner's preemption claim because the MSA-related statutes do not irreconcilably conflict with federal antitrust law. App. B14-16. These statutes "do not mandate, permit or place irresistible pressure on manufacturers to take concerted action." App. B15. They mandate instead

"unilateral action by each to make settlement or escrow payments." *Id.* It also ruled that the California Attorney General enjoys *Noerr-Pennington* immunity from liability arising from its entry into the MSA. *Id.* at B16-18.

The district court dismissed the claims against the tobacco defendants on the grounds that they enjoy *Noerr-Pennington* immunity for their efforts to negotiate the MSA and that they enjoy both *Noerr-Pennington* and *Parker* state action immunity for their compliance with the MSA. App. B18-22. The district court also rejected Petitioner's contention that the MSA and related statutes are hybrid restraints. *Id.* at B21-22. A hybrid restraint, it ruled, is where government delegates regulatory power to private parties to enforce their own market decisions. The MSA is not a hybrid restraint because it "does not authorize collusive action among the manufacturers or give them the regulatory authority to set prices in the cigarette market." *Id.* at B21. It merely requires tobacco manufacturers to make certain unilateral settlement payments. *Id.* at B21-22.

4. The Court of Appeals for the Ninth Circuit affirmed. In a unanimous opinion authored by Judge Clifton, the court ruled that: (a) California's MSA-related statutes are not preempted by federal antitrust law, App. A12-14; (b) the tobacco defendants enjoy *Noerr-Pennington* immunity for their efforts to negotiate the MSA and for their compliance therewith, *id.* at A15-21; and (c) California enjoys *Parker* state action immunity for its negotiation of

the MSA and enactment of related legislation, *id.*, at A21-30.

The court of appeals rejected the preemption claim because it found that the challenged statutes were not in irreconcilable conflict with federal antitrust law. App. A12. Such a conflict can exist only if the state statute "'mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party' to violate those laws." *Id.* (quoting *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982).) The challenged statutes, the court found, do not explicitly allow any price-fixing, market division or other per se unlawful behavior, nor do they irresistibly pressure tobacco companies to fix prices. App. A12-13. Although they do force profit-seeking NPMs to factor their escrow costs into their prices, they do not force them "to either peg their prices to those of participating manufacturers, or to refrain altogether from entering the market." *Id.* at A13. If the leading PMs really are charging artificially high prices, the court noted, an NPM could compete on price with escrow costs factored in and earn a "normal" profit. *Id.*

The court also held that the tobacco defendants enjoy immunity under the *Noerr-Pennington* doctrine for their conduct in negotiating and complying with the MSA. App. A15-21. It ruled, first, that their negotiation of the MSA is immunized because it is a form of speech directed at a governmental entity. *Id.* at A17-18. It next determined that under *Allied Tube*

*& Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and its own circuit precedent, *Noerr-Pennington* immunity also shields private parties from antitrust liability for injuries that result directly from the petitioned-for governmental action. *Id.* at A19-20. Because the injuries Petitioner alleged flowed directly from government action, his claims against the tobacco defendants failed. *Id.* at A21.

Lastly, the court held that California enjoys *Parker* state action immunity for agreeing to the MSA and enacting the related legislation. App. A21. After quoting *Parker* for the proposition that Congress did not intend to subject action directed by a state legislature to the Sherman Act, as well as its own precedents that *Parker* immunity extends to acts by judicial and executive branch officials, the court determined that "[t]he MSA thus fits the basic definition of 'state action' for *Parker* purposes." *Id.* at A23. The court next considered whether the MSA and related statutes are automatically immune under *Hoover v. Ronwin*, 466 U.S. 558 (1984), as sovereign state acts, or subject to *Midcal*'s two-part "clearly articulated"/"actively supervised" test. It held that *Hoover* "controls in cases where the state, acting as sovereign, imposes restraints on competition" and *Midcal* applies in situations where private parties participate in a state-authorized price-fixing regime. App. A28. Because the California Attorney General's decision to sign the MSA and the California Legislature's decision to pass the implementing legislation are sovereign acts which do not authorize private

parties to violate federal antitrust law, the court concluded that *Parker* immunity applies to these actions. *Id.*

## REASONS FOR DENYING THE PETITION

Petitioner argues that certiorari is warranted to resolve what he calls "the intractable division among the courts of appeals on the validity of the MSA and its implementing legislation." Pet. 21. There is, however, no such "intractable division," and no need for intervention by this Court.

Contrary to Petitioner's assertion, the Second Circuit has not held that "the [MSA's implementing] statutes are preempted." *Id.* It merely held, in the context of reviewing an order granting a motion to dismiss, that these statutes "*would*" be preempted "were the allegations of the complaint proven." *Freedom Holdings v. Spitzer*, 357 F.3d 205, 232 (2nd Cir. 2004) (emphasis added). Moreover, on remand, the district court in *Freedom Holdings* strongly indicated that the allegations are false and that the challenged statutes are valid. *Freedom Holdings v. Spitzer*, 447 F. Supp. 2d 230, 259 (S.D. N.Y. 2004), *aff'd*, 408 F.3d 112 (2nd Cir. 2005). In short, a conflict among the circuits is unlikely to emerge.

Similarly, there is no conflict among the circuits regarding the scope of *Noerr-Pennington* immunity. The Ninth and the Third Circuits agree that *Noerr-Pennington* immunity protects private parties from

federal antitrust liability for complying with governmental mandates in the MSA and related state laws. And the Ninth Circuit's application of the *Noerr-Pennington* doctrine to the private conduct alleged here is perfectly consistent with Second Circuit's truism that the *Noerr-Pennington* doctrine is irrelevant to preemption claims against state statutes.

Petitioner's final ground for review, which asserts that the circuits are divided over *Midcal*'s place in antitrust law and its applicability to the MSA and related legislation, is another attempt to fabricate a non-existent conflict. The four circuits that have considered *Midcal* in the MSA context all agree that *Midcal* is used to determine whether restraints imposed by private parties with state sanction or enforcement are immune under the *Parker* state action doctrine; *Midcal* does not apply to restraints directly imposed by states acting in their sovereign capacities. Although they reach different conclusions as to whether or not the alleged MSA-related restraints may be subject to *Midcal*, their disparate results follow from their disparate treatment of the plaintiffs' conclusory allegations at the pleadings stage, not from disparate understandings of *Midcal*'s scope.

More generally, once the pending challenges to the MSA and related statutes reach final judgment in the various circuits, they may well all result in victories for the States. If one of these final judgments is adverse to the States, this Court would be free to settle any resulting conflict at that point. But this

Court would thwart, rather than promote, judicial economy if it granted certiorari now, before a genuine conflict has arisen and before some lower courts have adjudicated these claims.

In short, there is no genuine split amongst the circuits regarding the validity of the MSA and related state laws under federal antitrust law, and no fundamental difference of opinion over federal antitrust doctrine generally. The petition should be denied.

## I. THE ASSERTED CIRCUIT CONFLICTS DO NOT EXIST

### A. The Tension Among the Circuits Regarding Federal Antitrust Preemption of the MSA and Related State Laws Is Inchoate and Likely to Be Resolved by the Lower Courts

Petitioner's argument, Pet. 20-23, that the federal appeals courts are intractably divided on whether or not the Sherman Act preempts MSA-related state laws is simply wrong. First, all three appellate courts that have considered the matter agree that such preemption claims are subject to the "irreconcilable conflict" test set forth in *Rice*, 458 U.S. at 659. *Sanders*, App. A12; *Tritent v. Commonwealth of Kentucky*, 467 F.3d 547, 554 (6th Cir. 2006); *Freedom Holdings v. Spitzer*, 357 F.3d 205, 222 (2nd Cir. 2004).

Second, contrary to Petitioner's assertion, Pet. 21-22, the Second Circuit did not hold that New York's MSA-related laws were preempted. Rather, it held that the *Freedom Holdings* complaint, which alleged that these laws enforced an express market-sharing agreement among private parties, stated a valid claim for preemption. *Freedom Holdings,* 357 F.3d at 224, 226, 235. In other words, the Second Circuit merely decided that a preemption claim had been adequately pled. Whether or not the challenged laws actually operated in the manner alleged, and therefore were preempted, was a matter that the Second Circuit remanded to the district court for decision.

Hence, the "conflict" among the circuits is nothing more than possible tension between the Second Circuit's holding that the complaint it reviewed adequately alleged a preemption claim, and the Sixth and Ninth Circuits' holdings that the complaints they reviewed did not. Moreover, this tension appears entirely attributable to the courts' slightly differing views of their obligation to accept the allegations of the complaint as true. Unlike the Sixth and Ninth Circuits, which independently examined the challenged statutes and the MSA, *Tritent*, 467 F.3d at 554-55, *Sanders*, App. A11-13, the Second Circuit uncritically accepted plaintiffs' allegations, a point which it repeatedly made in its ruling, *Freedom Holdings*, 357 F.3d at 208, 209, 216, 225, & 230.

Furthermore, subsequent rulings favoring New York strongly suggest that the final result in the

Second Circuit will accord with those already reached in other circuits. Since the Second Circuit's ruling in *Freedom Holdings*, both the district court in that case and another district court in New York have preliminarily rejected preemption challenges to MSA-related laws.

In the *Freedom Holdings* case after remand, the district court refused to preliminarily enjoin enforcement of the MSA and related laws because "plaintiffs have not shown a likelihood that the MSA and the Escrow and Contraband Statutes constitute a per se violation of the Sherman Act." *Freedom Holdings*, 447 F. Supp. 2d at 254. It found that "[t]he facts as proved . . . tell a quite different story" from the one alleged in the complaint, *id.* at 248, and that the "evidence seems to fit more closely with the State's view," *id.* at 258. Among other things, the court found that the escrow costs of the non-settling companies are lower than the MSA costs of most settling companies, and operate essentially as a flat tax. *Id.* at 238-40, 258. It also found that during the five years immediately following the MSA, the non-settling companies gained considerable market share (their market share rose from .5% to 8.2%), and the leading settling companies lost substantial market share (their market share dropped from 96.5% to 84.5%). These and other hard facts about the MSA, the related legislation, and the post-MSA cigarette market proved that plaintiffs' fundamental allegation that the MSA scheme is anticompetitive was untrue. The evidentiary record established instead that the MSA and the related

statutes have had "no adverse competitive impact on the [non-settling] NPMs." *Id.* at 241.

In *Grand River Enterprises v. Pryor*, No. 02 Civ. 5068 (JFK), 2006 U.S. LEXIS 35614 (2006), *aff'd on other grounds*, 481 F.3d 60 (2nd Cir. 2007), another district court in New York refused to enjoin enforcement of escrow statutes enacted by thirty-one states based upon its independent finding that such laws would likely survive federal antitrust preemption challenge. The court found that the statutes probably are not preempted because they require each cigarette manufacturer to "make its own unilateral decision with respect to price and output, and no state agent has the power to dictate the prices or output of any cigarette manufacturer." *Id.* at *25.

These rulings thus foreshadow final outcomes in the Second Circuit fully consistent with those reached by the Sixth Circuit and in the court below, and provide ample reason to deny review. There simply is no need to resolve now a potential conflict that is unlikely to mature into a serious division among the circuits. In the improbable event that such a conflict does arise, review may be sought at that time.

Denying review now also is potentially advantageous because it may give the Court the benefit of the views of two other appeals courts on the same subject. The Tenth Circuit presently has under submission two appeals which involve federal antitrust preemption challenges to Qualifying Statutes. *Xcaliber v. Morrison*, No. 06-3071 (10th Cir. argued Sept. 25,

2006); *Xcaliber v. Edmondson*, No. 05-5178 (10th Cir. argued Sept. 25, 2006).[3] In addition, an appeal of another judgment upholding a Qualifying Statute against federal antitrust preemption challenge was recently filed in the Eighth Circuit. *Grand River Enterprises v. Beebe*, 418 F. Supp. 2d 1082 (W.D. Ark. 2006), *appeal docketed*, No. 08-1436 (8th Cir. Feb. 26, 2008).

### B. There Is No Conflict Among the Circuits or with the Decisions of the Court Regarding the Scope of *Noerr-Pennington* Immunity.

Petitioner asserts that review should be had to resolve "growing conflict and confusion" among the federal circuits over the scope of the *Noerr-Pennington* doctrine.[4] Pet. p. 22. According to Petitioner, there is a conflict between the Third and Ninth Circuits, on the one hand, and the Second

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[3] The *Edmondson* appeal seeks review of an order granting Oklahoma's summary judgment motion on the grounds that its Allocable Share Amendment to its Qualifying Statute was not preempted and not a hybrid restraint. *Xcaliber v. Edmondson*, No. 04-CV-0922-CVE-PJC, 2005 U.S. Dist. LEXIS 26705 (N.D. Okla. 2005). The *Morrison* appeal seeks review of a parallel order issued by the district court in Kansas. *Xcaliber v. Kline*, No. 05-2261-JWL, 2006 U.S. Dist. LEXIS 77420 (Kan. 2006).

[4] The *Noerr-Pennington* doctrine traces back to *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Circuit and this Court, on the other, over whether or not *Noerr-Pennington* immunity protects private parties from Sherman Act liability for complying with petitioned-for governmental mandates in the MSA and related state laws. Pet. 23.

Such a conflict, however, does not exist. The two circuits that have reached this issue – i.e., the Third and the Ninth – agree that *Noerr-Pennington* immunity applies to such conduct. *Sanders*, App. A20-21; *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 251 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002). The Second Circuit is not in conflict with its sister circuits on this question. The Second Circuit did not rule on this issue in *Freedom Holdings* because it was not presented for decision, there being no private defendants in the case to assert the matter.

The issue which the Second Circuit did address – whether *Noerr-Pennington* immunity protects "anti-competitive legislation from being held to be pre-empted as in conflict with the *Sherman Act*," *Freedom Holdings*, 357 F.3d at 233, – is one on which the circuits apparently are in accord. Although the Ninth Circuit declined to decide the issue in this case because it was not raised, it carefully noted that the Second Circuit "may be correct" on this point. Pet. App. A21, n.9.

Nor is there any conflict between the Third and Ninth Circuit rulings and Supreme Court precedent. To the contrary, the rulings of both courts are faithful to *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,

486 U.S. 492, 499 (1988), wherein the Court held that "where a restraint upon trade . . . is the result of valid governmental action . . . , those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. . . ." They also accord with *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), on which Petitioner relies. In *Cantor*, a plurality decided that *Noerr-Pennington* immunity does not extend to independent antitrust violations occurring after successful government petitioning. Because Petitioner's complaint is based upon injuries "caused directly by governmental action," App. A21, and not on any independent antitrust violation, the opinion below does not conflict with *Cantor*.

### C. There Is No Circuit Split over *Midcal's* Place in Federal Antitrust Law and the Supposedly Different Analyses Regarding *Midcal's* Applicability to the MSA and Related State Laws are Easily Reconciled.

According to Petitioner, the decision below expands a preexisting circuit split over whether or not a state scheme that fails the *Midcal* test nevertheless can receive *Parker* state action immunity. Pet. 25. The supposed circuit split, with the Second and Third Circuits on one side, and the Sixth and Ninth Circuits on the other, however, does not exist. All four appeals courts agree that a state statutory scheme that is subject to, and fails, the *Midcal* test does not qualify as antitrust-exempt state action. *Sanders*,

App. A24; *Trident*, 467 F.3d at 554-55 (a statute that mandates or authorizes per se illegal conduct in all instances will be saved from preemption by the *Parker* state action doctrine only if it satisfies *Midcal*); *Freedom Holdings*, 357 F.3d at 223 (state statute that permits or compels private parties to engage in per se violations will be saved from preemption only if it satisfies *Midcal*); *Bedell*, 263 F.3d at 254 (state-authorized, but privately-imposed restraints qualify as state action only if they satisfy *Midcal*).

All four circuits also agree on *Midcal*'s place in federal antitrust law. The *Midcal* test applies to determine whether a statute (unlike these) that is preempted under *Rice*, is nevertheless "saved" from preemption, and whether private conduct pursuant to such a statute qualifies as immunized state action. The *Midcal* test does not apply to restraints directly imposed by the state acting as sovereign. *Sanders*, App. A23, A26-28 (*Midcal* test needed to decide whether private conduct pursuant to a state statute gets *Parker* immunity); *Trident*, 467 F.3d at 554-58 (*Midcal* applies to a state law which authorizes or mandates per se unlawful private conduct); *Freedom Holdings*, 357 F.3d at 222-23 (same); *Bedell*, 263 F.3d at 255 ("When it is uncertain whether an act should be treated as state action for the purposes of Parker immunity, we apply the test set forth in . . . *Midcal*").

The circuits diverge only with respect to the specific question of whether the complaints adequately allege claims that make *Midcal* applicable to the MSA and related legislation, and their divergent

answers are readily reconciled. The Second Circuit's ruling that *Midcal* did apply followed from its prior determination that the complaint had adequately alleged a claim for facial preemption under *Rice*. *Freedom Holdings*, 357 F.3d at 226. The Sixth Circuit's contrary ruling in *Tritent*, 467 F.3d at 558, flowed from its antecedent determination that the complaint did not adequately allege such a claim. Had the Second Circuit concluded that a claim of facial preemption had not been adequately alleged, it undoubtedly would have ruled, like the Sixth Circuit, that *Midcal* did not apply. And had the Sixth Circuit found the complaint adequate, it would have, like the Second Circuit, subjected the statutes to *Midcal*. These rulings thus follow from differences in the underlying pleadings, or judicial interpretations thereof, rather than from any disagreement over *Midcal* itself.

The same is true for any asserted inconsistency between the ruling in *Bedell* and the decision below. In *Bedell*, the Third Circuit stated that *Midcal* applied to the alleged conduct because the plaintiffs traced their alleged injuries mainly to conduct by the private tobacco companies, not to government action.[5]

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[5] Because the *Bedell* court affirmed the dismissal of the action on *Noerr-Pennington* grounds, its discussion of *Parker* immunity was unnecessary to its disposition of the case. However, in *Mariana v. Fisher*, 338 F.3d 189 (3rd Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004), a subsequent challenge to the MSA and related legislation brought against state officials, the Third Circuit revisited the *Parker* immunity issue. After affirming the dismissal of the action on *Noerr-Pennington* grounds, the court

(Continued on following page)

*Bedell*, 263 F.3d at 258. In the decision below, the Ninth Circuit ruled that *Midcal* did not apply because Petitioner traced his asserted injury to government, not private, action. Pet. App. A28. Both circuits agree with the rule of law that direct action by the state acting as sovereign is not subject to *Midcal*. *Bedell*, 263 F.3d at 255 ("[a]pplying Midcal is unnecessary if the alleged antitrust injury was the direct result of a clear sovereign state act"); *Sanders*, App. A28 ("*Hoover* therefore controls in cases where the state, acting as a sovereign, imposes restraints on competition. The state in such situations is immune from antitrust liability, regardless of whether the restraint in question would satisfy the *Midcal* test."). Thus, any tension between the Ninth and Third Circuits, like that between the Second and Sixth, is due to differing treatment of conclusory factual allegations, not to divergent understandings of federal law on antitrust preemption. Such minor discrepancies do not warrant the Court's attention.

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rejected the state officials' *Parker* immunity defense because it believed it was bound by *Bedell* and that *Bedell* assumed that state officials do not enjoy *Parker* immunity. *Id.* at 203-04. In so doing, however, it acknowledged that *Bedell's* analysis of *Parker* immunity was questionable, *id.* at 203, and that "[c]ritics may with some justification regard our discussion of *Parker* immunity as dictum," *id.* at 204.

## II. THE OTHER ASSERTED GROUNDS FOR REVIEW LACK MERIT

### A. The Decision Below Does Not Implicate Recurring Questions of National Importance.

1. Petitioner also requests review on the grounds that the validity of the MSA, its implementing legislation and tobacco company conduct thereunder are questions of great practical importance and recurrent litigation, and that "continuing uncertainty" about their validity is assertedly "harmful to all involved." Pet. 27-28. The MSA and related legislation are undeniably important. As this Court noted, the MSA is a "landmark" agreement, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001), which promotes public health in numerous important ways and provides Settling States with much-needed compensation for the enormous harm caused by cigarette smoking.[6] The implementing legislation likewise provides Settling States with security for non-released tobacco liabilities and protects against MSA-related unfair competition from non-settling tobacco companies.

There is, however, no serious question about the validity of the MSA and related state laws. To the contrary, the lower courts have, with remarkable

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[6] Tobacco use is perhaps "the single most significant threat to public health in the United States." *FDA v. Brown & Williamson*, 529 U.S. 101, 161 (2000).

consistency, rejected federal antitrust challenges to the MSA and implementing state laws. Every single district court that has entered a final judgment on such a claim has ruled in the State's favor, and every single federal appeals court has affirmed. *Sanders*, App. A31 (dismissal of Sherman Act claim affirmed); *Tritent*, 467 F.3d at 559 (same); *Mariana*, 338 F.3d at 200 (same); *Bedell*, 263 F.3d at 252 (same); *Int'l Tobacco Partners v. Kline*, No. 05-2319-KHV, 2007 U.S. Dist. LEXIS 9359, *20-28 (D. Kan. 2007) (Sherman Act claim denied on summary judgment); *Int'l Tobacco Partners v. Beebe*, 420 F. Supp. 2d 989, 994-97 (W.D. Ark. 2006) (Sherman Act claim dismissed for failure to state a claim); *Grand River Enterprises*, 418 F. Supp. 2d at 1089-91 (same); *Dos Santos v. Beebe*, 418 F. Supp. 2d 1064, 1071-73 (W.D. Ark. 2006) (same); *Xcaliber v. Kline*, No. 05-2261-JWL, 2006 U.S. Dist. LEXIS 77420 (Kan. 2006) (Sherman Act claim denied on summary judgment), *appeal docketed*, No. 06-3061 (10th Cir.); *S & M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604, 629-30 (M.D. Tenn. 2005) (same), *aff'd*, 228 Fed. Appx. 560, 562-63 (6th Cir. 2007); *Xcaliber v. Edmondson*, No. 04-CV-0922-CVE-PJC, 2005 U.S. Dist. LEXIS 26705 (N.D. Okla. 2005) (Sherman Act claim rejected on summary judgment), *appeal docketed*, No. 05-5178 (10th Cir.); *North Am. Trading Co. v. Nat'l Ass'n Attys Gen.*, Civ. No. 01-01600, (D. D.C. Sept. 18, 2001), *aff'd*, No. 01-7173 (D.C. Cir. Nov. 25, 2002); *PTI v. Philip Morris*, 100 F. Supp. 2d 1179, 1191-97 (C.D. Cal. 2000) (Sherman Act claim dismissed for failure to state a claim); *Hise v. Philip Morris*, 46 F. Supp. 2d 1201, 1209 (C.D. Cal.

2000) (Sherman Act claim rejected on summary judgment), *aff'd*, 208 F.3d 226 (10th Cir. 2000) (unpublished decision), *cert. denied*, 531 U.S. 959 (2000).

Contrary to Petitioner's assertion, Pet. 28-29, the States did not acknowledge uncertainty about the validity of the MSA and related legislation in their petition for certiorari to review the Second Circuit's decision in *Grand River Enterprises v. Pryor*, 425 F.3d 158 (2005), *cert. denied*, 127 S. Ct. 379 (2006). That petition concerned the distinct jurisdictional question of whether judicial review of a state law should be had by a federal court located in the state where the law was enacted or whether, as the Second Circuit erroneously held, such review may be had by a federal court located in some other state, depending upon the circumstances of the case. As the States' *Grand River* petition correctly observed, the availability of multiple forums for such review threatens "the certainty and finality that ordinarily results from decisions rendered by federal courts (particularly federal courts of appeals) in their respective States." Pet. 28 (quoting 2006 WL 1049019, at *14-*15.) This expression of concern about the certainty and finality of federal court decisions, however, is by no means an acknowledgment that there is doubt about the validity of the MSA and related legislation.

In short, there is very little doubt about the validity of the MSA and related state laws. Such residual doubt does not impair government budgeting or corporate planning, nor does it warrant Supreme Court review.

2. Petitioner seeks review on the additional ground that the questions presented are of general importance to the "proper implementation of antitrust law generally." Pet. 29-30. Petitioner argues that the court below reached a result that "essentially renders . . . [*Midcal*] a dead letter in most circumstance[s]." *Id.* at 30. This assertion, however, cannot be squared with the Ninth Circuit's decision, which recognizes *Midcal*'s proper place in antitrust jurisprudence and correctly rules that the restraints Petitioner challenged are direct state acts not subject to *Midcal*.

In this case, the Ninth Circuit held that *Midcal* applies to state statutes that authorize or require private parties to engage in per se violations of federal antitrust law and to hybrid restraints such as the scheme at issue in *Midcal;* it does not, however, apply to restraints directly imposed by the state. App. A28. This understanding of *Midcal*'s reach is consonant with *Parker*'s key holding that when Congress passed the Sherman Act it did not intend to limit the states' freedom to regulate markets, and with the Court's subsequent decisions, which apply *Midcal* to private antitrust violations pursuant to state directive, but not to direct state action. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-40 (1992) (*Midcal* applied to determine whether rate-setting by private title insurers was protected by *Parker* immunity); *S. Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 61 (1985) (*Midcal* "appli[es] to private parties' claims of state action immunity"); *Hoover*, 466 U.S. at 568-69 ("[w]here the conduct at issue is in fact that of the

state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision'").

The decision below also conforms to the logic behind the *Midcal* test. This test, which asks whether the restraint is "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the state," is a useful tool for determining whether private action pursuant to state authorization or directive is truly state action. It is unnecessary and nonsensical, however, as applied to restraints directly imposed by the state, because such restraints are clearly matters of state policy for which supervision is unnecessary. Thus, far from treating *Midcal* as a virtual dead letter, the court below afforded *Midcal* its proper scope, and correctly concluded that because the restraints that Petitioner challenged were direct acts by the state of California, *Midcal* did not apply.[7]

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[7] Petitioner's final argument that the MSA scheme implicates the constitutional prohibition against unapproved interstate compacts, Pet. 31-32, merits little reply. His complaint does not allege a violation of the Interstate Compact Clause, and it is far too late in the day to allege one now, even obliquely through an assertion that this constitutional provision is somehow "implicate[d]." Eugene Gressman et al., *Supreme Court Practice*, Ch. 6.37(i)(3) (9th ed. 2007). Moreover, such claims have been consistently rejected by other courts. *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 357-360 (4th Cir. 2002), *cert. denied*, 537 U.S. 818 (2002); *PTI*, 100 F. Supp. 2d at 1197-98; *Hise*, 46 F. Supp. 2d at 1210 (Interstate Compact clause claim rejected as "plainly frivolous"); see generally, *Mariana*, 338 F.3d 189 at 204-06 (Interstate Compact Clause claim rejected for lack of standing).

### B. The Decision Below Correctly Applied Settled Antitrust Immunity Principles to the MSA and Related State Laws.

Contrary to Petitioner's assertion, Pet. 32-35, the decision below is correct and affords no reason for review. It applied the correct "irreconcilable conflict" test to his claim of facial preemption. App. A12-14. Petitioner's assertion now that his preemption claim was actually an "as-applied" challenge, and subject to a different legal standard, is untrue. His complaint does not contain an "as-applied" claim and only seeks a judgment declaring that California's Qualifying Act and Contraband Amendment are "facially void as a *per se* restraint of trade." App. A10, n.6.

The conclusion by the court below that the MSA and related statutes are sovereign state acts, not hybrid restraints, is likewise correct. Both the MSA and California's related state laws impose unilateral obligations on tobacco manufacturers to make certain payments either directly to the Settling States or into an escrow account. They do not require or permit them to fix prices, divide markets, restrict output, or engage in any other conduct forbidden by federal antitrust law.

Nor is the MSA scheme a hybrid restraint. A hybrid restraint is where government delegates to private parties power to regulate trade. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345, n.8 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 267-68 (1986). A state

law which allows private parties to dictate other companies' prices, for example, is a hybrid restraint.

The MSA and the related state laws do no such thing. California does not enforce any tobacco manufacturer's pricing decisions or permit any tobacco manufacturer to control the pricing of others. It merely enforces their obligations to make certain settlement payments or escrow deposits. Every court to consider the matter on a factual record has so ruled. *Int'l Tobacco Partners*, 2007 U.S. Dist. LEXIS 9359, *25-27; *Xcaliber*, 2006 U.S. Dist. LEXIS 77420, *14; *Grand River*, 2006 U.S. Dist. LEXIS 35614, *25; *Xcaliber*, 2005 U.S. Dist. LEXIS 26705, *18; but see *Bedell*, 263 F.3d at 259 (per allegations of complaint, MSA "resembles" hybrid restraint).

## CONCLUSION

The petition for writ of certiorari does not satisfy the Court's standards for discretionary review and should be denied.

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Respectfully submitted,

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