No. 07-995

IN THE

Supreme Court of the United States

STEVE SANDERS,
individually and as class representative,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT MANUFACTURERS IN OPPOSITION

Darryl Snider
James F. Speyer
Eric Shapland
Leo D. Caseria
HELLER EHRMAN LLP
333 South Hope Street,
39th Floor
Los Angeles, California 90071

E. Joshua Rosenkranz
Counsel of Record
Kenneth L. Chernof
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 832-8300

Counsel for Respondent Philip Morris USA Inc.

(Additional Counsel Listed On Inside Cover)

Douglas L. Wald
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
(202) 942-5000

Counsel for Respondent Philip Morris USA Inc.

Stephen R. Patton
Barack S. Echols
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601-6636
(312) 861-2000

Counsel for Respondents Brown & Williamson Tobacco Corporation and R.J. Reynolds Tobacco Company

Irving Scher
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Respondent Lorillard Tobacco Company

Peter D. Isakoff
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW,
Suite 900
Washington, DC 20005
(202) 682-7144

Counsel for Respondent Lorillard Tobacco Company

QUESTIONS PRESENTED

Petitioner invokes the Sherman Act to challenge the Master Settlement Agreement ("MSA")—a landmark settlement between 46 states and respondent tobacco companies—as well as related state statutes. These 46 states and every other party to the MSA agree that the MSA and those statutes do not authorize tobacco companies to fix prices or output or induce the companies to price their products in lockstep. The questions presented are:

1. Did the Court of Appeals correctly hold that the Sherman Act does not preempt the MSA-related state statutes because the statutes do not mandate or authorize conduct that is an antitrust violation?

2. Did the Court of Appeals correctly hold that respondent tobacco companies are immune from liability under the *Noerr-Pennington* doctrine when (as petitioner concedes) the companies enjoy such immunity for entering into the MSA and the complaint does not allege any other agreement in restraint of trade?

3. Did the Court of Appeals correctly hold that the State of California is immune from liability under the "state action" doctrine because the MSA and related statutes do not authorize any antitrust violation?

RULE 29.6 STATEMENT

Respondent Philip Morris USA Inc. is a subsidiary of Altria Group, Inc., which is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

All of the stock of Respondent R.J. Reynolds Tobacco Company is owned by R.J. Reynolds Tobacco Holdings, Inc., all of whose stock in turn is owned by Reynolds American Inc. Reynolds American Inc. is the only publicly held company that owns 10% or more of the stock of R.J. Reynolds Tobacco Holdings, Inc.

Respondent Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) ("Brown & Williamson") is wholly owned by BATUS Tobacco Services, Inc., which is a non-public holding company. Brown & Williamson's ultimate parent corporation is British American Tobacco, p.l.c., which is a publicly held United Kingdom corporation. All other indirect parent companies of Brown & Williamson are non-public companies.

Respondent Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock. Other direct and indirect subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have securities that are publicly traded are CNA Financial Corporation, Diamond Offshore Drilling, Inc., Boardwalk Pipeline Partners, LP, and Texas Gas Transmission, L.L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

BRIEF IN OPPOSITION

INTRODUCTION[1]

Petitioner asks this Court to review the Court of Appeals' dismissal of his antitrust challenge to the Master Settlement Agreement ("MSA") and related California statutes. He contends that the circuits are split on three legal issues. But petitioner has concocted each purported conflict by misstating the holdings of the court below and its sister circuits. The Court of Appeals faithfully applied this Court's precedents and properly dismissed the complaint at the pleading stage. The petition presents no issue worthy of review.

As this Court has acknowledged, the MSA between 46 states and respondent tobacco companies (the "Manufacturers") is a "landmark agreement"—perhaps the most far-reaching and important government-induced settlement in history. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). Courts in each of the settling states expressly approved it. Each settling state's legislature subsequently endorsed it by enacting implementing legislation. In light of "our national commitment to fed-

[1] The petition is cited as "Pet." and the Appendix to the petition is cited as "App." Petitioner's briefs before the Court of Appeals are cited as "OB" and "CA9 Reply." The State of California's brief before the Court of Appeals and the amicus brief of the various Settling States are cited as "Cal. CA9 Br." and "Amici States CA Br." The Excerpts of Record before the Court of Appeals are cited as "ER" and the Clerk's Record is cited as "CR."

eralism," *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 374 (1991), any one state's decision to enter the MSA and enact related laws is entitled to "'great respect.'" *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) (citation omitted). When *46* states each make the independent judgment that the MSA is in the best interests of its citizens, the result is even more deserving of respect.

More than 20 lawsuits have been filed seeking to invalidate the MSA on antitrust grounds, and none has succeeded. Offering no new allegations or legal theories that would allow him to prevail where others have not, petitioner claims that the MSA has enabled the Manufacturers to charge supracompetitive prices for cigarettes. He asserts that the Sherman Act preempts the MSA and related statutes, and that the Manufacturers are liable for treble damages under California's antitrust law.

The District Court and a unanimous panel of the Court of Appeals held that petitioner's suit fails to state a claim as a matter of law. They held that: (1) the Sherman Act does not preempt the state laws petitioner challenges; (2) the Manufacturers are immune from liability under the *Noerr-Pennington* doctrine; and (3) the state is immune from liability under the *Parker* state-action doctrine.

Contrary to petitioner's assertion, there is no circuit split on whether the Sherman Act preempts the MSA or related legislation. With respect to the *Parker* and *Noerr-Pennington* immunity doctrines, petitioner similarly invents a circuit conflict by misstating the analyses and holdings of the Ninth Circuit and other courts.

To be sure, one circuit has taken a different *procedural* approach to dealing with a similar complaint in the early stages of the litigation. While the Ninth Circuit dismissed this case at the outset, the Second Circuit allowed a similar MSA challenge to proceed beyond the pleading stage. But this different procedural outcome is attributable to differences in the two courts' readings of the allegations of the complaints before them. The Second Circuit—in a decision rendered before this Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)—accepted the complaint's conclusory assertions that the MSA and related legislation authorized Sherman Act violations. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 225-26 (2d Cir. 2004). It thus allowed the plaintiffs *to try to prove facts* that might lead to preemption and defeat *Parker* immunity. *Id.* In contrast, the Ninth Circuit conducted a more critical examination of the complaint, including a review of the actual terms of the MSA (which was appended to the complaint), and reached a different conclusion. The Ninth Circuit's approach was correct, especially given *Twombly*'s emphasis on careful scrutiny of the complaint at the pleading stage.

This difference—wholly procedural, occurring in the early stage of litigation, and related to one particular contract—is simply not the sort of variance that warrants this Court's attention. Furthermore, any possible doubt on that issue is put to rest by the fact that *every* court that has examined the merits of the claim at issue here has reached the same conclusion: "The facts as proved . . . *tell a quite different story*" from the allegations of anticompetitive conduct in the plaintiffs' complaints. *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 248

(S.D.N.Y. 2004) (emphasis added), *aff'd*, 408 F.3d 112 (2d Cir. 2005); *see also infra* at 31 (collecting cases). The supposed "conflict" is thus no conflict at all; it amounts only to the question of when the antitrust challenge should be rejected: at the pleading stage, or after discovery.

The petition should be denied.

STATEMENT

The MSA and Implementing Legislation

Beginning in the mid-1990s, attorneys general in dozens of states filed lawsuits against the Manufacturers demanding reimbursement for smoking-related healthcare costs. App. A2-3. After prolonged litigation, a failed congressional solution, and months of negotiations, the Manufacturers and the states' attorneys general hammered out a comprehensive settlement. Attorneys general or governors representing 46 states, the District of Columbia, and five U.S. territories (the "Settling States" or "States") signed the MSA on behalf of their governments in 1998. App. A3-4. In each Settling State, the relevant court approved the MSA in a consent decree. App. A4. Each Settling State also enacted implementing legislation. App. A5.

Under the MSA, the Manufacturers paid billions of dollars to resolve claims of past harm. ER 87-88. Even more significantly, the MSA requires the Manufacturers to pay the States *billions more annually, in perpetuity.* App. A4. The MSA prescribes a formula for calculating the Manufacturers' annual payments. *Id.* The payment obligation increases or decreases depending on how many cigarettes a Manufacturer sells. App. A4-5. But regardless of how many cigarettes any Manufacturer sells,

each Manufacturer pays the same amount for each cigarette. *See* Amici States CA Br. 15-17.

The MSA also includes various terms governing the conduct of the Manufacturers—provisions that the Settling States have lauded as "significant measures designed to promote public health and prevent youth smoking." *Id.* at 2; *see id.* at 6 ("The MSA has had a dramatic positive impact on public health, and this will likely increase over time."). Among these measures are limits on the advertising, marketing, and promotion of tobacco products and the establishment of an independent national foundation to reduce youth smoking. ER 50-73.

The MSA invites any other cigarette manufacturer to sign on to the settlement. App. A4. Manufacturers that accept the invitation are known as "Subsequent Participating Manufacturers," or "SPMs," to distinguish them from the "Original Participating Manufacturers," or "OPMs." *Id.* SPMs agree to the various prospective reforms, including the obligation to pay a fixed per-cigarette cost, subject to an exemption: An SPM that signed the MSA within 90 days has no obligation to pay to the extent that its market share in a particular year is less than its 1998 market share (or 125% of its 1997 market share, if that is higher). *Id.* When an SPM crosses the volume threshold, it incurs a fixed per-cigarette cost for cigarettes sold above the threshold. ER 110-12.

Manufacturers that choose not to sign the MSA are obviously not bound by its terms. But in California, as in the other Settling States, these "Non-Participating Manufacturers," or "NPMs," do have obligations that are governed by state statute. App. B3; A5-6. The California Legislature enacted the

"Escrow Statute" (also called the "Qualifying Act"), which requires each NPM to contribute annually to an escrow fund based on the number of cigarettes it sells within the state. Cal. Health & Safety Code § 104557. The escrow fund is a security against future health-related costs for which an NPM might be held liable. App. A6. Thus, the fund can be used only to pay a settlement or a judgment against the NPM; whatever funds remain in escrow after 25 years revert to the NPM. *Id.*

The Escrow Statute prescribes precisely, on a per-cigarette basis, the NPMs' payment obligation. To strengthen enforcement of the Escrow Statutes, California and other states have enacted complementary legislation (petitioner calls it the "Contraband Amendment") providing that NPM-manufactured cigarettes may not be distributed unless the NPM is in compliance with the Escrow Statute. Cal. Bus. & Prof. Code § 22979; App. A6-7.

Neither the MSA nor the implementing legislation in any way limits each Manufacturer's freedom to set its own prices and output. Indeed, no provision in the MSA or the legislation purports to govern prices or output. And, because the payment obligations impose the same per-cigarette costs on all Manufacturers, they do not provide either an incentive to limit output or a disincentive to increase output. Finally, neither the MSA nor the legislation authorizes participants to enter into any agreement on prices or output.

Petitioner's Allegations and Legal Theory

Petitioner filed this lawsuit against the State of California and the Manufacturers under § 1 of the Sherman Act and California's antitrust law. Pur-

porting to represent all California smokers, petitioner seeks to invalidate what he calls the "anti-competitive provisions of the MSA" and the implementing legislation, ER 18, claiming they are preempted by the Sherman Act. He also seeks to recover billions of dollars from the Manufacturers for the alleged "supracompetitive prices" he claims the purported class was "forced to pay" as a result of the MSA. OB 10. Specifically, he alleges that the Manufacturers raised their prices more than twice the amount that would have been necessary to offset their MSA payment obligations. App. A7.

The essential element of a Sherman Act § 1 claim is a "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. But the *only* purportedly illegal agreement in restraint of trade alleged in the complaint is the MSA itself—and petitioner has conceded that he has no claim against the Manufacturers for negotiating and signing the MSA. App. B18; CR53 at 48-50.

Unable to point to any actionable agreement in restraint of trade, petitioner offers the theory that the MSA allows the Manufacturers to operate in a way that *resembles* a "horizontal output cartel," albeit without actually agreeing to raise prices or reduce output. *See* Pet. 12 (MSA "effectively" established a "horizontal output cartel"). Specifically, he alleges that the Manufacturers "have been able to raise prices with impunity and in lockstep." OB 10.

Petitioner's theory is based upon a misreading of the MSA, a contract to which he is not a party. He correctly notes that the MSA imposes increased payment obligations when a Manufacturer's market share increases. OB 22. From this he leaps to the counterfactual conclusion that these increased

payment obligations "offset or exceed[]" the increased revenue from any "market share gained through price competition," and thereby purportedly eliminate any incentive to cut prices. OB 10-11. Thus, according to petitioner, each Manufacturer has the "perfect incentive[]" to follow another's price hike, in order to avoid the purportedly negative effect of a market share increase. OB 17. Petitioner calls this theory his "key allegation," OB 25—and rightfully so, because without it his claim that the MSA creates something like an "output cartel" necessarily collapses.

The 46 States and every other party to the MSA, however, recognize that the express terms of the MSA flatly contradict petitioner's theory. Those terms make clear that the MSA and the related legislation require manufacturers to pay a flat per-cigarette cost for every cigarette they sell. This per-unit cost does not vary with market share. Thus, there is no reason for any manufacturer not to compete on price and gain market share. *See* Amici States CA Br. 17 ("[I]t is evident from the face of the MSA that there is no disincentive for any OPM to reduce prices or gain market share, [and] no output-limiting 'cartel.'").

Petitioner is *not* arguing that an agreement in restraint of trade should be inferred on the basis of the claimed lockstep pricing or other evidence. *See* App. A20. Nor could he. *See, e.g., Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (parallel conduct by itself is lawful and does not suggest conspiracy); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (describing parallel pricing in the tobacco industry as a "not . . . unlawful" consequence of oligopolistic interde-

pendence); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299-1301 (11th Cir. 2003) (affirming grant of summary judgment in Sherman Act § 1 case against Manufacturers based on alleged lockstep pricing on ground that no reasonable jury could conclude that Manufacturers agreed to fix prices).

If petitioner's suit succeeded, he would void the MSA—with dramatic adverse effects on the States. He would cancel the flow of billions of dollars a year from the Manufacturers to the Settling States. He would also eliminate the far-reaching and unprecedented advertising and marketing restrictions.

The Legal Framework

Respondents moved to dismiss on the grounds that petitioner failed to plead a preemption claim and that their conduct was immune from liability under the *Noerr-Pennington* doctrine and *Parker* state action doctrine. All parties agree on the basic legal framework on all three issues—as did the District Court, the Court of Appeals, and the two circuits petitioner invokes in attempting to raise a conflict.

1. Preemption. A state statute "is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *accord Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986). Because the "function of government may often be to tamper with free markets," the circumstances under which the federal antitrust laws will preempt a state statute are narrowly circumscribed. *Fisher*, 475 U.S. at 264; *see Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978)

("[I]f an adverse effect on competition were . . . enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.").

"A party may successfully enjoin the enforcement of a state statute *only* if the statute on its face *irreconcilably conflicts* with federal antitrust policy." *Rice*, 458 U.S. at 659 (emphasis added). Such an irreconcilable conflict will occur only when the state law

> 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 the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

Id. at 661; *accord Fisher*, 475 U.S. at 265; Pet. 15-16.

2. *Parker* immunity. The state action immunity doctrine described in *Parker v. Brown*, 317 U.S. 341 (1943), mirrors the foregoing preemption principles. For reasons of "federalism and state sovereignty," *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987), the basic rule is that the Sherman Act does not apply to "state action or official action directed by a state." *Parker*, 317 U.S. at 351. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not

lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. And if a state action enjoys *Parker* immunity, then so do the "regulated private parties" who operate under the law. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57 (1985).

Just as there is a single exception to the rule against Sherman Act preemption of state action, there is a single exception to the rule in favor of state action immunity from the Sherman Act: A state cannot "give immunity to [private parties] who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351. Sherman Act violations authorized by a state can come in the form of a private restraint (which petitioner does not allege) or a so-called "hybrid restraint" (which petitioner does allege).

The classic private restraint is the one this Court encountered in *FTC v. Ticor Title Insurance Co.*, where the state authorized title insurance companies to enter into a "private pricefixing arrangement[]" among themselves. 504 U.S. 621, 633 (1992). This Court held that the title companies could not claim immunity for their per se violation of the Sherman Act, even though state law authorized their conduct. *Id.* at 639-40.

A state creates a hybrid restraint when it grants a private party "a degree of private regulatory power" that allows that party to compel other private actors to follow its pricing or other "private marketing decisions." *Fisher*, 475 U.S. at 268 (internal quotation marks omitted); *accord 324 Liquor*, 479 U.S. at 345 n.8. For example, in *324 Liquor*, a state statute authorized alcohol wholesalers

to dictate the prices charged by retailers; the penalty for a retailer's non-compliance was a fine and loss of its license. 479 U.S. at 340. The Court held that the Sherman Act preempted the statute because it created a hybrid restraint that constituted resale price maintenance in violation of Sherman Act § 1. *Id.* at 343-45 & n.8.

A statute or other state action that authorizes or compels per se Sherman Act violations (such as the private restraint in *Ticor* or the hybrid restraint in *324 Liquor*) is a necessary precondition to establishing the inapplicability of *Parker* immunity, but is not by itself sufficient. The Court in *Midcal* held that even a statute or other state action authorizing per se Sherman Act violations will be entitled to *Parker* immunity, if the restraint is (1) "actively supervised" by the state and (2) "clearly articulated and affirmatively expressed as state policy." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *see Ticor*, 504 U.S. at 633. Similarly, a statute that would otherwise be preempted by the Sherman Act can be saved if the state satisfies the *Midcal* requirements. *Fisher*, 475 U.S. at 265.

Because petitioner does not allege a private restraint (i.e., petitioner "does not allege that the tobacco companies have agreed amongst themselves to fix prices," App. A8), his sole argument for preemption, and against *Parker* immunity, is that the cartel-like results that the MSA supposedly induces amount to a hybrid restraint. Thus, if the MSA regime does *not* grant the Manufacturers private regulatory power that allows them to legally compel other private parties to follow their pricing or marketing decisions (i.e., does not create a hybrid re-

straint), it will be protected by *Parker*, and will not be preempted, without the need to inquire whether it satisfies the *Midcal* requirements.

3. *Noerr-Pennington* immunity. *Noerr-Pennington* immunity derives in part from the recognition that laws intended to govern competition in commercial markets "are not at all appropriate for application in the political arena." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965). Rooted also in First Amendment principles, the doctrine holds that businesses must be free to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors," and the antitrust laws cannot be used to penalize them for their advocacy. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Noerr*, 365 U.S. at 137-38. The immunity applies even if the "sole purpose" of a party's conduct is to restrain trade or destroy competitors. *Noerr*, 365 U.S. at 138-40.

Courts have uniformly held that *Noerr-Pennington* protects private parties that enter into litigation settlements with the government, and petitioner has conceded from the start that the Manufacturers enjoy *Noerr-Pennington* immunity for negotiating and entering into the MSA. App. A16; B18-19; CR53 at 48-50.

The District Court Dismisses the Complaint and the Court of Appeals Affirms

Applying these settled principles, the District Court granted the motions to dismiss filed by the State of California and the Manufacturers. The District Court held that the Sherman Act does not preempt the implementing statutes, App. B14-16; that petitioner failed to plead a claim that could defeat *Parker* immunity, App. B9-14, 20-22; and that petitioner failed to plead a claim that could survive *Noerr-Pennington* immunity, App. B16-20.

A panel of the Ninth Circuit unanimously affirmed the dismissal. Central to the Court of Appeals' analysis was the decision to go behind the allegations and "analyze the MSA"—which was attached to the complaint and was "obviously central to the claim," App. A11—and evaluate whether petitioner's allegations about the MSA's effect bore any relation to what the MSA actually says.

1. Preemption. The Court of Appeals held that the implementing legislation is not preempted, because it is not in "'irreconcilable' conflict" with federal law. App. A12 (quoting *Rice*, 458 U.S. at 659). The court explained that neither of the statutes plaintiff challenges "explicitly allow[s] price fixing, market division, or other *per se* illegal monopolistic behavior." *Id.*

The Court of Appeals rejected petitioner's argument that the statutes "create such high barriers to NPMs' market entry and ability to price-compete that they have 'virtually guaranteed collusion and monopoly prices.'" App. A12-13 (citation omitted). It explained that the actual terms of the MSA—as distinguished from petitioner's characterization of

them—conclusively show that there is nothing to stop any competitor from entering the market and undercutting the MSA's participants on price. App. A13. Although "[t]he statutes . . . may cause higher prices," the court said,

> [n]othing . . . forces the NPMs to either peg their prices to those of participating manufacturers, or to refrain altogether from entering the market. If the OPMs really are charging artificially high prices, and thus making artificially high profits, an NPM conceivably could compete on price by charging a "normal" price and still make a "normal" profit, even taking the escrow payment into account.

Id.

2. *Parker* immunity. The Court of Appeals held that because the state did not authorize any per se violations of the Sherman Act, "*Parker* immunity protects the state from antitrust liability for entering into the MSA and for passing the implementing statutes." App. A28.

The court rejected petitioner's theory that the MSA and the implementing legislation create a hybrid restraint. App. A29. The Court of Appeals explained that under this Court's precedent the distinguishing feature of a hybrid restraint is a "state's decision to let producers dictate market conditions to others." *Id.* Since "the MSA involves no such delegation of *per se* illegal power such as the ability to fix prices," the court "conclude[d] that the MSA cannot be classified as a hybrid restraint." App. A30.

Accordingly, the court held that the state was not required to engage in active supervision of cigarette prices to obtain immunity, because "the *Midcal* test does not apply to sovereign state acts, which are immune from antitrust liability so long as they" do not "authoriz[e] *per se* illegal activities" by private parties. App. A27.

3. *Noerr-Pennington* immunity. The Court of Appeals also held that the Manufacturers are shielded by *Noerr-Pennington* immunity. App. A15-21.

The court began with the observation that "*Noerr-Pennington* immunity protects private parties from liability for negotiating and entering into settlements or other agreements with the government," App. A16—a point petitioner had conceded, App. B18. The court then rejected petitioner's argument that "even if *Noerr-Pennington* immunity protects the defendants from liability for the MSA itself, it does not protect the tobacco defendants from liability for increasing prices after the MSA." App. A18. The court acknowledged that the *Noerr-Pennington* doctrine does not necessarily immunize *all* conduct the Manufacturers might have engaged in after the MSA; if, for example, the Manufacturers had made post-MSA "agreements . . . to engage in the operation of an output cartel," such agreements "might not be immune from liability" under *Noerr-Pennington*. App. A20 (internal quotation marks omitted). But that possibility was beside the point, the court held, because petitioner's complaint "*does not allege any such subsequent agreement in restraint of trade.*" *Id.* (emphasis added). Thus, because the only agreement to restrain trade alleged in the complaint is the MSA itself—and entry into

the MSA is immunized by *Noerr-Pennington*—the court concluded that the complaint states no claim against the Manufacturers. App. A21.

In the end, the court held, "because [petitioner's] complaint is based on injuries caused directly by government action"—and not based on post-MSA activities that would themselves be antitrust violations—"*Noerr-Pennington* immunity shields the tobacco defendants from liability for the alleged supracompetitive price increases." App. A20-21 (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988)).

REASONS FOR DENYING THE PETITION

The petition should be denied because: (i) it presents no actual circuit conflict; (ii) this case presents no issue of national importance that warrants this Court's intervention; and (iii) the Court of Appeals' analysis was both correct and consistent with this Court's established jurisprudence.

I. THERE IS NO CIRCUIT CONFLICT ON ANY OF THE QUESTIONS PRESENTED.

Petitioner asserts a trio of circuit conflicts wrapped up in one case. In truth, there is no conflict on any of the three questions petitioner presents. The various circuits agree on the basic legal principles. *See supra* at 9-13. At most, they differ on how to assess allegations regarding the MSA at the pleading stage—a case-specific application of settled law that does not merit this Court's attention. *See* Sup. Ct. R. 10.

In fact, on at least three previous occasions, this Court has denied certiorari in MSA cases involving similar antitrust challenges in a similar posture.

See Mariana v. Fisher, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002); *Hise v. Philip Morris Inc.*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000). This Court's intervention is even more unwarranted now. In light of subsequent developments, described below, the two courts of appeals on the other side of the claimed conflict would likely assess the complaint allegations about the MSA as the Court of Appeals did here, if confronted with a motion to dismiss today.

A. There Is No Circuit Conflict on Whether the Sherman Act Preempts the MSA.

Petitioner does not assert that any court of appeals has rejected the preemption principles set forth above. *See supra* at 9-10. Indeed, each court recited exactly the same preemption principles, starting with the baseline rule that the Sherman Act does not preempt a state statute unless the "conduct contemplated by the statute [is] 'in all cases a per se violation' of the federal antitrust laws." *Compare Freedom Holdings*, 357 F.3d at 223 (quoting *Rice*, 458 U.S. at 661), *with Tritent Int'l Corp. v. Kentucky*, 467 F.3d 547, 554 (6th Cir. 2006) (same), *and* App. A12 (same).

Rather than claiming a disagreement over basic antitrust principles, petitioner focuses on an application of these settled principles to a specific—indeed, unique—context. He asserts that "[t]he decision below expands an existing split . . . over whether the MSA and its related statutes are preempted by federal antitrust law," because "[t]he

Second Circuit . . . has held that . . . the [implementing] statutes are preempted." Pet. 20-21. He is wrong. No circuit—indeed, no court at any level—has ever so held.

The Second Circuit case petitioner invokes is *Freedom Holdings*. There, the plaintiffs sued New York State, seeking to enjoin its implementing legislation on preemption grounds. 357 F.3d at 208-09. Addressing the allegations at the pleading stage, the Second Circuit held only that the plaintiffs had "sufficiently *alleged* a *per se* violation of the Sherman Act," *id.* at 226 (emphasis added), which meant only that *if "the allegations of the Complaint [were] proven,"* they would have a claim for preemption, *id.* at 232 (emphasis added). That holding rested entirely on the court's assumption, for purposes of the motion to dismiss, that the complaint was accurate in alleging that the MSA's payment obligations effectively penalized Manufacturers for increasing output, and therefore gave rise to market behavior that resembled an output cartel. *Id.* at 225-26.

That is not the same as a holding that "the statutes *are* preempted." Pet. 20-21 (emphasis added). Subsequent proceedings in the case underscore just how inaccurate that description is. On remand, the plaintiffs sought a preliminary injunction against enforcement of the same implementing legislation that petitioner challenges here. *Freedom Holdings, Inc. v. Spitzer*, 447 F. Supp. 2d 230, 248 (S.D.N.Y. 2004), *aff'd*, 408 F.3d 112 (2d Cir. 2005). The district court noted that the Second Circuit's holding was "based, not on fact, but on plaintiffs' allegations of fact that they claim to be able to prove. *The facts as proved, however, tell a quite different story.*" *Id.* (emphasis added).

The district court found that the complaint's allegations about the effects of the MSA were inconsistent with the MSA's express terms. It noted that the payment obligations of NPMs "are essentially a flat tax, assessed at a flat rate per cigarette sold" and that this does not prevent price competition among cigarette manufacturers. *Id.* at 258. For this reason, the court observed that, "contrary to plaintiffs' allegations, [NPMs'] incremental costs do not rise with their volume of sales, and they are not in any manner obliged to increase their prices in lockstep with the OPMs." *Id.* at 261; *see also Grand River Enters. Six Nations Ltd. v. Pryor*, No. 02-5068, 2006 WL 1517603 at *8-*9 (S.D.N.Y. May 31, 2006) (finding no likelihood of success on claim that MSA implementing statutes are preempted by Sherman Act and denying preliminary injunction), *aff'd on other grounds*, 481 F.3d 60 (2d Cir. 2007).

To be sure, the court below and the Sixth Circuit (in *Tritent*) rejected at the pleading stage complaints similar to the one the Second Circuit allowed to proceed beyond the pleading stage. But the difference was not (as petitioner asserts) about the ultimate question of the "validity of the MSA and its implementing legislation." Pet. 21. As the Sixth Circuit pointed out, the Second Circuit simply accepted as true the complaint's conclusory, and inaccurate, allegations concerning the MSA's operation. *See Tritent*, 467 F.3d at 557; Amici States CA Br. 22-24 & n.6. By contrast, the Ninth and Sixth Circuits scrutinized the MSA more closely, under the rule that "a court can consider a document on which the complaint relies if the document is central to the plaintiff's claim." App. A11.

If a court of appeals ever holds that the MSA and implementing statutes *are* preempted, that might well create a circuit conflict worthy of this Court's attention. At a minimum, this Court should await the Second Circuit's review of the district court's ruling on remand in *Freedom Holdings*. If the Second Circuit were to hold that the MSA regime is actually preempted, the Court would at that point have a basis for determining whether an actual, meaningful conflict exists. But without such a hypothetical ruling, the different outcomes in these cases boil down to the procedural question of how rigorously a court should scrutinize a complaint's allegations concerning a unique contract. That is not the sort of disagreement that is worthy of this Court's attention.

Indeed, the issue is particularly unworthy of review because there is good reason to believe the Second Circuit would not reach the same result today in light of this Court's recent guidance in *Twombly*. There, this Court reversed the Second Circuit in an antitrust case for sustaining a complaint when the claim was merely "conceivable," but not "plausible." 127 S. Ct. at 1974. *Twombly* directed the lower courts to do exactly what the Ninth Circuit did here: carefully scrutinize the complaint "for enough fact to raise a reasonable expectation that discovery will reveal evidence" that the plaintiff's allegations will be borne out. *Id.* at 1965. This Court directed the lower courts to take notice of "the full contents" of published documents "referenced in the complaint," *id.* at 1972 n.13, and assess allegations of the complaint "in light of common economic experience," *id.* at 1971, just as the Ninth Circuit did here.

B. There Is No Circuit Conflict on *Parker* Immunity.

Petitioner also asserts that there is a circuit split on "whether a state scheme, enabling private antitrust violations, that fails the *Midcal* test nonetheless receives *Parker* immunity." Pet. 25. No such split exists, because the Ninth Circuit did not hold that a state scheme "enabling private antitrust violations" receives *Parker* immunity even if it fails the *Midcal* test. Instead, the court held that the MSA and related statutes are entitled to *Parker* immunity precisely because they do *not* enable private antitrust violations. As the Ninth Circuit put it: "The MSA and the implementing statutes authorize no illegal activity .... We therefore hold that *Parker* immunity protects the state from antitrust liability ...." App. A28. Far from creating a circuit split, the Ninth Circuit's view of the law is precisely the same as the Second's and Third's: If the state action authorizes violations of the Sherman Act, *Parker* immunity is available only if the state can satisfy the *Midcal* requirements of active supervision and clear articulation. *See Freedom Holdings*, 357 F.3d at 226; *Bedell*, 263 F.3d at 255.

Petitioner is also wrong when he asserts that "the Second and Third Circuits ... held that the MSA and those statutes *failed* the *Midcal* test and thus were not entitled to *Parker* immunity." Pet. 25 (emphasis in original). This assertion is wrong for the same reason that petitioner's similar statement about preemption is wrong: Both cases were pleading cases, and thus the courts could not possibly

have held on the merits that the statutes "were not entitled to *Parker* immunity."[2]

There is an additional reason why any disagreement on this pleading matter is inconsequential: The Third Circuit ultimately reached the same result as the Ninth Circuit here, only on the basis of a different brand of immunity. In *Bedell*, the Third Circuit *dismissed* the antitrust complaint against the Manufacturers (the only defendants there) on *Noerr-Pennington* grounds—just as the Ninth Circuit did in this case. 263 F.3d at 250-54. In a subsequent case, the Third Circuit extended that holding to state officers (the only defendants in that case). *See Mariana*, 338 F.3d at 197-200. Thus, if this case had been filed in the Third Circuit, it not only would have been dismissed at the pleading stage, but it would have been dismissed on the ground that both the state and the Manufacturers were immune from suit. That is what the Ninth Circuit did here.[3]

---

[2] In this case, the Ninth Circuit observed, imprecisely, that "[t]he Second Circuit in *Freedom Holdings* and the Third Circuit in *Bedell* applied the *Midcal* analysis and held that *Parker* immunity does not protect the state from liability for entering into the MSA." App. A28-29. The court obviously did not mean to say that the other courts had reached that ultimate merits conclusion, when all they had before them was the question whether the complaint stated a claim.

[3] In *Bedell*, after holding that *Noerr-Pennington* barred the complaint and that "our analysis could end here," 263 F.3d at 254, the Third Circuit went on to state that based on the complaint allegations, "defendants are not immune under the *Parker* immunity doctrine." *Id.* at 266. Although the Third Circuit has characterized this statement as a "holding," it plainly was not, because it was not necessary to the dispo-

(footnote continued...)

C. There Is No Circuit Conflict on *Noerr-Pennington* Immunity.

Every court that has addressed the issue—including the Third Circuit in *Bedell*, 263 F.3d at 250-54—has held, on the pleadings, that the *Noerr-Pennington* doctrine immunizes the Manufacturers from liability in an antitrust suit challenging the MSA.[4] Nevertheless, petitioner incorrectly insists there is a conflict between the Ninth Circuit and the Second Circuit on two *Noerr-Pennington* issues.

Petitioner's main argument is that "the Ninth Circuit [held], in conflict with the Second Circuit, that the *Noerr-Pennington* doctrine applies not only to protect petitioning activity, but also to immunize any resulting anticompetitive legislation . . . undertaken pursuant thereto." Pet. i; *see* Pet. 24. But the Ninth Circuit did not hold any such thing. To the contrary, it noted that "defendants here *do not claim* that *Noerr-Pennington* immunity protects *the implementing statutes* from preemption," and accordingly never decided the issue. App. A21 n.9

(continued from previous page)
sition of the case—indeed, it flatly contradicts that disposition. *Mariana*, 338 F.3d at 204 ("Critics may with some justification regard our discussion of *Parker* immunity as dictum, and well it may be."). In any event, the Third Circuit itself has since questioned the soundness of its *Parker* analysis. *Id.* at 203.

[4] *See* App. A15-21, *aff'g* App. B18-20; *Bedell*, 263 F.3d at 250-54, *aff'g* 104 F. Supp. 2d 501, 505-07 (W.D. Pa. 2000); *Hise*, 208 F.3d 226, *aff'g* 46 F. Supp. 2d 1201, 1205-07 (N.D. Okla. 1999); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1191-97 (C.D. Cal. 2000); *Forces Action Project LLC v. California*, No. 99-0607 (N.D. Cal. filed Jan. 16, 2002).

(emphasis added). The Ninth Circuit even quoted the Second Circuit's view that "the immunity for advocacy cannot sensibly protect the resultant anticompetitive legislation from being held to be preempted," *id.* (quoting *Freedom Holdings*, 357 F.3d at 233), and observed that it "may be correct." *Id.*

Petitioner also asserts a conflict, again between the Ninth Circuit and the Second Circuit, over whether *Noerr-Pennington* immunizes private "conduct undertaken pursuant" to such "anticompetitive legislation." Pet. i. But there is no circuit split with respect to this question either. Contrary to petitioner's assertion, the Second Circuit did not decide whether, or under what circumstances, "*Noerr-Pennington* immunity . . . reach[es] subsequent . . . conduct" of a private actor operating under the state legislation. Pet. 24. The Second Circuit had no occasion to decide the issue because there *were* no private parties in *Freedom Holdings*; it was a lawsuit against the state alone. As the Second Circuit noted, "Here, [the plaintiffs] *do not seek to impose liability on private defendants* but rather seek to have the Contraband Statutes declared invalid." 357 F.3d at 233 (emphasis added).

Moreover, granting certiorari on this question would be pointless, because the outcome of this case would be the same regardless of the answer. As the Ninth Circuit pointed out, the Manufacturers cannot be held liable for post-MSA conduct because *Noerr-Pennington* immunizes their entry into the MSA and petitioner does not allege any other agreement in restraint of trade. App. A20-21.

II. THIS PLEADING CASE RAISES NO ISSUE OF NATIONAL IMPORTANCE.

Petitioner argues that his petition raises concerns "of national importance" for three reasons. Pet. 27-32. While there is no doubt about the importance of the *MSA*, petitioner is wrong about the importance of the issues presented at this early juncture.

1. Petitioner's main claim of importance is that this case presents an "intractable division among the courts of appeals on the validity of the MSA and its implementing legislation." Pet. 21; *see* Pet. 29 (noting "inherent importance of the legality of the MSA"). But as we have demonstrated above, there is no such division. No court—district court or court of appeals—has held the MSA or implementing legislation invalid.

Petitioner conflates the willingness of plaintiffs' lawyers to roll the dice by filing new lawsuits challenging the MSA with "[t]he continuing unsettled legality of the MSA's funding mechanisms." Pet. 28. As this Court recently observed, the willingness of plaintiffs' lawyers to bring "even anemic cases" in hopes of extracting a settlement or hitting a jackpot is a problem to be addressed, as the Court of Appeals did here, by carefully scrutinizing pleadings. *Twombly*, 127 S. Ct. at 1967. It is not a basis to rush "anemic cases" to this Court.

In any event, other lawsuits unsuccessfully challenging the MSA and implementing legislation on antitrust grounds are currently pending before the courts of appeals. *See Xcaliber Int'l Ltd., LLC v. Edmondson*, No. 04-0922, 2005 WL 5654220 (N.D. Okla. May 20, 2005), *appeals docketed*, No. 05-

5175 (10th Cir. Sept. 29, 2005) & No. 05-5178 (10th Cir. Oct. 3, 2005); *Xcaliber Int'l Ltd., LLC v. Kline*, No. 05-2261, 2006 WL 288705 (D. Kan. Feb. 7, 2006), *appeal docketed*, No. 06-3061 (10th Cir. Feb. 16, 2006); *Grand River Enters. Six Nations Ltd. v. Beebe*, 418 F. Supp. 2d 1082 (W.D. Ark. 2006), *appeal docketed*, No. 08-1436 (8th Cir. Feb. 26, 2008). Unlike this case, two of those cases (*Edmondson* and *Kline*) went up on appeal after full discovery and grants of summary judgment to the defendants. If a circuit conflict ever developed, and this Court were interested in deciding the ultimate question whether the Sherman Act preempts the MSA, cases in that posture would be better vehicles than this case.

2. Next, petitioner posits that "the questions presented here are of general importance to the proper implementation of antitrust law generally." Pet. 29-30. Specifically, he claims that the Court of Appeals "reached a holding that essentially renders [*Midcal*] a dead letter in most circumstance[s]." Pet. 30. Petitioner portrays the Court of Appeals' opinion as holding that a state law is always immune—and need not satisfy the *Midcal* requirements—even if it authorizes antitrust violations. *Id.* But as we have already demonstrated, the Court of Appeals held no such thing. It expressly recognized that *Midcal*'s requirements *must* be met when "a state law . . . attempts to 'give immunity to those who violate the Sherman Act by authorizing them to violate it.'" App. A21-22, 28 (citation omitted). Thus, far from purporting to "overrule[]" *Midcal*, Pet. 30, as petitioner charges, the Court of Appeals was entirely faithful to the decision.

Petitioner also asserts that "the continued uncertainty as to the validity of *Midcal* and its relationship to [*Hoover v. Ronwin*, 466 U.S. 558 (1984)], has been a source of confusion in the lower courts for many years." Pet. 30-31. If the lower courts really were confused, one would have expected petitioner to adduce a long string cite of cases expressing confusion. There is no string cite, because there is no confusion.

In *Hoover*, the Court held that the state action there in issue—a state's decision about who should be admitted to practice law in Arizona—was a sovereign act of the state. 466 U.S. at 570-74. Because the state did not authorize private parties to violate the Sherman Act—it did not, for example, let a group of private practitioners dictate which of their competitors should be admitted to practice law—it was immune under *Parker*, without any need to satisfy the *Midcal* requirements. *Id.* at 575. Thus, there is no tension or inconsistency between the two decisions; *Hoover* simply involved a particular set of facts in which it was unnecessary to apply the *Midcal* requirements to conclude that immunity was available. *See Mass. Food Ass'n. v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 563-66 (1st Cir. 1999) ("What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that *by themselves* limit or reduce competition." (emphasis in original)), *cert. denied*, 529 U.S. 1105 (2000).

3. Finally, petitioner asserts that *Parker* immunity should not apply because when many states—rather than just one—take similar action, the federalism concerns that animate *Parker* evaporate. Pet.

31. Petitioner has it exactly backwards. If only one State had decided that the MSA's terms were in the best interests of its citizens, the courts would owe that judgment "special deference . . . in our system of federalism." *Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006). When *46* States each make the same independent judgment, the respect is amplified, not muted. *Cf. New York v. O'Neill*, 359 U.S. 1, 6 (1959) (uniform laws adopted by 42 states "increas[es] harmony within the federalism created by the Constitution").

The assertion that the MSA "encroaches upon national authority over a national market," Pet. 31, is equally meritless. As the Fourth Circuit has held, the MSA "does not increase the power of the States at the expense of federal supremacy and . . . , therefore, it is not an interstate compact requiring congressional approval under the Compact Clause." *Star Scientific Inc. v. Beales*, 278 F.3d 339, 360 (4th Cir.), *cert. denied*, 537 U.S. 818 (2002); *see id.* ("[T]he [MSA] 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.'" (citation omitted)). Petitioner's failure here even to assert a Compact Clause claim shows that not even he is persuaded by his "encroachment" argument. In any event, Congress has recognized and endorsed the MSA by authorizing each Settling State to use MSA payments for any expenditures determined appropriate by the State. 42 U.S.C. § 1396b(d)(3)(B).

III. THE COURT OF APPEALS' ANALYSIS IS CORRECT AND FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

Petitioner asserts that the Court of Appeals' opinion is "wrong" and in "direct conflict" with decisions of this Court. Pet. 32. But petitioner fails to identify any such conflict. And each claim of error is meritless.

1. Petitioner asserts that the Court of Appeals "erroneously applied the standards for a pre-implementation facial challenge" to an "as-applied post-implementation challenge" to the MSA regime. *Id.* But as petitioner made clear in his complaint, and as the Court of Appeals recognized, he is seeking relief on the ground that the implementing statutes are "*facially void* as a *per se* restraint of trade." ER 17 (emphasis added); App. A10 n.6 (same).

In any event, the standard petitioner says the court *should* have applied—considering the "'economic realities of the relevant transactions'"—is the standard the court did in fact apply. Pet. 33 (citation omitted). Examining the MSA itself, the Court held that, contrary to the complaint's allegations, "[n]othing . . . forces the NPMs to either peg their prices to those of participating manufacturers, or to refrain altogether from entering the market." App. A13.

Petitioner, a complete stranger to the contract, offers his own idiosyncratic interpretation of the MSA, insisting that when the MSA calculates the Manufacturers' payment obligations, it punishes them for increasing their market share. *See* Pet. 9-11. But the States that are the actual parties to the MSA reject his interpretation, describing it as "a

fundamental misreading of the MSA and Escrow Statutes." Amici States CA Br. 13 (joined by 41 states, D.C., and three territories); *see id.* at 14-17; Cal. CA9 Br. 9-11. Every court that has addressed this issue on the merits agrees with the parties to the MSA. *Grand River*, 2006 WL 1517603, at *9 ("The MSA does not create disincentives for OPMs, SPMs or NPMs to restrict output or to avoid reducing prices."); *Xcaliber Int'l*, 2005 WL 5654220, at *5 ("[T]here is no evidence that the MSA incorporates penalties for increased market share by any class of PM which would serve to effect a market-sharing or price-fixing agreement."); *Freedom Holdings*, 447 F. Supp. 2d at 261 (NPMs' "incremental costs do not rise with their volume of sales, and they are not in any manner obliged to increase their prices in lock-step with the OPMs.").

As these courts and the parties to the MSA recognize, the MSA imposes a set unit cost on every cigarette that remains the same regardless of how many cigarettes a manufacturer sells. It is indisputable that this type of payment mechanism does *not* eliminate the incentive to cut prices or increase market share. Indeed, even petitioner and the Second Circuit agree with this proposition. CR53 at 42; *see Freedom Holdings*, 357 F.3d at 229 (a fixed per-cigarette cost "would not prevent price competition"). Thus, the linchpin of petitioner's output cartel/hybrid restraint theory—that the payment obligations encourage lockstep pricing by creating a disincentive to compete on price—is belied by the "economic realities" of the MSA's own terms.

2. Petitioner also asserts, without citation to any authority, that the Court of Appeals erred in concluding that the MSA and related statutes do not

create a hybrid restraint. Pet. 33. Petitioner is wrong. This Court has made clear that such a restraint arises *only* when the government *delegates* to a private actor "'a degree of private regulatory power'" that enables it to mandate compliance by other private actors with its "private marketing decisions" by force of law. *Fisher*, 475 U.S. at 268 (quoting *Rice*, 458 U.S. at 666 n.1 (Stevens, J., concurring)); *accord 324 Liquor*, 479 U.S. at 345 n.8 (citing *Fisher*); *Midcal*, 445 U.S. at 103. Thus, each arrangement that this Court has labeled a hybrid restraint has involved a situation in which private actors are *legally compelled* to charge the prices established by another private actor. *See 324 Liquor*, 479 U.S. at 340; *Midcal*, 445 U.S. at 100; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386-87 (1951). Indeed, petitioner acknowledged below that "legal compulsion . . . is the hallmark of a hybrid restraint." CA9 Reply 17.

The Court of Appeals correctly held that no hybrid restraint is involved here. The state has not delegated any regulatory authority to the Manufacturers. App. A30. Each company sets its own prices and has *no* power to set the prices or control the output of others, much less any such power backed by the state.

Rather than challenge that conclusion, petitioner shifts ground and asserts a novel definition of a hybrid restraint: "[T]he MSA and the related statutes were not simply unilateral state action, they were the result of an *agreement* with and among the major tobacco companies, which agreement effectively coerced state legislatures to adopt the statutes provided for in the MSA." Pet. 33. Without citation to any authority from this Court, petitioner calls

this "a classic instance of a hybrid restraint rather than unilateral regulation." *Id.*

But this Court has never suggested that the definition of hybrid restraint has anything to do with whether the state arrived at its policy choices through negotiation with private interests or whether state legislation was the product of careful deliberation or "effective[] coerc[ion]"—whatever that means. *See id.* That is presumably why petitioner never offered his novel definition of hybrid restraint in the lower courts.

Petitioner's suggestion that the MSA regime should be treated as a hybrid restraint simply because "the states left the OPMs free to make marketing decisions regarding price increases without supervision" is also wrong. *Id.* Under *Parker* and *Midcal*, economic actors *are* free to make such decisions without state supervision, *unless* the state has authorized those actors to engage in antitrust violations. Where, as here, the state has *not* authorized private parties to violate the antitrust laws, the *Parker* doctrine permits states to regulate conduct without the need for "active supervision."

3. Petitioner next argues that there can be no *Parker* immunity because the MSA is not a sovereign state act. According to petitioner, only "legislative" conduct may be considered sovereign state action. Pet. 34-35. Petitioner does not explain why *Parker* immunity should not apply to the executive branch. This Court has never held that it does not, and every court of appeals to consider the question has agreed with the Ninth Circuit that the immunity covers the actions of executive-branch officials. *See Neo Gen Screening, Inc. v. New England Newborn Screening Program,* 187 F.3d 24, 28-29 (1st Cir.),

cert. denied, 528 U.S. 1061 (1999); *Saenz v. Univ. Interscholastic League*, 487 F.2d 1026, 1027-1028 (5th Cir. 1973). Moreover, the MSA regime was endorsed by the other branches of government: The Superior Court of California expressly approved it, and the California Legislature passed the related statutes.[5]

4. Finally, petitioner is wrong in attributing to the Court of Appeals the holding that "the mere act of requesting [a law] . . . entitle[s] . . . the requesting party to have [its] conduct thereunder[] immunized." Pet. 34. Rather, the court recognized that the "conduct thereunder"—i.e., the post-MSA behavior—would *not* be immunized if that conduct would violate antitrust laws. *See* App. A20-21.

The Court of Appeals underscored the point when it correctly distinguished this case from *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). App. A18-19. In *Cantor*, the private party's post-petitioning conduct was alleged to have been an antitrust violation in its own right. *Cantor*, 428 U.S. at 581-82. That is why the post-petitioning conduct did not enjoy *Noerr-Pennington* immunity. *See id.* at 601-02; *accord Greenwood Utils. Comm'n v. Miss. Power Co.*, 751 F.2d 1484, 1504 (5th Cir. 1985) (distinguishing *Cantor* on same ground). For petitioner to fit his case into the *Cantor* mold, he would have to have alleged that, subsequent to the MSA, the Manufacturers entered into an independ-

---

[5] In any event, petitioner has never made this argument before; indeed, he conceded below that the challenged conduct constitutes "sovereign acts of the state." App. B11.

ent agreement to fix prices or restrict output. He does not, and could not, make any such allegation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DARRYL SNIDER
JAMES F. SPEYER
ERIC SHAPLAND
LEO D. CASERIA
HELLER EHRMAN LLP
333 South Hope Street,
39th Floor
Los Angeles, CA 90071
Counsel for Respondent
PHILIP MORRIS USA INC.

E. JOSHUA ROSENKRANZ
Counsel of Record
KENNETH L. CHERNOF
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300
Counsel for Respondent
PHILIP MORRIS USA INC.

DOUGLAS L. WALD
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-
1206
(202) 942-5000
Counsel for Respondent
PHILIP MORRIS USA INC.

STEPHEN R. PATTON
BARACK S. ECHOLS
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601-6636
(312) 861-2000
Counsel for Respondents
BROWN & WILLIAMSON
TOBACCO CORPORATION
and R.J. REYNOLDS
TOBACCO COMPANY

IRVING SCHER
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
Counsel for Respondent LORILLARD TOBACCO COMPANY

PETER D. ISAKOFF
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW
Suite 900
Washington, DC 20005
(202) 682-7144
Counsel for Respondent LORILLARD TOBACCO COMPANY