No. _____

In The

Supreme Court of the United States

S&M BRANDS, INC., TOBACCO DISCOUNT HOUSE # 1, and MARK HEACOCK,

Petitioners,

v.

JAMES D. "BUDDY" CALDWELL, in his official capacity as Attorney General of the State of Louisiana,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

HANS F. BADER
SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street, NW
Washington, D.C. 20036

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

QUESTIONS PRESENTED

Forty-six States and numerous tobacco companies have signed an irrevocable agreement, called the Master Settlement Agreement ("MSA"), which divides markets, suppresses price competition, and restricts competitive advertising, with the purpose and effect of increasing both tobacco company profits and state revenues. It is undisputed that this agreement would violate the antitrust laws if entered into by the tobacco companies alone.

The questions presented are:

1. Whether a binding agreement among multiple States and private companies is immunized from antitrust scrutiny under the state-action immunity doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

2. Whether a binding agreement among multiple States, with both intrastate and interstate effects, violates the Compact Clause, Article I, § 10, cl. 3 of the United States Constitution, in the absence of congressional approval.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner S&M Brands, Inc., is a cigarette manufacturer that has not joined the MSA. Petitioner Tobacco Discount House # 1 is a retail tobacco store in Louisiana. Petitioner Mark Heacock is a smoker living in Louisiana.

Petitioners were the plaintiffs in the district court and the appellants in the Fifth Circuit.

None of the petitioners is publicly traded or owned in whole or in part by any publicly traded corporation.

Respondent James D. "Buddy" Caldwell is the Attorney General of the State of Louisiana, being sued in his official capacity. Respondent was the defendant in the district court and the appellee in the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Western District of Louisiana granting defendant summary judgment is unpublished and is attached at Appendix B1-B22. The decision of the Fifth Circuit affirming the district court decision is published at 614 F.3d 172 and is attached at Appendix A1-A14.

JURISDICTION

The Fifth Circuit issued its decision on August 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides, in relevant part:

> Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal.

The Compact Clause, U.S. CONST., Art. I, § 10, cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign power."

STATEMENT OF THE CASE

During the 1990s, Attorneys General in many States, including Louisiana, sued the four largest tobacco companies (the "Majors") to recoup Medicaid expenses allegedly incurred as a result of fraudulent sales techniques. The tobacco companies drafted a settlement that would enrich themselves as well as the States. Rather than base damages on retrospective losses caused by each tobacco company, the parties agreed to divide payment responsibility based on each company's future market share. The anticipated payments totaled more than $200 billion over the succeeding 25 years, with further payments in perpetuity. Because these payments would place the settling companies at a competitive disadvantage with other manufacturers, the Master Settlement Agreement ("MSA") required the 46 settling States to impose countervailing escrow payments on all nonparticipating tobacco manufacturers, and to insulate the settling companies from competition in a variety of ways described below. The MSA also contained various provisions to prevent its member States from defecting from this nationwide scheme.

As a result of this agreement, the participating States have reaped billions of dollars in revenues each year from duties on tobacco sales without enacting taxes, and the large tobacco companies have been able to increase their prices by an even greater amount – all at the expense of consumers and competition. The States could not have attained this result acting individually because of the force of interstate competition. The tobacco companies could not have attained this result acting without the States because

it would have too blatantly violated the antitrust laws. Only through the binding and irrevocable MSA have they been able to achieve such a result. And, to insulate and preserve this regime from future political pressure, the agreement forbids the signatories to oppose the MSA in the future or even to speak or petition against it.

This lawsuit was filed by a small non-settling tobacco company, a consumer, and a tobacco shop. The plaintiffs contend that the MSA violates the antitrust laws and, because it was not approved by Congress, the Compact Clause of Article I, § 10. The court of appeals held that the agreement is immune from antitrust scrutiny under the state-action immunity doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and falls outside the scope of the Compact Clause because it does not directly conflict with any federal law or other constitutional constraint.

Those holdings, we submit, conflict with this Court's decisions and do grave damage to principles of interstate federalism and competition. Because of the unusual conjunction of interests of the States and the large tobacco companies in sharing the rents generated by the MSA's suppression of competition, and because of the irrevocable and unchallengeable character of the agreement, there is little prospect for effective public debate or legislative scrutiny unless this Court intervenes.

1. In 1998, 46 Attorneys General and the Majors settled numerous lawsuits brought by many States against the Majors by collectively entering into the MSA.

The MSA, which was devised and drafted by the tobacco companies, contained something for almost everyone. For the States, the agreement provided that the Majors and certain other cigarette manufacturers who later joined the MSA would pay more than $200 billion over 25 years, plus other payments in perpetuity. MSA § IX.[1]

For the tobacco companies, in addition to securing them a release from past and potential future liability, the MSA set up an interstate cartel enabling them to charge monopoly prices and recover their MSA costs, plus hefty additional profits, from consumers without fear of price competition among themselves or from non-participating cigarette manufacturers.

2. The MSA establishes this cartel through a variety of restrictions on interstate commerce in cigarettes.

First, the agreement discourages price competition for market share by allocating the costs of the MSA among the Majors in proportion to their *current* national market share of cigarette sales, including sales in States that have not joined the MSA. MSA § IX(c)(1). The percentage of MSA payments by each of the four Majors thus annually rises or falls in relation to its national market share, thereby discouraging price competition for gains in market share that would increase MSA expenses and reduce profits. That disincentive also encourages each company to match price increases by competitors, even beyond those necessary to pass on MSA expenses, in order to

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[1] The lengthy MSA is available in PDF form at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf.

avoid increased market share (and MSA expenses) that would result from lower relative prices.

Second, the agreement discourages price competition and divides the market among subsequent participating manufacturers ("SPMs") that joined within 90 days by exempting them from MSA payments on all sales at or below their "grandfathered" market shares – the higher of their 1998 sales, or 125% of their 1997 sales. MSA § IX(i). SPMs exceeding their grandfathered market shares are penalized by having to make MSA payments on excess sales.

Third, the agreement stabilizes prices and limits price competition from all other manufacturers joining the MSA after 90 days by imposing annual MSA payments on those manufactures based on their entire national market share. *Id.* The per-cigarette payments by such late-joining SPMs are larger than the per-cigarette MSA payments by the Majors, thereby raising the floor on prices such companies can charge and still recover their costs.

Fourth, the agreement restrains competition among all participating manufacturers by forbidding numerous forms of advertising, as well as lobbying and litigation adverse to the MSA. MSA §§ III(b)-(i), III(m)-(p), XVIII(*l*). Many of those restrictions apply nationwide, not merely within the MSA States. *Id.* §§ II(rr), III(b)-(c).

Fifth, the agreement stabilizes prices and limits price competition from non-participating cigarette manufacturers ("NPMs") that refuse to join the MSA by requiring member States to enact so-called "Qualifying" or "Escrow" statutes compelling NPMs to pay into escrow each year an amount equal to or greater

than the MSA payments on comparable sales. MSA § IX(d)(2)(E); MSA Exh. T.

The MSA's Escrow Statute requirement has the express purpose of "effectively and fully neutraliz[ing] the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of" the MSA. MSA § IX(d)(2)(E); LA. R.S. § 13:5061 (6) (Escrow Statute designed to prevent NPMs from having a "resulting cost advantage").

Absent the Escrow Statutes, smaller tobacco companies that had neither engaged in nor been sued for fraud – and hence had no liabilities to settle – would have had substantially lower per-cigarette costs than companies having to make MSA payments. The Majors and other participating manufacturers thus faced a competitive dilemma: If they raised prices to pass MSA costs on to consumers they risked losing market share to NPMs without such expenses; but if they kept their prices competitive their MSA payments would have eaten into their profits.

The Escrow Statutes raise the costs for NPMs and thereby stabilize prices at or above the level necessary to allow MSA participants to pass their MSA costs on to consumers without risk of price competition from NPMs.

Indeed, the MSA's restrictions on price competition have actually allowed the Majors to raise prices by far more than the amount necessary to make MSA

payments.[2] Thus, after joining the MSA, the major cigarette manufacturers have made record profits from their supra-competitive pricing.[3]

3. The MSA also contains various provisions to prevent member States from defecting from their supporting role in the cartel.

First, the MSA restrains the political and legislative processes of its member States by binding "present and future" state officials, and forbidding States to withdraw from or "directly or indirectly" challenge the MSA. MSA §§ XVIII(g), (*l*). The agreement may not be modified without the unanimous consent of the parties affected. *Id.* § XVIII(j). The ordinary political and legal processes that might mitigate state-imposed or supported restraints on trade thus are rendered inoperative. Future state officials cannot withdraw from, and hence cannot be held accountable for, their participation in the MSA.

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[2] *Final Submission of the Settling States: Expert Report of Jonathan Gruber & Robert S. Pindyck* at 2-3 (Jan. 30, 2006) ("*Gruber & Pindyck Final Sub.*") ("Between 1997 and 2003, OPM premium and discount retail prices increased by much more than MSA marginal costs") [Sealed Doc. 96, attach. 5]; *Report of Plaintiffs' Expert Jeremy Bulow* at 3 (Aug. 13, 2008) ("*Bulow Rep.*") ("the major companies have raised the price of cigarettes by considerably more than the cost of the MSA, or by the amount of any cost increases. Experts for the major companies have acknowledged that the MSA created incentives to raise prices by more than costs increased") [Record on Appeal ("R") R1087].

[3] Mark Curriden, *Up In Smoke*, ABA JOURNAL (March 2007) at 30 (Philip Morris profits "were $4.5 billion in 2005—up 36 percent from 1997," while its stock price doubled).

Second, the MSA requires each State to adopt and diligently enforce the Escrow Statute set out in the MSA in a manner that "effectively and fully neutralizes" the competitive consequences for companies joining the MSA. MSA § IX(d)(2)(E). Failure to do so subjects non-compliant States to the severe financial penalty of having their payments reduced by the so-called "NPM Adjustment," which reduces the MSA fees paid by companies that lose market share as a result of the MSA. MSA §§ II(ff), IX(d).

All determinations regarding the size and allocation among the States of the NPM adjustment are delegated to a private group of economic consultants (dubbed "the Firm") selected by the Majors and the executive committee of the National Association of Attorneys General. MSA § IX(d)(1)(C). Determinations by the Firm are "conclusive and binding," "final and non-appealable." *Id.*

Non-compliant States thus could forfeit much of their share of payments on nationwide cigarette sales, at the cost of billions of dollars, while leaving their citizens to pay the remaining passed-through MSA costs on all cigarette sales in that State. Such potential penalties imposed "coercive" pressure on the member States to adopt and enforce the Escrow Statute, and all did. *Star Scientific Inc.* v. *Beales,* 278 F.3d 339, 359 (CA4) ("Because Virginia could face a substantial financial burden if it were not to enact a qualifying statute, the [MSA] is coercive in requiring the states to pass such a statute"), *cert. denied*, 537 U.S. 818 (2002). Louisiana state legislators cited

such penalties and pressure to justify passing the State's Escrow Statute.[4]

Third, the MSA constrains the sovereignty of its member States by allowing some States to extract revenues from cigarette sales in other States. It does so by freezing the share of MSA payments distributed to each State as of the date of the agreement, while the share of MSA payments passed on to each State's consumers rises or falls with changes in sales within each State. MSA §§ IX(c)(1), IX(j); MSA Exh. A. This renders some States net exporters and other States net importers of MSA revenues.

Fourth, the MSA encroaches upon the sovereignty of the four non-member States by requiring the tobacco companies to make payments based on their *national* market share of cigarette sales, including sales to consumers in non-member States. MSA § IX(c)(1). The MSA also restricts tobacco companies' advertising, lobbying, and litigation throughout the nation, forbidding many such activities even in non-member States. *See, e.g.*, MSA § II(rr) (definition of "State" to mean "any state of the United States" and various territories); *id.* § III(b)-(c) (ban on use of cartoons; restrictions on "Brand Name Sponsorship in any State"); *id.* § III(m) (prohibition on manufacturers supporting, "in Congress or any other forum," leg-

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[4] *Stipulated transcript of portions of hearing in Louisiana House of Representatives* (April 8, 1999), at 6, and of *Chamber Proceedings in Louisiana House of Representatives* (April 15, 1999), at 7-9 & 12-13 (statements of Louisiana legislators and Louisiana's Attorney General noting that the State had no choice but to enact the MSA's Qualifying Statute word-for-word) [R1072, R1077-79, R1082-83].

islation or rules "that would preempt, override, abrogate, or diminish" the member States' rights under the MSA). The MSA thus purports to regulate tobacco company behavior in Florida, Texas, Minnesota and Mississippi, even though those States are not parties to the agreement.

4. Given the national scope of the restrictions and their direct operation on interstate commerce, the States and the Majors initially sought to have Congress legislatively implement and provide enforcement for a precursor to the MSA proposed by the tobacco companies and various States.[5] That proposal was similar to the MSA in most relevant respects. After the Federal Trade Commission warned of its anticompetitive character, the proposal died in the Senate. 144 CONG. REC. S6479-S6481 (June 17, 1998).[6] Undeterred, the Majors and the participating

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[5] Philip Morris Companies, Inc., SEC Form 8-K Current Report, June 20, 1997 (reporting proposed settlement), available at http://www.sec.gov/Archives/edgar/data/764180/0000940180-97-000570.txt.

[6] *See* FTC, *Competition and the Financial Impact of the Proposed Tobacco Settlement* (September 1997) ("From an antitrust and economic perspective, a proposal that Congress enact a statute enabling private firms to agree to raise prices to pay past liabilities should be viewed with caution."; "there is reason to believe that cigarette prices will increase by more than is necessary simply to 'pass through' the annual payments to consumers"; "restrictions on marketing could raise barriers to entry and expansion and ultimately lead to higher prices"; provision requiring escrow payments for non-participating manufacturers "could have a disproportionate effect on the small firms at the fringe of the market as well as potential entrants * * * and may make it less likely they can effectively compete in the market"), available at www.ftc.gov/reports/tobacco/tobacco9909.shtm;

States adopted the MSA as a private agreement, without congressional involvement or approval.

5. On August 2, 2005, plaintiffs brought suit against Respondent Louisiana Attorney General Caldwell's predecessor, in his official capacity, seeking a declaratory judgment and an injunction against enforcement of the MSA and its Louisiana implementing statutes.

Plaintiffs alleged, *inter alia*, that the MSA, in conjunction with its implementing statutes, (1) constitutes an illegal agreement in restraint of trade that creates a national cartel to divide markets, suppress competition, and raise prices, in violation of federal antitrust laws, and (2) constitutes an interstate agreement, unapproved by Congress, that potentially and actually encroaches upon federal authority and upon the independent sovereign interests of both member and non-member States, in violation of the Compact Clause.[7]

6. On November 9, 2006, the district court denied defendant's motion to dismiss, except as to one claim that is no longer at issue in this case. [R9, docket entry 48]

7. On September 24, 2009, the district court denied plaintiffs' motions for summary judgment on

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Freedom Holdings v. *Spitzer*, 357 F.3d 205, 229 n.23, 230 (CA2 2004) (quoting objections from FTC Chairman Robert Pitofsky).

[7] Plaintiffs also raised claims that the MSA and its implementing legislation violated the First Amendment, conflicted with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, violated the Commerce and Due Process Clauses, and violated the Tenth Amendment.

their remaining claims and granted defendant's motion for summary judgment as to those claims. App. B1-B22.

8. On August 20, 2010, the Fifth Circuit affirmed. App. A1-A14.

Regarding the antitrust claim, the court did not dispute the unchallenged proposition that the MSA itself was an agreement in restraint of trade and a *per se* violation of the Sherman Act. Rather, it addressed only whether defendant was entitled to invoke "state-action" immunity as originally set forth in this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943).

Plaintiffs argued that *Parker* was inapplicable to the MSA. In *Parker*, this Court explained that state-action immunity would not extend to cases where the State acts as a "participant in a private agreement or combination by others for restraint of trade," or seeks to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351-52.

The Fifth Circuit provided almost no independent analysis of this issue, relying instead on two prior cases that rejected challenges to individual state Escrow Statutes, rather than the MSA itself. App. A8-A9 (quoting *Xcaliber Int'l Ltd. LLC* v. *Caldwell*, 612 F.3d 368, 375 (CA5 2010) and *Tritent International Corp.* v. *Kentucky,* 467 F.3d 547, 557 (CA6 2006)). Viewed in isolation from the MSA, the Escrow Statutes arguably fall within the antitrust immunity doctrine of *Parker* because they are single-state statutes with only intrastate application that do not themselves require agreements or conduct illegal un-

der the antitrust laws. The MSA, by contrast, is an agreement among 46 States and numerous private companies, directly restrains trade and divides markets among its private participants, and has nationwide operation and economic effects. The Fifth Circuit did not explain how such an agreement could be entitled to antitrust immunity under *Parker*.[8]

Regarding the Compact Clause claim, the court of appeals relied upon this Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) ("*MTC*"), and upon the Fourth Circuit's decision in *Star Scientific, Inc.* v. *Beales*, 278 F.3d 339 (CA4), *cert. denied*, 537 U.S. 818 (2002), for the proposition that the Compact Clause only applies to agreements that " 'enhance[] state power *quoad* the National Government.' " App. A6 (quoting *MTC*, 434 U.S. at 473). Quoting the Fourth Circuit, the court then held that

> "the [MSA] may result in an increase in bargaining power of the States *vis-a-vis* the tobacco manufacturers, but this increase in power does not interfere with federal supremacy be-

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[8] The court also cited, without discussion, two other appellate decisions involving the MSA. *Grand River Enters. Six Nations, Ltd.* v. *Beebe,* 574 F.3d 929 (CA8 2009), *cert. denied*, 130 S. Ct. 2095 (2010); *Sanders* v. *Brown,* 504 F.3d 903 (CA9 2007), *cert. denied*, 553 U.S. 1031 (2008). App. A8-A9. Although both decisions contain dictum to the effect that the MSA was entitled to antitrust immunity, that issue was not actually presented in either case. *Grand River* involved a challenge only to an amendment to the Arkansas Escrow Statute. 574 F.3d at 932. *Sanders* addressed a challenge to post-MSA conduct, noting that the plaintiff "does not allege that the MSA itself is illegal." 504 F.3d at 906.

> cause the [MSA] 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.' "

App. A7 (quoting 278 F.3d at 360, in turn quoting *MTC*, 434 U.S. at 473). That holding effectively limited the Compact Clause to agreements to engage in conduct that would otherwise be illegal or unconstitutional for individual States.

In restricting the Compact Clause to such a narrow and unnecessary category of agreements, the court below effectively eliminated two other categories of agreements identified by this Court as being subject to the Compact Clause – those that have the *potential* for encroaching on federal authority and those that potentially or actually encroach on sister-State sovereignty. *MTC*, 434 U.S. at 472 (agreements with "potential" for encroachment); *Florida* v. *Georgia*, 58 U.S. 478, 494 (1855) (agreements that "might affect injuriously the interest of the other[]" States). The Fifth Circuit simply ignored how the MSA fit within these other categories, thus stripping the Compact Clause and this Court's cases of virtually all independent function and effect.

REASONS FOR GRANTING THE WRIT

The MSA is an unprecedented multistate and multi-company agreement that restrains trade in and stifles competition for hundreds of billions of dollars of interstate commerce, extracts billions of dollars in supra-competitive profits from consumers, and perverts core federalism principles. It establishes both a nationwide cartel among tobacco manufacturers and a nationwide economic confederacy among numerous

States without the congressional consent required by the Compact Clause.

The MSA is as undemocratic as it is anticompetitive. Congress and the state legislatures have ample authority to tax and regulate tobacco. But this should be done the old-fashioned way: by passing taxes and restrictions subject to the democratic scrutiny of the people – not by enforcing sweetheart deals drafted by industry, imposed on the entire nation without congressional involvement, and carefully insulated against repeal or democratic review.

Unfortunately, the MSA has escaped judicial as well as democratic scrutiny, by virtue of strained interpretations of antitrust immunity and Compact Clause limitations that ignore the important limits this Court has placed on those doctrines. The sheer magnitude of the private and governmental interests backing the MSA – contrasted with the relative powerlessness of the consumers and small companies injured by it – has seemingly discouraged the serious and searching judicial scrutiny one would expect of an agreement of such economic and political importance. Forty-six of the States reap billions of dollars every year as a result of the MSA, and the tobacco industry giants reap billions more. It seems too good to be true – unless you are a consumer or a small company trying to compete with the Majors and other participating manufacturers. Yet as the decision below illustrates, the courts have given a perfunctory back of the hand to challenges to the MSA. Without careful analysis or explanation, immunities have been stretched far beyond their proper scope and the Compact Clause has been rendered a redundancy.

Only this Court can bring about the judicial and congressional scrutiny required by the Sherman Act and the Constitution.

I. This Court Should Decide Whether *Parker* State-Action Immunity Should be Extended to Agreements Among Multiple States and Private Companies in Restraint of Nationwide Commerce.

As described above, at 4-10, the MSA is a collective agreement between multiple tobacco companies and numerous States that, *inter alia*, divides markets, penalizes price competition, stabilizes prices, and restricts advertising. Such an agreement is illegal under the plain and express terms of the Sherman Act, which provides that "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal." 15 U.S.C. § 1.

It is undisputed that were the MSA solely an agreement between private parties, it would be *per se* illegal.[9] Indeed, in *Freedom Holdings*, 357 F.3d at

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[9] This Court's cases firmly establish that combinations and conspiracies establishing cartels, dividing markets, and fixing prices are quintessential *per se* antitrust violations. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 406-07 (1978) (cartels); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-49 (1980) ("combination formed for the purpose of raising * * * or stabilizing the price of a commodity"); *United States* v. *Topco Assocs.*, 405 U.S. 596 (1972) (horizontal market division); *see also Blackburn* v. *Sweeney*, 53 F.3d 825, 828 (CA7 1995) (agreements among competitors restricting advertising violate Sherman Act); *National Electrical Contractors Ass'n* v. *National Constructors Ass'n*, 678 F.2d 492, 497 (CA4 1982) (agreement between union and contractors to impose costs on some

225, the Second Circuit recognized that because "the MSA" is an "express market sharing agreement, * * * [h]ad the executives of the major tobacco companies entered into such an arrangement without the involvement of the States and their attorneys general, those executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines."

The Fifth Circuit's sole basis for declining to apply the Sherman Act to the MSA was the state-action immunity defense originally articulated by this Court in *Parker* v. *Brown*. App. A7-A10.

In *Parker*, this Court, relying on principles of federalism and state sovereignty, declined to "lightly" attribute to Congress, in enacting the Sherman Act, an intention to "restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Reviewing a California marketing statute that restricted competition among raisin growers, this Court observed that a State was presumptively free to direct its officers and agents to regulate its own markets. *Id.*; *see id.* at 359-60 (the "governments of the states are sovereign within their territory").

Absent any specifically expressed congressional intent to limit state legislative activity, and finding that the State "as sovereign" had "imposed the restraint as an act of government" rather than by making an "agreement or contract" or by entering into a "conspiracy in restraint of trade," this Court held that

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competitors to compensate for costs voluntarily assumed by other competitors is a *per se* illegal attempt to "stabilize prices").

the state program at issue was not prohibited by the Sherman Act. *Id.* at 352.

This Court included the proviso, however, that even state action will not avoid the prohibitions of the Sherman Act if the State acts as a "participant in a private agreement or combination by others for restraint of trade," or seeks to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351-52.

The Fifth Circuit below relied upon the *Parker* state-action doctrine to find the MSA immune from the Sherman Act. Erroneously adopting the Sixth Circuit's reasoning rejecting a challenge to Kentucky's Escrow Statute, rather than to the MSA as a whole, the court discussed only the indirect effects of the *statute* on price competition. Observing that diminished price competition was " 'neither mandated nor specifically authorized by the State,' " the court held that the Escrow Statute was entitled to state-action immunity. App. A9 (quoting *Tritent*, 467 F.3d at 557).

The Sixth Circuit's analysis of whether the Escrow Statute alone compels or authorizes subsequent illegal activity is largely beside the point. The question in this case is whether, by joining and condoning an admittedly *per se* illegal agreement between private parties, Louisiana and other States have conferred *Parker* immunity on the MSA. Under the express limits of the *Parker* decision and its fundamental rationale, state-action immunity does not apply to the MSA.

First, *Parker* specifically distinguished between the imposition by a single State of a "restraint [on trade] as an act of government," which is presumed immune from the antitrust laws, and conduct by a State that constitutes an "agreement or contract" or a "conspiracy" with private parties, which remains subject to antitrust scrutiny. 317 U.S. at 352 *Parker* was quite explicit in excluding from immunity those cases where the State acts as a "participant in a private agreement or combination by others for restraint of trade" or seeks to "authoriz[e]" such an agreement, *id.* at 351-52, and that exclusion squarely applies to the MSA.[10]

Second, the *Parker* doctrine only shields regulations within individual States, not national cartels like the MSA. *See Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904) (State may not "give a corporation * * * authority to restrain interstate or international commerce"). This Court has never applied *Parker* outside the single-state context, and certainly not to a multistate and multi-competitor agreement restricting nationwide interstate commerce. The very premise of *Parker* was that federalism and state sovereignty provided some presumptive protection to State conduct within a State's limited sphere of sovereignty – and required an express statement of congressional intent to overcome that presumptive sovereignty. *Parker*, 317 U.S. at 350; *cf. id.* at 359-60 (emphasizing, in discussing the related

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[10] Furthermore, the decision by Louisiana's Attorney General to enter into the MSA was not conduct "directed by its legislature," as described in *Parker*. 317 U.S. at 350-51. The MSA preceded any state legislation.

Commerce Clause challenge, that "states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution," or conflict with national powers or legislation).

The decision below turns *Parker*'s premises and presumptions on their heads. Rather than making independent choices regarding matters wholly "within their territory," the MSA States have acted *collectively*, via agreements with private industry, to divide markets, raise prices, and restrict advertising nationwide, even in the four non-MSA States. *Supra* at 4. Far from being legislation internal to each State, the MSA virtually compelled state participation by imposing costs on consumers in all 50 States, while distributing benefits only to those state governments that joined the agreement. Such collective, coercive, and extraterritorial regulation flies in the face of the federalism interests animating *Parker*. *See Lafayette*, 435 U.S. at 406-07 (conduct's extraterritorial reach, involving buyers outside the defendant city, militated against granting immunity).

Third, the federalism virtues of local control and political accountability – thought by this Court to mitigate any potential consequences of individual state choices to restrict competition – have no application to the MSA, which has collectivized the decision-making of the States and removed *both* local control and political accountability. *Cf. Hallie* v. *Eau Claire*, 471 U.S. 34, 45 n.9 (1985) (distinguishing municipal from private anticompetitive conduct permitted by State because "the electoral process * * * may provide some greater protection against antitrust abuses than exists for private parties").

As noted above, at 9 n.4, Louisiana legislators acknowledged during debate over passage of the qualifying Escrow Statute that they had no choice but to enact it word for word. Moreover, having joined the MSA, they may not withdraw from it, have no recourse regarding the decisions of the Firm, and are forbidden from challenging the MSA in virtually any way. *Supra* at 7-8. Individual States may not alter the MSA without the unanimous consent of the other affected parties, MSA § XVIII(j). States are therefore forbidden to adapt their law to local conditions or to respond to local political pressures. The people of Louisiana cannot bring about democratic change via elections because the Attorney General who signed the MSA bound all future state officials in perpetuity. MSA § XVIII(g). Contrary to the democratic premises of *Parker*, the citizens of States that are part of the MSA have no means, either through the "electoral process" or "public scrutiny," of holding their officials accountable on matters governed by the MSA. *Hallie*, 471 U.S. at 45 n.9. And, of course, the four non-MSA States and their citizens have no say whatsoever over the behavior of the MSA States. *See Lafayette*, 435 U.S. at 406 ("consumers living outside the municipality * * * have no recourse at the municipal level").

Fourth, even *Parker*'s basic premises of reserved state sovereignty, limited federal power, and the presumed congressional reluctance to interfere with state prerogatives do not apply to an *agreement* between States as opposed to independent state action. As explained in the following section, the Compact Clause expressly limits state authority to enter into certain agreements with other States, requires affir-

mative congressional approval for such agreements, and consequently reverses the ordinary federalism presumptions and permissive default rule applied in challenges to individual state action.

Finally, because "state action immunity is disfavored, much as are repeals by implication," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), it should not be extended to cover an agreement imposing extraterritorial regulation of national scope, like the MSA. Unlike in *Parker*, the relevant implications from the Constitution's terms and structure cut in *favor* of enforcing the Sherman Act strictly against multistate agreements in restraint of trade, and thus there is no justification for judicially narrowing the plain terms of the Sherman Act.

II. The Decision Below Strips the Compact Clause of All Independent Meaning.

In addition to being an agreement among competitors, joined by the States, the MSA also is an agreement between and among the member States themselves, falling within the express terms of the Compact Clause. That Clause provides that "[n]o state shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign power." U.S. CONST., Art. I, § 10, cl. 3.

In constructing our system of federalism, the Framers were sensitive not only to the need to limit the national government and preserve state sovereignty, but also to the dangers posed by competing combinations of States with each other or with foreign nations. Such combinations threatened to interfere

with the careful balance of state independence and national collective action contemplated by the Constitution. To avoid those dangers, the Constitution strictly forbade States to "enter into any Treaty, Alliance, or Confederation" and required congressional consent for any state "Agreement or Compact" with other States or with foreign nations. U.S. CONST., Art. I, § 10, cl. 1 & 3.

As this Court has recognized, the purpose of that latter restriction, the Compact Clause, is "to guard against the derangement of [compacting States'] federal relations with other States of the Union, and the federal government; which might be injuriously affected." *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 726 (1838). It achieves this purpose by "ensur[ing] that whatever sovereignty a State possesses within its own sphere of authority ends at its political border." *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 315 (1990).

In order to prevent the Compact Clause from overstepping its purpose, this Court has observed that it should not be read too literally to encompass *every* possible agreement between States, lest it cover agreements "to which the United States can have no possible objection or have any interest in interfering with." *Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1883). There nonetheless remains a sizeable category of interstate agreements that *are* objectionable or of interest to the United States.

Some agreements – those of an overtly political character – are absolutely prohibited by the Treaty

Clause of Article I. U.S. CONST., Art I, § 10, cl. 1.[11] Other agreements, involving " 'what might be deemed mere private rights of sovereignty; such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other' " are permissible only with the consent of Congress. 148 U.S. at 519 (quoting J. Story, *Commentaries* § 1403).

This Court's cases have identified three basic qualities of agreements that are subject to the Compact Clause:

- The Compact Clause applies to *binding* agreements between States, not mere coordination, voluntary cooperation, or reciprocity. *Virginia* v. *Tennessee*, 148 U.S. at 520-21 ("Compacts or agreements * * * cover all stipulations affecting the conduct or claims of the parties"; "no compact or agreement between the states in this case * * * until they had * * * mutually declared the boundary established by them to be the true and real boundary between the states," each "in consideration of the ratification of the other").

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[11] *Virginia* v. *Tennessee*, 148 U.S. at 519 (Treaty Clause prohibits agreements of a political character " 'in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges' ") (quoting J. Story, *Commentaries* § 1403).

- The Compact Clause applies to agreements that "*may* lead * * * to the increase of the political power or influence of the states affected, and thus encroach * * * upon the full and free exercise of federal authority." *Id.* at 520 (emphasis added).

- The Compact Clause applies to agreements that "*might* affect injuriously the interest of the other[]" States, *Florida* v. *Georgia*, 58 U.S. at 494 (emphasis added).

Over the years a variety of interstate compacts have been submitted to Congress, and Congress has not hesitated to impose conditions on its approval in order to protect federal interests. *See* Michael Greve, *Compacts, Cartels, and Congressional Consent,* 68 Mo. L. Rev. 285, 288-89, 326-28 (2003) (over 200 interstate compacts on numerous subjects, including environmental and energy policy, crime control, education, and limits on competition regarding commodities or natural resources; imposition of periodic reapproval requirements for dairy and oil and gas compacts).

In the leading modern case on the Compact Clause, *United States Steel Corp.* v. *Multistate Tax Commission*, this Court endorsed its earlier observations in *Virginia* v. *Tennessee*, and used them to evaluate a voluntary agreement among various States designed to coordinate taxation of business income earned in multiple States. Recognizing the underlying purposes of the Compact Clause, this Court agreed that the "pertinent inquiry is one of *potential*, rather than actual, impact upon federal supremacy."

434 U.S. at 472 (emphasis added). Even so, it concluded that the benign character of the agreement placed it outside the concerns of the Compact Clause.

Unlike the MSA – or the binding agreement in *Virginia* v. *Tennessee* – the agreement in *MTC* was not binding, but was wholly voluntary and States could (and did) withdraw unilaterally at any time. *Id.* at 454 n.1, 457. Given the exit threat, the voluntary coordination provided in *MTC* posed no danger of hindering the independence of and competition among the States. The agreement in *MTC* involved no "delegation of sovereign power" from the States and each participating State retained "complete control over all legislation and administrative action" regarding taxes, and the authority "to reject, disregard, amend or modify any rules" of the Commission without penalty, "just as it could if the compact did not exist." *Id.* at 473, 477-78.

Unlike the MSA's restrictions on trade in the national tobacco market, its extraterritorial fees and prohibitions, and its restrictions on speech, nothing in the *MTC* agreement even "touche[d] upon constitutional strictures." *Id.* at 478. Indeed, the agreement in *MTC* actually provided voluntary coordination in *furtherance* of avoiding constitutional and federal concerns regarding multiple taxation of interstate businesses. *Id.* at 455-56. The agreement thus did not even potentially encroach upon federal authority.

And, unlike the nationwide fees, structured payments, and fixed distributions under the MSA, there was nothing in the *MTC* agreement that would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477.

Given the limited and innocuous scope of the agreement in *MTC*, this Court concluded that it posed no threat to federal authority or state rights and interests and consequently was not subject to the Compact Clause.

In rejecting application of the Compact Clause to the MSA, the Fifth Circuit in the present case adopted an unreasonably narrow construction that ignored the holding and lessons of *MTC* and rendered the Clause redundant with the Supremacy Clause. App. A5-A7. Offering no analysis of its own, the court below adopted the cursory reasoning of the Fourth Circuit in *Star Scientific*, which found no encroachment upon federal authority because the MSA did not authorize conduct otherwise forbidden to the States individually and because the MSA acknowledged the primacy of federal law in the event of any conflict. 278 F.3d at 359-60. Neither *Star Scientific* nor the court below addressed the significant differences between the MSA and the agreement in *MTC*, and neither court engaged in the "pertinent inquiry" whether the MSA involves "potential, rather than actual, encroachment." *MTC*, 434 U.S. at 472.

Both the court below and the Fourth Circuit were wrong in their construction of the Compact Clause and in upholding the MSA pursuant to that overly narrow construction. The MSA is a binding agreement among numerous States that, at a minimum, potentially encroaches on federal sovereignty and sister-state authority and interests.

A. The MSA Is a Binding Agreement Among Its Member States.

As noted above, *supra* at 7-9, 26, the MSA goes well beyond the mere voluntary coordination in *MTC* and imposes binding and perpetual obligations on the States, controls "the conduct [and] claims of the parties, *Virginia* v. *Tennessee*, 148 U.S. at 520, and penalizes non-compliance. The MSA is, in fact, the polar opposite of the agreement in *MTC* in this constitutionally critical dimension. It effectively coerced States into joining and severely constrains their behavior such that they are not free to act "just as [they] could if the compact did not exist." *MTC*, 434 U.S. at 477-78.

B. The MSA Potentially and Actually Encroaches upon Federal Supremacy.

As emphasized by this Court in *MTC*, the Compact Clause protects against even "potential" encroachments on federal sovereignty, not merely against actual conflicts.

The court below and the Fourth Circuit, however, narrowed their Compact Clause analysis to whether the MSA purported to authorize its member-States "to exercise any powers they could not exercise" individually. App. A7; *Star Scientific*, 278 F.3d at 360; *see also id*. (MSA "does not derogate from the power of the federal government" because it acknowledges the supremacy of current or future conflicting federal legislation). But the only "powers" individual States may not exercise are those actually preempted by federal law or forbidden them by the Constitution. If the test for applying the Compact Clause is solely

whether an agreement purports to authorize conduct otherwise preempted or unconstitutional as to individual States, then this Court's distinction between potential and actual encroachment on federal supremacy is eliminated and the Compact Clause is rendered entirely redundant. Such a narrow construction of the Clause would have no operation beyond situations already covered by the Supremacy Clause, the Commerce Clause, or other constitutional limits on state action. "It cannot be presumed," however, "that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 5 U.S. 137, 174 (1803). [12]

A focus on potential, rather than actual, encroachment provides the necessary independent effect to the Compact Clause. States acting individually have the power to legislate in ways that potentially conflict with federal supremacy, so long as state law does not actually conflict with such supremacy. In close or ambiguous cases, courts apply a default rule – based on federalism principles of state sovereignty and limited national powers – that operates to sustain state laws absent an actual and "irreconcilable conflict * * *. The existence of a hypothetical or potential conflict is insufficient." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982). But for *agreements* between States, the Compact Clause and this Court's cases reverse the default rule: agreements to

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[12] Were that a correct reading of *MTC* – though it is not – it would make *MTC* an inappropriate and "[in]effective alternative" to "a literal reading of the Compact Clause," *MTC*, 434 U.S. at 460, and call for this Court to modify or overrule *MTC* in order to provide some meaning for the Compact Clause.

engage in conduct having precisely the same "potential" for conflict are invalid absent congressional consent. That *prophylactic* default rule protects federal prerogatives regarding interstate agreements and places the risk of "false negatives" in ambiguous cases on the States rather than on Congress. *See* Greve, 68 Mo. L. Rev. at 317 (usual presumption under the Supremacy or dormant Commerce Clause "will produce a number of 'false negatives' – that is, unaddressed offenses against national rights and prerogatives," with Congress bearing the burden to correct such results). [13]

Under a proper reading of the Compact Clause, the MSA is invalid absent congressional consent because it raises no lack of potential conflicts with federal supremacy:

- As the debate in Congress over the proposed legislative precursor to the MSA shows, *see supra* at 10, the MSA has at least the potential to encroach upon federal authority concerning interstate competition and antitrust law. The Federal Trade Commission issued a report warning that the proposed legislation, which was comparable to the MSA in relevant respects, could "raise barriers to entry and

[13] Applying the Compact Clause's restrictive default rule to interstate agreements, rather than the permissive default rule applied to individual state statutes, does not undermine principles of judicial restraint. Rather, the Compact Clause rule eliminates the need for judicial speculation regarding congressional intent in cases of potential or uncertain conflict, and shifts the resolution of any conflicting legal or policy concerns away from the courts and back to Congress, where it belongs.

expansion," enable companies to raise prices "by more than is necessary" to pass through settlement costs, and "have a disproportionate effect on" NPMs, stifling their ability to "effectively compete in the market." *Supra* at 10 n.6. Because of such concerns, Congress declined to enact the proposed legislation. It should be obvious that an agreement among the States and the tobacco industry to do precisely what Congress decided not to do – and that violates the plain text of the Sherman Act – is at least a "potential" infringement on federal authority.[14]

- The MSA's extraterritorial fees on national cigarette sales and restrictions on national advertising, lobbying, and litigation, even in States that are not parties to the MSA, likewise establish *at least* the potential for encroachment on federal authority.[15] Congress

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[14] The existence of at least a potential conflict also is reflected in the Fifth Circuit's reliance on *Parker*'s disfavored and counter-textual implied immunity. And Congress certainly has viewed anticompetitive multistate agreements as encroaching upon its authority sufficiently to warrant greater national supervision through protective conditions on its consent, without regard to the prospect of *Parker* immunity. *E.g.*, 73 Stat. 290 (1959) (requiring periodic resubmission of the Oil & Gas Compact, forbidding state cartels or price stabilization (Art. V), and ordering attorney general to investigate whether it promotes monopoly).

[15] The Fifth Circuit did not even address such extraterritorial restrictions, but instead held that the *Escrow Statute* had no extraterritorial application, an issue that was not in contention on appeal. App. A10-A11.

has itself imposed restrictions on advertising, sometimes choosing expressly to preempt contrary or additional state requirements. 15 U.S.C. § 1334. Even apart from congressional legislation, extraterritorial action is outside the authority of individual States. *See Healy* v. *Beer Institute,* 491 U.S. 324, 336 (1989) (Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); *Miller Bros.* v. *Maryland*, 347 U.S. 340, 342 (1954) ("no principle is better settled than that the power of a State * * * in respect to property, is limited to such as is within its jurisdiction").

- The MSA has at least the *potential* to interfere with Congress's access to unfettered information and opinion regarding matters of national importance. One remarkable feature of the MSA is that it forbids both private and governmental members from taking positions adverse to it. Companies may not challenge the MSA or even lobby Congress or the States in any manner opposed to the MSA. MSA § III(m). States likewise must "support the integrity and enforcement of" the MSA and may not "directly or indirectly" support any challenge to the MSA. MSA § XVIII(*l*). Such binding and perpetual gag rules barring communication with Congress on subjects within congressional jurisdiction has long been recognized in other contexts as having

the potential to encroach upon federal sovereignty. *Cf. United States* v. *Cruikshank*, 92 U.S. 542, 552-53 (1876) (right to petition Congress is "an attribute of national citizenship" and a right "within the scope of the sovereignty of the United States").

C. The MSA Potentially and Actually Encroaches upon State Authority and Interests.

A further purpose of the Compact Clause is to protect the States from agreements that "might affect injuriously the interest of the other[]" States or "derange[]" States' "federal relations with other States. *Florida* v. *Georgia*, 58 U.S. at 494; *Rhode Island* v. *Massachusetts*, 37 U.S. at 726. The Fourth Circuit and the court of appeals below entirely ignored the MSA's encroachment on sister-state interests, effectively excising this component of the Compact Clause's purpose and reach.

The MSA, once again, raises no lack of potential injury and derangement to be covered by the Compact Clause:

- The MSA's extraterritorial fees and restrictions manifestly encroach upon the sovereignty of non-member States, in addition to encroaching on federal supremacy. *See supra* at 31-32.

- The MSA severely restricts the sovereignty of its member States. State legislatures were coerced into adopting Escrow Statutes when presented with the MSA as a *fait acompli* by the Attorneys General and the tobacco com-

> panies, and faced severe penalties for non-compliance. The agreement is binding on the States, which may not withdraw from and may not modify the agreement without unanimous consent from affected parties. The agreement effectively allows some member States to tax cigarette sales in other member States. Member States are subject to the binding determinations of a non-public body – the Firm – which issues unappealable decisions regarding compliance and the distribution of MSA proceeds. And States may not even voice their objections to the MSA, which forbids them from taking positions adverse to it. *See supra* at 7-10. Such multilateral restrictions on sister States could not be attempted legally, or accomplished effectively, by individual States acting without the aid of an enforceable agreement.

Once again, the MSA is the polar opposite of the agreement in *MTC*, unquestionably "redound[ing] to the benefit of [a] particular group of States [and] to the harm of others." *MTC*, 434 U.S. at 477-78.

This Court should grant certiorari both to correct the constitutionally destructive legal standard applied by the court below and the Fourth Circuit, and to decide whether a binding agreement as sweeping and significant as the MSA is indeed subject to the Compact Clause.

III. This Petition Presents Important Issues Having a Tremendous Impact on the National Economy and Our Federal System.

This case presents issues of tremendous national importance that should be resolved by this Court.

The absence of a split regarding the MSA in no way undermines the importance of the questions presented and is not a sufficient reason to decline review. Compact Clause cases rarely generate a circuit split, yet still receive this Court's attention. *See, e.g.*, *Northeast Bancorp* v. *Board of Governors of the Federal Reserve Sys.*, 472 U.S. 159, 162 (1985). Cases involving related structural restraints in Article I, § 10, cl. 3 – such as the Tonnage Clause – likewise have been reviewed by this Court even in the absence of a split. *See, e.g.*, *Polar Tankers, Inc.* v. *City of Valdez*, 129 S. Ct. 2277, 2281 (2009).

This Court has repeatedly recognized that a circuit split is not the *sine qua non* of reviewability for cases involving issues of sufficient economic or legal importance. This Term alone, this Court has granted several petitions that have not alleged any split – merely important or economically significant questions. *See, e.g.*, Petition at 5, *Schwarzenegger* v. *Entertainment Merchants Ass'n* (No. 08-1448) (May 19, 2009) (acknowledging lack of a split); Petition at 8, *Costco Wholesale Corp.* v. *Omega, S.A.* (No. 08-1423) (May 18, 2009) (same); Petition, *Flores-Villar* v. *United States* (No. 09-5801) (Aug. 3, 2009) (no split alleged); Petition at 11-12, *Chamber of Commerce* v. *Candelaria*, (No. 09-115) (July 24, 2009) (same).

And there can be little doubt that this case presents issues of great economic, political, and legal importance.

Economically, the MSA annually regulates roughly $80 billion in national cigarette sales and literally *trillions* of dollars in sales over the life of the agreement. By suppressing competition, the MSA raises prices by many billions of dollars each year, with the States and participating tobacco companies splitting the supra-competitive profits. On sheer dollar value alone, this case is significant enough to warrant this Court's attention.

Politically, the MSA has allowed an independent confederacy of States to extract revenues from citizens across the nation without passing a tax through normal democratic processes, and without political accountability in individual States. Because the MSA is binding on present and future officials, they can disclaim responsibility and cannot alter or withdraw from the MSA regardless of electoral outcomes. Such bold circumvention of democratic processes is of deep concern for its own sake, for the precedent it sets, and for the damage it does to our system of federalism and its division of power and responsibility. *See, e.g*, *United States* v. *Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (benefits of federalism in enhancing liberty require "distinct and discernable lines of political accountability"; "the inability to hold either branch of government answerable to the citi-

zens is more dangerous even than devolving too much authority to the remote central power").[16]

Legally, the court below and other federal courts have dismissed the MSA's serious legal and constitutional failings by casually extending implied immunity under the Sherman Act and by narrowing the scope of the Compact Clause in ways that have no precedent in this Court's cases, go far beyond the contexts of the cases they cite, disregard and indeed pervert the underlying reasoning in those cases, and conflict with the plain statutory and constitutional texts at issue. These rulings severely undermine the Sherman Act, effectively nullify the Compact Clause, and overreach the role of lower courts by expanding this Court's limited cases to the detriment of a federal statute and the Constitution. That the federal courts have uniformly committed such errors in sustaining the MSA simply makes matters worse, and highlights the necessity for this Court to step in as final arbiter.

In short, the MSA is an economic, political, and legal abomination backed by powerful vested interests and upheld by inadequate and destructive legal reasoning. This is the only Court in a position to offer an authoritative and definitive evaluation of that scheme and to decide whether it is indeed as innocuous as its supporters claim, or whether it must be

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[16] This case is *not* about the merits of regulating cigarettes or the desirability of higher prices to deter smoking. It is about the manner in which such choices are to be made, and who will be accountable for those choices. There are sufficient means of regulating and taxing cigarettes – including submitting the MSA to Congress for approval – that do not trench on democratic processes or federal authority.

invalidated as incompatible with federal law and the Compact Clause.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

MICHAEL MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

HANS F. BADER
SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street, NW
Washington, D.C. 20036

Counsel for Petitioners

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