No. 10-622

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

BRIEF FOR ANTITRUST LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Amici have no financial interest in any party to the case or in the outcome of the case. Neither party, nor any of either party's counsel, authored this brief in whole or in part.

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. Per the terms of such consents, written notice was provided to the parties more than seven days prior to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. The International Center for Law and Economics ("ICLE") provided funding to the brief's principal authors, Professors Todd Zywicki and Joshua Wright, for preparation and filing of the brief.

STATEMENT

Petitioners seek a writ of certiorari to review a decision affirming a grant of summary judgment that the tobacco Master Settlement Agreement is beyond antitrust scrutiny under the state action doctrine. Petitioners are a small tobacco company, a consumer, and a tobacco shop. The plaintiffs contend that the agreement 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 as state action under *Parker v. Brown*, 317 U.S. 341 (1943).

This brief focuses on the question of whether state action immunity applies to a cartel-facilitating arrangement with significant interstate effects. Disagreements across the Circuit Courts of Appeals call into question the extent of the state action doctrine immunizing private actors within state-facilitated cartels. The Fifth Circuit decision purports to expand the scope of the state action doctrine to immunize cartel arrangements merely sanctioned by, as opposed to actively monitored by, the state. The widespread and entrenched nature of the national tobacco cartel arising from the challenged restraint necessitates this Court's intervention.

SUMMARY OF ARGUMENT

1. This case involves an antitrust challenge to the 1998 Master Settlement Agreement ("MSA") between

the four largest tobacco manufacturers ("Majors")[2] and the Attorneys General of 46 states. The MSA is designed to create – and actually creates – a national cigarette cartel to maintain the market shares of participating manufacturers ("PMs"), to suppress competition from non-participating manufacturers ("NPMs"), and to increase tobacco prices. This cartel extracts monopoly profits for the Majors and tax revenues for the states at the cost of massive consumer welfare losses through decreased quantities supplied, increased prices, and stifled innovation.

2. The MSA establishes a nationwide cartel through a dual system of incentives for PMs and penalties for NPMs. The MSA systematically insulates PMs from competitive disadvantages vis-à-vis NPMs by simultaneously fixing PM liabilities as a function of market shares, subsidizing PMs that lose market share as a result of the MSA, and requiring comparable "escrow payments" from NPMs that refuse to join the MSA. The MSA threatened to withhold settlement funding from states that did not pass statutes mandating escrow payments from NPMs. The states responded, as anticipated, with escrow statutes designed to prevent inter-state competition for tobacco regulation and thereby inhibit NPMs from gaining national market share as a result of price increases from the MSA. Cigarette prices between 1998 and 2002 increased by double the additional costs of the MSA.

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[2] The four Majors are Phillip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Company and Lorillard Tobacco Company.

3. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, prohibits a "contract, combination . . . or conspiracy, in restraint of trade or commerce." Furthermore, contracts among competitors at the same market level – "horizontal" contracts – to divide markets, raise prices, or otherwise suppress competition are *per se* illegal. Without state prompting and endorsement, the MSA would doubtlessly present an emblematic *per se* violation of Section 1 of the Sherman Act, as it seeks to suppress competition through limiting advertisements and dividing market shares. As Judge Ralph Winter noted about the MSA, "Had the executives of the major tobacco companies entered into such an arrangement without the involvement of the States and their attorneys general, those executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 225 (2d Cir. 2004) (*Freedom Holdings I*). Yet several judicially-crafted limitations on the Sherman Act, each predicated on state intervention, sometimes immunize or lessen antitrust scrutiny of otherwise *per se* illegal restraints.

4. This Court has held that the antitrust laws do not apply to states acting in their sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). When a state program is "clearly articulated and expressed as state policy [and] the [State] policy is 'actively supervised' by the State itself," *Parker* 'state action' immunity exempts normally illegal conduct from the Sherman Act's prohibition. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). A state cannot claim *Parker* immunity

through intermittent or "gauzy" involvement in "a[n] essentially private price-fixing arrangement." *Id.* at 106. If a state program merely provides a "hybrid restraint" which "contemplates a private market decision but provides a nonmarket mechanism for enforcing [that] decision," then the validity of the state restriction largely depends on the level of actual state involvement. *Rice v. Norman Williams Co.*, 458 U.S. 654, 665-66 (1982) (Stevens, J., concurring). When compliance with a state restriction necessitates "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," federal antitrust laws preempt the state restriction. *Id.* at 658 n.4, 661.

5. The *Midcal* and *Rice* limitations on state action immunity reflect this Court's skeptical view of anticompetitive state regulation. Scholars of the regulatory process and antitrust enforcement officials have recognized that regulated businesses – deprived of more straightforward, private anticompetitive combinations – will attempt to substitute into public-private partnerships in order to legitimize conduct that violates the antitrust laws. *Midcal* accordingly requires both clear articulation and active supervision of state action to qualify for *Parker* immunity. Even when the state satisfies these requirements, state action that would necessarily compel *per se* violation of the antitrust laws nonetheless runs afoul of *Rice*. Both of these restrictions recognize the potential mischief in a broad state action doctrine; minimizing special interest legislation remains part of federalist traditions since James Madison's comments

on factionalism in Federalist 51. The MSA permits states to elude the political consequences of anticompetitive laws by insulating them from the constraints imposed by the inter-state competition that horizontal federalism is intended to provide. Both of these consequences militate against finding *Parker* immunity.

6. Conflicting Federal Circuit Court opinions reviewing the antitrust implications of the MSA also make this case unusually important and ripe for review by this Court. The Fifth Circuit has not offered a coherent explanation relevant to this case. The Fifth Circuit instead cited *Sanders v. Brown*, a Ninth Circuit decision also examining the competitive consequences of the MSA. In *Sanders*, the Ninth Circuit speculated that in light of this Court's decision in *Hoover v. Ronwin*, *Midcal* may no longer remain good law. *Sanders v. Brown*, 504 F.3d 903, 916 (9th Cir. 2007). The Ninth Circuit therefore held that, sans *Midcal*, "a state need not show that it 'actively supervises' private parties, as long as the state itself, acting as sovereign, created the restraint of trade." *Id.* (citing *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984)). The Second and Third Circuits, however, have applied *Midcal* to examine state and private antitrust immunity claims resulting from the MSA. *See Freedom Holdings I* at 305; *A.D. Bedell Wholesale Co. v. Phillip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2002). Tension between the circuits as to the scope of *Hoover*, the interplay between *Midcal* and *Rice*, and even whether *Midcal* remains good law underscore the deep confusion that exists today regarding the interaction of these three doctrines and the pressing

need for this Court's guidance. This need for clarification is especially important where, as here, courts scrutinize what amounts to an integrated national settlement of commerce with an unquestionable interstate nature.

7. The MSA presents the largest settlement in American history – nearly a quarter-trillion dollars – and impacts both taxpayers and consumers in every state, directly and indirectly. The MSA is antithetical to the principles of federalism upon which the state action exception to the antitrust laws is grounded. This Court's guidance is both necessary due to the impending and growing split amongst the Circuit Courts of Appeals as to the extent of *Parker* immunity as well as the billions of dollars at stake in the result.

ARGUMENT

I. The MSA and Escrow Statutes Form a National Cartel in the Cigarette Market.

On November 23, 1998, the Attorneys General of 46 states signed an agreement settling allegations that the largest four tobacco manufacturers defrauded the states of Medicaid expenses.[3] The Master Settlement Agreement obligates the Majors and other manufacturers who opt in to the MSA to make annual payments totaling $206 billion. Under the MSA's terms, PMs' payments are calculated on the basis of their current national market shares. The annual payments are then allocated to the settling

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[3] Mississippi, Florida, Texas, and Minnesota reached settlements prior to this date.

states. The MSA also prohibits PMs from various tobacco-related lobbying and advertising activity. MSA §§ III(b)-(i); III(m)-(p). The MSA raises the costs of cigarettes by approximately 35 cents per pack.

Structuring damage payments in this way would have created a significant competitive advantage for NPMs, which would have been able to undercut PMs' resulting inflated prices. The MSA contemplates this consequence by including several provisions that provide incentives for NPMs to join the settlement, thereby mitigating the competitive consequences of the PMs' annual payments to the states. These NPMs are often smaller companies which would stand to gain substantial market share by not joining the MSA. The MSA's incentives are accordingly generous.

First, new participants in the settlement which subject themselves to the tax increase within 90 days make zero MSA payments at all on sales at or below a benchmark level, defined as the higher of their 1998 sales or 125 percent of their 1997 sales. MSA § IX(i). To put the magnitude of this subsidy in perspective, a small manufacturer with sales of $100,000 per month would be entitled to a $1.5 million annual tax subsidy. *See* Jeremy Bulow, Director, Bureau of Econ., Fed. Trade Comm'n, The State Tobacco Settlements and Antitrust (June 25, 2007).

Second, the MSA includes provisions entitling Majors to substantial reductions in their required payments in the event that they lose market share to non-participating manufacturers. MSA §§ II(ff), IX(d). These "adjustments" insure the Majors will be compensated for any decrease in market share resulting from the MSA.

Third, the MSA also provides significant incentives for states to join. The MSA requires each settling state to pass a model "qualifying" or "escrow" statute. These statutes require manufacturers who refuse to join the MSA to make alternative "trust fund" payments as a so-called "bond" against future claims. States that did not pass model statutes forfeit their share of tax revenue, while consumers in states that did not pass model statutes still bear the burden of the national tax. With these incentives, it is no surprise that smaller manufacturers joined and states enforced the MSA.

Consider the competitive consequences of the MSA. The MSA imposed significant costs of NPMs in order to prevent them from acquiring a "resulting cost advantage." Escrow statutes such as the one challenged here require NPMs to put significant payments in escrow equivalent to a full payment under the MSA. The MSA also exposes NPMs and their customers to the possibility of being sued by the states. Further, escrow statutes also impose other burdensome compliance costs on non-participating manufacturers. *See, e.g.*, LA. REV. STAT. §§ 13:5071-77, 47:843D.

Imposing these significant costs on NPMs dampens the Majors' typical incentives to engage in vigorous price competition. Two key features of the MSA directly dampen these incentives. First, the imposition of costs on NPMs enables the Majors to pass on a significant amount of their MSA costs to consumers in the form of higher prices without fear that the smaller manufacturers will undercut the Majors' market share and profit margins. Second, the MSA effectively guarantees small manufacturers a stable market share equal to 125 percent of their 1997 market share but strongly discourages them from expanding beyond that level. Under these conditions, the Majors have a greater incentive to increase prices because their rivals have a reduced incentive to expand sales. In other words, by requiring even NPMs to pay into an escrow fund, the government has eliminated the ability of the NPMs to compete with the Majors by undercutting their prices, which would be an unambiguous benefit to consumers. In turn, the Majors concede a modest increase in the market share of small manufacturers in exchange for the ability to raise prices free from the threat of losing a much larger market share. The MSA represents a coordinated effort of the States, the Majors, and other participating manufacturers to increase cigarette prices.

The competitive consequences of cartels are both predictable and intended: prices and cartel profits increase while consumer welfare falls. Far from penalizing the Majors, the anticompetitive features of the MSA, such as its limits on advertising and facilitation of coordinated pricing, produced supracompetitive profits and dramatic increases in their stock prices. *See* Frank A. Sloan et al., *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 Tobacco Control 356 (2004) (demonstrating that tobacco industry firms experienced abnormal positive stock returns post-MSA); Stuart J. Fowler & William F. Ford, *Has a Quarter-Trillion Dollar Set-*

tlement Helped the Tobacco Industry?, 28 J. ECON. & FIN. 430, 433-34 (2004) (finding that the MSA "induces anticompetitive behavior" by facilitating coordinating pricing which "may more than fully compensate for the external costs smokers impose on nonsmokers"). The empirical evidence suggests that the MSA changed the nature of competition in the tobacco industry from the price war period following the so-called "Marlboro Friday" price war of April 3, 1993, which had led to lower cigarette prices, to a consistent increase in prices in the post-MSA period. For example, one economic study found that although the MSA resulted in only a 44 cent per-pack tax on cigarettes, overall prices for cigarettes increased by more than one dollar. *See* Federico Ciliberto & Nicolai V. Kuminoff, *Public Policy and Market Competition: How the Master Settlement Agreement Changed the Cigarette Industry*, 10 B.E. J. OF ECON. ANALYSIS & POL'Y (2010). The authors conclude that the evidence "supports the hypothesis that the [MSA] acted as a coordinating device for firms to collectively end their price war and raise cigarette prices." *Id.* at 39. Moreover, prior research has found that the overall health effects of higher cigarette prices are ambiguous or even counterproductive, as higher prices lead smokers to essentially seek "more bang for their buck" by switching to cigarettes that are higher in tar and nicotine and adjusting their smoking style in order to extract more nicotine from each cigarette. *See* Jerome Adda & Francesca Cornaglia, *Taxes, Cigarette Consumptions, and Smoking Intensity*, 96 AM. ECON. REV. 1013 (2006); Matthew C. Farrelly et al., *The Effects of Higher Cigarette Prices on Tar and Nicotine Consumption in a Cohort of Adult Smokers*, 13

HEALTH ECON. 49 (2004); William N. Evans & Matthew C. Farrelly, *The Compensating Behavior of Smokers: Taxes, Tar, and Nicotine*, 29 RAND J. ECON. 578 (1998).

As predicted by economic theory, the MSA dampens the incentive for price competition by the Majors against the subsidized smaller manufacturers, resulting in stabilized market shares, increased industry profits, and price increases much larger than justified by the increase in costs or predicted under competitive conditions. The MSA and the escrow statutes combine to ensure a national cigarette cartel. Economic theory accurately predicts corresponding welfare transfers from consumers to the tobacco industry and states through higher profits and tax increases.

Further, economics teaches that public restraints on trade – cartels in which the government plays a role of participant or enforcer – have the most pernicious consequences for consumers because they are more likely to be immunized from the competitive pressures of entry that discipline private restraints of trade. *See* Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid et al., eds, 1974). The National Industrial Recovery Act (NIRA) and the National Recovery Administration (NRA) present historic examples of government-sponsored cartelization of industry in the United States. The NIRA and NRA helped industries create and enforce so-called industry codes. Economic evidence overwhelmingly shows that cartel arrangements facilitated by government action slowed recovery from the Great Depression, seriously harming consumers and the economy as a whole. *See* Jason Taylor, *Cartel Code Attributes and Cartel Performance: An Industry Level Analysis of the National Industrial Recovery Act*, 50 J. L. & ECON. 597 (2007); Harold Cole & Lee Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004); Christina Romer, *Why Did Prices Rise During the 1930s?,* 59 J. ECON. HIS. 167 (1999). The MSA-inspired cartel imposes similar effects: Majors and the states gain profits and tax revenues; consumers pay higher prices and lose choices. Indeed, as Judge Ralph Winter observed in his review of the MSA in *Freedom Holdings v. Spitzer*, the MSA was a contract initially agreed to by the Majors, which originally sought congressional ratification of the bargain through a formal antitrust exemption. *Freedom Holdings I*, 357 F.3d at 224. It was only after Congress refused to carve out an exception to the antitrust laws to protect the Majors' cartel that they turned to an interstate agreement of state governments instead.

II. *Parker* Immunity is Justified Only When It Comports With Principles of Competitive Federalism.

The state action doctrine is grounded in principles of federalism. *See Parker*, 317 U.S. at 341; *Federal Trade Commission v. Ticor Insurance Co*., 504 U.S. 621, 633 (1992) (noting that "our decision [in Parker] was grounded in principles of federalism."). As the Report of the State Action Task Force of the Federal Trade Commission observed, "although the Court has held that the state action doctrine is grounded in principles of federalism, it has never fully explained how federalism justifies the current form of the defense." FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE 5 n.4 (2003) [hereinafter "FTC State Action Report"]. The present case provides the Court an important opportunity to clarify this doctrine by declaring that while *Parker* immunity may grant a state the power to adopt an anticompetitive regulatory policy within its own borders, the principles of competitive federalism upon which the immunity is grounded require that it not be extended to reach multi-state agreements that facilitate a national cartel. Recently, the bipartisan Antitrust Modernization Commission, noting that the federalism principles of the state action exception counsel that caution where political accountability is attenuated, concluding that "[w]here the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine." *See* ANTITRUST MODERNIZATION COMM., RECOMMENDATIONS AND REPORT 346 (April 2007); FTC State Action Report, at 44 ("[S]pillovers undermine both economic efficiency and some of the same political representation values thought to be protected by principles of federalism.").

This Court's state action jurisprudence has recognized that just as private markets can fail, thereby justifying regulatory intervention (including antitrust scrutiny), political markets can fail as well, resulting in the special-interest capture of the regulatory process. Accordingly, this Court has progressively narrowed the scope of the state action doctrine and stressed the importance of linking the protection of the state action exception to values of federalism and political accountability.

This justification draws upon the logic of competitive federalism as established by the American constitutional system. Competitive federalism operates as a crucial check on special interest activity conducted under the guise of the state action doctrine. While the state action doctrine permits states to opt-out of the regime of robust private ordering and competition embodies in the Sherman Act, for that dynamic process to work properly, it is crucial that the state actors that enact anticompetitive regulations bear the full costs of those policy decisions.

Competitive federalism serves two related functions in the American constitutional system. First, it provides a mechanism for individuals to sort themselves into different communities so as to match their personal preferences with different mixes of governmental services, taxes, and regulations. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Friedrich A. Hayek, *The Economic Conditions of Interstate Federalism*, NEW COMMONWEALTH Q. (Sept. 1939), *reprinted in* FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 255 (1948). A citizen-consumer who prefers a mix of high taxes and high governmental services may select that combination; others may select lower taxes and services. Some might prefer metropolitan areas with high-density economic and residential development; others may prefer to a more suburban or rural environment.

The mirror proposition is true as well: just as competitive federalism permits people to opt *in* to the communities that they prefer, it also allows them to opt *out* of, or exit from, jurisdictions that fail to match their preferences or which provide governmental services inefficiently. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992). In particular, competitive federalism provides a crucial constraint on rent-seeking and special interest activity at the state and local levels by enabling citizens to vote with their feet to escape inefficient or oppressive governmental regimes.

As James Madison noted in Federalist 51, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Thus, the challenge of constitutional design is to simultaneously prevent special interest factions from influencing the government for their own ends while also constraining agency costs by governmental officials tempted to use the power of their office to promote their own narrow ends. Madison further notes that the resolution of this tension resides in the final place on the people—"a dependence on the people is, no doubt, the primary control on the government"—but that "experience has taught mankind the necessity of auxiliary precautions."

The most important of these auxiliary precautions are the twin structural pillars of the Constitution: separation of powers and federalism. At the federal level, separation of powers raises the costs and increases the difficulties for special interests and governmental officials to combine in schemes of improper legislation at the expense of the public. Competitive federalism provides the same check at the state level—to establish a system of competition that constrains special interest activity by forcing state politicians to bear the political costs of their decisions. Competitive federalism in turn ameliorates the economic costs of legislative rent-seeking by enabling those otherwise forced to subsidize special-interest legislation to exit by moving to states with more efficient and effective policies. As Justice (then-professor) Scalia observed, the constitutional value of federalism is the promotion of freedom and open markets. Horizontal competitive federalism can be a powerful instrumentality for these ends. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & PUB. POL'Y 19 (1982).

The general applicability of the Sherman Act and the principle of free competition it embodies is itself a powerful example of the use of vertical federalism to promote interstate commerce and competitive markets and to "restrain the centrifugal tendencies of the states." *Id.* at 20-21. Federalism's value as a constitutional principle, therefore, is to balance individual liberty, competitive markets, and the reduction of special-interest factions on one hand against a state's legitimate regulatory interests on the other. If states can simply band together to thwart important federal and constitutional policies, however, federalism will be perverted into a tool for restraint on liberty and the promotion of interest-group rent-seeking. As Justice Scalia has remarked, federalism "is a stick that can be used to beat either dog"—the states or federal government—as necessary in order to promote individual liberty and mitigate interest-group factionalism. *Id.* at 19. The judicious use of the Sherman Act's preemptive powers over anticompetitive state laws is an example of Congress's power to promote this constitutional balance.

Research has shown that competitive federalism provides a powerful check on the ability of state governments to raise taxes on cigarettes. Cigarette taxes target a relatively small group of citizens with a relatively inelastic demand for the taxed product; this inelastic demand generates a temptation for government officials to force smokers to bear a disproportionate tax burden for the provision of general governmental services. Competitive federalism limits the ability of governmental officials to disproportionately raise taxes upon this disfavored minority by enabling smokers at the margin to cross state boundaries to purchase cigarettes. *See* Daniel K. Benjamin & William R. Dougan, *Efficient Excise Taxation: The Evidence from Cigarettes*, 40 J. L. & ECON. 113 (1997).

The tobacco MSA attempts to extend the state action exception well beyond its logical federalist limits. *Parker* immunity has never been extended, and should not now be extended, to a national agreement with significant effects on firms and consumers nationwide. By facilitating an interstate cartel for tobacco, the MSA eliminates the constraints of competitive federalism, forming a cartel that enables the Majors to raise prices free from market competition and enables the states to raise taxes and engage in special-interest bargains free from interstate competition. These increased prices are parceled out by both wings of the cartel: PMs enjoy increased profits; state officials gain additional revenues to fund general governmental operations and funnel hundreds of millions of dollars to a hand-picked group of politically-connected lawyers who recycle some of those riches back to state officials in political donations. *See* W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL 55 (2002) (discussing trial lawyers' efforts to "protect their windfalls gains and to promote their interests in future cases" with campaign contributions).

Just as private market actors prefer the quiet life of a cartel to the rivalry of competition, state politicians prefer to enact laws that further their reelection efforts and reward powerful special interests without having to worry about other states undercutting them with more efficient laws.

The MSA solves the "cheating" problem plaguing most state efforts to create cartel arrangements in goods such as cigarettes that would otherwise arise because one state would be tempted to reduce its taxes in order to draw more transactions to its state. The MSA protects state politicians from the natural consequences of their actions by creating an interstate compact, thereby enabling each state's politicians to raise taxes on consumers to fund general operations without fear of competition from other states. The interstate nature of the MSA to protect states from competition is at root no different from private market cartelists agreeing not to compete. In the end, consumers lose from both types of cartels.

The state action exception to the antitrust laws is rooted in federalism as a theory of state power: that state officials should have the discretion to compromise the presumptive value of competitive markets and individual liberty where they decide that other regulatory goals should predominate. But implicit in this theory is the equally important recognition of competitive federalism as a check on excessive agency costs and special interest factionalism. Under the MSA, by contrast, the states assert the authority to engage in a government-facilitated and enforced cartel with the Majors to create and share monopoly profits—and, importantly, to do so while simultaneously eliminating the constraints of competitive federalism. To the extent that the states seek the shelter of the state action doctrine to protect cartels that they create, this Court has made it clear that the states must also accept the constraints of federalism as well. Thus, while this Court has recognized legitimate state action as an exception to the Sherman Act when a state imposes, supervises, and otherwise takes responsibility for, a clearly articulated policy to implement an anticompetitive policy, it has not extended *Parker* immunity to state programs facilitating a nationwide cartel generating significant out-of-state supracompetitive profits and consumer harms. This limit on the state action exception follows logically from the federalist roots of the doctrine itself—where the state facilitates a national cartel with pernicious economic effects at the national level, political accountability breaks down, and with it the justification for state action immunity from the Sherman Act. This Court has never applied the protection of the state action doctrine to a multi-state agreement. Nor should it start now.

CONCLUSION

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

Respectfully submitted,

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