No. 19-

IN THE

Supreme Court of the United States

CONNECTICUT FINE WINE AND SPIRITS, LLC,
dba Total Wine & More,

Petitioner,

v.

COMMISSIONER MICHELLE H. SEAGULL, et al.,

Respondents,

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., et al.,

Intervenors-Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ADAM B. ABELSON
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444

CARTER G. PHILLIPS*
JONATHAN E. NUECHTERLEIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Connecticut Fine Wine and Spirits, LLC dba Total Wine Spirits Beer & More

* Counsel of Record

December 3, 2019

QUESTION PRESENTED

Connecticut law requires private beer, wine and liquor wholesalers to "post" their prices in advance so that all competing wholesalers can match them, to "hold" those prices for a month, and to refrain from offering quantity discounts to retailers. In addition, the wholesalers in this scheme determine not only the case prices paid by retailers, but also the minimum bottle prices paid by consumers. By design, this scheme mimics the results of an illegal price-fixing conspiracy while enabling the cartel's participants to avoid any explicit "agreement." Yet no state actor supervises the ensuing prices to ensure their reasonableness.

The question presented, which has divided the courts of appeals, is:

Whether Section 1 of the Sherman Act preempts state laws facilitating such unsupervised private price-fixing.

PARTIES TO THE PROCEEDING

Petitioner is Connecticut Fine Wine & Spirits, LLC dba Total Wine & More ("Total Wine").

Respondents are Michelle H. Seagull, in her official capacity as Commissioner of the Connecticut Department of Consumer Protection, and John Suchy, in his official capacity as Director of the Connecticut Division of Liquor Control. In addition, the following parties were granted leave to intervene as defendants in the District Court and participated as intervenors-appellees in the Court of Appeals: Wine & Spirits Wholesalers of Connecticut, Inc.; Connecticut Beer Wholesalers Association, Inc.; Connecticut Restaurant Association; Connecticut Package Stores Association, Inc.; and Brescome Barton, Inc.

RULE 29.6 STATEMENT

Petitioner Connecticut Fine Wine & Spirits, LLC dba Total Wine & More has no parent corporation, and no publicly held company owns any of its stock or membership interests.

RELATED PROCEEDINGS

Counsel are aware of no directly related proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

STATUTES

TABLE OF AUTHORITIES—continued

INTRODUCTION

By design, Connecticut's Liquor Control Act, Conn. Gen. Stat. § 30-1 *et seq*., raises the prices consumers pay for beer, wine, and liquor by suppressing competition among wholesalers and retailers. It achieves that objective not through regulatory oversight, but through unsupervised private price-fixing. Among its other provisions, the Act enables alcohol wholesalers to coordinate wholesale and retail prices in advance and thus ensures the same high prices and wide profit margins that an illegal price-fixing conspiracy would produce, but without having to reach any explicit "agreement."

Following this Court's precedent in *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), the Fourth and Ninth Circuits have held that Section 1 of the Sherman Act preempts such laws and that the absence of an explicit agreement is no basis for concluding otherwise. In the decision below, however, the Second Circuit relied on its own, pre-*324 Liquor* precedent, *Battipaglia* v. *New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), to hold that such laws are not preempted. It concluded that such laws survive precisely because they spare private actors the need to make explicit agreements in order to achieve the same anticompetitive results as an illegal conspiracy.

Four Second Circuit judges dissented from a denial of rehearing en banc. Writing for the dissenters, Judge Sullivan observed that the decision below "perpetuate[s] a longstanding circuit split" and "allow[s] de facto state-sanctioned cartels" to inflict "artificially high prices on consumers and retailers across all three states in our Circuit." Pet. App. 83a. Judge Sullivan added that this result was "unfortunate . . . particularly when the correct legal analysis has been staring

us in the face for more than thirty-five years." *Id.* That "correct legal analysis" appeared in Judge Winter's *Battapaglia* dissent, which other courts of appeals have followed over the ensuing decades and which leading academic commentators have endorsed. This Court should now resolve that circuit conflict and reverse.

OPINIONS BELOW

The district court's opinion granting respondents' motions to dismiss (Pet. App. 35a-79a) is published at 255 F. Supp. 3d 355 (D. Conn. 2017). The court of appeals' amended panel opinion affirming that judgment (Pet. App. 1a-34a) is published at 932 F.3d 22 (2d Cir. 2019). The court of appeals' order denying rehearing en banc is reproduced at Pet. App. 80a-81. The opinion of Judge Sullivan, joined by Judges Cabranes, Livingston, and Park, dissenting from the denial of rehearing en banc (Pet. App. 82a-91a), is published at 936 F.3d 119 (2d Cir. 2019).

JURISDICTION

The court of appeals entered judgment on February 20, 2019, and rehearing was denied on September 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1.

2. Sections 30-63(b)-(c), 30-68k, 30-68m, and 30-94(a) of the General Statutes of Connecticut are set forth in Pet. App. 92a-96a.

STATEMENT OF THE CASE

A. Statutory Background

Connecticut's alcohol-pricing regime has three related but distinct components. See Pet. App. 3a-6a. First, on a specific date each month, every wholesaler must give advance public notice of ("post") its case and bottle prices for the following month. Conn. Gen. Stat. § 30-63(c). The posted *case* prices determine what retailers pay wholesalers; as discussed below, the posted *bottle* prices establish the minimum prices retailers can then charge consumers. For four days after the monthly industry-wide posting date, any wholesaler may amend its posted case and bottle prices to match any lower prices posted by competing wholesalers. All wholesalers must then "hold" their final posted prices for the ensuing month.

This *post-and-hold* requirement is designed to, and does, undermine price competition. See Pet. App. 7a-8a. If one wholesaler cuts prices, all competing wholesalers will "punish" it by cutting their own prices by the same amount for the same upcoming month, keeping the first wholesaler from making up in volume the profits it lost through price-cutting. And in fact competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors' prices. See *id.* at 102a (Compl. ¶ 19).

The second and third components of Connecticut's scheme work hand-in-glove with the first to destroy price competition at the retail level as well. The *quantity discount ban* requires each wholesaler to charge every retailer the same price, irrespective of the quantity sold. See Conn. Gen. Stat. §§ 30-63(b), 30-68k, and 30-94(a). And the *minimum retail price* requirement in

turn prohibits retailers of wine and liquor from setting consumer prices below an arbitrary "cost" metric pegged not to their actual costs, but to the bottle price posted by the wholesaler. See *id.* § 30-68m. Although wholesalers typically sell by the case, the posting of separate "bottle prices" enables wholesalers to determine minimum retail prices. Specifically, to give every retailer the same minimum profit margin per bottle, wholesalers post a price for each bottle that is arbitrarily higher than the bottle's pro rata share of the corresponding case price. See Pet. App. 100a-102a (Compl. ¶¶ 13, 17).

In short, all wholesalers coordinate their case and bottle prices; every wholesaler charges every retailer the same price for the same products; and no retailer may offer consumers prices below an inflated minimum "bottle price" set by the coordinating wholesalers. There is thus no wholesale or retail price competition, and retail prices are predictably uniform and inflated. See Pet. App. 102a & 107a-119a (Comp. ¶ 19 & Tabs. 1 & 2). Although this scheme "has made business rather cozy for the state's small liquor stores," the victims are consumers: "Shoppers in Connecticut pay the price . . . every time they frequent a local liquor store. Prices are 24 percent higher than in neighboring states or up to $8 more a bottle." Allie Howell, *Connecticut's Liquor Pricing Scheme Is a Bad Law That Just Won't Die*, Reason (June 27, 2017); see also Pet. App. 102a (Compl. ¶ 18) (quantifying retail price effects).[1]

---

[1] In 2010 the Federal Trade Commission issued a staff paper examining the impact of post-and-hold laws, concluding that they undermine price competition and "generate monopoly rents" but do not discernibly "generate any offsetting benefits in the form of

The State does not dispute that its regime raises consumer prices above competitive levels—nor could it, because that is the regime's *explicit purpose*. The State acknowledges that the regime is designed to suppress "price wars" (*i.e.*, competition), "protect[] smaller retailers," and guarantee "higher prices" for consumers of beer, wine, and liquor. Pet. App. 7a-8a (quoting *Eder Bros.* v. *Wine Merchants of Conn., Inc.*, 880 A.2d 138, 147 (Conn. 2005)). Indeed, the regime generates supracompetitive prices in the same way that it would if it had simply directed the State's wholesalers to set prices through private agreement. Significantly, the State exercises no regulatory oversight to ensure that wholesale or retail prices are reasonable. Instead, it leaves those prices to the entirely unsupervised discretion of this wholesalers' cartel.[2]

B. Proceedings Below

Total Wine today operates more than 200 retail alcoholic beverage stores in 24 States, including four in Connecticut. Total Wine's business model emphasizes wide selection and customer service combined with competitive retail prices. But Total Wine cannot offer

---

reduced social harms" such as "alcohol-related accidents and underage drinking." James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms* 2, 13, 25 (FTC Bureau of Econ., Working Paper No. 304, 2010).

[2] Respondents have raised no Twenty-First Amendment defense, *see* Pet. App. 18a-19a n.11, which is understandable. As Judge Winter explained in his *Battipaglia* dissent, "where state legislation merely legislates a cartel of liquor dealers and plays no further role in determining prices and output, its self-evident purpose is not to protect the public from the evils of the demon rum, but to preserve the high standard of living of those who sell it." 745 F.2d at 180 (Winter, J., dissenting); *see also Costco Wholesale Corp.* v. *Maleng*, 522 F.3d 874, 901-04 (9th Cir. 2008) (rejecting Twenty-First Amendment defense in similar circumstances).

Connecticut consumers lower prices because, under the state regime challenged here, wholesalers coordinate to control retail prices and—with the acquiescence of most retailers—keep them artificially high. Pet. App. 101a-102a (Compl. ¶¶ 16-19).

Total Wine filed this suit alleging that the Sherman Act preempts Connecticut's regime because it induces horizontal price fixing (Count One) and industry-wide vertical price fixing (Count Two). The government respondents, along with five intervenors (various wholesale and retail trade associations and Connecticut's largest wholesaler), moved to dismiss.

The district court granted the motions. It agreed that Connecticut's regime "grants private actors a degree of regulatory control over competition" without any state supervision. Pet. App. 46a (quoting *Freedom Holdings, Inc.* v. *Cuomo*, 624 F.3d 38, 50 (2d Cir. 2010)). The court nonetheless upheld the regime, relying heavily on what it perceived as the controlling precedent of *Battipaglia*. *Id.* at 56a-63a.

A panel of the Second Court affirmed. It held that no binding precedent of this Court had undermined *Battipaglia*. And it defended *Battipaglia* on the merits, reasoning that Section 1 reaches only private "agreements" and thus does not preempt state laws that enable unsupervised private actors to mimic the results of an anticompetitive agreement without explicitly entering into one. Pet. App. 28a-34a. The court acknowledged that its decision conflicts with those of the Fourth and Ninth Circuits, both of which have invalidated similar post-and-hold laws in other states. *Id.* at 27a.

The court of appeals further upheld the closely related quantity discount ban on the ground that, viewed in isolation, it controls prices through a "unilateral"

prohibition imposed by statute without any exercise of private discretion. See Pet. App. 33a-34a. Finally, the panel upheld the minimum retail price requirement on the grounds that it is a purely "vertical" restraint; that, under *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007), such restraints now escape *per se* invalidation when reached as the product of an explicit private agreement; and that Section 1 preempts only those state laws creating *per se* antitrust violations. See Pet. App. 20a-21a. Because the court analyzed each of these requirements only in isolation, however, it did not analyze their role within the overall scheme: enabling a wholesaler cartel to fix *industry-wide* prices at the retail as well as wholesale level.

Total Wine unsuccessfully petitioned for panel rehearing and rehearing en banc. Judge Sullivan, joined by three other judges, dissented from the denial of rehearing en banc. Pet. App. 82a-91a. As he observed, the Connecticut scheme enables "a de facto cartel in which wholesalers vie to post the highest possible prices without fear of market reprisal." *Id.* at 87a. Such schemes, he added, have "precisely the kinds of anticompetitive effects that doomed similar liquor laws under the Sherman Act" in "courts across the country." *Id.* at 88a. Judge Sullivan thus expressed regret for the "missed opportunity" to overrule *Battipaglia* and "adopt the reasoning of Judge Winter's prescient dissent." *Id.* at 91a. He added that a "formidable collection of authorities now reject[s]" the majority opinion in that case, including the Fourth and Ninth Circuits, several district courts, and the leading antitrust treatise. *Id.* at 85a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SQUARELY PRESENTS TWO RELATED CIRCUIT CONFLICTS.

The decision below entrenches two related but distinct circuit conflicts. First, after the Second Circuit upheld New York's post-and-hold statute in *Battipaglia*, the Fourth and Ninth Circuits rejected the rationale of that decision and concluded that such statutes are preempted because they undermine the core objectives of the Sherman Act. See *Costco Wholesale Corp.* v. *Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008); *TFWS, Inc.* v. *Schaefer* (*TFWS I*), 242 F.3d 198, 209-10 (4th Cir. 2001); see also *TFWS, Inc.* v. *Franchot* (*TFWS II*), 572 F.3d 186, 189-90 (4th Cir. 2009); *Miller* v. *Hedlund*, 813 F.2d 1344, 1349-51 (9th Cir. 1987). In the Fourth Circuit's words, a post-and-hold regime "mandates activity that is essentially a form of horizontal price fixing, which has been called 'the paradigm of an unreasonable restraint of trade.'" *TFWS I*, 242 F.3d at 209 (quoting *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 100 (1984)); accord *Costco*, 522 F.3d at 895-96 ("an agreement to adhere to posted prices is a per se violation without regard to its reasonableness").

Both circuits have thus expressly adopted the analysis in Judge Winter's *Battipaglia* dissent. See *TFWS I*, 242 F.3d at 210 ("*Battipaglia* has not been followed elsewhere, and a leading commentator on antitrust law has sided with the dissent." (citing 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217 (2d ed. 2000)); *Costco*, 522 F.3d at 894 ("[T]he dissent's position is more consistent with [*California Retail Liquor Dealers Ass'n* v.] *Midcal* [*Aluminum, Inc.*, 445 U.S. 97 (1980)]." (quoting Areeda & Hovenkamp, *supra*, ¶ 217b)). Adopting this majority view, two district courts have likewise invalidated post-and-hold stat-

utes governing alcohol pricing. See *Beer & Pop Warehouse* v. *Jones*, 41 F. Supp. 2d 552, 560-62 (M.D. Pa. 1999); *Canterbury Liquors & Pantry* v. *Sullivan*, 16 F. Supp. 2d 41, 46-47 (D. Mass.), *appeal dismissed sub nom. Sea Shore Corp.* v. *Sullivan*, 158 F.3d 51 (1st Cir. 1998). By reaffirming the now-minority position in *Battipaglia*, the Second Circuit has cemented that longstanding circuit conflict, as confirmed by both the panel below (Pet. App. 27a) and the judges dissenting from denial of rehearing en banc (*id.* at 83a, 85a).

Second, the decision below entrenches a related circuit split concerning the validity of quantity discount bans tied to post-and-hold regimes. In *TFWS I*, the Fourth Circuit invalidated a Maryland quantity discount ban that is indistinguishable from Connecticut's here on the ground that the provision "reinforce[d]" the anticompetitive effects of the post-and-hold system "by making it even more inflexible." 242 F.3d at 209; see also *TFWS II*, 572 F.3d at 193 (a "volume discount ban facilitates self-policing among market participants because departures from established prices are readily recognizable").

On this latter circuit conflict, the Ninth Circuit has sided with the Second against the Fourth, reasoning that quantity discount bans are "unilateral" restrictions imposed by statute without any exercise of private discretion. See *Costco*, 522 F.3d at 898-99. That position conflicts not only with the Fourth Circuit's decisions in *TFWS I* and *TFWS II*, but also with this Court's recognition that industry-wide discounting bans undermine the Sherman Act's core value of competitive pricing. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam); see also *TFWS II*, 572 F.3d at 193.

As discussed below, these circuit conflicts arise because of widespread confusion about the proper interpretation of decades-old precedent of this Court. Courts and commentators have thus urged the Court to "clarif[y] this doctrinally confusing area." *Costco*, 522 F.3d at 888; see also pp. 16-19, *infra*. This case is an ideal vehicle for doing just that.

II. THE COURT OF APPEALS' DECISION FUNDAMENTALLY MISAPPLIES THIS COURT'S ANTITRUST PRECEDENT.

"The federal interest in enforcing the national policy in favor of competition is both familiar and substantial. 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.'" *Midcal*, 445 U.S. at 110 (quoting *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). As Judge Sullivan explained, the Connecticut regime must yield to that federal interest because it subjects consumers to "precisely the kinds of anticompetitive effects" that the Sherman Act was enacted to prohibit. Pet. App. 88a. The court of appeals upheld that regime only because it fundamentally misapplied this Court's antitrust decisions, to the detriment of consumers throughout the Second Circuit.

1. Congress enacted Section 1 of the Sherman Act to protect consumers against the high prices and economic waste caused when potential rivals coordinate their activities to avoid competition. Such coordination harms consumers whether private firms explicitly agree on prices or whether a state law enables them to replicate the effects of an agreement without actually having to enter into one. Connecticut's scheme is just such a law. It is expressly designed to facilitate price coordination among competitors in order to raise prices and lower output—to "guard[] against escalat-

ing price wars," reduce "economic pressure" on industry participants by widening their profit margins, and in the process generate "higher prices" for consumers. Pet. App. 7a-8a (internal quotation marks omitted).

No one disputes that the State could enact such a law if it "actively supervised" such price coordination by "review[ing] the reasonableness of" the resulting prices. *Midcal*, 445 U.S. at 105. The question presented by this case, however, is whether a State may dispense with such supervision altogether while "empower[ing] private actors to exercise discretion as to the nature or level of consumer injury in a way that closely resembles an antitrust violation." John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 Yale. J. on Reg. 269, 273 (2003).

As noted, the Fourth and Ninth Circuits have concluded that such laws are preempted unless the State satisfies the *Midcal* "active supervision" requirement, whether the laws facilitate express or, as here, tacit collusion.[3] Leading commentators also agree.[4] As this

---

[3] *See Costco*, 522 F.3d at 894-95 (adopting Lopatka & Page's position and reaffirming prior Ninth Circuit precedent); *TFWS I*, 242 F.3d at 209 (Sherman Act preempts post-and-hold scheme because analogous "private agreements to accomplish" the same outcome would violate the Act).

[4] *E.g.*, Areeda & Hovenkamp, *supra*, ¶ 217b3 (even where private parties "enter[] no agreements whatsoever," "state statutes or local ordinances creating unsupervised private power in derogation of competition are subject to preemption"); Lopatka & Page*, supra,* at 273-74; Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 506-07 (1987) ("whether the Court describes the state action doctrine as a question of exemption, immunity, or preemption,"

Court has explained, active supervision of such price coordination is necessary in order to "ensure the States accept political accountability for anticompetitive conduct they permit." *N.C. State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1111 (2015). "The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* (quoting *Midcal*, 445 U.S. at 106).

2. The decision below, however, permits Connecticut to inflict "what is essentially a private price-fixing arrangement" on consumers *without* "accept[ing] political accountability" for the extent of the ensuing harms. *Id.* The court of appeals tried to justify that outcome by holding that a state law causes no cognizable antitrust injury, and thus cannot be preempted, unless it actually leads private actors to enter into *explicit agreements* with one another. In the court's view, it "is of no moment" that the law is designed to induce "conscious parallel conduct [that] can create an *equally uncompetitive market* to parallel conduct achieved by agreement." Pet. App. 32a-33a (emphasis added).

As Judge Sullivan's dissent explains, that holding conflicts not only with decisions of the Fourth and Ninth Circuits, but also with this Court's own precedent. In *324 Liquor*, the Court explicitly held that "the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior"—even where "there is no contract, combination, or conspiracy" underlying that behavior. 479 U.S. 345 n.8 (internal quotation marks and ellipsis

---

what matters is "not the presence of agreement," but whether "the prices the states enforce[] [are] chosen by the producers or distributors alone," without state supervision (footnotes omitted)).

omitted). That statement was not dictum. It was essential to the Court's holding in that case and to its earlier holdings in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *Midcal*, both of which the Court cited in the same *324 Liquor* passage.

First, in *Schwegmann*, this Court invalidated a state law that bound *all* retailers to the minimum retail price to which *any* retailer agreed by contract. At the time, a since-repealed federal statute—the Miller-Tydings Act—exempted the underlying agreement from Sherman Act scrutiny. Nonetheless, the Sherman Act preempted the portion of the state law that sought to bind third-party "nonsigners" to the private agreements. 341 U.S. at 386-87. Indeed, it was precisely because the state law tried "to impose price fixing on persons who ha[d] *not* contracted or agreed to the scheme" that the Court deemed the law outside the scope of the Miller-Tydings exemption and thus within the preemptive scope of the Sherman Act. *Id.* at 388 (emphasis added). Similarly, in *Midcal*, the Court invalidated a state law that required vintners to impose minimum resale prices on their buyers, and the successful plaintiff was a buyer that did *not* agree to this scheme and sought to sell at a lower price. 445 U.S. at 100.

In *324 Liquor* itself, the Court invalidated a New York pricing regime that was materially indistinguishable from Connecticut's here, in that it imposed a post-and-hold requirement on wholesalers and allowed them to set minimum price floors for retailers.[5] The

---

[5] The similarities between the two schemes are striking. Like the Connecticut scheme here, the New York law (1) required wholesalers to post monthly "bottle and case price[s]," (2) forbade retailers to "sell below 'cost,'" defined as a function of "the posted

defendants argued that the statute avoided preemption because it achieved its anticompetitive ends without requiring private parties to enter into any "contract, combination, or conspiracy, in restraint of trade." 479 U.S. at 345 n.8 (ellipsis omitted). This Court "reject[ed that] contention" because "[t]he State ha[d] displaced competition among liquor retailers without substituting an adequate system of regulation." *Id.* at 345 & n.8.

The court of appeals here asserted that all of these cases "are readily distinguished factually because they involved express or readily implied agreements"; "the wholesaler and each of its retailers were in privity and necessarily had an agreement to buy from and/or sell to each [other]." Pet. App. 29a-30a. That is a misreading of these cases—as *324 Liquor* confirms. 479 U.S. at 345 n.8. *Schwegmann* invalidated the state law in question precisely because its intended result was "*not* price fixing by contract or agreement" but was instead "price fixing by compulsion." 341 U.S. at 388 (emphasis added). And whether or not the buyers and sellers in *Midcal* and *324 Liquor* were in privity, they "had *not* agreed with anyone about prices"; "they were merely obeying the law." Areeda & Hovenkamp, *supra*, § 217b1 (emphasis added). Again, the Court has left no room for doubt on this point: it expressly held in *324 Liquor* that the absence of a "contract, combination, or conspiracy" cannot save a state scheme that produces anticompetitive results and "is not actively supervised by the State." 479 U.S. at 344, 345 n.8 (ellipsis omitted).

---

bottle price," and (3) thereby "permit[ted] wholesalers to set retail prices, and retail markups, without regard to actual retail costs" and "to maintain retail prices at artificially high levels." 479 U.S. at 338-40.

3. The court of appeals also attempted to downplay the precedential significance of these cases on the theory that they involved primarily vertical arrangements and that "the application of preemption doctrine to vertical price fixing arrangements has been overtaken by *Leegin*'s removal of vertical restraints from *per se* condemnation." Pet. App. 30a. That is a *non sequitur*. *Leegin* was not a preemption case, and it left undisturbed the rule of *324 Liquor*, *Midcal*, and *Schwegmann* that an "agreement" is unnecessary for preemption if a state law replicates an agreement's effects by facilitating anticompetitive coordination without state supervision of the resulting prices.

Leegin has implications only for an entirely distinct question: whether such a law is subject to facial invalidation because the *type* of coordination it facilitates would constitute a per se violation if undertaken solely by private agreement. As to that issue, *Leegin* applies only to conventional *vertical* restraints between an individual supplier and its distributors, which may be procompetitive or anticompetitive, depending on the circumstances. It does not address *horizontal* price coordination among competitors or coordinated, *industry-wide* retail price maintenance, both of which are categorically anticompetitive because they undermine inter-brand as well as intra-brand competition. *Leegin* cannot salvage a state regime that replicates the per se unlawful outcomes that such coordination would produce if undertaken via coordinated private agreements throughout an industry.

Indeed, the court of appeals' reliance on *Leegin* turns that decision on its head. The Court there eliminated the *per se* prohibition on vertical price-maintenance contracts involving individual suppliers precisely because it recognized that vertical price arrangements

between suppliers, on one hand, and distributors or retailers, on the other, are generally far less problematic than horizontal price arrangements among competitors. See 551 U.S. at 888. Yet the decision below illogically insulates horizontal price coordination among competing suppliers from a preemption challenge to a greater extent than it insulates vertical price coordination imposed by a single supplier on its buyers.

Specifically, under the decision below, state laws causing tacit *horizontal* coordination are categorically immune from preemption under the Second Circuit's approach because by definition they involve no "agreement." But state laws causing tacit *vertical* coordination remain subject to as-applied (as opposed to facial) Sherman Act preemption challenges because any relationship between a supplier and distributor or retailer necessarily "involve[s] express or readily implied agreements." Pet. App. 29a; *see also* Areeda & Hovenkamp, *supra*, ¶ 217b2 (as-applied preemption claims can survive rejection of facial preemption claims). In Judge Winter's words, the panel's approach perversely allows preemption challenges only when States "authoriz[e] resale price maintenance, the anticompetitive effect of which is the subject of great controversy, but . . . allow[s] [States] to authorize horizontal price fixing, about which all agree." *Battipaglia*, 745 F.2d at 179 (Winter, J., dissenting) (citation omitted).

4. Contrary to the court of appeals' suggestion (Pet. App. 31a-32a), this Court's decision in *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986), fully comports with its subsequent holding in *324 Liquor* that no "agreement" is necessary for preemption. The rent-control scheme in *Fisher* avoided preemption because it did not cede market outcomes to coordination among private parties; instead, it "place[d] complete control

over maximum rent levels exclusively in the hands" of governmental authorities. 475 U.S. at 269. The *324 Liquor* Court distinguished *Fisher* on precisely that ground. See 479 U.S. at 345 n.8.

As the Ninth Circuit has held, "[t]he rule to be taken from these cases is that state statutes or local ordinances creating *unsupervised private power* in derogation of competition are subject to preemption." *Costco*, 522 F.3d at 889 (emphasis added). Again, that Ninth Circuit rule is the same rule that the Fourth Circuit and several leading commentators have held is imposed by decisions of this Court. See note 4, *supra*. The Second Circuit alone misconstrues *Fisher* to mean that a state may "creat[e] unsupervised private power in derogation of competition," *Costco*, 522 F.3d at 889, so long as it facilitates tacit rather than explicit collusion—even though *324 Liquor* explicitly rejected that very proposition the year after *Fisher* was decided. See 479 U.S. at 345 n.8; see also Areeda & Hovenkamp, *supra*, ¶ 217b3 (*Fisher* did not "hold that an illegal agreement was a prerequisite to preemption" but instead "reaffirmed the preemptions found in *Schwegmann* and *Midcal*," which involved "no agreements whatsoever" (footnotes omitted)).[6]

---

[6] As now-Chief Judge Garland explained in 1987, the ordinance in *Fisher* would have been preempted under *Midcal* if the city "had simply permitted a single landlord—or a single tenant—to choose a price unilaterally, which the city then required all others to pay. . . . [W]hat saved rent control in *Fisher* was not the absence of abstract agreement, but rather the fact that the ordinance 'place[d] complete control over maximum rent levels exclusively in the hands of the city's Rent Stabilization Board.'" Garland, *supra*, at 506-07 (second alteration in original). The Connecticut scheme here closely resembles Chief Judge Garland's hypothetical ordinance, not the ordinance at issue in *Fisher*.

That said, the relationship between *Fisher* and other cases "is extraordinarily elusive" because the "teaching [of *Fisher*] was cryptic." Lopatka & Page, *supra*, at 272. In particular, this Court "has not provided clear guidance" on "the uncertain relationship between the 'active supervision' inquiry under *Midcal* and the 'hybrid/unilateral' inquiry under *Fisher*." *Costco*, 522 F.3d at 886-87 (citations omitted).

That relationship should be straightforward. The *Midcal* doctrine provides antitrust immunity for private arrangements pursued under an explicitly anticompetitive state policy only if the state "actively supervise[s]" the results by "review[ing] the reasonableness of the price schedules." *Midcal*, 445 U.S. at 105. The "hybrid/unilateral" analysis similarly asks whether an anticompetitive arrangement is "unilaterally imposed by government . . . to the exclusion of private control," in which case the state law survives preemption, or instead flows from "a similar degree of free participation by private economic actors," in which case the state law is preempted if it does not satisfy *Midcal*'s "active supervision" requirement. *Fisher*, 475 U.S. at 266, 268; accord *324 Liquor*, 479 U.S. at 345 n.8.

The level of government control that makes a law "unilateral" and thus exempt from preemption under *Fisher* necessarily satisfies *Midcal*'s active-supervision requirement for antitrust immunity under the state action doctrine. Thus, "[i]n the case of a facial challenge to a state regulation, . . . a determination of whether a restraint is [unilateral or] hybrid will largely answer the question of whether the state actively supervises the restraint" under the *Midcal* analysis, and "there is such substantial overlap between the active supervision and hybrid inquiries that they effectively merge." *Costco*, 522 F.3d at 887-88.

There is now a general consensus on this point outside the Second Circuit, shared not only by the Fourth and Ninth Circuits but also by the leading commentators.[7] That approach forecloses the Second Circuit's highly anomalous conclusion that a state may enact a hybrid law, see Pet. App. 19a-20a, 22a, 29a-30a, provide *no* state supervision of the anticompetitive harms it facilitates, and still avoid preemption. This Court should grant certiorari, reverse the panel's decision, and bring much-needed clarity to this area of antitrust law.

---

[7] *See, e.g.*, Areeda & Hovenkamp, *supra*, ¶ 217b3 ("[T]he *Fisher* decision, like *Midcal*, supports the proposition . . . that state statutes or local ordinances creating unsupervised private power in derogation of competition are subject to preemption."); Garland, *supra*, at 507 ("There are signs that the *Fisher* court understood the way in which its preemption analysis collapses into the *Midcal* test."); Daniel J. Gifford, *The Antitrust State-Action Doctrine After* Fisher v. Berkeley, 39 Vand. L. Rev. 1257, 1283-84 (1986) ("The class of restraints deemed hybrid under *Fisher* ought to be coextensive with the restraints that cannot pass the *Midcal* supervision requirement. . . . Occam's razor ought to dispense with the evaluation of hybrid restraints under *Midcal*'s supervision requirement.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ADAM B. ABELSON
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, MD 21202
(410) 332-0444

CARTER G. PHILLIPS*
JONATHAN E. NUECHTERLEIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Connecticut Fine Wine and Spirits, LLC dba Total Wine Spirits Beer & More

December 3, 2019

* Counsel of Record