No. 19-710

In The Supreme Court of the United States

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

Petitioner,

v.

COMMISSIONER MICHELLE H. SEAGULL, et al.,

Respondents,

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

Intervenors-Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Connecticut's alcoholic beverage pricing laws—which on their face neither mandate nor authorize any party to engage in conduct that constitutes a *per se* violation of the antitrust laws—are preempted by Section 1 of the Sherman Act under this Court's facial preemption standard set forth in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

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INTRODUCTION

The Second Circuit properly applied this Court's two key precedents that frame the Sherman Act's § 1 preemption inquiry: *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) ("*Norman Williams*"), and *Fisher v. City of Berkeley, California*, 475 U.S. 260 (1986). *See* Pet. App. 14a; 15 U.S.C. § 1. The petitioner's ("Total Wine's") argument to the contrary simply ignores *Norman Williams* and improperly focuses on precedent and concepts related to defenses and immunity inquiries that would have arisen at later stages of the litigation and that the Second Circuit therefore did not need to—and did not—address. The Second Circuit correctly applied *Norman Williams*'s threshold inquiry to hold that the Sherman Act did not facially preempt Connecticut's statutory liquor pricing regime—a regime that Total Wine concedes "is unique to Connecticut among all 50 states." Pet. App. 102a, ¶ 18.

The unique nature of Connecticut's laws counsels against granting this petition. That conclusion is buttressed by Total Wine's argument below that the undeniable trend has been for states to abandon statutes like the ones at issue here. Dist. Ct. ECF No. 82, p. 32 n.15.[1] As Total Wine's own allegations and arguments show, there is little—if any—reason to believe that the Second Circuit decision will have

[1] Throughout this opposition, for clarity, references to lower court documents that are not in the petitioner's Appendix are to ECF docket numbers, with pinpoint cites to the page numbers that are provided by the ECF system and appear at the top of the respective documents.

meaningful impact outside Connecticut. Indeed, the Second Circuit decision's long-term impact may prove to be limited even inside Connecticut because the people of Connecticut, through their elected representatives, may choose to change the liquor pricing laws. As the district court noted, this legislative process, not a preemption case, is the proper outlet for litigating changes to Connecticut's liquor laws. Pet. App. 43a n.6 ("Whether or not the statutory and regulatory scheme implemented by the State of Connecticut is wise is not a question for" the federal courts and is "more appropriately directed to Connecticut's executive and legislative branches of government").

Total Wine's petition offers little to support a conclusion that this Connecticut-specific case warrants this Court's review. Total Wine claims that this case squarely presents two related circuit conflicts among the Second, Fourth, and Ninth Circuits on the price discrimination ban and on the Post-and-Hold Provisions of Connecticut's Liquor Control Act, Conn. Gen. Stat. § 30-1, *et seq*. But those conflicts are amply tolerable, because the decision below is in the majority for the first purported conflict and the second conflict has limited impact.

Total Wine's argument that the claimed conflict on price discrimination bans warrants this Court's review collapses under scrutiny. Total Wine acknowledges that the Second Circuit below joined the Ninth Circuit on the majority side of that conflict, and the Fourth Circuit decision that Total Wine relies on for the other

side of the conflict was based in whole or in part on concessions made by the defending state that Connecticut has not made here.

Given the unique nature of Connecticut's laws, a conflict on the Post-and-Hold Provision has very limited impact. None of the cases Total Wine relies upon dealt with a legal regime that was equivalent to the one at issue below. Even if this Court were to consider each challenged aspect of Connecticut's laws separately in assessing conflicts (contrary to how Total Wine litigated the issue below and presents it here), the Second Circuit's decision below left the law in that circuit precisely as it has been since 1984, and the most recent decision Total Wine identifies outside the Second Circuit was issued in 2009, over a decade ago.

Finally, the Second Circuit properly applied this Court's precedents. The facial preemption inquiry is guided by *Norman Williams*. The state's provisions are unilateral restraints, governed by the rule of reason, or both. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007); Pet. App. 20a-21a. The state statutes do not give rise to *per se* violations and thus are beyond § 1's preemptive reach. Pet. App. 30a; *see Fisher*; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

There is no need for this Court to grant review of the Second Circuit's reaffirmation of its own thirty-five year old precedent at this time, particularly given that, according to Total Wine, the national trend has been,

and is, away from similar laws so this issue has not been arising frequently and is unlikely to arise in the future.

STATEMENT OF THE CASE

A. The Statutory Background

Connecticut's Liquor Control Act ("the Act") is codified at Conn. Gen. Stat. § 30-1, *et seq*. While "a primary purpose of regulating pricing practices within the liquor industry is to prevent unfair competition," the Connecticut Supreme Court "has determined that the reason for preventing that competition is because of the potential harm to the public." *Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc.*, 880 A.2d 138, 147 (Conn. 2005). Connecticut's legislature enacted the Act to prevent unfair competition, to "promote temperance in the consumption of intoxicating liquor," and to prevent people from consuming "more liquor than they would if higher prices were maintained." *Id.* at 147-48 (emphasis and quotation marks omitted). The legislation further sought to reduce incentives for retailers to sell liquor to minors or to stay open after hours. *Id*. The legislation was "not for the economic benefit of a particular wholesaler," but to promote "public health, safety and welfare." *Id.* at 148 (emphasis and quotation marks omitted).[2]

[2] This Court has recognized that it "must, of course, accept the state court's view of the purpose of its own law." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The Second Circuit

Total Wine, by contrast, incorrectly implies in its petition that the Act was primarily intended to benefit liquor wholesalers economically to the detriment of the public. Pet. 5. The Connecticut Supreme Court found—in the very case Total Wine cites—that "the purpose of the Liquor Control Act is to regulate the sale and consumption of alcohol for the protection of the public, not for the economic benefit of a particular wholesaler." *Eder Bros.*, 880 A.2d at 144 n.5. Connecticut law has been consistent on that point for decades. *See id*. at 147-48 (citing cases).

The Connecticut Supreme Court has found that "there is nothing in the Liquor Control Act indicating that it was intended to protect individual plaintiffs in their capacity as competitors." *Eder Bros., Inc.*, 880 A.2d at 148. Despite that, Total Wine claims to be disadvantaged. Total Wine asked the federal courts to preempt three components of Connecticut's framework intended to promote public health, safety and welfare in connection with liquor sales: (1) the "Minimum Retail Price Provision," *see* Conn. Gen. Stat. § 30-68m; (2) the "Price Discrimination Prohibition Provisions," banning discrimination in price discounts, *see* Conn. Gen. Stat. §§ 30-63(b), 30-68k, and 30-94(a); and (3) the "Post-and-Hold Provision," *see* Conn. Gen. Stat. § 30-63(c).

The first challenged provision—the Minimum Retail Price Provision—generally prohibits retailers

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expressly discussed the Connecticut Supreme Court precedent on the issue. Pet. App. 7a-8a.

from selling liquor at a price below their cost, but permits retailers, with notification to the Department of Consumer Protection, to make one exception per month, which they can sell at not less than ninety percent of cost. Conn. Gen. Stat. § 30-68m (Pet. App. 94a-95a). The Connecticut Supreme Court has found that the purpose of the Minimum Retail Price Provision is to protect public safety by preventing "price wars," which could lead to both increased consumption and "cutthroat competition," leading providers to violate the public safety aspects of Connecticut's liquor laws "in order to withstand the economic pressure." *Eder Bros., Inc.*, 880 A.2d at 147.

The second challenged provisions—the Price Discrimination Prohibition Provisions—prohibit "discriminat[ion] in any manner in price discounts between one permittee and another." Conn. Gen. Stat. § 30-63(b) (Pet. App. 92a); *see also* Conn. Gen. Stat. § 30-68k (Pet. App. 94a) (similar); Conn. Gen. Stat. § 30-94 (Pet. App. 96a) (prohibiting gifts, loans, or other inducements in connection with the sale of liquor).[3] The Connecticut Supreme Court has found that the legislature intended the discrimination ban to serve two fundamental purposes. One was to ensure that "there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut." *Slimp v. Dep't of*

[3] Total Wine refers to these provisions collectively as the "quantity discount ban," implying that the provisions are directed only at entities like Total Wine that sell in large quantities. In reality, the provisions prohibit all price discrimination, not just price discrimination based on quantity. *Cf.* Pet. 3.

Liquor Control, 687 A.2d 123, 129 (Conn. 1996). "The second fundamental concern evinced by the statutes and regulations is the legislature's concern that artificial inducements to purchase liquor will result in increased consumption." *Id*.

The final challenged requirements are two different Post-and-Hold Provisions, one for "alcoholic liquor other than beer," and another for beer.[4] Conn. Gen. Stat. § 30-63(c) (Pet. App. 92a-94a). For liquors other than beer, "each manufacturer, wholesaler, and out-of-state shipper permittee shall post" their prices with the Department and the prices "shall be the controlling price for such manufacturer, wholesaler, or out-of-state permittee for the month following such posting" absent an amendment. Pet. App. 92a. The permittee purchasers are given notice of those prices once they are posted. Then, "[a] manufacturer or wholesaler may amend" their "posted price for any month to meet a lower price posted by another manufacturer or wholesaler" on the same item "provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices." Pet. App. 93a. That "amended posting shall not set a price lower than those being met." *Id*.

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[4] Although Total Wine sells beer and parts of the challenged provisions control beer, Total Wine has represented that it "only challenges those provisions to the extent they regulate the pricing of wine and spirits" rather than beer. Dist. Ct. ECF No. 52, p. 2; Pet. App. 99a, ¶ 7.

B. The Proceedings Below

In its Complaint, Total Wine detailed the statutory framework discussed above and alleged that Connecticut's "regime . . . is unique to Connecticut among all 50 states." Pet. App. 102a, ¶ 18. According to Total Wine, the challenged provisions constitute both horizontal and vertical price fixing and are preempted by the Sherman Act, 15 U.S.C. § 1. Pet. App. 104a.

The State and Intervenors filed separate motions to dismiss. Total Wine opposed the motions, and spent considerable time seeking to distinguish this Court's decision in *Norman Williams*. *See* Dist. Ct. ECF No. 82, pp. 17-18, 24 n.11, 25, 26 n.13, 29. Notably, Total Wine fails to cite—let alone persuasively distinguish—*Norman Williams* in its pending petition to this Court.

After hearing oral argument, the district court granted the motions to dismiss. Pet. App. 38a. In so holding, the district court found that "the parties agree" that this Court's decision in *Norman Williams* provides at least part of the framework governing the court's analysis," Pet. App. 44a n.7, and carefully applied this Court's rule from *Norman Williams*. Pet. App. 44a-48a, 50a, 53a, 56a, 59a, and 72a.

In upholding Connecticut's ban on discrimination in price discounts, the district court observed that the Ninth Circuit had upheld a similar ban in *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008). The district court noted that the Fourth Circuit's decisions in the *TFWS* cases—on which Total Wine relies in its petition to support its claimed circuit

conflict—were "unpersuasive," in part, because the defending state did not argue that its price discount ban could be considered independently of the other challenged provisions and was bound by that failure in the subsequent appeal. Pet. App. 77a (discussing *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), the fourth and final appeal in the case ("*TFWS IV*")); *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001) ("*TFWS I*").

The district court held that under this Court's preemption jurisprudence, "[w]hether or not the statutory and regulatory scheme implemented by the State of Connecticut is wise is not a question for" the federal courts. Pet. App. 43a n.6. Rather, "[a]rguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government." *Id*.

The Second Circuit unanimously affirmed. Pet App. 1a-34a. It noted that the "post-and-hold and minimum-retail-price provisions . . . commonly have been justified as means of guarding against escalating price wars among alcohol retailers that may lead to excessive consumption." Pet. App. 7a (citing *Slimp*, 687 A.2d at 129 and *Eder Bros., Inc*., 880 A.2d at 147). The court also noted that the "price-discrimination provision" was "justified as guarding against favoritism within the liquor industry and protecting smaller retailers." Pet. App. 8a (citing *Slimp*, 687 A.2d at 129).

In its analysis, the Second Circuit identified *Norman Williams* and *Fisher* as "the two key precedents that frame the § 1 preemption inquiry." Pet. App. 14a. In *Norman Williams*, this Court held that "'[a] state statute is not preempted by the federal anti-trust laws simply because the state scheme might have an anti-competitive effect.'" Pet. App. 15a (quoting *Norman Williams*, 458 U.S. at 659). Rather, this "Court held, '[a] party may successfully enjoin enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal anti-trust policy'" by requiring activity that "'is in all cases a *per se* violation.'" Pet. App. 15a, 16a (quoting *Norman Williams*, 458 U.S. at 659, 661).

In *Fisher*, this Court "identified a related hurdle that a claim of preemption by § 1 must clear," namely, establishing that the challenged statutes do not "'constitute unilateral action outside the purview of § 1.'" Pet App. 17a, 18a (quoting *Fisher*, 475 U.S. at 267). There was no dispute that *Norman Williams* and *Fisher* "constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1" and the issue before the Second Circuit was whether Total Wine's Complaint failed at that first step. Pet. App. 18a; *see also id*. at 12a n.9.

The Second Circuit carefully applied this Court's decisions in *Norman Williams* and *Fisher* to the challenged provisions. As to the minimum price provision, the court agreed with Total Wine that this Court's decision in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), established that the provision was "hybrid

[under *Fisher* (rather than unilateral)], and hence capable of preemption by § 1." Pet. App. 19a. However, in applying *Norman Williams*, the Second Circuit held that this Court's premise in *324 Liquor* "that the New York statute [at issue in *324 Liquor*] mandated *per se* violations of § 1, has been overtaken by a change in antitrust law." Pet. App. 20a. Specifically, "in 2007, [this Court], culminating a line of decisions, held that the rule of reason—and not *per se*—analysis applies to all vertical restraints." Pet. App. 20a (citing *Leegin*). Therefore, "Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under § 1." Pet. App. 21a.

As to the Price Discrimination Prohibition Provisions, the Second Circuit held that Total Wine's challenge failed under both *Fisher* and *Norman Williams*. Under *Fisher*, the "provisions impose a unilateral restraint"; "[t]hey leave each wholesaler at liberty to choose the price it will charge all retailers for a product while prohibiting each from charging different prices to different retailers." Pet. App. 21a-22a. Under *Norman Williams*, "the price restraint is purely vertical in operation" and therefore was not preempted because—in light of *Leegin*—it is not "*per se* unlawful." Pet. App. 22a.

With respect to the Post-and-Hold Provisions, the Second Circuit held that its previous decision in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), which "applied the controlling standards from *Rice* [*v. Norman Williams*] to" uphold

New York's Post-and-Hold Provisions that were similar to Connecticut's provisions at issue here, was "controlling." Pet. App. 28a. The Second Circuit also carefully analyzed the same arguments Total Wine repeats in its petition to this Court (Pet. App. 23a-34a) and held that Judge Friendly's decision in *Battipaglia* was not only correct when it was decided, but has since "been fortified by [this Court's] intervening decisions like *Fisher* and *Twombly*" and was therefore not only controlling on the panel but "persuasive." Pet. App. 34a. Therefore, the Second Circuit panel unanimously held that the Sherman Act does not preempt any of the challenged provisions and that the district court correctly dismissed Total Wine's Complaint.

Total Wine petitioned the Second Circuit for panel rehearing and rehearing *en banc*, making many of the arguments it makes in this petition. The Second Circuit panel made minor amendments to its opinion after considering the petition but declined to rehear the case *en banc* by a vote of 7-4.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A FACIAL PREEMPTION CHALLENGE TO UNIQUE STATE LAW.

This case is a challenge to a unique state law, and involves the *Norman Williams* facial preemption analysis. Total Wine repeatedly represented and argued throughout the proceedings below that Connecticut law is unique. In its Complaint, Total

Wine alleged that Connecticut's "regime . . . is unique to Connecticut among all 50 states." Pet. App. 102a, ¶ 18. Total Wine repeated that language, or made similar representations, again and again before both the district court and the Second Circuit. *See*, *e.g.*, 2d Cir. ECF No. 58, p. 8 n.4; Dist. Ct. ECF No. 82, p. 32 n.15.

For example, when an Intervenor argued that other jurisdictions had laws similar to Connecticut's, Total Wine noted that the Intervenor had cited "only five 'other jurisdictions'" and represented to the district court that that was not surprising because the undeniable trend has been for states to abandon statutes like the ones at issue here. Dist. Ct. ECF No. 82, p. 32 n.15. In addition, Total Wine expressly argued that the liquor laws and regulations in both New York and Vermont—the other states in the Second Circuit—were meaningfully distinguishable from Connecticut's, and also distinguished the laws of the other states the Intervenor referenced. *Id*.; 2d Cir. ECF No. 58, p. 29 n.11.

This is sufficient reason to deny this petition. By Total Wine's own repeated and binding admissions, the issues Total Wine seeks to present to this Court are Connecticut-specific, *see*, *e.g.*, Pet. App. 102a, ¶ 18, and other states are not likely to follow Connecticut's example.

Total Wine's representation that the national trend is away from similar laws is borne out by the fact that the most recent case that Total Wine has cited to

support its claimed circuit conflicts was decided in July 2009, over a decade ago. Pet. 8 (citing *TFWS IV*). There is no reason to believe that if this Court allows the Second Circuit's decision (which left Second Circuit precedent as it has been since 1984) to stand, another court—let alone another circuit court—will be faced with a similar case in the near future. To the contrary, there is a significant possibility that a similar case may never arise.

There is also reason to believe that Connecticut's liquor laws may continue to change. Total Wine acknowledged below that in 2012 Connecticut's liquor laws were changed to allow retailers to sell one item below cost. 2d Cir. ECF No. 58, p. 16 n.4; *see also* Pet. App. 95a (providing the language of Conn. Gen. Stat. § 30-68m(c)). That change was part of a broader Public Act that *inter alia* expanded the days and hours for off-premises alcohol sales, including allowing sales on Sundays, and established a Competitive Alcoholic Liquor Pricing Task Force to study Connecticut's liquor and pricing laws and compare them with surrounding states. *See* Conn. Pub. Act. No. 12-17.

This evolution of Connecticut's laws and the possibility of future changes is telling. It demonstrates that the people of Connecticut—through their elected representatives—are continuing to evaluate whether the policy judgments they have made in the past should change.

This Court has held that process is entitled to respect. As the district court correctly recognized,

although federal courts "do not hesitate to find state law preempted when the Supremacy Clause so requires, their analysis includes 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.'" Pet. App. 50a (quoting *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316 (1981)). That regard manifested itself in the district court's reminder that "[w]hether or not the statutory and regulatory scheme implemented by the State of Connecticut is wise is not a question for" the federal courts. Pet. App. 43a n.6. Rather, "[a]rguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government." *Id*.

II. THE CLAIMED CIRCUIT SPLITS ARE ILLUSORY WITH LIMITED IMPACT.

For two of the three challenged provisions of Connecticut's Liquor Control Act, Total Wine contends that the Second Circuit's decision below "entrenched" two related circuit splits. Pet. 8. The Second Circuit's decision below neither created nor "entrenched" a circuit split. Rather, the Second Circuit merely affirmed its long-standing jurisprudence in this matter, as established by *Battipaglia*, in accord with *Norman Williams*.

The Ninth Circuit and the Fourth Circuit have ruled on state statutes that are in some respects

similar but also contain elements that are meaningfully different from Connecticut's challenged provisions. Given the nature of the differences and the admitted unique nature of Connecticut's liquor control laws, the purported conflicts among the circuits are far more ephemeral than the petitioners would have this Court believe.

However, even setting aside the differences among the respective state statutes, the claimed circuit conflicts are illusory and limited. With respect to Connecticut's Price Discrimination Prohibition Provisions, the Second Circuit's decision below is in accord with the Ninth Circuit's decision regarding Washington State law. *See Costco*, 522 F.3d at 898. For the Fourth Circuit, Maryland did not properly preserve the issue and thus the Fourth Circuit considered Maryland's volume discount ban as an integral part of its Post-and-Hold Provision. *TFWS IV*, 572 F.3d at 193-94.

The Second Circuit has dismissed challenges to Connecticut's Post-and-Hold Provision in 1984 and 2019, whereas the Ninth Circuit struck down Washington's Post-and-Hold Provision a decade ago, in 2008. *Costco*, 522 F.3d at 892-96. The Fourth Circuit reaffirmed its earlier decision striking down Maryland's version of a Post-and-Hold Provision a year later, in 2009. *TFWS IV*, 572 F.3d at 191. Any differences among the circuits are long-standing, with limited impact, and do not support granting this petition.

It is not at all clear that any circuit court will ever face this issue in the future, given both that over a decade has passed since the last time it arose and that Total Wine claimed below that there is an "undeniable trend" away from such laws. Dist. Ct. ECF No. 82, p. 32 n.15. But even if the issue were to arise again, it would not be the type of circuit conflict that circuit courts would have difficulty handling without additional guidance from this Court.

A. The Claimed Circuit Conflict on the Price Discrimination Prohibition Provisions is Illusory.

Regarding the Price Discrimination Prohibition Provisions, Total Wine acknowledges that to the extent there is a 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." Pet. 9. Thus, even Total Wine admits that to the extent there is a circuit conflict on this issue, the Second Circuit's decision is consistent with the majority, and the most recent of the other decisions was issued over ten years ago.

Total Wine's claimed circuit conflict on the price discrimination ban becomes even weaker upon closer examination. As the district court correctly pointed out, the Fourth Circuit's decisions in the *TFWS* cases were "unpersuasive," in part, because the defending state initially failed to make a key argument and was

bound by that failure in the subsequent appeal. Pet. App. 77a.

The *TFWS* cases involved "[a] lengthy process of litigation," where Maryland initially "essentially agreed" with the position the Fourth Circuit adopted in *TFWS I*, namely, that Maryland's price discrimination ban "was *part of*" the state's post-and-hold scheme and therefore hybrid rather than unilateral. *TFWS IV*, 572 F.3d at 193 (emphasis in original). It was not "until its third appeal to" the Fourth Circuit "and years after Maryland itself had staked a position essentially identical to [the Fourth Circuit's] holding in *TFWS I* on th[e] issue" that Maryland reversed positions and argued—as Connecticut has argued from the outset here—that its discount ban could "stand on its own" and that, "[s]tanding alone, it is clearly a unilateral restraint." *TFWS IV*, 572 F.3d at 193 & n.11.

Once the Fourth Circuit in *TFWS IV* was squarely faced with the issue of whether a discount ban standing alone was unilateral, it did not expressly reach a conclusion on the issue. *Id*. at 193-94. Rather, the Fourth Circuit noted that it had previously held that Maryland's discount ban was hybrid at a stage of the litigation when Maryland was describing the discount ban as part of a comprehensive scheme that included a hybrid post-and-hold. *Id*. In *TFWS IV*, "Maryland present[ed] its argument for severance of its volume discount ban as though for review in the first instance, and d[id] not attempt to meet the high

burden of showing that [the Fourth Circuit's] holding in *TFWS I* was clearly erroneous and would work a manifest injustice." *Id*.

All that the Fourth Circuit held in *TFWS IV* was that Maryland failed to meet that "high burden." *Id*. at 194. Or, as the Fourth Circuit more evocatively put it, its prior decision in *TFWS I* did not strike it "as wrong with the force of a five-week-old, unrefrigerated dead fish." *Id*. That is a thin reed for Total Wine to use to support its side of the claimed circuit conflict, particularly given that in his concurrence Judge Howard agreed that "the law of the case controlled" the decision but stated that if the court was "writing on a clean slate" he would have voted to uphold the volume discount ban on the ground that it was a "unilaterally imposed government restriction[], which do[es] not run afoul of § 1 of the Sherman Act." *TFWS IV*, 572 F.3d at 197 (Howard, J., concurring).

The Ninth Circuit agreed with the Second Circuit below and upheld a discount ban "as unilateral within the meaning of *Fisher*." *Costco*, 522 F.3d at 899 (unanimous panel). To the extent the Fourth Circuit reached a different conclusion in the past, that conclusion was bound up in concessions made by the defending state. There really is no circuit split on the merits for this aspect of Connecticut's liquor laws.

B. The Claimed Circuit Conflict on the Post-and-Hold Provision has Limited Impact.

Like the circuit conflict Total Wine identifies on the Price Discrimination Prohibition Provisions, the purported conflict on the Post-and-Hold Provisions has limited impact, and thus the issue is not such an important matter as to warrant this Court's review.

The Second Circuit's decision below left the law in the Second Circuit precisely as it has been since 1984, when Judge Friendly wrote *Battipaglia*. Thus, as a practical matter, the decision below changed little. Indeed, it is possible that the national trend away from these types of laws will prevent this issue from ever again reaching the circuit level.

Before the Second Circuit, Total Wine did not dispute that this Court's decisions in "*Rice* [*v. Norman Williams*] and *Fisher* . . . constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1." Pet. App. 18a; *see also id*. at 12a n.9. The Second Circuit applied those "two key precedents" to the challenged Connecticut laws and regulations. Pet. App. 14a.

Total Wine's petition completely ignores one of those two "key precedents"—it does not cite *Norman Williams*, let alone convincingly challenge the Second Circuit's application of that decision, either below or in *Battipaglia*. Pet. v-vi. S*ee also Battipaglia*, 745 F.2d at 173-75. There is no evident explanation for that failure. Total Wine discussed and analyzed *Norman*

Williams extensively below. *See*, *e.g.*, 2d Cir. ECF No. 58, pp. 33, 35, 37 & 45. There is no question that *Norman Williams* remains good law. *See*, *e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (opinion of the Court) (citing *Norman Williams* for the proposition that "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute"); *see also id.* at 1685 (Alito, J., concurring, joined by Roberts, C.J., and Kavanaugh, J.) (citing *Norman Williams* for a similar proposition).

Total Wine's failure to address one of the two key precedents the Second Circuit relied on would be sufficient reason to deny the petition. But it is also telling: *Norman Williams* supplied the "controlling standards" in both the Second Circuit's decision below and in *Battipaglia*, and Total Wine offers no explicit argument, let alone a persuasive argument, that the Second Circuit misapplied those standards. Pet. App. 28a.

The Second Circuit's decision is the first circuit level decision to address the impacts of both *Leegin* and *Twombly* on the analysis. "As to *Twombly*, although it is more commonly cited for its articulation of pleading standards, th[is] Court in its substantive discussion homed in on the discrete evil prohibited by § 1," which is an agreement among competitors. Pet. App. 32a. As the Second Circuit explained, *Twombly* made clear that that evil is not implicated by "conscious parallel conduct," even where that conduct "can create an equally uncompetitive market to

parallel conduct achieved by agreement." Pet. App. 32a-33a.

Total Wine presumably disagrees with the Second Circuit's application of *Twombly*, but—as with *Norman Williams*—its petition does not cite *Twombly* or expressly rebut the Second Circuit's analysis of it.

Indeed, even several of the Judges that concluded that the Sherman Act preempted state post-and-hold laws expressed concern that doing so expanded Sherman Act preemption beyond its proper parameters. In *TFWS I*, then-Judge Luttig expressed concern that the result was "in derogation of what should be obvious state plenary authority." *TFWS I*, 242 F.3d at 214-15 (Luttig, J., concurring). Similarly, in *TFWS IV*, Judge Howard agreed that the panel was bound by the law of the case but made clear that he otherwise would have upheld the post-and-hold system as a unilateral restraint within the state's authority. *TFWS IV*, 572 F.3d at 197 (Howard, J., concurring).

In *Costco*, the unanimous Ninth Circuit panel "share[d] this concern about broadening the reach of the antitrust laws to preempt state law." *Costco*, 522 F.3d at 895 n.17. Both then-Judge Luttig and the Ninth Circuit felt bound by this Court's decision in *324 Liquor* to reach results that appeared to unduly restrict state authority. *See TFWS I*, 242 F.3d at 214 (Luttig, J., concurring); *Costco*, 522 F.3d at 895 n.17.

Neither of those courts analyzed *Twombly*, which the Second Circuit held "lent support to Judge Friendly's reasoning in finding against preemption" in

Battipaglia "by underscoring the limited scope of private conduct capable of *per se* violating § 1." Pet. App. 30a.[5] Of course, under *Norman Williams*, the Sherman Act preempts a state statute only "when the conduct contemplated by the statute is in all cases a *per se* violation." *Norman Williams*, 458 U.S. at 661.

It may be that both the Fourth and Ninth Circuits would have reached the same result even if they had had the benefit of the Second Circuit's analysis and application of *Twombly*, but that is speculative. It is possible that no circuit court will address a comparable issue in the future. If and when one does, it will have the benefit of *Twombly* as informed by both the Second Circuit's analysis below as well as this Court's decisions in the intervening years or decades.

III. THE SECOND CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS.

This Court's review is not necessary for the further reason that the Second Circuit correctly applied this Court's precedents.

This Court's decision in *Norman Williams* establishes the standard for determining whether Section 1 of the Sherman Act preempts a state statute on its face. Pet. App. 14a. Pursuant to *Norman*

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[5] *Twombly* was decided well after *TFWS I*. Even though the appellants in *TFWS IV* cited *Twombly*, the *TFWS IV* court did not reference it in its opinion. The parties in *Costco* apparently did not cite *Twombly* in their briefing, and the Ninth Circuit did not reference it in its decision.

Williams, a state statute is preempted "only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Norman Williams*, 458 U.S. at 659. This means that "a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id*. at 661. "Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation." *Id*. "If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." *Id*.

Pursuant to this Court's decision in *Fisher*, if a restraint is imposed unilaterally by a government statute or regulation, it "does not become concerted-action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law." Pet. App. 17a (quoting *Fisher*, 475 U.S. at 267).

Applying *Norman Williams* and *Fisher* to the challenged laws, the Second Circuit properly found no Sherman Act preemption. Regarding the Price Discrimination Prohibition Provisions, they are unilateral governmentally-imposed restraints that prohibited wholesalers from charging different prices to different retailers, but did not involve concerted activity among competitors. Pet. App. 21a-22a.

Pursuant to *Leegin*, the price discrimination provisions are evaluated under the rule of reason, and thus were not preempted. Pet. App. 22a. *See Leegin*, 551 U.S. at 882.

Turning to the Post-and-Hold Provisions, the Second Circuit analyzed its prior decision in *Battipaglia*, which had applied the controlling standards from *Norman Williams* to hold that the Sherman Act did not preempt New York's post-and-hold law that was similar to Connecticut's. Pet. App. 28a. The *Battipaglia* court had held that New York's law did not meet the *Norman Williams* standard for preemption because the only conduct that the law compelled—the exchange of price information among competitors—might or might not signify an agreement and therefore did not constitute a violation of the antitrust laws in all cases. Pet. App. 26a.

Battipaglia was not only correct when it was decided but has since been fortified by this Court's subsequent decisions in *Fisher* and *Twombly*. *Fisher* held that a *per se* violation of § 1 of the Sherman Act requires "concerted action," but Connecticut's Post-and-Hold laws, which at most require limited price disclosures and a restriction on action during the hold period, do not mandate or authorize concerted action. *See* Pet. App 31a. Similarly, *Twombly* held that § 1 prohibits "only restraints effected by a contract, combination, or conspiracy," and that conscious parallel acts based on competitors' mutual recognition of shared economic interests are not in themselves unlawful. Pet. App. 32a (quoting *Twombly*, 550 U.S. at

553). Both decisions support the Second Circuit's holding that Connecticut's Post-and-Hold laws are not *per se* violations of § 1 and thus are not preempted.

The petitioners do not contend that the Second Circuit misapplied *Norman Williams*. Indeed, notwithstanding *Norman Williams*'s central importance to the preemption analysis, the petitioners do not even mention the case. Instead, they rely extensively on *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and argue that the Second Circuit failed to apply *Midcal*'s "active supervision" requirement. Pet. 12. But *Midcal*'s "active supervision" requirement is not a factor in *Norman Williams*'s test for whether a statute conflicts with the Sherman Act. Rather, it is a factor in determining an entirely different issue—whether a state statute that conflicts with the Sherman Act is shielded from preemption by "state action immunity" under *Parker v. Brown*, 317 U.S. 341 (1943). It was in addressing the application of state action immunity that the *Midcal* Court held that a policy must be "actively supervised" by the state. *Midcal*, 445 U.S. at 105.

Because this case was resolved on motions to dismiss, Respondents did not reach the stage where they would raise defenses, whether under the Twenty-First Amendment, the *Parker* immunity doctrine, or otherwise. *See*, *e.g.*, Pet. App. 45a-46a; Dist. Ct. ECF No. 89, p. 6 (district court asking during motion to dismiss argument whether Respondents raised *Parker* immunity and/or the Twenty-First Amendment, and

Respondents' counsel responding that those issues "usually [are] raised not in the 12(b) stage, but later in the case"). State action immunity is not at issue. The district court granted respondents' motion to dismiss based on the lack of preemption under *Norman Williams*. The Second Circuit recognized that *Parker* immunity was "not presented here." Pet. App. 23a n.13. Petitioners' argument that the Second Circuit failed to follow *Midcal* is therefore wholly misplaced.

The petitioners repeat this error in arguing that the Second Circuit's analysis is inconsistent with *324 Liquor*, and specifically footnote 8 of that decision. *See* Pet. 12-14, 17, 18. As in *Midcal*, the statements in footnote 8 in *324 Liquor* were within the Court's discussion of whether state action immunity under *Parker* applied to the statutes at issue. Because state action immunity is not at issue here, the footnote is not relevant.

Although active supervision is not part of the *Norman Williams* analysis, denying this petition will not mean that violations of the Sherman Act will go unpunished. When antitrust concerns have been raised in connection with Connecticut's liquor industry in the past, Connecticut has taken action and the state will continue to vigilantly monitor for any such issues and take appropriate action if and when they arise.

In short, the issue before the Second Circuit was the limited question whether Connecticut's statutes were facially preempted by § 1 of the Sherman Act. Because the Second Circuit properly applied *Norman*

Williams, which the petitioners do not contest, and reached a decision entirely consistent with this Court's subsequent precedents on the limited issue presented, certiorari is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

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