No. 87-895

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JEROME LIDZ
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Does the Sherman Act invalidate state regulations which require each beer and wine distributor to post its prices and offer those prices evenhandedly to all retailers for a specified period, but which neither permit concerted action among distributors nor grant any distributor the "private regulatory power" to set prices for other distributors or retailers, unless the state actively supervises each distributor's pricing decisions?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: William H. Hedland, Sylvia S. Bedingfield, Reuben A. Worster, Stan Auderkirk and Jill Thorne, individually in their representative capacities as the Commissioners of the Oregon Liquor Control Commission; C. Dean Smith, individually in his capacity as Administrator for the Oregon Liquor Control Commission (petitioners herein); Elsie Viola Miller and Oretta Bernice Lancaster, doing business as the Junction Cafe and Tavern; Taylors' Coffee Shop, Inc., dba Rennie's Landing; Wian, Inc., dba Barney's Cable, individually and as representatives of others similarly situated (respondents herein), and Beer and Wine Distributors Association, Inc.; Spear Beverage Co., Inc.; Coast Distributors, Inc.; and United Beer Distributing Company; individually and as representatives of others similarly situated.

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[1] PETITION FOR WRIT OF CERTIORARI

Petitioners, the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon, respectfully pray that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), and is attached to this petition as Appendix A. The order and judgment of the district court is reported as *Miller v. Hedlund*, 579 F. Supp. 116 (D. Or. 1984), and is attached as Appendix B.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was dated and filed initially on October 31, 1986. The decision thereafter was withdrawn and then refiled on April 6, 1987. By order filed August 27, 1987, the Ninth

Circuit denied defendants' timely petition for rehearing and suggestion for rehearing en banc. A copy of the order denying the petition for rehearing is attached as Appendix C. This petition for writ of certiorari is filed within 90 days following the filing of the order denying the petition for rehearing, pursuant to Sup. Ct. R. 20, as time is computed under Sup. Ct. R. 28 and 29. The district court had jurisdiction in this matter pursuant to 15 U.S.C. §§ 1, 2, 15 and 26 (1982), and 28 U.S.C. § 1331 (1982). Jurisdiction to review the judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The Supremacy Clause, Article VI, of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the [2] Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,

or with foreign nations, is declared to be illegal. . . .

Oregon Revised Statutes (Or. Rev. Stat.) § 471.030 (1985) provides in part:

> (1) The Liquor Control Act shall be liberally construed so as:
>
> (a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.
>
> (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.
>
> (c) To protect the safety, welfare, health, peace and morals of the people of the state.
>
> (2) Consistent with subsection (1) of this section, it is the policy of this state to encourage the development of all Oregon industry.

Or. Rev. Stat. § 471.730 (1985) provides, in part:

> The function, duties and powers of the commission include the following:
>
> (1) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this chapter.
>
> . . . .

> (5) To adopt such regulations as are necessary and feasible for carrying out the provisions of this chapter [3] and to amend or repeal such regulations. When such regulations are adopted they shall have the full force and effect of law.

Oregon Administrative Rules (Or. Admin. R.) 845-06-090 (1987) provides:

> A licensed retailer of malt beverages or of wine who is operating under a restaurant license, package store license, retail malt beverage license or dispenser license may transport, or have transported by the licensed retailer's employe or by a common carrier, from the licensed wholesaler premises to the licensed retailer premises, the malt beverages or wine sold to the licensed retailer by the licensed wholesaler. The purchase price of such malt beverages or wine shall be the price posted pursuant to OAR 845-10-210.

Or. Admin. R. 845-10-210 (1984) provided:

> *Price Posting.*
>
> (1) Posting of malt beverage prices:
>
> (a) Licensees of the Commission engaged in the business of soliciting the sale of, selling or distributing malt beverages for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in three copies of prices to be charged for all such beverages offered for sale within the state. The prices shall be uniform

for the same class trade buyers and shall set forth:

(A) All brands and types of products offered for sale,

(B) The delivered sale price for each size container to retail licensees,

(C) Prices or maximum allowances or discounts to wholesale licensees, and

(D) Any allowance granted for return containers.

All price postings shall be consistent as between the various packages and containers offered for sale. No price postings involving quantity discounts shall be made.

[4] (b) The Commission may reject any price posting which is in violation of any of its rules.

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 180 days after the effective date of the posting. The Commission, at its discretion, may waive the 180-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

(2) Posting of wine prices:

(a) Licensees of the Commission engaged in the business of soliciting sales of, selling or distributing wine for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in two copies of prices to be charged by such licensee for all wine offered for sale within the state. The prices shall be uniform for the same class of trade buyers and shall set forth:

(A) All brands, classes and kinds of wine offered for sale, and

(B) The delivered sale price of each size container to retail licensees.

Prices shall be the same for one container as for each like container in any quantity comprising a sale, order or delivery. No allowance shall be made for return of containers and a wholesale licensee shall not purchase used containers from a retail licensee.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 30 days after the [5] effective date of the

> posting. The Commission, at its discretion, may waive the 30-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

STATEMENT OF THE CASE

The Oregon Liquor Control Act, enacted in 1933, established a regulatory system for the distribution of alcoholic beverages among manufacturers, wholesalers and retailers in Oregon. The Act also created the Oregon Liquor Control Commission (hereinafter, "OLCC" or "commission") and granted the commission extensive powers to adopt regulations to implement the statutory policies.[1]

Pursuant to statutory authority, the commission adopted regulations governing the sale of beer and

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[1] As presently constituted, the OLCC consists of five commissioners appointed by the Governor, subject to confirmation by the Senate. Or. Rev. Stat. § 471.705 (1985). One commissioner is designated to be chosen from the food and alcoholic beverage industry. *Id.* The other four commissioners, as well as all persons holding office or position under the commission, are prohibited from having "any connection with any person engaged in or conducting any alcoholic liquor business of any kind" and from having any pecuniary interest in or receiving any profit from purchases by the commission or persons authorized to manufacture, purchase or sell any alcoholic liquors. Or. Rev. Stat. § 471.710 (1985). The commissioner appointed from the industry is not eligible to serve as the chairman of the commission. Or. Rev. Stat. § 471.715(1) (1985). When this litigation commenced in 1978, the statutes provided for three commissioners, none of whom was permitted to have ties to the alcoholic beverage industry. Or. Rev. Stat., § 471.710 (1979 Replacement Part).

wine by distributors to retailers.[2] These regulations, *inter alia*,

1) require distributors to post their prices with the commission ten days before their effective date;

2) require that price decreases which they post remain in effect for 180 days for malt beverages[3] and 30 days for wine [6] (the "post-off" rules);

3) require that the posted price be the purchase price to the retailer, regardless of the distributor's actual delivery costs (the "delivered price" rules); and

4) prohibit distributors from giving retailers discounts from the posted price based on the quantity of beer or wine sold to retailers.

Under these regulations, every distributor unilaterally sets its own prices, posts those prices and offers them uniformly to its customers for the period specified in the rules, without quantity or delivery-related discounts. No distributor has the power to set prices for any other distributor or for any retailer.

The uniform price regulations are designed to prevent "tied house" arrangements prevalent in earlier times, in which distributors controlled retail

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[2] In Oregon, packaged hard liquor is sold exclusively through state-owned liquor stores, whereas beer and wine are sold by private retailers.

[3] The current rules require malt beverage prices to remain in effect for only 90 days and provide that the commission may waive the 90-day period under specified conditions. Or. Admin. R. 845-10-210(1)(d) (1987).

establishments through discriminatory pricing practices and left most retailers at the mercy of distributors who discounted prices to a few favored retailer-customers. The post-off rule prevents a distributor from posting a low price one day for a favored customer and then immediately restoring the higher price for other customers. Public price posting allows distributors and retailers to monitor and report to the commission any instances of noncompliance with the regulatory scheme.

In 1978, several retailers of beer and wine, respondents in this Court, filed suit in the United States District Court for the District of Oregon against the commission and several wholesaler-distributors. The retailers challenged the four regulatory provisions described above on the ground that the regulations had the effect of stabilizing beer and wine prices in violation of the Sherman Act, 15 U.S.C. §§ 1, *et seq*.[4] The [7] retailers sought declaratory and injunctive relief to prevent the commission from enforcing the challenged regulations.

In 1979, the district court stayed the proceedings to allow the Oregon courts to review the validity of the challenged regulations under the commission's enabling legislation. The Oregon Court of Appeals held the regulations to be valid and reasonably designed to

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[4] The retailers subsequently dropped their challenge to the prohibition of quantity discounts, and the Ninth Circuit did not rule on it.

advance statutory policy. *Miller v. OLCC*, 42 Or. App. 555, 600 P.2d 954 (1979), *review denied* 288 Or. 493 (1980).

Thereafter, the district court dismissed the retailers' federal suit on the ground that Oregon's involvement in the regulation and control of the liquor industry was sufficient to establish its immunity from federal antitrust law under the doctrine of state action immunity, first articulated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). Because the immunity was dispositive, the district court did not consider whether the regulations violated the Sherman Act or whether the Twenty-first Amendment constituted a defense. On appeal, the Ninth Circuit reversed the dismissal and remanded for further proceedings. *Miller v. Oregon Liquor Control Com'n*, 688 F.2d 1222 (9th Cir. 1982). The Ninth Circuit held that Oregon did not "actively supervise" its regulatory policy and therefore was not entitled to immunity under *Parker v. Brown.* It expressed no opinion on the two issues which the district court had not reached.

On remand, the parties filed cross motions for summary judgment. The commissioners contended that the regulations did not violate the Sherman Act because they neither authorized nor required any concerted activity, and that neither the [8] commissioners nor the wholesaler defendants had engaged in any combination, conspiracy or agreement in restraint of trade. They also renewed arguments based on state action immunity and the Twenty-first Amendment.

The district court granted defendants' motion. The court found no concerted action as to the regulations requiring wholesalers to post their prices and adhere to them for certain time periods. Because compliance with the regulations entails only unilateral action by the distributors, the court concluded that the regulations did not violate the Sherman Act. The court found a conflict with the Sherman Act as to the delivered price regulations. Nonetheless, it relied on intervening changes in Oregon law to conclude that the regulations were protected by state action immunity. The court found no concerted activity on the part of the distributors and, accordingly, granted judgment in their favor as well.

The retailers appealed to the Ninth Circuit, which reversed and remanded. *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987). The Ninth Circuit concluded that the challenged regulations effected a *per se* violation of the Sherman Act, despite the absence of concerted activity among the distributors in their unilateral compliance with the commission's regulations. The absence of concerted activity, however, led the court to affirm the district court's judgment in favor of the distributors.

After concluding that the commission's regulations violated the Sherman Act, the court then decided that Oregon's involvement in the regulatory scheme was not sufficient for the state to invoke state action immunity. Because the court viewed Oregon's regulations as a "hybrid" restraint, it applied the two-pronged test of *California Liquor Dealers v. Midcal Aluminum*,

445 U.S. 97 (1980), conditioning immunity on a clearly articulated and affirmatively expressed state policy and the state's active supervision of the policy. Without [9] reaching the first prong of the *Midcal* test, the court concluded that the state clearly failed the second prong because the state does not actively supervise distributors' individually set prices. The Court remanded the case to the district court for consideration of the Twenty-first Amendment issue.

The Ninth Circuit withdrew its opinion pending this Court's decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987). After that case was decided, the Ninth Circuit concluded that *324 Liquor Corp.* confirmed its reasoning in *Miller* and it, therefore, reissued its opinion. 813 F.2d 1344. The OLCC commissioners now petition this Court for a writ of certiorari.

REASONS TO GRANT THE WRIT

The Ninth Circuit erroneously concluded in this case that a state scheme regulating the manner in which beer and wine distributors set prices they charge to retailers is invalid under the Sherman Act, even though the regulations authorize no concerted activity and grant no private regulatory power. The Ninth Circuit's decision conflicts with decisions of other circuit and state courts which have upheld similar price regulation schemes against attack under the Sherman Act. Because many states have regulations similar to those at issue in this case, the Ninth Circuit's decision leaves those states in doubt as to

whether their regulatory schemes withstand Sherman Act scrutiny.

In reaching its conclusion, the Ninth Circuit erroneously identified the regulations at issue in this case as "hybrid" restraints on competition. The court went astray partly because it lacked the guidance which would enable it to distinguish between hybrid and purely public restraints. While antitrust decisions from this Court are legion, the cases discussing the concept of hybrid restraints—how they are identified and what analysis applies to them—can be counted on one hand. The ability to distinguish between hybrid and purely public restraints, how[10]ever, is critical. To establish the requisite "state action" necessary to give a hybrid regulatory scheme Sherman Act immunity, states must actively supervise the private, regulatory conduct that the scheme authorizes. On the other hand, states need not actively supervise private conduct authorized in a purely public scheme, because the only restraints on competition are those directly mandated by state law. The Oregon scheme is purely public because it confers no private regulatory power; hence, there is no conduct which the state must supervise.

Hybrid regulation, with its attendant active state supervision components, is expensive and time consuming to administer. States such as Oregon, which desire to regulate only limited aspects of the marketplace, need to know the difference between hybrid regulation and purely public regulation so that they can tailor their regulations, where possible, to avoid resource-draining "hybrid" regulatory schemes. Only this

Court can provide the necessary guidance. Because this Court's resolution of the issue presented in this case will resolve a split in the circuits and have wide-ranging impact in an important and emerging area of antitrust law, the Court should grant this petition for writ of certiorari.

I. The Ninth Circuit erroneously construed the commission's limited, purely public regulation as a "hybrid" restraint on competition which *per se* violated section 1 of the Sherman Act

The Ninth Circuit erred in concluding that Oregon's regulatory scheme is a "hybrid" restraint on competition forbidden by the Sherman Act. Oregon's regulations neither require nor authorize private parties to engage in concerted activity to restrain competition, and do not confer on private parties any regulatory authority. Each distributor acts independently in posting its own beer and wine prices, and no other distributor is required to read or follow any other distributor's [11] prices. The regulations mandate that distributors adhere to their posted prices for a set period, and that the posted prices be the delivered prices regardless of actual delivery costs. The posted prices do not control the prices retailers may charge, but do prevent distributors from giving preferential treatment (*e.g.*, lower prices) to some retailers and not others.[5]

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[5] In upholding the commission's regulations against a challenge that the regulations exceed the commission's statutory

The Ninth Circuit rejected the state's argument that the absence of concerted activity among distributors precludes a finding that the regulations mandating this conduct violate the Sherman Act. The court also rejected the state's argument that the regulations conferred no private regulatory power but were a unilateral restraint imposed by government, immune from invalidation under the Sherman Act.

The court first noted that "[a]n agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act." 813 F.2d at 1349. The court then observed that because Oregon's regulatory scheme

> facilitate[s] the exchange of price information and require[s] adherence to the publicly posted prices . . . the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence

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authority, the Oregon Court of Appeals noted that the regulations advanced both statutory and constitutional objectives. Principal among those objectives were prohibiting financial assistance to retailers, separating possible wholesale and retail financial connections and ensuring that beer and wine prices would be the same for all retailers. *Miller v. OLCC*, 42 Or App at 561-62, 600 P2d at 957-58.

> and effect of the state's involvement in the matter.

Id.

After discussing this Court's decisions in *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. 1045 (1986), *Schwegmann Bros. v.* [12] *Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the court compared this case to *Schwegmann* and *Midcal* and concluded that Oregon's regulations were a "hybrid" restraint that violated the Sherman Act:

> First, *Schwegmann* demonstrates that a showing of concerted activity among the Oregon wholesalers is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge. In *Schwegmann*, non-contracting retailers were compelled to comply unilaterally with a state-authorized pricing scheme, but the absence of concerted activity among the retailers was not a bar to a finding of a Sherman Act violation. Second, *Schwegmann* and *Midcal* show that Oregon's actions are not unilateral. The regulations constitute a "hybrid" restraint because, as in those two cases, Oregon allows private parties to set the prices and does not review the reasonableness of those prices. It follows that this case is unlike the purely public restraint of Berkeley's regulatory scheme

> which removed the power to set rents from the landlords.

813 F.2d at 1350-51.

The Ninth Circuit erroneously relied on *Schwegmann* and *Midcal* to decide the instant case. As is discussed below, *Schwegmann* and *Midcal* did not require concerted activity because the conduct which the schemes in those cases authorized—resale price maintenance—constitutes a *per se* Sherman Act violation. *Midcal*, 445 U.S. at 102. In contrast, under Oregon's scheme, the required private conduct does not *per se* violate the Act, and, indeed, the Ninth Circuit dismissed the Sherman Act claim against the private distributors. The Ninth Circuit, thus, was wrong in concluding that Oregon's regulations did not have to authorize concerted activity to run afoul of the Sherman Act.

[13] As is also discussed below, *Schwegmann* and *Midcal* were hybrid restraint cases because they conferred regulatory power on private individuals to restrain competition in a manner that violated the Sherman Act. Under Oregon's scheme, private distributors are granted no private, regulatory power because their conduct regulates no one else's behavior. The Ninth Circuit erred in further concluding that Oregon's regulatory scheme is a hybrid restraint on competition which is immune from the Sherman Act only if the state actively supervises private distributors' prices.

A. The Ninth Circuit erred in concluding that Oregon's regulations need not authorize concerted activity among distributors for the regulations to violate the Sherman Act.

The Ninth Circuit decided that because "concerted activity" was not present in either *Schwegmann* or *Midcal*, concerted activity by distributors in setting and adhering to their prices was not required in order for the Sherman Act to preempt Oregon's regulatory scheme. *Schwegmann* and *Midcal* are not controlling, however, because the rationale for dispensing with actual, concerted activity in those cases does not exist in the present case.

When this Court decided *Schwegmann*, the Miller-Tydings Amendment to the Sherman Act, 50 Stat. 693, authorized retail price fixing between consenting distributors and retailers, conduct which, but for the amendment, would constitute a *per se* violation of the Sherman Act. 341 U.S. at 386. The Miller-Tydings Amendment thus permitted distributors to restrain the market to the extent their market strength or position would enable them to co-opt retailers into agreeing to adhere to the distributors' retail prices. Louisiana, however, attempted to bind non-consenting retailers to retail price schedules set forth in distributors' agreements with other retailers. Louisiana law further permitted distributors [14] to enforce their price schedules against non-consenting retailers. This Court concluded that Louisiana, by permitting distributors to restrain the market in a way that their own

market strength or position might not permit, had exceeded the scope of the exemption which the Miller Tydings Amendment had intended.

> And when we read what the sponsors wrote and said about the amendment, we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well.

Id. at 395 (emphasis in original). Thus, without the shield of the Miller-Tydings Amendment, Louisiana's law authorized conduct which constituted a *per se* Sherman Act violation.[6]

In *Midcal*, California's statutory scheme similarly involved mandatory resale price maintenance. The scheme required wine producers to file either fair trade contracts or price schedules with the state, and required wine wholesalers to sell wine at the prices fixed in the contracts or price schedules. This Court noted that this regulatory scheme authorized resale price maintenance, a result which was *per se* in violation of the Sherman Act since repeal of the Miller-Tydings Act in 1975. 445 U.S. at 102. Because the scheme gave wine producers the power to dictate the prices that wholesalers could charge,

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[6] The Ninth Circuit probably is wrong that *Schwegmann* did not involve concerted activity. Indeed, under Louisiana law, before retailers who had not signed a resale price agreement could be bound to sell at the distributor's set retail price, that price had to be established in an agreement between the distributor and at least one retailer. 341 U.S. at 387.

> such vertical control destroys horizontal competition [among wholesalers as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions. by agreement with each other."

[15] *Id.* at 103 (quoting from Justice Hughes' opinion in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

Concededly, the decisions in both *Schwegmann* and *Mical* could have been clearer as to why the state regulatory schemes involved in those cases satisfied the "contract, combination . . . or conspiracy" requirement of section 1 of the Sherman Act. The scheme in *Midcal* did not authorize wine producers to agree either among themselves or with their wholesalers that wholesalers would adhere to the producers' specified resale prices. But because the statutory schemes authorized wine producers in *Midcal* and distributors in *Schwegmann* to restrain competition in a way that they could otherwise achieve only by "contract, combination . . . or conspiracy," the court apparently decided the concerted activity requirement of section 1 of the Sherman Act had been met. These cases, then, appear to hold that even without actual concerted activity, the Sherman Act preempts a regulatory scheme that authorizes conduct such as resale price maintenance, because the conduct has such a "pernicious effect on competition and lack[s]. any redeeming virtue" (*see*

Northern Pac. R. Co. v. United States, 356 U.S. 1, 4-5 (1958)), that it *per se* violates the Act.[7]

In terms of its anti-competitive effect, the conduct mandated by the commission's regulations in the present case is not in the same class as the conduct in *Midcal* and *Schwegmann*, First, the distributors' conduct, absent state compul[16]sion, would not alone violate the Sherman Act. A distributor could lawfully decide to announce its prices and adhere to those prices for a given period. Setting prices violates the Sherman Act only if a private individual sets someone else's prices; setting one's own prices does not violate the Act. Yet, that is all that occurs under Oregon's regulatory scheme.

Second, the commission's regulations do not authorize, let alone mandate, *resale* price maintenance or any other conduct that *per se* would violate the Sherman Act. The prices posted by distributors do not prevent beer and wine retailers from charging any price they may deem appropriate, whether above or below the posted wholesale prices. Thus, the posting requirement

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[7] This Court's recent decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987) is to the same effect. The Ninth Circuit said *324 Liquor Corp. "confirms* the reasoning and conclusions set forth in the opinion." 813 F2d at 1345. Like the statutes in *Midcal* and *Schwegmann*, New York's liquor law authorized distributors to set minimum prices at which liquor would be sold at retail. This authority was conferred as a result of a scheme which required retailers to sell liquor at no less than 112 percent of the distributor's posted bottle price. This Court concluded that the analysis in *Midcal* provided the "framework" for resolving the issue in the case. 107 S.Ct. at 724.

permits intra-brand competition among retailers and, unlike the *Midcal* and *Schwegmann* schemes, it also permits inter-brand competition. Moreover, distributors of different brands freely may adjust their prices upward or downward after the lapse of 30 days (wine) or 90 days (beer) in response to prices posted by distributors of competing brands.[8] At most, Oregon's statutory scheme may have the effect of producing less vigorous inter-brand competition than might exist in the absence of the 30- and 90-day posting periods. But the fact that a state regulation might have some anticompetitive effect is not a basis for its invalidation under the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

In determining that Oregon's regulations satisfied the "contract, combination . . . or conspiracy" requirement because they require distributors to post prices and adhere to [17] them, the Ninth Circuit ignored this Court's teachings in *Fisher v. City of Berkeley, Cal.*, and misconstrued the effect of Oregon's regulations under the Sherman Act. In *Fisher*, this Court held that a city ordinance freezing rents and granting a governmental body the authority to allow rental adjustments as

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[8] Restraint in inter-brand competition is further attenuated because only price *decreases* are subject to the 30-day and 90-day posting requirements. A distributor who posts a price increase is free at any time to respond to the competition by further increasing or decreasing its price. Moreover, a distributor who posts a price decrease will not be required to adhere to that price for the 30-day or 90-day period if it can convince the commission that circumstances warrant lifting the requirement. *See* Or. Admin. R. 845-10-210(1)(d) and (2)(d) (1987).

conditions may warrant, constituted "purely public" or "unilateral" government regulation exempt from the Sherman Act. 106 S.Ct. at 1051. This Court stressed that a landlord's (or distributor's) decision to adhere to its announced price for a set period does not amount to a contract, combination or conspiracy to restrain competition just because the state mandates the decision.

> A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords.

Id. at 1049-50. Just as the absence of actual, concerted activity by landlords to fix rental ceilings required the court to find that the City of Berkeley's regulations freezing rent levels did not violate the Sherman Act, so too, the absence of actual, concerted activity by beer and wine distributors should preclude a conclusion that OLCC's price posting regulations violate the Act.

The Ninth Circuit concluded that *Fisher* does not control the present case because in *Fisher* the regulatory scheme removed the landlord's power to set rents. But this is a distinction of degree only that should not

matter in the ultimate analysis. To a degree, the commission's regulations also divest the distributors of their ability to set prices by mandat[18]ing that once prices are set they must be adhered to for a given time. However, the regulations also provide that the commission may permit posted prices to be adjusted upward if conditions warrant the increase. *See* note 8, *supra.* That beer and wine distributors, at the end of the posted period, are free to adjust their prices up or down does not prevent the regulations from being "purely public" or "unilateral" under the *Fisher* analysis. If the City of Berkeley had imposed less ambitious rent stabilization measures that simply required landlords to adhere to rental prices for a period of six months or one year, after which they could adjust their rental prices up or down as they deemed appropriate, it is inconceivable that this Court would hold the city's failure to set the rental prices at the end of the period subjected the regulations to Sherman Act scrutiny.

The Ninth Circuit was wrong in concluding that concerted activity by distributors was not necessary to find that the Sherman Act preempted Oregon's regulations.

B. To the extent Oregon's regulations may authorize conduct that *per se* violates the Sherman Act, the regulations are pure "state action" and confer no private regulatory authority.

Even assuming Oregon's regulations fulfilled the concerted activity requirement, as they did in the

resale price fixing cases discussed above, that fact is not fatal. Where, as here, the state regulations mandate price posting and adherence to those prices, and set the period for which prices must remain in effect, the regulations are not invalid. It is just this kind of state action that the Court held in *Parker v. Brown* to be immune from challenge under the Act. As the Court in *Parker* stated, "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351. *See also Town of Hallie v. Eau Claire*, 471 U.S. 34 [19] (1985); *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1051-52 (Powell, J., concurring). Precisely because the state regulations require price posting, specify how long distributors must adhere to their prices and grant private parties no discretion or "regulatory power" in this regard, the regulations constitute pure "state" action, immune from the Sherman Act, and not "hybrid" state action for which immunity can only be determined after applying the two-pronged *Midcal* analysis.

Hybrid restraints exist when state regulations confer on private entities a degree of private regulatory power. *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1050. *Midcal* requires the state actively to supervise the private regulatory power to ensure that the private decisions made pursuant to that power advance state policy, not the private actor's own interests. *Town of Hallie*, 471 U.S. at 47. In *Schwegmann, Midcal* and *324 Liquor Corp.*, because the state allowed private parties to set the resale prices, the state was required actively

to supervise those prices to ensure that they were consistent with the state's articulated resale price maintenance policy.

In Oregon's regulatory scheme, unlike those considered in *Schwegmann, Midcal* and *324 Liquo*r *Corp*., the predicate for active state supervision—conferrence of private, regulatory power—is absent. The scheme does not authorize distributors to agree among themselves to post their prices and adhere to those prices for a period they agree upon. Posting prices and the period for adherence to those prices are mandated by the regulatory scheme itself. The regulations *confer* no private power, because even without state involvement, distributors may establish their own prices. Moreover, because setting once's own prices regulates no one else's conduct, no "regulatory" power is conferred.

Because Oregon's scheme confers no private, regulatory power, Oregon's regulatory scheme is not "hybrid." No requirement or reason exists for the state to supervise dis[20]tributors' prices. *Fisher*, not *Midcal*, should control. This Court should reverse the Ninth Circuit's decision that Oregon's regulatory scheme is a "hybrid" restraint which survives the Sherman Act only if the state actively supervises distributors' own prices.

II. Both the concept of a "hybrid restraint" and the analysis which follows from characterizing state regulation as a hybrid restraint need clarification from this Court.

In a series of cases decided over the past twelve years, this Court has developed a framework for determining the types of state regulation and regulated activities which are not preempted by or are immune under the Sherman Act. The focus of the inquiry has been to ascertain the degree to which the challenged conduct represents the policy of the state acting in its sovereign capacity, as opposed to private conduct motivated by private interests. To refine that inquiry, the Court recently has developed a modified analysis for "hybrid restraints" on competition, which require closer scrutiny than purely public ones. *See 324 Liquor Corp. v. Duffy; Fisher v. City of Berkeley, Cal.*; and *Rice v. Norman Williams Co.* (Stevens, J., concurring in the judgment). Yet the precise nature of hybrid restraints—as well as the analysis that follows from that characterization—remains unclear.

To date, the Court has analyzed as a hybrid restraint only state regulation which confers regulatory power on private parties. *See*, *e.g., California Liquor Dealers v. Midcal Aluminum*; *324 Liquor Corp v. Duffy*; *Southern Motor Carriers v. U.S.*, 471 U.S. 48 (1985). The court of appeals treats Oregon's regulatory scheme as a hybrid restraint, even though the scheme confers no private regulatory power and even though the court agreed that the private defendants had not themselves violated the Sherman Act. The Ninth Circuit fails to

distinguish between state action which merely requires pri[21]vate parties to comply with the state's market regulations and that which grants them power to regulate other private parties. As a result, the court upsets the delicate balance between federal supremacy and state sovereignty which lies at the heart of our federal system. The Ninth Circuit's approach illustrates the need for this Court to clarify the "hybrid restraint" aspect of the preemption and state action immunity doctrines.

The Ninth Circuit's decision also is flatly inconsistent with decisions of other federal courts of appeals, federal district courts and state supreme courts rejecting antitrust challenges to state regulations requiring posting of wholesale prices and adherence to those prices for a specified time.[9] The Second Circuit sustained such regulations in New York and Connecticut respectively in *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984) and *Morgan v. Division of Liquor Control, Etc.*, 664 F.2d 353 (2d Cir. 1981), *affirming Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F.Supp 936 (D. Conn. 1981). Substantially similar price posting and price adherence regulations survived antitrust challenges in *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (N.D. Cal. 1982), *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330 (Minn. 1984), and *Wine and Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416 (Mo. 1984). Each of these decisions reviews

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[9] *Miller* is consistent, however, with the decision in *Lewis-Westco v. Alcoholic Bev. Cont.App. Bd.*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982), *cert. denied*, 464 U.S. 863 (1983).

this Court's *Midcal* opinion in detail and distinguishes the price-posting and price adherence regulations from the regulatory scheme invalidated in *Midcal*. Nothing in the courts' analyses suggests that this Court's most recent decision in *324 Liquor Corp.* would alter their decisions.[10]

[22] As a matter of policy, a state's interest in regulating an industry or profession may justify regulation which ranges from minimum oversight designed to punish or prevent specific types of abuses to close scrutiny of every aspect of the regulated industry or profession. The Ninth Circuit's decision unnecessarily constrains the state's latitude to fashion its policy. The decision requires a state which imposes limited constraints on price competition to assume the burden of overseeing competitive pricing decisions made within the state's regulatory framework, even where the regulation confers no private, regulatory power and authorizes no private, anti-competitive conduct.

Oregon has neither reason nor resources to review the reasonableness of distributors' prices, as the Ninth Circuit would require. Oregon has set a few, relatively unrestrictive boundaries on price competition; within those boundaries, it does nothing to alter the balance of competitive forces. If a state which seeks to impose minimal restraints must necessarily occupy the entire field, "nothing short of a complete monopolization of the industry by the State could escape Sherman Act

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[10] *See 324 Liquor Corp., supra*, 107 S.Ct. at 725, n.6, distinguishing *Morgan v. Division of Liquor Control, supra.*

liability." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. at 939. Nothing in this Court's decisions supports the proposition that a state which regulates some aspects of the marketplace violates the Sherman Act unless it assumes full control of the marketplace.

Several states' price posting regulations are in jeopardy under the Ninth Circuit's analysis. Nearly every state imposes extensive regulation on the sale of alcoholic beverages. While the specifics of the regulatory schemes vary considerably from one state to another, the price posting features of Oregon's regulation are a common ingredient of many state regulations.[11] Given the Ninth Circuit's decision in the [23] present case, these states are left in a quandary as to whether their price posting regulations are a permissible means of regulating the liquor industry. This Court's guidance in distinguishing between purely public and hybrid regulatory schemes is critical, not only for the benefit of states which actively regulate the liquor industry, but also for all state and governmental units which

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[11] Twenty-three states require price posting for distilled spirits, beer and wine, or at least one of the three. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 4-252; Calif. Bus. & Prof. Code § 25000; Conn. Gen. Stat. § 30-63; Del. Code Ann. tit. 4, § 508; Georgia Comp. R. & Regs. r. 560-2-3-.45; Haw. Rev. Stat. § 281-123; Kan. Stat. Ann. § 41-1101; Me. Rev. Stat. tit. 28 § 655, tit. 28A, § 1408; Mass. Gen. L. ch. 138, § 25C; Mich. Admin. Code r. 436.1625, 436.1726; Mo. Rev. Stat. §§ 311.332, .334, .336, .338; N.J. Admin. Code tit. 13, § 2-24.5; N.M. Stat. Ann. § 60-8A-12; S.D. Admin. R. 64:75:03:02; Tenn. Code Ann. § 57-6-104(a); Wash. Admin. Code §§ 314-20-100, 314-20-105, 314-24-190, 314-24-200.

engage in limited regulation of other areas of the private marketplace.

CONCLUSION

For the reasons given above, the Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JEROME LIDZ
Assistant Attorney General
Counsel for Petitioners

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1987

BEGINNING OF TERM

OCTOBER 5, 1987, THROUGH FEBRUARY 23, 1988

FRANK D. WAGNER
REPORTER OF DECISIONS

ORDERS FOR OCTOBER 5, 1987, THROUGH FEBRUARY 22, 1988

OCTOBER 5, 1987

Appeals Dismissed

No. 86-1242. CITY OF AKRON ET AL. *v.* OHIO MANUFACTURERS' ASSN. ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 801 F. 2d 824.

No. 86-1656. UTAH POWER & LIGHT CO. *v.* IDAHO PUBLIC UTILITIES COMMISSION ET AL. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 112 Idaho 10, 730 P. 2d 930.

No. 86-1850. ANDERSON *v.* FROHNMAYER ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 812 F. 2d 714.

No. 86-1885. SCARVACI *v.* MATESTIC, ASSISTANT DISTRICT ATTORNEY, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-1891. HALLIWELL *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86-1899. POLYAK *v.* STACK ET AL. Appeal from C. A. 6th Cir. dismissed for, want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 812 F. 2d 1408.

No. 86-2008. BRANSON *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for

want of jurisdiction. Treating the papers whereon the appeal was taken as a

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ORDERS

February 22, 1988

No. 87-840. CUMBERLAND FARMS, INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 826 F. 2d 1151.

No. 87-853. SIERRA PACIFIC POWER CO. *v.* PUBLIC SERVICE COMMISSION OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 187, 734 P. 2d 1245.

No. 87-863. JENSEN *v.* SATRAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 87-865. GREGORY LUMBER CO., INC. *v*. UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 831 F. 2d 305.

No. 87-868. NELSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 110.

No. 87-870. CONNECTICUT *v.* JARZBEK. Sup. Ct. Conn. Certiorari denied. Reported below: 204 Conn. 683, 529 A. 2d 1245.

No. 87-877. JOVANOVIC *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 677.

No. 87-879. ODEGARD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 140.

No. 87-882. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87-884. BENSON *v.* ALLY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 771.

No. 87-885. KHAN *v.* JENKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 655.

No. 87-891. FRIEDRICH *v.* OHIO. Ct. App. Ohio, Holmes County. Certiorari denied.

No. 87-895. HEDLUND ET AL. *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1344.

No. 87-905. ANNABI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 824 F. 2d 1294.

No. 87-906. ROBERTS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1130.

17-2003-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiff-Appellant,

– v. –

COMMISSIONER MICHELLE H. SEAGULL,
DEPARTMENT OF CONSUMER PROTECTION,
JOHN SUCHY, DIRECTOR,
DIVISION OF LIQUOR CONTROL,

Defendants-Appellees,

WINE & SPIRITS WHOLESALERS OF
CONNECTICUT, INC., CONNECTICUT
BEER WHOLESALERS ASSOCIATION, INC.,
CONNECTICUT RESTAURANT ASSOCIATION,
CONNECTICUT PACKAGE STORES
ASSOCIATION, INC., BRESCOME BARTON, INC.,

Intervenors-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFF-APPELLANT

JAMES T. SHEARIN
EDWARD B. LEFEBVRE
PULLMAN & COMLEY, LLC
850 Main Street, 8th Floor
P.O. Box 7006
Bridgeport, Connecticut
06601
(203) 330-2000

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

Attorneys for Plaintiff-Appellant

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* * *

[8] Conn. Gen. Stat. § 30-68m(a)(3). These minimum markups apply across the board, to all products, whether a $10 bottle of whisky or a $200 bottle of champagne.[4] There is no cap, however, on how much wholesalers can require retailers to mark up their

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[4] The statute provides one token gesture at competition: as of May 2012, a retailer may sell "one beer item" or "one item of alcoholic liquor" below its statutory "cost" – but even then, retailers may only discount below their artificial "minimum bottle cost" by ten percent. Conn. Gen. Stat. § 30-68m(c); 2012 Conn. Legis. Serv. P.A. 12-17 (H.B. 5021).

products by manipulating the difference between their posted case prices and posted minimum bottle prices.

The final challenged aspect of the Act is its ban on discounts, whether for quantity or any other reason. Section 30-68k requires wholesalers to sell every bottle, can and case of liquor to any retailer at the same price, regardless whether the retailer buys 1 case or 1,000 cases. Similarly, § 30-63(b) prohibits wholesalers and manufacturers from offering any "discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases," as well as from "discriminat[ing] . . . in price discounts."[5]

C. The Purpose And Effect Of The Challenged Statutes

These provisions, on their face, eliminate any incentive for wholesalers to compete on price. If a wholesaler were to drop its price on a particular product, its [9] competitors would know that immediately (from having seen the posted price), and would have four days to match the posted price. The wholesaler who first dropped its price would then be required to "hold" the lower price for an entire month – during which it would have no competitive advantage, because its competitors would be charging the same price.

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[5] *See also* Conn. Gen. Stat. § 30-94(a) (prohibiting "free goods, gratuities, gifts, prizes, coupons, premiums, combination items, quantity prices, cash returns, loans, discounts, guarantees, special prices or other inducements in connection with the sale of alcoholic beverages or liquors").

These incentives are not just theoretical. If a wholesaler sells a (12-bottle) case of Acme pinot noir for $240 and sets the bottle price at $25, virtually every retailer in the state will sell Acme at $25 per bottle. Retailers cannot seek a lower price from a competing wholesaler, because the wholesale prices have been coordinated through the post-and-hold regime. Retailers *could* sell Acme for more than $25, but the wholesaler has already established an above-market profit margin for the retailer (in this example, the $25 minimum retail price less the $20 wholesale price per bottle, yielding a profit margin of $5, or 25%). As a result, the retail market for Acme pinot noir becomes fixed at $25 per bottle throughout the state. Retailers cannot reduce their costs or affect minimum bottle prices by purchasing in large quantities. And efficient retailers like Total Wine have no advantage through economies of scale. Competition plays no role in pricing; and Connecticut consumers pay grossly inflated above-market prices for every bottle of wine or spirits they purchase.

[10] In short, as set forth in Total Wine's Complaint, there is simply no price competition among Connecticut wholesalers, and no effective price competition among Connecticut retailers. "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' on-post and off-post case prices." JA 20 (Compl. ¶ 19).

The tables attached to the Complaint (JA 24-31) make this eminently clear. They set forth, as to twenty-two illustrative name brand products, each wholesaler's posted case price offered to retailers ("cost/bottle") and its posted minimum bottle price to consumers ("Min bottle"), from December 2015 to July 2016. JA 24-25. For each of the products listed, each wholesaler set *exactly* the same case and bottle price every month. When one wholesaler increased its minimum bottle retail price, the competing wholesaler(s) increased their own posted "bottle" prices the same month, by the same amount, and then adhered to that increased retail price.

The anticompetitive effect of this across-the-board horizontal and vertical price fixing mandated by the statute is illustrated vividly by a practice among wholesalers known as "on-post" and "off-post" pricing. JA 19-20 (Compl. ¶ 17). After several months holding case prices steady ("on-post"), all wholesalers simultaneously reduce ("off-post") their *case* prices – the prices at which [11] wholesalers sell to retailers. But they keep the minimum *bottle* prices as high, or nearly as high, as they were before the simultaneous drop in case prices. That means not only that the post-and-hold statute requires horizontal fixing of the case and bottle prices posted by the wholesalers, but also that the wholesalers effectively control not only retailers' prices, but also their profit margins.[6]

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[6] For example, all three Connecticut wholesalers who sold Bombay Gin maintained the identical minimum bottle price of

In addition to mandating horizontal price fixing, the challenged statutes also mandate industry-wide vertical price restraints by requiring that wholesalers post not only the case prices at which they sell to retailers, but also the minimum "bottle" prices that create a floor for retail sales to consumers. *See* JA 19-20 (Compl. ¶ 17). Every aspect of the statutory scheme is mandatory. This mandatory pricing regime creates irresistible pressure on wholesalers to collude not only with other wholesalers to keep case prices high, but also with retailers [12] who want to keep retail prices artificially high, whether because they are inefficient or they desire unreasonably large profit margins. The statutes also prohibit more efficient retailers like Total Wine from taking advantage of economies of scale in purchasing and from passing along any cost savings to consumers.

$29.99 for a 1.75 liter bottle between December 2015 and July 2016. But the case prices varied over time, being offered by all three wholesalers at $29.91 per bottle in most of those (on-post) months but being reduced to an identical level of $26.08 per bottle in February and May 2016. Retailers who purchased their supply of Bombay Gin in those two off-post months were guaranteed a profit margin of at least $3.91 per bottle. But consumers never saw any benefit from the wholesalers' uniform reduction in case prices during the two off-post months because the posted minimum bottle price remained fixed at $29.99. The examples drawn from the case and bottle prices for 1.75 liter bottles of Jameson's Whiskey are even more extreme, with the identical posted case and bottle prices from four separate wholesalers guaranteeing to retailers profit margins of between $9.08 and $14.08 on a $44.99 to $49.99 minimum bottle retail price during some of those months. *See* JA 24 (Complaint, Table 1).

A recent study of the regulatory price control regime in Connecticut, prepared on behalf of the Distilled Spirits Council of the United States ("DISCUS"), concluded that this regime, which is unique to Connecticut among all fifty states, resulted in retail prices for wine and spirits that are as much as 24 percent higher than prices offered for identical products in the surrounding states. *Id.* ¶ 18; *see* An Act Ensuring the Regional Competitiveness of Connecticut's Liquor Prices, Conn. S.B. 00014, 2016 Sess., Public Hearing Testimony of Distilled Spirits Council of the United States[7] and Jay Hibbard[8] (Feb. 23, 2016).

D. Total Wine's Claims

There are more than 100 retail alcoholic beverage stores operating in approximately 20 states under the "Total Wine & More" name. JA 17 (Compl. ¶ 7). Total Wine opened its first Connecticut store, in Norwalk, in December 2012, and since then has opened three more stores, in Milford, Manchester, and [13] West Hartford. *Id.* (Compl. ¶ 8). Total Wine & More stores are committed to offering the nation's best selection of alcoholic beverages, and to having the most competitive prices on wine, spirits, and beer. *Id.* (Compl. ¶ 7). Since the first Total Wine & More store opened in Delaware in

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[7] Available at https://www.cga.ct.gov/2016/GLdata/Tmy/2016SB-00014-R000223-Distilled%20Spirits%20Council%20of%20the%20United%20States.-TMY.PDF.

[8] Available at https://www.cga.ct.gov/2016/GLdata/Tmy/2016SB-00014-R000223-Jay%20Hibbard,%20%20V.P.%20Government%20Relations-TMY.PDF.

1991, the stores have received numerous awards and recognitions not only for their broad selection of products and expertly trained wine associates, but also for their low everyday prices. JA 18 (Compl. ¶ 10).

Total Wine has not, however, been able to provide Connecticut consumers with the full benefit of lower prices. *Id.* (Compl. ¶ 11). Instead, as discussed above, the three challenged statutes authorize, indeed mandate, that wholesalers control retail prices. Some products are sold exclusively by a single wholesaler; others are sold by multiple wholesalers (so-called "duals"). As to both categories, however, "Connecticut manufacturers and wholesalers have used the challenged provisions of Connecticut law to fix and maintain prices at levels substantially above what fair and ordinary market forces would dictate." JA 19 (Compl. ¶ 16).

The Complaint alleges that the challenged statutes are preempted by the Sherman Antitrust Act because they mandate and/or authorize horizontal price fixing (Count One) and industry-wide vertical price fixing (Count Two). The Complaint principally seeks a declaratory judgment that the challenged statutes and regulations are void, and an injunction prohibiting their continued [14] enforcement. JA 23 (Compl. ¶ 34). The named defendants were Jonathan A. Harris, the Commissioner of the Department of Consumer Protection,[9] and John Suchy, the Director of the Division of

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[9] Mr. Harris has since been succeeded in office by Michelle H. Seagull, who was appointed as Commissioner of the DCP on May 1, 2017. *See* Fed. R. App. P. 43(c)(2).

Liquor Control, who together are responsible for enforcing the challenged statutes and implementing regulations. JA 16-17 (Compl. ¶¶ 2-3).

Defendants filed a motion to dismiss under Federal Rule 12(b)(6). JA 32-33. Four industry associations intervened: the Wine & Spirit Wholesalers of Connecticut ("WSWC"), the Connecticut Beer Wholesalers Association ("CBWA"), the Connecticut Restaurant Association ("CRA"), and the Connecticut Package Stores Association ("CPSA") (collectively, the "Intervenors"). The Intervenors filed a joint motion to dismiss. JA 34-36. Another Intervenor, the state's largest wholesaler, Brescome Barton, Inc., was also granted intervention, and filed its own motion to dismiss on December 7, 2016. JA 37-39.

E. The District Court's Ruling

After hearing oral argument (JA 40-132), the District Court granted the defendants' and intervenors' motions to dismiss. The District Court agreed that the challenged statutes, at least in part, constitute "hybrid restraints," *i.e.*, they are laws that "grant[] private actors a degree of regulatory control over competition."

* * *

[20] with respect to the industrywide vertical price fixing alleged in Count Two, the Supreme Court's controlling decision in *324 Liquor* has been implicitly overruled.

For these reasons, the judgment should be reversed and the case remanded for further proceedings.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's dismissal under Rule 12(b)(6). *See*, *e.g.*, *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016). When reviewing a Rule 12(b)(6) dismissal, the Court accepts the factual allegations of the complaint as true, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 5 (2010), and draws all reasonable inferences in plaintiff's favor, *Fulton*, 591 F.3d at 43.

A complaint survives a Rule 12(b)(6) motion when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard does not impose an across-the-board, heightened fact pleading standard, *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008), or "require[] a complaint to include specific evidence [or] factual allegations in addition to those required by Rule 8." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010). Rather, a claim "has facial plausibility [21] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 120.

II. The Challenged Statutes Are Part Of A Unified Regulatory Scheme And Should Be Analyzed As Such.

The Complaint alleges that three aspects of Connecticut's Liquor Control Act are preempted by the Sherman Act. They are codified in separate subsections of the Act, but they are part of a unified regulatory scheme set forth in Part V of the Liquor Control Act. All wholesalers are required to post their monthly case and minimum bottle prices, and then upon reviewing their competitors' posted prices (and adjusting their own accordingly), to fix those prices for the entire next month. The prices they are required to post and hold are not only the case prices (at which they will sell to retailers that month) but also the so-called "minimum bottle" prices (which, with a fixed markup, will be the mandated minimum retail price offered to Connecticut consumers). All wholesalers must sell to all retailers at the same posted case prices. All retailers must sell to all Connecticut consumers at bottle prices that are not less than the posted and fixed minimum prices that prevail throughout the state. These interrelated provisions make Connecticut's alcohol pricing statute easily the most anticompetitive in the country.[11]

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[11] In the District Court, one of the wholesaler intervenors, Brescome Barton, identified five jurisdictions with statutes it argued were similar: Delaware, New York, Oklahoma, Vermont and Michigan. ECF No. 80-1 at 12 n.2. One of them (Delaware) put an end to mandatory "holds," discount bans, and minimum retail pricing, having abandoned the last of them in 1999 – in part based on concerns they "require[d] the posting and holding of prices *in violation of the Sherman Anti-Trust Act.*" 4 Del. Code

[22] The Defendants conceded below that all the challenged statutes boiled down to a single "basic prohibition – a single manufacturer must sell at the same price to every wholesaler and a single wholesaler must sell at the same price to every retailer" (ECF No. 38-1 at 5), and the Intervenors conceded that the challenged statutes had a "common purpose" (ECF No. 66-1 at 8). Moreover, the District Court's analysis made clear there is no coherent way to analyze Connecticut's "tripartite pricing mechanism," JA 135, *except* as a single pricing regime. It explained, for example, that although "the post and hold provisions by themselves contemplate no interaction between actors at different tiers of Connecticut's liquor market," the minimum retail price provisions "explicitly tie together the prices posted by wholesalers and those charged by retailers." JA 158. *See also* JA 159 [23] (explaining that the court's analysis of whether the post-and-hold provisions are hybrid "informs [its] efforts to answer the question of

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Regs. 29; 2 Del. Reg. Regs. 1538-41 (Mar. 1, 1999) (proposed rule) (emphasis added); 2 Del. Reg. Regs. 2160, 2162 (May 1, 1999) (adoption of rule and summary of comments). The minimum bottle pricing regime in New York was invalidated by *324 Liquor*, 479 U.S. at 343. Moreover, the current New York statute not only does not ban quantity discounts; it expressly authorizes them. N.Y. Alco. Bev. Cont. Law § 101-b(2)(a) (McKinney). The Oklahoma regulations Brescome Barton cited involve only price posting; they neither grant wholesalers control over retail prices nor forbid quantity discounts. Okla. Admin. Code 45:30-3-8. The Vermont regulations also do not grant wholesalers any control over retail prices. Vt. Admin. Code § 14-1-8(12). As for Michigan, that state's law applies only to wholesale prices; wholesalers neither set nor hold retail prices. Mich. Admin. Code R. 436.1726.

whether the minimum retail price provisions are best characterized as a unilateral or hybrid restraint").

Nonetheless, the District Court determined that it was precluded from considering whether the statutes *taken together* "authoriz[e] or compel[] private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8. JA 144-47. Instead, Judge Hall considered herself bound by her view of antitrust principles and federalism concerns to analyze the challenged statutes "individually." JA 145. The District Court's reasoning in this regard does not withstand scrutiny.

First, as a practical matter, these statutes are inextricably intertwined. The post-and-hold statute explicitly requires the posting of both case and minimum bottle prices. The "bottle price" posting requirement ***sets*** the minimum retail price, because it is that price (plus a fixed markup for "shipping or delivery"), when posted by the wholesalers, that sets the price floor for retail consumers. And the quantity discount ban is simply the legislature's reiteration that the posted case prices really are the minimum wholesale prices; no discounts are permitted, whether for bulk purchases or for any other reason.[12]

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[12] The District Court's reliance on Connecticut's general severability statute, Conn. Gen. Stat. § 1-3 (*see* JA 146) is not persuasive for largely the same reasons: it does not apply where, as here, challenged statutes are "mutually connected and dependent on [each other]." *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 685 (1990); *see also Burton v. City of Hartford*, 127 Conn. 80, 91 (1956) (presumption of separability created by separability clause

[24] **Second**, as discussed in section III, *infra*, courts must consider the purpose and effect of statutes challenged under the Sherman Act, and the purpose and effect of these statutes is unitary: to authorize and mandate horizontal price fixing, in order to keep retail prices artificially high. JA 20 (Compl. ¶ 19). And their economic effect – retail prices as much as 24% higher than in surrounding states, JA 20 (Compl. ¶¶ 18-19) – is also unitary; each aspect of the challenged statutes reinforces and contributes to the anticompetitive effect of the others.

Third, the Supreme Court has repeatedly done precisely what the District Court considered itself precluded from doing here: analyzing closely related statutes together in deciding whether they are preempted by federal law. The *324 Liquor* Court, for example, invalidated substantively identical statutes because the effect of the "*complex* of statutory provisions and regulations [was] to permit wholesalers to maintain retail prices at artificially high levels." 479 U.S. at 340 (emphasis added). Similarly, in *Midcal*, the wine distributor plaintiff challenged several interrelated statutes, involving "fair trade contracts," price posting, and minimum wholesale prices. 445 U.S. at 99. The Supreme Court analyzed as a single "threshold question" whether California's "plan for wine pricing" violated [25] the Sherman Act. *Id.* at 102. *See also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 104-06 (1992) (analyzing as a unit over a dozen different

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overcome when rent control provisions of ordinance were dependent on validity of eviction controls).

statutory provisions, some related to "public safety" and others to "occupational safety," in deciding whether they were preempted by the Occupational Safety and Health Act of 1970).

Fourth, although the District Court cited "federalism principles" as "counsel[ing] in favor of addressing the statutes in turn," it simply does not follow that federalism is "best given effect" by addressing each provision of state law separately. JA 145. A state statute is preempted by the Sherman Act only when 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." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). Because preemption is limited to those cases in which there is truly such an "irreconcilable conflict," federalism concerns are addressed in the preemption analysis itself. *Id.* at 659. The question whether particular state statutes are sufficiently interrelated in their purpose and effect so that they must be analyzed together is a separate question.

Fifth, the District Court reasoned that each statute must be analyzed in isolation because of the "framework by which the court analyzes antitrust preemption claims," as it "makes little sense, for example, to conceive of the post-[26]and-hold provisions as having vertical effect." JA 146. To be sure, many preemption cases involve only horizontal *or* vertical price fixing. But there is nothing about the "framework" for analyzing Sherman Act preemption claims

that *requires* that each interrelated provision of a challenged statute be analyzed in isolation. For example, if a statute mandates or authorizes horizontal price fixing, it is preempted, even if the same statute *also* mandates or authorizes vertical price fixing. The latter mandate, which viewed alone might dictate "rule of reason" analysis, obviously does not purge the former mandate of its *per se* illegality. *See Toys "R" Us, Inc. v. Federal Trade Comm'n*, 221 F.3d 928, 930 (7th Cir. 2000) (holding that an anticompetitive arrangement among a dominant supplier and multiple retailers was subject to *per se* scrutiny, even though it had both horizontal and vertical elements, because the "essence of the agreement network [the supplier] supervised was horizontal").

In short, the District Court erred in analyzing the challenged statutes in isolation. The Complaint states preemption claims based both on horizontal and vertical price fixing because these statutes are inextricably intertwined, and because the anticompetitive pricing regime they implement creates both horizontal and vertical price restraints.

[27] **III. The District Court Erred In Disregarding the Complaint's Allegations Concerning the Purpose and Effect of the Challenged Statutes.**

As stated above, the Complaint makes concrete factual allegations that the statutes' ***purpose*** was to mandate and authorize horizontal and vertical price

fixing, and that their ***effect*** has been precisely that: wholesalers set the same bottle and case prices down to the penny, month after month, resulting in significantly higher retail prices for Connecticut consumers. The District Court concluded it could ignore those well-pleaded allegations because "whether or not private parties are actually colluding has no import in the preemption analysis, which focuses [exclusively] on the text and face of the statutes at issue." JA 140. *See also* JA 138 n.6 ("Arguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government."). But the Supreme Court has made clear that courts **must** consider the purpose and effect of state statutes challenged under the Sherman Act.

Purpose. The core preemption question, as described below (§ V, *infra*) and articulated in *Rice*, 458 U.S. at 661, is whether the state statute (1) "mandates," "authorizes," or "contemplates" conduct "that necessarily constitutes a violation of the antitrust laws in all cases," and/or (2) "places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." The purpose for which a statute was enacted is inseparable from those questions.

[28] Total Wine's Complaint includes concrete allegations that the Connecticut legislature not only "contemplated" that wholesalers and retailers would act horizontally and vertically to fix prices. Total Wine alleges that the very purpose of the statutes was to "impel wholesalers to combine, conspire and agree, either tacitly or expressly, to fix and maintain

wholesale and retail prices," and to thereby permit wholesalers to fix and maintain those retail prices "at levels substantially above what market forces would dictate." JA 19-20 (Compl. ¶¶ 16, 19). By disregarding and thus effectively discrediting those well-pled allegations, the District Court turned *Twombly*, 550 U.S. at 544, on its head.

Effect. The Complaint alleges that the effect of the statutes has been two-fold: First, "[c]ompeting 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' on-post and off-post case prices." JA 20 (Compl. ¶ 19). Second, "retail prices for wine and spirits in Connecticut . . . are as much as 24% higher than prices offered for identical products in the surrounding states." JA 20 (Compl. ¶¶ 18-19).

While the District Court felt compelled to ignore these critical allegations, the Supreme Court has made clear that the practical effect of a statute, including whether "private parties are actually colluding," is critical to determining whether a challenged statute in fact "authoriz[es] or compel[s] private parties to engage in [29] anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8. The *324 Liquor* Court held that the New York statutes at issue were facially invalid in part because the evidence revealed that the "effect" of the statute was that wholesalers were in fact "set[ting] retail prices" and thereby "guarantee[ing] retailers large markups, sometimes in excess of 30 percent." *Id.* at 340. *See also Gade*, 505 U.S. at 107 ("[P]re-emption

analysis cannot ignore the effect of the challenged state action on the pre-empted field."). Although the fact that a state statute "*might* have an anticompetitive effect," standing alone, does not state a preemption claim, *Rice*, 458 U.S. at 659 (emphasis added), the actual anticompetitive effect of a statute is *relevant* to a plaintiff's preemption claim that the statute authorizes or mandates anticompetitive conduct. *See 324 Liquor*, 479 U.S. at 340. In dismissing the Complaint at the outset of the case, the District Court prevented Total Wine from even pursuing discovery of those anticompetitive effects.

The stark, horizontal uniformity of the Connecticut wholesalers' posted case prices to retailers and their posted minimum bottle prices that retailers must set as a floor for sales to consumers is further illustrated in the tables attached to the Complaint. JA 24-31. This evidence of horizontal uniformity is not just a plausible allegation (though that is all it needs to be at this stage); the clear evidence of uniform pricing across the entire statewide alcoholic beverage industry [30] establishes that the mandatory effect of *all* of the challenged statutes is horizontal (and vertical) price fixing.[13]

In short, the District Court could not resolve Total Wine's preemption claims, whether at the pleading stage or otherwise, without taking into account the

[13] These facts also are relevant to whether the challenged statutes are unilateral or hybrid restraints, which, among other things, turns on the "degree of discretion" that is exercised by "private actors" in setting prices. *Costco*, 522 F.3d at 890.

actual purpose, and the effects in the marketplace, of the challenged statutes. The Complaint stated concrete, plausible allegations as to both the purpose and effect of the statutes. The District Court erred in granting dispositive relief without having permitted Total Wine to pursue discovery and develop a further record on which the District Court (and this Court) will be able to make the requisite findings to assess fairly and completely Total Wine's preemption claims. For these reasons alone, this Court should reverse the judgment below and remand for further proceedings.

IV. The Quantity Discount Ban, Like The Other Challenged Aspects of the Act, Is A Hybrid Restraint.

Broadly speaking, there are three categories of anticompetitive restraints: (1) "purely private restraint[s]," *Rice*, 458 U.S. at 665 (Stevens, J., concurring), such as agreements to fix prices, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006), or to boycott a particular competitor, *United States v. General Motors Corp.*, 384 U.S. [31] 127, 140, 143-46 (1966); (2) purely "unilateral" action by states or local governments "to the exclusion of private control," which is beyond the reach of the Sherman Act, *Fisher v. City of Berkeley, California*, 475 U.S. 260 (1986); and (3) "[h]ybrid restraints," *Rice*, 458 U.S. at 665 (Stevens, J., concurring), which are "state laws authorizing or compelling private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8.

As the Intervenor-Appellees conceded below, "[t]he core feature" of a hybrid restraint is that it "requires or permits" *private parties* to dictate prices, "which the state merely "enforce[s]." ECF No. 66-1 at 14 (citing *Fisher*, 475 U.S. at 267-69). On three occasions, the Supreme Court has "held that hybrid price-fixing restraints are prohibited by the Sherman Act." *See Rice*, 458 U.S. at 666 (Stevens, J., concurring) (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *Midcal*, 445 U.S. 97). *See also 324 Liquor*, 479 U.S. at 342-43 (decided after *Rice*).

The District Court properly held that two aspects of Connecticut's "tripartite" price control regime – the post and hold rules, and the minimum bottle retail price provisions – constitute hybrid restraints. This conclusion, as the District Court explained, was mandated by *324 Liquor*, which held that New York statutes that were "remarkably similar" to the statutes challenged here were hybrid restraints. JA 150, 159. After all, public officials in Connecticut play no role [32] whatsoever in setting wholesale or retail prices for alcoholic beverages. Instead, Connecticut law empowers liquor wholesalers not only to set the prices at which they sell to retailers (through posted case prices), but also to establish a minimum price floor below which retailers are prohibited from selling to their customers (through posted "bottle" prices).[14] But

[14] The District Court also properly observed that although in a purely private antitrust case a plaintiff must prove "an actual agreement to fix or control prices," this Court "ma[de] clear . . . that no actual agreement needs to be pleaded or shown for a

as to the prohibition on quantity discounts, the District Court concluded it was analogous to the City of Berkeley's rent-control ordinance at issue in *Fisher*, which granted ongoing authority to a local board to set pricing in the form of maximum rents, and which the Supreme Court held to be a unilateral restraint. *See* JA 168-69. The District Court erred because the ordinance in *Fisher* was fundamentally different from the quantity discount ban at issue here. This Court should follow the Fourth Circuit's holding in *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208 (4th Cir. 2001) *("TFWS I")*, that a substantively identical quantity discount ban constituted a hybrid restraint.

The District Court acknowledged that the quantity discount prohibitions grant no authority whatsoever to government authorities to set prices. Instead, "wholesalers *may choose* what price they will charge all retailers." JA 169 [33] (emphasis in original). But having considered itself precluded from considering the interrelated effects of the challenged statutory provisions, and because wholesalers "are prohibited from charging different prices" to different retailers, the District Court concluded that the discount ban is a "unilateral" government-imposed restraint beyond the reach of the Sherman Act. JA 169 (quoting *Freedom*

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plaintiff to succeed on a preemption claim." JA 156-57 n.11 (citing *Freedom Holdings I*, 357 F.3d at 223 n.17). *See also 324 Liquor*, 479 U.S. at 345 n.8 (holding that no "contract, combination . . . or conspiracy" need be pleaded or proven when challenging a hybrid restraint).

Holdings IV, 624 F.3d at 50) (alteration omitted). This conclusion was wrong, for two reasons.

First, the "*Fisher* doctrine" only applies where a state or local government imposes restraints "unilaterally" and "to the *exclusion* of private control." 475 U.S. at 266.[15] A statute is "unilateral" ***only*** if it allows "no degree of discretion" to

* * *

[15] Under the *Fisher* doctrine, a state or local government that has engaged in "unilateral" conduct is held not to *violate* the Sherman Act – that is, such conduct is beyond the reach of the Sherman Act. There is a related *immunity* doctrine, known as "state action" immunity or "*Parker*" immunity (for the case *Parker v. Brown*, 317 U.S. 341 (1943)). Under that doctrine, even if a state governmental actor has violated the Sherman Act, he or she is "immune" from liability where (1) the challenged anticompetitive restraint was "clearly articulated and affirmatively expressed as state policy" and (2) the policy was "actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (1980). In this case, the Defendants and Intervenors did not assert *Parker* immunity as a basis for dismissal – and for good reason, because the State of Connecticut is not involved in setting, regulating or monitoring the prices set by the manufacturers and wholesalers, as the "active supervision" element requires. *See North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1112 (2015) ("The active supervision requirement demands, *inter alia,* 'that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.' ") (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)); *Midcal*, 445 U.S. at 105-106 (no *Parker* immunity because the state did not "establish[ ] prices," "review[ ] the reasonableness" of prices, or "monitor market

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Connecticut Fine Wine and Spirits, LLC Plaintiff.	)	
vs.	)	NO: 3:16cv1434(JCH) May 18, 2017 10:07 a.m.
Jonathan A. Harris, et al Defendants.	)	

141 Church Street
New Haven, Connecticut

HEARING

BEFORE:

THE HONORABLE JANET C. HALL, U.S.D.J.

APPEARANCES:

For the Plaintiff	:	James T. Shearin Pullman & Comley 850 Main Street Bridgeport, CT 06601 William J. Murphy Zuckerman Spaeder LLP 100 East Pratt St. Baltimore, MD 21202
For the Defendant	:	Gary M. Becker Robert J. Deichert Office of the Attorney General 55 Elm Street Hartford, CT 06141

Intervenor Defendants:

Wine & Spirits Wholesalers of CT, Inc.	Deborah A. Skakel Craig Flanders Blank Rome LLP 405 Lexington Avenue New York, NY 10174 Robert M. Langer Wiggin & Dana 20 Church Street Hartford, CT 06103
Connecticut Beer Wholesales Association, Inc.	David S. Hardy Carmody Torrance 195 Church St. 18th floor PO Box 1950 New Haven, CT 06510-1950
Connecticut Restaurant Assn	Meredith G. Diette Siegel, O'Connor 14 Eugene O'Neill Dr. New London, CT 06320
Connecticut Package Stores Association, Inc.	Patrick A. Klingman Klingman Law, LLC 280 Trumbull Street Hartford, CT 06103
Brescome Barton, Inc.	Jeffrey J. Mirman Hinckley, Allen & Snyder LLP 20 Church Street Hartford, CT 06103
Court Reporter :	Terri Fidanza, RPR

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[45] you must be in per se because the statute does not mandate or authorize improper conduct in all cases. That's all.

I don't mean to repeat myself, but I think it is important not to lose sight of that significant and critical distinction as to is this per se or is this rule of reason. Because if this is rule of reason, then Total Wine's Complaint as pled is out.

THE COURT: All right. I am going to ask another question that doesn't involve analyzing per se versus rule of reason.

MS. SKAKEL: Thank you, Your Honor.

THE COURT: You don't have to thank me.

In Battipaglia, you claim that the Court analyzed New York's post and hold statute as if its conduct at issue were unilaterally mandated by state statute. That's your brief at 27. Do you agree?

MS. SKAKEL: Yes, Your Honor.

THE COURT: I think you acknowledge, as you would have to if you haven't already, that Battipaglia preceded Fisher –

MS. SKAKEL: Yes, Your Honor.

THE COURT: – temporally. So Fisher is the first time – we've already gone over this – it's post-Norman Williams. It's the first time the Supreme Court created the analytical framework of horizontal versus – excuse me, [46] hybrid versus unilateral.

Move from there only if hybrid to per se or rule of reason. Okay.

MS. SKAKEL: Yes, Your Honor.

THE COURT: So I don't understand how you can argue to the Court that the unilateral nature of the post and hold requirement was confirmed – that's your word – by Battipaglia.

MS. SKAKEL: Well, Your Honor, keep in mind that first of all we're talking about post and hold in Battipaglia and we're not talking about post and hold in Fisher. But in the analysis that Judge Friendly undertook is effectively not inconsistent with the subsequent Fisher case. In other words, his analysis was that post and hold you have independent wholesalers setting their own prices. And so there is no – there is no slippage there in terms of whether or not there is, in fact, an agreement because the statute is not mandating that the wholesalers agree.

It is a function of the statute that they, first of all, determine what their own price is going to be and then post it.

THE COURT: I don't know that any of that addresses my question of how you can argue that Battipaglia supports and, in effect, found the statute at issue in Battipaglia to be unilateral.

MS. SKAKEL: It also followed, Your Honor, the [47] predecessor case, Morgan, which was the affirmance of Serlin Wine. And that case, of course, as Your Honor may recall did discuss a Connecticut statute

and that case followed a unilateral approach, if you will.

THE COURT: I am going to be really specific. Point me to the page and paragraph in Battipaglia that would, in your opinion, best support your statement that Battipaglia analyzed New York's post and hold statute as if the conduct at issue were unilaterally mandated by state statute.

MS. SKAKEL: Your Honor, in that regard, shall I provide you with the page in which Judge Friendly is discussing the Connecticut and federal court cases?

THE COURT: I don't know. I want you to provide me with the page that answers my question.

MS. SKAKEL: Well, Your Honor, he certainly is – one of the other sort of pieces of the framework that he's providing, of course, is his discussion of Midcal. And I think he's contrasting what was going on with Midcal and the – and the analysis the court undertook there with the analysis that, as we have noted in our brief is, if you will, a unilateral approach. And the discussion – let's see here. I mean, we cite page 170 in our brief, and then likewise it continues – again this discussion of the prior cases continues on to page 173.

So without going back, Your Honor, and literally [48] rereading, my sense is that, you know, again, his notion of going through the prior Connecticut cases as well as going through Midcal and comparing and contrasting, that is creating the appropriate analysis that

should apply here, which is one where the post and hold statute is viewed as a unilateral restraint.

THE COURT: Thank you very much. Who is going to argue for the plaintiff?

MR. MURPHY: I am, Your Honor.

THE COURT: It's Attorney Murphy?

MR. MURPHY: Yes, Your Honor. Nice to meet you.

THE COURT: Would you make sure the mic is in front of you, sir, so your voice is being picked up by the system.

It seems to me, and you correct me if I'm wrong, but your view is that I should look at the challenge scheme provisions collectively. Am I correctly reading your arguments?

MR. MURPHY: Yes, Your Honor, although that's I don't believe essential, but that is how we think the Court ought to proceed.

THE COURT: Okay. Page 1 of your brief, you say the three aspects of the Liquor Control Act taken together . . .

MR. MURPHY: Yes.

THE COURT: So I guess I am going to proceed on the assumption that's what you are asking me to do.

[49] MR. MURPHY: I think it is the preferred way to do it.

THE COURT: Why? What do you mean by – forget about preferred. What case or law, statute or otherwise would tell me that's how I would analyze the situation in front of me?

MR. MURPHY: The statutes work together and the statutes refer to each other.

THE COURT: But I have a lot of liquor cases here, including from New York, which have many of the same features. And when they are talking about – I don't know, I'm going to have the wrong cases, but in one case they're talking about resale price maintenance. I guess 324. They don't go and say, oh, by the way, you have got to look at this to see are there four other sections of the New York statute that could affect how anticompetitive this resale price piece is.

MR. MURPHY: I think that was a function of the plaintiff's challenge in that case, or the party that was challenging the statute because in 324, it was actually a defendant. But, for example, in the Total Wine case in the Fourth Circuit, TFWS, which was a Total Wine case, we challenged two aspects of the Maryland statute. And the Court agreed and considered them together.

In Costco, which I was not involved in, the parties [50] challenged nine different provisions and the appellate court felt, well, some of these provisions interrelate

and some don't. And so the court ended up looking at them all individually.

Here, in Connecticut, the below cost prohibition, what's been referred to as a resale price maintenance situation, is part and parcel of the post and hold. Because cost is defined as the lowest – the posted bottle price that the wholesaler posts. Now, the posted bottle price is defined by the post and hold statute. There's two different statutes. But what is being challenged – what we're challenging is the interaction of the two.

So we do challenge post and hold. We also challenge the resale price maintenance. We challenge the quantity discount because, as Judge Michael found in TFWS, it has the effect of enabling people to enforce – enabling the State to enforce more readily the post and hold provision.

THE COURT: Was that Blaine Michael?

MR. MURPHY: Blaine Michael.

THE COURT: Michael?

MR. MURPHY: Yes, Your Honor.

THE COURT: Well, I'm an old antitrust lawyer. I emphasize old, and I don't do much antitrust law. Haven't done it for a really long time, but I still remember that we, I thought, always framed antitrust analysis into horizontal [51] and vertical restraints. Would you agree with me?

MR. MURPHY: I agree that that is certainly a construct that is often applied.

THE COURT: So I'm struggling with how I take post and hold, which seems to me to be a horizontal scheme.

MR. MURPHY: Yes.

THE COURT: It relates to what the wholesalers or bottlers get to do or not do vis-a-vis the prices they set with the pricing by a retailer, which to me looks to be a vertical issue.

MR. MURPHY: It certainly has a vertical aspect. But, Your Honor, because of the way the statute works, every wholesaler is posting a bottle price for every retailer for every product and every retailer must charge at least that posted bottle price in every store in Connecticut. So there are horizontal aspects as well as vertical aspects.

This is not a case like Leegin where an individual leather producer wants to induce his retailers to provide better service and maintain higher prices and avoid the discounters. That's not what this case is.

THE COURT: Okay. I think I understand you, but I don't think it is going to help you. Let me try to explain. I will tell you what my reading is and then you tell me why I'm wrong.

In my view, Leegin announced a blanket rule vertical [52] resale price maintenance schemes, wholesaler maker of product compelling a price at the level below will never be per se illegal under the antitrust laws. It may violate the antitrust laws under a rule of reason analysis if the benefits we identify in this little

case, you know, small manufacturer, small share of the market, trying to support the little mom and pops that are the outlets of their product against the mega competition. That's all pro competitive we think nowadays in the light of the '80s, or whenever it was decided, as opposed to the dark ages of Dr. Miles. Right?

But Leegin goes on to educate us don't be so comforted by the fact that it isn't a per se rule that all resale price maintenance is rule of reason. It is that. It is going to be a standard blanket test rule of reason, but not all defendants will win under the rule of reason test for resale price maintenance. And you have just suggested in this case that, well, look, here we have got every player in the market, it's not just the little guy with the small share like in Leegin. We've got everybody up here at the top fixing a price and then driving that price down to their retailers. Correct?

MR. MURPHY: Yes, Your Honor.

THE COURT: Okay. So if we didn't have preemption, if you can preempt the statute, I might be thinking you've got a good shot of winning this case under rule of reason as [53] anti-competitive because of the nature of the whole market being involved. The warning signs that Leegin said let's not lose sight of this.

The problem for you – give me a minute to try to frame it. The problem for you is Rice, I think, Norman Williams and everything I have been attacking the other counsel over, this two-step construct, let's assume I find it is hybrid and then I move to rule it has

to be under Norman Williams irreconcilably in conflict, and there's language swear about it has to be a per se rule, you're under a rule of reason rule for that analysis that you want me to look at the whole market of how this resale price maintenance works, and therefore, you don't preempt.

MR. MURPHY: Your Honor, I don't think so. And the reason I don't think so is because 324 Liquor versus Duffy anticipated your question. And in that decision, Justice Powell wrote the following, mandatory industry-wide resale price fixing is virtually certain to reduce inter-brand competition as well as intra-brand competition because it prevents manufacturers and wholesalers from allowing or requiring retail price competition. The New York statute at issue in 324 Liquor specifically forbids retailers from reducing the minimum prices set by wholesalers.

Now, when the Supreme Court decided Leegin, it did not overrule 324 Liquor. It didn't discuss 324 Liquor. And [54] the Supreme Court recognized along the way in its historical analysis of Dr. Miles and all the vertical restraints and how they gradually all became rule of reason, it recognized, though, that there was still this notion that industry-wide resale price maintenance is different. And that's what Justice Powell wrote in 324 Liquor. It hasn't been overruled.

I don't know how the Supreme Court will decide it, but this is not a case involving the typical vertical resale price maintenance where a manufacturer tells a retailer here is what you're going to charge. This is

something entirely different, and it is system-wide industry-wide. I think that the Supreme Court may decide that, you know, this has got horizontal aspects and that makes it different.

THE COURT: I would give you a good shot at it, actually. I think – if I now understand your argument, it is not a bad argument.

MR. MURPHY: Thank you, Your Honor.

THE COURT: But the fact of the matter is I have precedence that binds me. And the precedence says – Supreme Court, if it's hybrid, it is preempted only if it is per se. There's all that strong language in Norman. Really, really strong. And then the Supreme Court says resale price maintenance is not per se. I don't see how I fit. I don't disagree, Justice Powell did a very fine analysis of how this [55] particular construct of statutes can create an anti-competitive effect, but it's an analysis. It's not a per se rule anymore.

MR. MURPHY: It was when he wrote it.

THE COURT: It was, but it isn't anymore.

MR. MURPHY: It hasn't been overruled, Your Honor. I mean, the Supreme Court doesn't go out of its way to overrule random court of appeals decision that it finds throughout the country that it might be at odds with the decision. The Supreme Court does not overrule sub silentio a decision of the Court rendered a few years before. 324 Liquor on this point, Your Honor, was unanimous.

THE COURT: But it relied on Dr. Miles in that very paragraph you quoted to me. Tell me anywhere that says that when the Supreme Court announces an – overruling a case which is the doctrinal case, it is the case which has been followed in hundreds of cases, including Supreme Court cases, I don't know of any principle that says that unless the Supreme Court names every case that relied on Dr. Miles, it isn't overruling those cases to the extent that they relied on Dr. Miles. That's can't be, sir.

MR. MURPHY: Your Honor, I think that it is. In 324, Justice Powell recognized the tension with Dr. Miles, recognized the criticisms of Dr. Miles, recognized the ways in which the Court had narrowed the per se rules with respect [56] to vertical restrictions, and did all of that. And in Leegin itself, the Court recognized that what it was doing with respect to a private cartel would lead perhaps to unfortunate consequences if it was not a private cartel involving a small segment of the market, but indeed the entire market.

THE COURT: But it didn't say – what it didn't say, sir, is it didn't say we're going to overrule Dr. Miles which said per se analysis for resale price maintenance. It didn't say we're going to overrule that for rule of reason with little industry participants, but when they are everybody or all the big boys, that's a per se rule.

MR. MURPHY: It also didn't, Your Honor, distinguish between statutorily imposed restraints

and private agreements because it wasn't dealing with the statutorily imposed restraint.

THE COURT: No.

MR. MURPHY: This case is one and 324 Liquor is one.

THE COURT: When I'm at the second step of my analytical framework, I'm looking at it under antitrust principles, per se rules, rule of reason. I understand I'm looking at it in the context of the state statute because I'm in the box because it's a preemption question. But I'm still analyzing it under universal, I'll call them, antitrust principles. Right?

[57] MR. MURPHY: You're right, Your Honor. But we are also challenging this aspect of the statutory scheme as a horizontal restraint.

THE COURT: I understand that. Maybe we'll get to that in a minute. You've got me all over my questions, though, I'm trying to – I think that takes care of that one. Let me get back to some of my earlier ones.

I just want to be clear you're making a facial challenge to the statute?

MR. MURPHY: Yes.

THE COURT: That's why you named, you know, the Assistant A.G.'s clients, right?

MR. MURPHY: We're seeking injunctive relief to declare the statute unconstitutional as – on contravention of the Sherman Act.

THE COURT: On its face.

MR. MURPHY: On its face.

THE COURT: Period, end of answer.

MR. MURPHY: On its face.

THE COURT: So to the extent I might find a few words here or there in the Complaint that try to tip their hat at private participants and what they are doing as a result of having this umbrella of the statute, that can only be understood in the context of a facial challenge, in other words, something on the face of the statute.

[58] MR. MURPHY: Yes, Your Honor. Can I explain that?

THE COURT: I think, as long as you don't take back what you just said.

MR. MURPHY: I'm not going to take anything back. I'm going to explain why it's there.

THE COURT: Go ahead.

MR. MURPHY: Because in Midcal, for example, the Supreme Court analyzed what had been the impact of the statutes being challenged on prices and analyzed the price impact. In Battipaglia, Judge Friendly stated that there was not the kind of evidence that he

would have expected to see on the impact on prices if the statute was as bad as the plaintiffs there was alleging.

This happens to be a case in which we can tell pretty readily what the impact of a statutory scheme is, and that's what those charts attached to the Complaint do.

THE COURT: I'm paying too much for my alcohol, right?

MR. MURPHY: You are paying too much for your alcohol.

THE COURT: While we're on this – I'm sorry I interrupted you, but I'll just keep interrupting you.

You make some statement or arguments in your brief, they are very well framed but I think irrelevant to me, about the whole question of whether this is a good choice for the [59] State of Connecticut, its consumers, even its business people. That's not my decision, correct? I might think that your position is the best position in the world in the sense of we don't need this scheme, but that isn't what I'm deciding here. Do you agree?

MR. MURPHY: You have to decide whether it is consistent with the Sherman Act.

THE COURT: I have to decide if it is preempted.

MR. MURPHY: Right.

THE COURT: That's fine. I interrupted you. So if you can remember where you, you can please proceed.

MR. MURPHY: So in some of these cases, the Court – and including the Supreme Court – has clearly looked at how does the statute work in the real world. And what our charts show is that in the real world what happens is every wholesaler that sells Tanqueray gin or a particular brand of vodka, whether a dual wholesale arrangement, the case price is identical every month to the penny because the competing wholesalers and the bottle price is identical every month. And when the case prices change to give the retailer a break and a discount from the usual price, bottle price remains the same. The retailer can never pass on the benefit to the consumer. That's why it is –

THE COURT: That's not what the statute contemplates, is it?

[60] MR. MURPHY: I'm not sure the statute contemplates that. The statute has caused that.

THE COURT: Allows it.

MR. MURPHY: Caused it. Allows it.

THE COURT: We won't quibble.

MR. MURPHY: It is anti-competitive.

THE COURT: Of course it is.

MR. MURPHY: That is the major concern of the Sherman Act.

THE COURT: Right, but we have lots of – we have lots of state statutes to which the antitrust laws don't apply, right? I might like to see more competition in my electric bill.

MR. MURPHY: Absolutely. It is one thing to have a regulated utility and it's another thing to have an unregulated liquor industry that has what the Supreme Court is Midcal called a gauzy veil of state enforcement over top of private market decisions. And these are private market decisions.

THE COURT: Well, but – well, that's fine.

The intervenors in their reply write that, quote, you, the plaintiff, do not assert irresistible pressure either in your Complaint or as a basis for your opposition, in other words, that second prong of the test. Are they correct?

[61] MR. MURPHY: Your Honor, I would like to say we'll allege whatever we need to allege to have our Complaint survive.

THE COURT: Tell me what you have argued.

MR. MURPHY: What we have argued is that this statute – I think we use the word facilitates and impels.

THE COURT: Right. That isn't in the test. That's why I think I'm having trouble with it.

MR. MURPHY: Maybe the word should have been compels, but it compels a uniform pricing system.

THE COURT: I really hate to – I'm very pedantic, you know. I have boxes. Is it in the mandate or authorize box or is it in the irresistible pressure?

MR. MURPHY: I think what we argue is mandate and authorize.

THE COURT: I think that's right. I just wanted to be sure. You argue in your brief, quoting – relying on the Costco decision, that a statute – this is on the hybrid unilateral issue. That a statute is hybrid so long as private parties have any power to set prices. That is – and I will finish your thought – pubic officials do not have exclusive authority to determine the nature and extent of the resulting consumer injury, end quote.

I don't see how that can be a correct framing because Fisher, which, of course, found the unilateral [62] violation, the City – I'm going to frame this backwards, but I will just state the facts. The City said you can't set the price at least to the extent it said it cannot be higher than X dollars for that apartment. So I don't know how you can argue – I mean, so that in – I have to finish my thought. I apologize.

In Berkeley, while the City set the maximum, the parties were free to set prices below that. So the private parties had some power to set prices. Not all of it, but some. And in that case, it was unilateral. Why is our case – why is. My problem is how you framed your argument, so I will go back to what you said.

The statute is it hybrid so long as private parties have any power to set price, that is where public officials do not have exclusive authority to determine the nature and extent of the resulting injury.

MR. MURPHY: I guess, Your Honor, I would start with the premise that if the result is anti-competitive, then I would look at the role of the state and the role of the private parties.

THE COURT: Maximum pricing is anti-competitive. We have cases if two private parties agree on a maximum price, that would be anti-competitive per se, right? I can't remember the name of the case. I learned it a long time ago. Had to be decided before the '70s. Maybe it is not good law [63] anymore. You don't remember maximum pricing?

MR. MURPHY: I'm not familiar with –

MR. LANGER: Yeah, horizontal maximums are no longer per se.

THE COURT: See I told you I was an old antitrust lawyer. It's not per se, but it can be anti-competitive.

MR. LANGER: Yes.

MR. MURPHY: What I'm really relying on. In the language in Fisher itself says that not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of Section 1. Certain restraints may be characterized as hybrid and that non-market mechanisms

merely enforce private marketing decisions where private actors are thus granted a degree of private regulatory power. The regulatory scheme may be attacked under Section 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. That's a passage from Fisher that discusses unilateral versus hybrid. And at that time, of course, 324 had not yet been decided so there were two examples, now there are three.

THE COURT: But this is the part of where I was sort of stifling the defendants and intervenors in trying to talk to me about how there's nothing compelled in the statute that make these people have to agree on things. I'll give them a chance to respond. But what is it in the scheme here that – [64] what's the difference? In Berkeley – okay. It is not per se anymore, but the City set the maximum and each landlord assuming there's not further antitrust violations individually decides, okay, Unit B is going to be this much below the max, but I'm charging the max on this one. He didn't have to get with anybody else. What's in this scheme that's any different than that?

MR. MURPHY: The rent control ordinance in Berkeley established what the base rentals would be based on the historical data, and they said that's it, and you can't raise your rents. And then they had some incrementals, I think, over time, you can raise it a little bit, raise a little bit. And you could come in, if you had a compelling case to make, and argue before the Rent Stabilization Board why you needed more rent for this

unit in this building in this neighborhood. And the Board then would adjudicate that.

Not too dissimilar in a situation where you would have a private electric utility back in the old days that would justify its rates and there's a regulatory board to decide whether those rates are reasonable or not. That's not what we have in Connecticut with respect to liquor prices. What we have instead is that each wholesaler sets a price for not only the case price that he's going to offer to his retailers, but also the bottle price that will dictate what the retailer can sell to the consumer. He does it every [65] month.

THE COURT: Unilaterally.

MR. MURPHY: It could be unilateral. He posts it. Everybody sees it. Everybody can match it if they have a comparable product, and then they have to hold it for 30 days.

THE COURT: It is the match and hold?

MR. MURPHY: That's certainly an aspect of it. It is the match and the hold. And it is the hold that creates the per se violation of the antitrust laws.

THE COURT: Except we have got Battipaglia to deal with.

MR. MURPHY: I mean, that was Judge Winter's dissent in Battipaglia. He said –

THE COURT: That's great, and I have the most respect for Judge Winter that I could possibly

articulate. In fact, I could say I agree with him. But he didn't write the majority opinion.

MR. MURPHY: I understand that, Your Honor.

THE COURT: And Judge Friendly is no slouch. You are going to tell me that I should overrule Judge Friendly?

MR. MURPHY: No.

THE COURT: I don't think so.

MR. MURPHY: I'm going to tell you that Justice Powell overruled Judge Friendly –

[66] THE COURT: Where?

MR. MURPHY: – in 324.

THE COURT: Well, no. How did he do that?

MR. MURPHY: Because he took a case that's just like the New York statute in every material respect and he said in 324, not only was it Justice Powell – on the issue of whether this is a hybrid restraint that has per se effects and that is a violation of the Sherman Act, setting aside the Twenty-First Amendment defense, the Supreme Court was unanimous on that. The only dissents were dissented on the Twenty-First Amendment analysis, which is not at issue in this case. So it was a unanimous Supreme Court opinion.

And unlike the situation with court of appeals decisions, it is not all that surprising that Justice Powell

didn't talk about Battipaglia. But it is interesting that he did talk about the earlier decision of the Second Circuit involving the Connecticut statutes and said they might survive this analysis. They might. But he's dealing with New York and he didn't cite Judge Friendly's opinion. And I don't think they can be reconciled. Other courts have agreed that they can't be reconciled, including the Fourth Circuit in TFWS.

THE COURT: I have to, in order to be fair, take you to task on your brief. You write at page 28 of your brief that mandatory industry-wide resale price fixing – that's a [67] quote from 324 Liquors in your brief. Then you stop the quote and say which . . . is precisely what is accomplished by a post and hold regime – is a per se violation of the Sherman Act.

I don't understand the jump from resale price fixing/maintenance which is what was at issue in 324 to its equation to a post and hold regime. Again, I'm in my boxes, I've got vertical, I've got horizontal. I don't know – you are making this very – I don't want to say clever. If it held, it would be a great argument, but I don't see how you can make the illative leap from the 324 analysis of resale price maintenance and equate it to post and hold. Maybe I – no, I didn't misquote you. I'm at the bottom, the last paragraph, third line.

MR. MURPHY: I'm with you, Your Honor. It's not an ellipsis. It is a dash.

THE COURT: But it is still a quote, then a dash, which as noted above is precisely what's accomplished by a post and hold regime. Is that the decision

we had earlier about how you want to morph the post and hold with the resale price maintenance?

MR. MURPHY: Really, that post and hold has been recognized both in Costco and in TFWS to be horizontal price fixing. That's what those courts held.

THE COURT: Not in 324.

[68] MR. MURPHY: No, not in 324. 324 did not involve a post and hold statute. It involved –

THE COURT: It involves retail price maintenance statute, which I have here.

MR. MURPHY: Yes, it did. But you have both here.

THE COURT: Let's get back to Battipaglia. 324 – well – Battipaglia was analyzed in the post and hold statute, right?

MR. MURPHY: It was.

THE COURT: So one would think that it would be very helpful to me in analyzing this case, would you agree?

MR. MURPHY: I would generally agree.

THE COURT: The Second Circuit decision written by Judge Friendly.

MR. MURPHY: I would generally agree with that, sure. Can I say something? There's a major distinction in Battipaglia between the New York statute and the Connecticut statutes that Judge Friendly

thought was important. If I can direct the Court's attention to it, I would like to.

THE COURT: Go ahead.

MR. MURPHY: On page 172 of the opinion, Judge Friendly noted that the challenge sections of the ABC law plainly are not resale price maintenance, a scheme of the sort, and then to Midcal. In contrast to Midcal, each wholesaler is completely free to file whatever price schedule [69] he desires, and his schedule now has no controlling effect on retail prices since the statute which prohibited retail prices at a price less than that established in the schedule has been declared to be unconstitutional by the New York Court of Appeals.

So Judge Friendly was looking at the interaction of this statute with the other statute that had imposed the prices on the retail level, noted that the New York Court of Appeals had declared that statute to be unconstitutional and thought that that was significant to his opinion because it really distinguished the case from Midcal.

THE COURT: Right. But it also distinguishes the post and hold from resale price maintenance sections.

MR. MURPHY: I think that's right. We have both in this case.

THE COURT: Okay. And so I don't understand how you equate the 324 holding that mandatory industry-wide retail price maintenance is precisely

what the post and hold regime accomplishes. I'm still hung up on page 28 of your brief.

MR. MURPHY: I'm still trying to convince you, Your Honor, that when you have resale price maintenance across an entire industry, applies to every wholesaler, applies to every retailer, applies to every product, that that in effect creates horizontal price fixing.

THE COURT: But we had that in 324, didn't we? You [70] may not have had post and hold, but you had every participant having to do resale price maintenance, right, or am I misremembering the case?

MR. MURPHY: No. Every participant was required to jack up their prices by a fixed 12 percent at the retail level, yes.

THE COURT: At the retail level, right. So we had what you just said we didn't have, we did have in 324. Everybody in the industry was doing resale price maintenance.

MR. MURPHY: Everybody was required to, yes. Which is why I say it hasn't necessarily been overruled by Leegin.

THE COURT: It hasn't what?

MR. MURPHY: It has not necessarily been overruled by Leegin or Leegin.

THE COURT: I don't understand. The section you quote at page 28, which I think is relying on Dr. Miles at that point – wait a minute. It is not in that paragraph.

Okay. Let me – if I understand, you're saying that nothing in – Leegin speaks about an resale price agreement and said we're going to reverse Dr. Miles' resale price agreements between that manufacturer and the retail distributors is not per se illegal. Okay. And you say that the flipping of the rule, the analytics of vertical agreements will now be rule of reason doesn't touch the rule that should be applied when there's more than one player or [71] one stream and it is everybody. Is that really what you are arguing?

MR. MURPHY: I'm really arguing that if it's industry-wide, then that's a different analysis.

THE COURT: That's fine. You say Leegin is one actor or one stream and here it is industry-wide and, therefore, Leegin doesn't give us an answer on the test to apply when it is industry-wide.

MR. MURPHY: That's right.

THE COURT: First of all, you would agree with me nothing in Leegin said that. They don't say, oh, by the way, this is only limited to the individual stream.

MR. MURPHY: They talk about the prospects of, you know, wide resale price maintenance can be anti-competitive and might be violative of the antitrust laws under rule of reason.

THE COURT: Right.

MR. MURPHY: They talk a lot about broader aspects of it, but they don't ever say, and by the way, if

you had a statute like the one in 324 Liquor, that would still be subject to the per se rule. They don't say that.

THE COURT: No, because what they have said is resale price maintenance is subject to rule of reason. And we'll point out to courts like me who have to have these questions answered by a trial level court about is something

* * *

[89] advisement. I know this case –these motions have been pending longer than I would have liked and I expect to get a decision out shortly. Hopefully, that won't be a promise I break. So – but they are all taken under advisement, and the Court will stand will recess. Thank you all very much.

(Whereupon, the above hearing adjourned at 12:20 p.m.)

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Terri Fidanza
Terri Fidanza, RPR
Official Court Reporter

17-2003-cv

United States Court of Appeals for the Second Circuit

CONNECTICUT FINE WINE & SPIRITS, LLC,
d/b/a Total Wine & More

Plaintiff-Appellant,

– v. –

COMMISSIONER MICHELLE H. SEAGULL,
Department of Consumer Protection;
JOHN SUCHY, Director, Division of Liquor Control,

Defendants-Appellees,

WINE & SPIRITS WHOLESALERS OF
CONNECTICUT, INC.; CONNECTICUT
BEER WHOLESALERS ASSOCIATION, INC.;
CONNECTICUT RESTAURANT ASSOCIATION;
CONNECTICUT PACKAGE STORES
ASSOCIATION, INC.; BRESCOME BARTON, INC.,

Intervenors-Defendants-Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PLAINTIFF-APPELLANT CONNECTICUT FINE WINE & SPIRITS, LLC'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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

JAMES T. SHEARIN
EDWARD B. LEFEBVRE
PULLMAN & COMLEY LLC
850 Main Street,
P.O. Box 7006
Bridgeport, Connecticut
06601
(203) 330-2000
Attorneys for
Plaintiff-Appellant

* * *

[7] Total Wine appealed, and a panel of this Court affirmed. The panel addressed the challenged statutes individually, rather than as a unified scheme that was intentionally anticompetitive. As to the minimum bottle retail pricing requirement, the panel held it was a purely vertical restraint and *324 Liquor* was effectively overruled by *Leegin*. Slip op. at 24-25. The panel held that quantity discounts and other price-discrimination prohibitions were "purely vertical" unilateral restraints controlled by *Leegin*. *Id.* at 26. And as to post-and-hold, the Court followed the majority opinion in *Battipaglia*, concluding that it had not been undermined by *324 Liquor*. *Id. at* 27-41.

ARGUMENT

I. The Panel Decision Entrenches a Circuit Split on Post-and-Hold Laws and Quantity Discount Bans.

A. This Is The Sole Circuit To Hold That Post-and-Hold Statutes Like Connecticut's Are Not Preempted By The Sherman Act.

As explained above, the core of Connecticut's anti-competitive regime is wholesalers' unilateral control over not only the prices they charge retailers, but also the minimum prices retailers charge customers. The Sherman Act preempts any statute that "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." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The circuits are split two (Ninth and Fourth) to one (Second) on whether statutes like these are preempted.

[8] As discussed below, the forerunner of this Circuit's position, the 1984 divided *Battipaglia* decision, was invalidated by the Supreme Court's 1987 *324 Liquor* decision. *See* § III, *infra.* Even without reaching that issue, the Court should grant *en banc* review because *Battipaglia* is an outlier; this Court should eliminate the circuit split and join the Ninth and Fourth Circuits in holding that statutory regimes like Connecticut's are subject to *per se* antitrust scrutiny and are preempted by the Sherman Act.

In *Battipaglia*, the majority acknowledged that New York's post-and-hold law "force[d] each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them . . . and that if this had been done pursuant to an agreement, the agreement would have constituted a violation of § 1." 745 F.2d at 172. But because the majority believed, despite "some doubt," that "Section 1 requires an agreement" – a premise the Supreme Court later rejected in *324 Liquor* – the majority concluded the statute "does not place 'irresistible pressure on a private party to violate the antitrust laws in order to comply' with it." *Id.* (quoting *Rice*, 458 U.S. at 661). In dissent, Judge Winter correctly predicted that the Supreme Court would eliminate the requirement of a private agreement in the context of statutory hybrid restraints; he would have held that the "requirement of adherence to announced prices," including among competitors at the same horizontal tier, was subject to *per se* scrutiny and violated the Sherman Act [9] because it "brings about the very anti-competitive arrangements the Sherman Act was designed to avoid." *Id.* at 179.

Since then, two other Circuits have held post-and-hold statutes are preempted by the Sherman Act. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001) ("The Maryland system . . . mandates activity that is essentially a form of horizontal price fixing, which has been called 'the paradigm of an unreasonable restraint of trade.' ") (citation omitted); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008) ("[A]n agreement to adhere to posted prices is a

per se violation without regard to reasonableness. . . . Such agreements . . . are anticompetitive because they are highly likely to facilitate horizontal collusion among market participants. . . .").

Both circuits expressly rejected the *Battipaglia* majority's analysis and instead followed Judge Winter's dissent. *See TFWS*, 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, at 308-09 (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, 105-06 (1980)].") (quoting Areeda & Hovenkamp ¶ 217b).

[10] Connecticut's statute is indistinguishable from the post-and-hold provisions invalidated in *TFWS* and *Costco*. *See also*, *e.g.*, *TFWS, Inc. v. Franchot*, 572 F.3d 186, 188 (4th Cir. 2009) (earlier Fourth Circuit opinion, concluding that the statutes were preempted); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding that Oregon's post-and-hold statute was preempted).

Total Wine argued before the panel that *Battipaglia* is no longer good law, and thus there should be *no* circuit split on whether post-and-hold statutes are preempted. The panel disagreed, concluding that *Battipaglia* remains controlling and that only the full Court can overrule it. This Court should grant *en banc* review to eliminate the circuit split, and overrule *Battipaglia*.

B. The Panel's Decision Also Entrenches a Circuit Split On Quantity Discount Bans.

The panel opinion also entrenches a circuit split with respect to quantity discount bans. The Fourth Circuit in *TFWS* squarely held that the Sherman Act preempts Maryland's quantity discount ban, which also is indistinguishable from Connecticut's. That volume discount ban "reinforce[d] the post-and-hold system by making it even more inflexible." 242 F.3d at 209. "Wholesalers post their prices as required, and discounts of any nature are prohibited by regulation." *Id.* Unlike with respect to post-and-hold, one other Circuit has reached the same conclusion as the panel here: that quantity discount bans are "unilateral" restraints. *See Costco,* [11] 252 F.3d at 898. But the fact that the panel opinion fortified the circuit split with respect to quantity discount bans further supports *en banc* review.

II. The Panel Improperly Disregarded Controlling Supreme Court Precedent.

In *324 Liquor*, the Supreme Court struck down a minimum-pricing and post-and-hold regime that was materially indistinguishable from Connecticut's. Contrary to the panel's conclusion, *324 Liquor* controls this case in two ways.

First, *324 Liquor*'s footnote 8 establishes that post-and-hold statutes like Connecticut's satisfy the "concerted action" requirement of Sherman Act § 1, which by its terms prohibits "contract[s], combination[s] . . .

or conspirac[ies], in restraint of trade." *See* 479 U.S. at 345 n.8. That footnote in the Supreme Court's opinion is not ambiguous, is not dicta, and is not distinguishable. It must be followed by this Court unless that aspect of *324 Liquor* has been overruled.

The panel found that *324 Liquor* was not controlling because Connecticut's regime did not "call for any private action, let alone concerted action," and that "*Fisher*'s emphasis on the need for concerted action reinforces" that *Battipaglia* – decided before *324 Liquor* – was correct. Slip op. at 38 (citing *Fisher v. City of Berkeley*, 475 U.S. 260 (1986)). But the Supreme Court in *324 Liquor* reached exactly the opposite conclusion – and cited *Fisher* in support. In *TFWS*, Judge Luttig was also skeptical that footnote 8 of *324 Liquor* reflected a proper understanding of prior Supreme Court precedent, including *Fisher.* 242 F.3d at [12] 214-15. The Ninth Circuit shared Judge Luttig's concern. *Costco*, 522 F.3d at 895 n.17. But both Judge Luttig and *Costco* (as well as the majority in *TFWS*) properly concluded that footnote 8 was controlling because, as Judge Luttig put it, "the Maryland regulations before us are not materially different from the regulations in *324 Liquor.*" 242 F.3d at 214.[1]

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[1] There also was no evidence of an "agreement" in *Midcal*, yet there as well the Supreme Court held that the state laws were hybrid restraints that were preempted. *Midcal*, 445 U.S. at 103. *See also Miller*, 813 F.2d at 1349 ("While it is true that there is no agreement or concerted activity among the wholesalers . . . the state compels activity that would otherwise be a per se violation

The Connecticut regulations at issue here are even more closely analogous to the New York regulations at issue in *324 Liquor* than the Maryland regulations in *TFWS*. Footnote 8 is as binding on this Court as it was on the courts in *TFWS* and *Costco*. At best, therefore, the panel decision splits with the other two federal Courts of Appeals to have considered the issue after *324 Liquor*. At worst, it openly disregards binding Supreme Court precedent. Either way, this Court should revisit the matter *en banc*.[2]

[13] **Second**, Total Wine argued that *324 Liquor* established that New York's minimum-pricing and post-and-hold requirements caused *industry-wide* resale price fixing, which the Supreme Court held to be a *per se* Section 1 violation. *See* 479 U.S. at 342. Again, this holding must be followed unless and until it has been overruled. The panel acknowledged that the minimum pricing components of the New York and Connecticut statutes, like the post-and-hold components, were "substantively identical," Slip op. at 24, but held that *Leegin* displaced the holding in *324 Liquor* that

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of the Sherman Act"); *Costco*, 522 F.3d at 893 (same); *TFWS*, 242 F.3d at 214 (Luttig, J., concurring).

[2] The panel also observed that *Freedom Holdings* treated *Battipaglia* as good law, a highly questionable reading of *Freedom Holdings* that is entirely inconsistent with the Ninth Circuit's reading. *Costco*, 522 F.3d at 894 n.16 ("[I]t appears that Judge Winter's view in *Battipaglia* has prevailed in the Second Circuit.") (citing *Freedom Holdings*, 357 F.3d at 223-24 n.17). The panel here, however, did not feel itself free to deviate from *Battipaglia*. The panel also relied on *Bell Atlantic Group v. Twombly*, 550 U.S. 544 (2007), which neither discusses *324 Liquor* nor comes close to overruling it.

New York's minimum pricing law was a *per se* violation of § 1. According to the panel, *324 Liquor* was a straightforward case about a vertical restraint, and after *Leegin* vertical restraints could never be considered *per se* violations of Section 1.

The panel overlooked Total Wine's argument that *Leegin* addressed purely private vertical resale price maintenance arrangements. It did not address statutory regimes that caused industry-wide resale price fixing. *E.g.*, App't Br. at 49-55; App't Repl. Br. at 16-20. The animating principle of *Leegin* is that economists had come to recognize *pro*-competitive justifications for a particular manufacturer's use of resale price maintenance. 551 U.S. at 889. A leather goods manufacturer, for instance, might set high retail prices to promote *intrabrand* competition among retailers based on exceptional service. Those set prices, in turn, could promote *interbrand* competition with other manufacturers on price.

[14] But the New York and Connecticut statutory regimes effectively eliminate all price competition among retailers. Wholesale prices must be shared and competing wholesalers given an opportunity to amend their prices, thereby eliminating price competition among wholesalers. *All* wholesalers are then required to set retail prices through the minimum bottle price provisions. The result is not the promotion of interbrand competition, as in *Leegin*, but rather the opposite. *See 324 Liquor*, 479 U.S. at 342 ("Mandatory industrywide resale price fixing is virtually certain to *reduce* interbrand competition as well as intrabrand

competition.") (emphasis added). The result is an entire industry of stabilized (i.e., fixed) prices at both the wholesale and retail levels. *324 Liquor* struck down that statutory regime *in toto*, and the Court in *Leegin* did not begin to contemplate whether its holding that private agreements for resale price maintenance should be judged according to a rule of reason analysis affected *324 Liquor*'s holding that a statutory regime that caused industry-wide price fixing was illegal *per se*.

Moreover, as Total Wine argued before the panel, "[i]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Nowhere in *Leegin* did the Supreme Court suggest it was overruling *324 Liquor*; *Leegin* does not even cite *324 Liquor*. Where "a precedent of [the Supreme] Court has direct application in a case," as *324 Liquor* does here, "the Court of Appeals should follow the case which directly controls" – even if the [15] case "appears to rest on reasons rejected in some line of decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

III. The *En Banc* Court Should Conclude That *Battipaglia* Does Not Control.

The panel expressly concluded that *Battipaglia* remains controlling, and that "[a]ny application to revisit *Battipaglia* is beyond this panel's authority." Slip op. at 41. Even if the panel's decision had neither entrenched circuit splits nor disregarded controlling Supreme

Court precedent, this Court should grant *en banc* review to overrule the wrongly decided and widely criticized *Battipaglia* opinion.

First, as set forth above, *Battipaglia* was abrogated by *324 Liquor*. A central premise of *Battipaglia* was that a statute is preempted only where it "compel[s] an[] agreement." 745 F. 2d at 170. The *Battipaglia* majority also suggested that it saw the preemption analysis as a balancing test, weighing New York's interest in "deal[ing] with the subject of intoxicating liquor" against "the federal commerce power." *Id.* at 169. There is no way to reconcile either *Battipaglia*'s "agreement" requirement or its interest-balancing test with *324 Liquor*.

Second, not only is *Battipaglia* an anachronistic outlier; it has been heavily criticized. The overwhelming opinion of courts and commentators is that *Battipaglia* reached the wrong outcome based on faulty reasoning. As the District Court noted, the *Battipaglia* court "[c]uriously . . . relied on cases that applied rule of reason scrutiny to arrangements by which competitors only *shared* price [16] information, rather than grappling with the additional complexity stemming from the state's requirement that wholesalers *hold* their posted prices." 255 F. Supp. 3d at 371. As discussed above, "posting" alone is not necessarily fatal from an antitrust perspective; many retailers and wholesalers publish their prices. It is the posting *and holding* that is pernicious, and that violates the Sherman Act.

Judge Winter, in his *Battipaglia* dissent, explained that New York's mandatory "hold" moved the challenged regime from rule of reason to *per se* analysis, because agreements to adhere to announced prices have long "been uniformly held illegal without regard to [their] reasonableness." 745 F.2d at 179 (Winter, J., dissenting) (citing *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 601 (1936)). As noted above, the leading antitrust treatise also criticized *Battipaglia* for the same reasons. "Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with *Midcal*." Areeda & Hovenkamp ¶ 217b2.

Battipaglia is no longer good law. That the panel felt constrained to follow it is further reason for the full Court to grant *en banc* review.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing *en banc* and thereafter reverse the judgment of the district court.

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Respectfully submitted,

/s/ William J. Murphy

William J. Murphy
John J. Connolly
Adam B. Abelson
ZUCKERMAN SPAEDER LLP
100 East Pratt Street,
Suite 2440
Baltimore, Maryland 21202

(410) 332-0444
(410) 659-0436 (fax)
wmurphy@zuckerman.com
jconnolly@zuckerman.com
aabelson@zuckerman.com

James T. Shearin
Edward B. Lefebvre
PULLMAN & COMLEY, LLC
850 Main Street,
P.O. Box 7006
Bridgeport, CT 06601
(203) 330-2000
(203) 576-8888 (fax)
jtshearin@pullcom.com
tlefebvre@pullcom.com
Attorneys for
Plaintiff-Appellant