No. 19-710

IN THE

Supreme Court of the United States

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

Petitioner,

v.

COMMISSIONER MICHELLE H. SEAGULL, et al.,

Respondents,

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

Intervenors-Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
I. DISARRAY AMONG THE CIRCUITS ON THE ANTITRUST PREEMPTION FRAMEWORK IS NOT "TOLERABLE."	2
II. RESPONDENTS CITE NO PLAUSIBLE BASIS FOR DEFENDING THE SECOND CIRCUIT'S OUTLIER APPROACH.	6
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

324 Liquor Corp. v. *Duffy*, 479 U.S. 335 (1987) 2, 7, 10
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 7
Cal. Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 6, 10
Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 10
Costco Wholesale Corp. v. *Maleng*, 522 F.3d 874 (9th Cir. 2008) 3, 8, 11
Fisher v. *City of Berkeley*, 475 U.S. 260 (1986) 10
Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 8
Miller v. *Hedlund*, 813 F.2d 1344 (9th Cir. 1987) 3
N.C. State Bd. of Dental Exam'rs v. *FTC*, 135 S. Ct. 1101 (2015) 10
Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 1, 8, 9
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 7
TFWS, Inc. v. *Franchot*, 572 F.3d 186 (4th Cir. 2009) 3
TFWS, Inc. v. *Schaefer*, 242 F.3d 198 (4th Cir. 2001) 3

OTHER AUTHORITIES

1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (4th ed. 2013) 7
Allie Howell, *Connecticut's Liquor Pricing Scheme Is a Bad Law That Just Won't Die*, Reason (June 27, 2017) 5

Page
Wholesale Pricing Practices and Restrictions, Alcohol Policy Info. Sys., https://bit.ly/2SEnZIc (last visited Mar. 16, 2020)..... 4

REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that the decision below conflicts with repeated decisions of the Fourth and Ninth Circuits. In fact, it entrenches not one but two circuit conflicts, which will not be resolved until this Court intervenes. The basic question underlying these conflicts is simple and fundamental: may a State enable private cartels to fix prices without supervision when it creates such effective mechanisms for tacit collusion that explicit collusion is unnecessary?

Respondents implausibly contend both that the answer is yes and that disagreement among the circuits is tolerable because it has persisted for many years. But the durability of a conflict, deepened by each new court of appeals decision, is a reason for granting certiorari, not denying it. Respondents fare no better in trying to downplay the stakes. The answer to the question presented is important not only to the rational development of antitrust doctrine, but also to the millions of consumers harmed by unsupervised cartels in Connecticut, New York, and Vermont (see Pet. App. 90a), and to States across the country that face uncertainty about how much price-setting authority they can turn over to unsupervised cartels.

On the merits, respondents offer no persuasive basis for siding against the Fourth and Ninth Circuits, against Judge Sullivan and his three *en banc* co-dissenters, against Judge Winter in his *Battipaglia* dissent, against the leading antitrust treatise, and against the great weight of legal scholarship. Despite all their hand-waving about *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982), that case holds only that plaintiffs may not bring facial antitrust challenges to state laws that may be *procompetitive* in application because they foster greater interbrand competition. In

contrast, the Connecticut regime is always and inherently anticompetitive because, by design, it suppresses both intra- *and* inter-brand competition.

Respondents are also wrong to cite *Norman Williams* for the proposition that a state law can be preempted only if it induces private actors to commit actionable Sherman Act violations of their own—and thus only if it causes them to enter into an express "agreement." According to this logic, a state regime such as this one is *never* preempted, even though it *always* has anticompetitive effects, so long as it creates mechanisms enabling private actors to mimic the effects of a private price-fixing cartel while sparing them the need to enter into any explicit "agreement." That position is not only deeply illogical, but also foreclosed by *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), decided five years after *Norman Williams*. The Fourth and Ninth Circuits, like the four dissenting Second Circuit judges below, understood that point. This Court should grant certiorari to resolve that conflict and restore much-needed consistency and rationality to this area of law.[1]

I. DISARRAY AMONG THE CIRCUITS ON THE ANTITRUST PREEMPTION FRAMEWORK IS NOT "TOLERABLE."

Respondents do not dispute that the decision below conflicts with those of the Fourth and Ninth Circuits. Both of those courts have held that the Sherman Act preempts post-and-hold statutes indistinguishable

[1] Our petition challenges all "three related but distinct components" of Connecticut's alcohol pricing regime: the minimum retail price requirements, the quantity discount ban, and the post-and-hold scheme. Pet. 3-4; *see* Pet. i (question presented); *cf*. Ints.' Opp. 2, 4 (wrongly implying that we challenge only the first two components of this inextricably interrelated scheme).

from this one. See *Costco Wholesale Corp.* v. *Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008); *TFWS, Inc.* v. *Schaefer* (*TFWS I*), 242 F.3d 198, 209-10 (4th Cir. 2001); see also *TFWS, Inc.* v. *Franchot* (*TFWS II*), 572 F.3d 186, 189-90 (4th Cir. 2009); *Miller* v. *Hedlund*, 813 F.2d 1344, 1349-51 (9th Cir. 1987). And the Fourth Circuit has further held that the Sherman Act preempts a wholesale discount ban that is also indistinguishable from Connecticut's. *TFWS I*, 242 F.3d at 209; see also *TFWS II*, 572 F.3d at 193 ("[A] volume discount ban facilitates self-policing among market participants because departures from established prices are readily recognizable.").

Rather than deny these conflicts, respondents argue they should now be "tolera[ted]" in perpetuity because they have already persisted for so long. Ints.' Opp. 3; see also Conn. Opp. 2 ("those conflicts are amply tolerable"). Of course, the long duration of a circuit conflict cuts for, not against, this Court's intervention. That is particularly so where, as here, the courts involved have repeatedly revisited the same issues and reaffirmed their longstanding disagreements.

Respondents also claim that the Connecticut regime is either "unique," Conn. Opp. 12, or similar to those in "only two states outside the Second Circuit," Ints.' Opp. 14-15—a figure that conspicuously omits the state laws already invalidated under Fourth and Ninth Circuit precedent. That claim is both irrelevant and false. It is irrelevant because *all* States are affected by these circuit conflicts. All States in the Second Circuit remain free to help unsupervised wholesaler cartels keep prices and margins high. See Pet. App. 90a (noting similarities between Connecticut scheme and those in New York and Vermont). In contrast, States throughout the Fourth and Ninth Circuits understand that they may not adopt such a

scheme. And States in all other circuits face continued uncertainty about the same legal issue.

Beyond that, Connecticut's regime is not nearly as unusual as respondents contend, as amicus Southern Glazer's explains. The panel itself recognized that "variations of [Connecticut's regime] are found in many states." Pet. App. 4a; see also *id.* at 90a. In fact, sixteen other states have some type of post-and-hold law, *Wholesale Pricing Practices and Restrictions*, Alcohol Policy Info. Sys., https://bit.ly/2SEnZIc (last visited Mar. 16, 2020), and these include "among the largest and most important markets for alcoholic beverage sales nationwide," Amicus Br. 10. Nor is it rare for states to have additional restrictions, similar to Connecticut's, that can operate in tandem with post-and-hold regimes to bloat downstream prices even further. See *Wholesale Pricing Practices*, *supra* (identifying fifteen states in addition to Connecticut that restrict or ban quantity discounts).

That said, Connecticut's provisions are particularly egregious in their documented anticompetitive effects, and no state has combined two-step post-and-hold requirements for wholesale prices with identical post-and-hold requirements for minimum bottle prices. Because Connecticut thus makes it especially easy for an unsupervised cartel to fix both wholesale and retail prices, Connecticut consumers pay as much as 24 percent more than consumers pay for identical products in surrounding States. Pet. App. 102a (¶ 18) (citing study). These documented consumer harms, tied to Connecticut's especially objectionable regime, are not a reason for denying certiorari. If anything, they make this case a particularly *attractive* vehicle for analyzing

the antitrust concerns underlying a state's creation of unsupervised price-fixing cartels.[2]

Finally, the intervenor respondents argue that antitrust intervention is unwarranted in Connecticut because "interbrand competition" is "robust" nationally. Ints.' Opp. 13. This is nonsense. Robust competition in States *without* anticompetitive regimes is no basis for tolerating such regimes in States that have them. And make no mistake: Connecticut's regime is explicitly intended to, and does in fact, undermine both inter- and intrabrand competition by promoting price uniformity, both upstream and downstream. See Pet. 3-4, 15. It thus disables both wholesalers and retailers such as petitioner from competing on the basis of price. As a result, Connecticut consumers pay almost exactly the same inflated prices no matter where in the State they buy alcoholic beverages. See Pet. 4 (citing Pet. App. 102a & 107a-119a (Comp. ¶ 19 & Tabs. 1 & 2)). Any residual competition that survives among Connecticut retailers exists in spite of, not because of, Connecticut's decision to destroy price competition.

The intervenor respondents may be right on one point: Connecticut's regime has not "interfered with the success of the industry," Ints.' Opp. 13, by which they presumably mean themselves. Indeed, Connecticut's regime has affirmatively *promoted* the interests of industry incumbents by facilitating their price-fixing cartel, enabling them to keep their prices high and profit margins fat. But of course that is precisely the

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[2] Given the strength of the state liquor lobby, Connecticut's legislature is notorious for its consistent hostility to repeal efforts. *See* Allie Howell, *Connecticut's Liquor Pricing Scheme Is a Bad Law That Just Won't Die*, Reason (June 27, 2017). It is thus implausible to speculate, as Connecticut does (Conn. Opp. 14), that the legislative process might yet favor competition sometime in the foreseeable future.

problem. The core objective of Section 1 of the Sherman Act is to eliminate such industry-friendly cartels, thereby restoring competition, lowering prices, and narrowing profit margins. This Court's intervention is needed to reaffirm that federal interest, which it has described as "the Magna Carta of free enterprise." *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980) (quoting *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). Although a State may let private actors coordinate prices so long as it adequately supervises the results, see p. 10, *infra*, it may not consign consumers to the unsupervised mercy of a private price-fixing cartel, as Connecticut has done here.

II. RESPONDENTS CITE NO PLAUSIBLE BASIS FOR DEFENDING THE SECOND CIRCUIT'S OUTLIER APPROACH.

On the merits, respondents try without success to explain why the panel below is right on the scope of Sherman Act preemption and everyone else is wrong, including the Fourth and Ninth Circuits, the four dissenting judges below, Judge Winter in *Battipaglia*, the leading antitrust treatise, and all major academic commentary on this Court's Sherman Act preemption jurisprudence. See Pet. 11-12 & n.4, 17-19 & nn.6-7.

1. Citing *Norman Williams*, respondents argue that a State may create unsupervised price-setting cartels so long as the cartel members do not *themselves* commit Sherman Act violations—*i.e.*, so long as the State sets up mechanisms (such as those here) that mimic all the anticompetitive effects of an explicit "agreement" while sparing the members any need to enter into one. See Conn. Opp. 21-22, 25-26; Ints.' Opp. 24-25 n.11. *Norman Williams* does not support that proposition, and for good reason: it is anathema to sound

antitrust policy, as this Court reaffirmed five years later in *324 Liquor*.

The Court there recognized that "the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior," even where "there is no contract, combination, or conspiracy" underlying that behavior. 479 U.S. at 345 n.8 (internal quotation marks and ellipsis omitted). As our petition explains (at 13-14), that holding not only was critical to the outcome in *324 Liquor*, but also is the only way to explain the Court's earlier holdings in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *Midcal*, both of which the Court cited favorably in the same passage. See 479 U.S. at 345 n.8. Specifically, *Schwegmann* invalidated the law challenged there because its intended result was "*not* price fixing by contract or agreement" but was instead "price fixing by compulsion." 341 U.S. at 388 (emphasis added). And whether or not the buyers and sellers in *Midcal* and *324 Liquor* had contracts, they "had *not* agreed with anyone about prices"; "they were merely obeying the law." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217b1 (4th ed. 2013) (emphasis added). Respondents' efforts to sweep these cases under the rug (*e.g.*, Ints.' Opp. 24 n.11) provide no basis for denying certiorari.[3]

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[3] Because the Sherman Act preempts state laws that facilitate tacit price-fixing cartels by sparing their members any need to enter into "agreements," *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), is simply irrelevant because it governs pleading standards where allegations of an agreement *are* necessary. *See* Pet. App. 87a (Sullivan, J., dissenting from the denial of rehearing en banc). Connecticut's suggestion that the Fourth and Ninth Circuit decisions might have come out differently if only they had focused more on the irrelevant and already-decided *Twombly* (Conn. Opp. 23) is unpersuasive.

Indeed, the statutory feature that respondents cite against preemption—the fact that Connecticut makes *explicit* collusion unnecessary by creating mechanisms for equally effective *tacit* collusion—is, if anything, the regime's most pernicious feature. "By prohibiting certain unilateral conduct in which private parties might otherwise have engaged, post-and-hold regulations limit the domain of rivalry and thus increase the likelihood of an anticompetitive outcome that private parties could not legally achieve by actual agreement." *Costco*, 522 F.3d at 895-96 (quoting John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 Yale J. Reg. 269, 312 (2003)).

2. *Norman Williams*, which preceded *324 Liquor*, obviously does not cast doubt on the latter case's holding. Instead, *Norman Williams* holds only that a plaintiff may not bring a facial challenge to a state law that has potentially *procompetitive* effects and that challenges to any accompanying anticompetitive effects must therefore proceed on a case-by-case basis. The restraint at issue there was purely vertical: the statute authorized each brand manufacturer to contract with a designated retailer in California (an "authorized importer") and prohibit any non-designated retailers from selling the same brand. 458 U.S. at 656-57. The law thus bore the same procompetitive hallmarks as the purely vertical arrangements in *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007); both permitted upstream actors to control which retailers could sell their products and at what price, in order to encourage interbrand competition. See *Norman Williams*, 458 U.S. at 661 (noting stat-

ute's potential for "promot[ing] interbrand competition").[4] But *Norman Williams* reaffirmed that the Sherman Act preempts any state statute that "on its face irreconcilably conflicts with federal antitrust policy." *Id.* at 659.

The Connecticut regime here presents precisely that "irreconcilable conflict." Respondents do not even try to identify pro-competitive justifications for this regime. To the contrary, Connecticut forthrightly concedes that the regime's avowed purpose and effect is anticompetitive. See Conn. Opp. 4, 6 (statute was enacted "to prevent people from consuming 'more liquor than they would if higher prices were maintained'" and to "prevent[] 'price wars' … and 'cutthroat competition'"). And whereas *Norman Williams* (like *Leegin*) addressed only purely vertical arrangements involving a single upstream firm and its downstream distributor, every aspect of the Connecticut regime has an inextricably horizontal character, enabling wholesalers to coordinate both their own prices and those of *all retailers industry-wide*. See Pet. 3-6, 15-16.[5] In that and

[4] *Leegin*, which was not a preemption case, casts no doubt on the relevant preemption holdings of *324 Liquor*, *Midcal*, and *Schwegmann* for the reasons explained in our petition (at 15-16)—reasons that respondents essentially ignore.

[5] Specifically, at the wholesale level, all wholesalers operating in Connecticut must post case prices from which they will not deviate for at least a month and may match competitors' case prices for identical brands, so that the retailers have no alternative sources of supply at lesser prices for those products. At the retail level, wholesalers dictate minimum bottle prices for every product they sell, and Connecticut retailers—all of them—must in turn adopt those price floors and hold them in place until such time, if ever, that the wholesalers set a new minimum bottle price. Pet. App. 100a-102a (¶¶ 12-19). This system on its face creates horizontal price restraints at both levels of the distribution

other respects, Connecticut's regime is strikingly similar to the invalidated New York regime in *324 Liquor*, which "applie[d] to *all* wholesalers and retailers" on an "industrywide" basis. 479 U.S. at 342.

3. As our petition explains (at 16-19), States may eliminate price competition, but only if they directly ("unilaterally") regulate prices themselves, see *Fisher* v. *City of Berkeley*, 475 U.S. 260, 269 (1986), or if they "actively supervise[]" the results of industry-wide price coordination, *Midcal,* 445 U.S. at 105. Such active supervision at least "ensure[s] th[at] States accept political accountability for anticompetitive conduct they permit," *N.C. State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1111 (2015). Connecticut faults us for even noting that this legislative alternative exists, arguing that "[s]tate action immunity is not at issue" because "this case was resolved on motions to dismiss." Conn. Opp. 26-27. This is blatant misdirection. It is uncontested that Connecticut has no mechanism for "actively supervising" the results of the private price-fixing cartel it has facilitated through these laws, and there is thus no "immunity" it could possibly invoke. But *Midcal* remains very much relevant to this case because it illustrates the basic point recognized by most courts and commentators that have addressed the issue: States may not facilitate private price-fixing conspiracies while offering consumers no supervisory protection from the resulting harms.

To be sure, lower courts and commentators have noted that this Court "has not provided clear guidance" on "the uncertain relationship between the 'active su-

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chain, which are classic per se violations of the antitrust laws. *See, e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648-50 (1980) (per curiam) (holding that agreements among competitors not to deviate from published prices is per se unlawful).

pervision' inquiry under *Midcal* and the 'hybrid/unilateral' inquiry under *Fisher*." *Costco*, 522 F.3d at 886-87 (citations omitted); see Pet. 18. The two lines of cases are nonetheless easily reconciled. In the Ninth Circuit's words, "a determination of whether a restraint is [unilateral or] hybrid will largely answer the question of whether the state actively supervises the restraint" under *Midcal*, and "there is such substantial overlap between the active supervision and hybrid inquiries that they effectively merge." *Costco*, 522 F.3d at 887-88. Respondents and the Second Circuit reject that approach, treating these deeply related lines of authority as though they occupied different doctrinal universes. That position is not only illogical, but inconsistent with the great weight of legal and academic authority. See Pet. 16-19 & nn.6-7. This Court should grant certiorari to resolve that fundamental disagreement and restore rationality to this area of antitrust law.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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