

ORIGINAL
in the

Supreme Court of the United States

BAXTER RICE, DIRECTOR, DEPARTMENT)	
OF ALCHOLIC BEVERAGE CONTROL)	
OF CALIFORNIA,)	
Petititioner)	
v.)	NO. 80-1012
NORMAN WILLIAMS COMPANY ET AL.;)	
-----)	
BOHEMIAN DISTRIBUTING COMPANY,)	
Petitioner)	
v.)	NO. 80-1030
NORMAN WILLIAMS COMPANY ET AL.;)	
-----)	
WINE & SPIRITS WHOLESALERS OF)	
CALIFORNIA,)	
Petitioner)	
v.)	NO. 80-1052
NORMAN WILLIAMS COMPANY ET AL)	

Washington, D. C.

April 21, 1982

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ALDERSON



REPORTING

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OF ALCOHOLIC BEVERAGE CONTROL :
OF CALIFORNIA, :
Petitioner :

v. : No. 80-1012

NORMAN WILLIAMS COMPANY ET AL., :

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WINE & SPIRITS WHOLESALERS OF :
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NORMAN WILLIAMS COMPANY ET AL., :

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Washington, D. C.

Wednesday, April 21, 1982

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:09 o'clock a.m.

1 APPEARANCES:

2 JOHN R. McDONOUGH, ESQ., Beverly Hills, Cal.; on behalf
3 of Petitioners in 80-1030 and 80-1052.

4 GEORGE J. ROTH, ESQ., Sacramento, Cal.; on behalf of
5 the Petitioner in 80-1012.

6 GEORGE G. WEICKHARDT, Esq., San Francisco, Cal.;
7 on behalf of Respondents.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Rice against Williams Company and
4 the consolidated cases.

5 Mr. McDonough, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF JOHN R. McDONOUGH, ESQ. ON BEHALF
8 OF PETITIONERS BOHEMIAN DISTRIBUTING COMPANY
9 AND WINE & SPIRITS WHOLESALERS OF CALIFORNIA

10 MR. McDONOUGH: Mr. Chief Justice, may it
11 please the Court:

12 The California statute at issue in today's
13 proceeding is Section 23672 of the California Business
14 and Professions Code. It provides: "A licensed
15 importer shall not purchase or accept delivery of any
16 brand of distilled spirits unless he is designated as an
17 authorized importer of such brand by the brand owner or
18 his authorized agent." The parties have referred to
19 this statute and I will refer to it in argument as the
20 California designation statute.

21 The judgment below ordered Respondent Rice,
22 who is the Director of the California Department of
23 Alcoholic Beverage Control, to refrain from enforcing
24 the designation statute, this determination based upon
25 the Court of Appeals' judgment that the statute is

1 invalid under the Sherman Act.

2 The court did not quite say that the statute
3 was being held invalid per se, but that indeed was the
4 thrust of the opinion and that could only have been the
5 basis of the judgment, because there was no factual
6 record before the Court of Appeals of California
7 pertaining to the effect of the statute on either
8 intrabrand competition in the sale of distilled spirits
9 in California or interbrand competition, and indeed
10 because by virtue of various stays that were ordered
11 during the course of the proceedings below, the statute
12 never did go into effect for practical purposes.

13 Now, the case was necessarily decided under
14 the supremacy clause of the United States Constitution,
15 although that constitutional provision was not mentioned
16 in the Court of Appeals' opinion. This of course cannot
17 be a preemption case in the true sense under the
18 supremacy clause, because it has long been decided that
19 the Sherman Act does not preempt for exclusive federal
20 regulation economic matters and affairs of the several
21 states.

22 From Parker v. Brown to the New Motor Vehicle
23 Board case, it is clear that the states may regulate
24 economic enterprise. So this can only be then adjudged
25 as a case in which it is contended that the designation

1 statute conflicts with the Sherman Act in such a fashion
2 as to be invalid under the supremacy clause.

3 This Court has often said and held, and we
4 have quoted those opinions in our brief, that every
5 effort should be made in adjudging a conflict or claim
6 to conflict case under the supremacy clause to interpret
7 the two statutes in such fashion in relation to each
8 other as to avoid a conflict between the federal and
9 state law. The court below did not mention those cases,
10 nor did the court proceed in accordance with their
11 teaching.

12 There is no conflict between the designation
13 statute and the Sherman Act, for the Sherman Act surely
14 does not require that every California wholesaler of
15 distilled spirits have the right to vend every brand of
16 distilled spirits that is manufactured in the land and
17 sold in California. The Sherman Act does not lay any
18 universal compulsion on everyone to deal with everyone
19 else.

20 Nor does the Sherman Act impose any restraint
21 on every device, agreement, or statute which may impose
22 some limitation on intrabrand competition. Indeed, the
23 court so held even with respect to private arrangements
24 imposing limitations on intrabrand competition in the
25 GTE-Sylvania case, where the Court held that such

1 restraints must be adjudged under the rule of reason
2 rather than on the basis of holding a statute or a
3 practice per se in violation of the Sherman Act.

4 The Court of Appeals did not apply the rule of
5 reason in adjudging the validity of the designation
6 statute. Indeed, the court could not have done so
7 because there was no factual record before the court
8 with respect to the factors that would be relevant to a
9 rule of reason analysis or determination of the validity
10 of the statute.

11 The statute was struck down without regard,
12 for example, to the market share of any distiller who
13 might in the future decline to designate any particular
14 wholesaler, without regard to whether in the facts of a
15 particular case there was a large amount of intrabrand
16 competition because the particular distiller had elected
17 to appoint a substantial number of wholesalers. There
18 was no consideration of what the interbrand competition
19 situation might be.

20 So the case was not adjudged under the rule of
21 reason. Now, we think that the California designation
22 statute cannot be held to be in conflict with the
23 Sherman Act for two individual, separate and sufficient
24 reasons: The first, because it does not involve or
25 contemplate or provide for, authorize or purport to

1 immunize any combination or contract or conspiracy by
2 anybody to do anything; and because it does not compel
3 or authorize or immunize any particular restraints on
4 intrabrand competition that might be established by any
5 particular pattern of designations and non-designations
6 by any particular brand owner. Each of those we think
7 is a sufficient reason.

8 Ever since Parker against Brown it has been
9 clear, of course, that the mere fact that a legislature
10 enacts a statute does not violate the Sherman Act. The
11 question of violation can only come up if the statute
12 authorizes some conduct by private individuals which may
13 violate the Sherman Act or which does.

14 It is the statute here that precludes the
15 importation of non-designated brands. The statute
16 operates, as of course many statutes do, by reference to
17 private conduct which may have preceded it and made it
18 effective.

19 QUESTION: Mr. McDonough, can I ask you a
20 question there? I think we've recently been advised
21 that Oklahoma has finally decided the effect of its own
22 statute is to prevent the import -- the export of these
23 products to California. Does the case have much
24 continuing significance as a practical manner?

25 MR. McDONOUGH: Yes, I think it does, Your

1 Honor, for several reasons. First, what the Oklahoma
2 Supreme Court decided was that there was no requirement
3 that an Oklahoma -- that a brand owner sell to an
4 Oklahoma distributor for sale outside the state. That
5 appears -- that appears to leave it open to brand owners
6 now to impose contractual limitations on Oklahoma
7 wholesalers.

8 Whether those can be effectively enforced is
9 not clear. The lawyers who have been involved in that
10 case are not at all clear what remedies would be
11 available to a brand owner who imposed that limitation
12 if it were not observed.

13 Second, Your Honor --

14 QUESTION: Well, wouldn't they have the remedy
15 of just refusing to continue to deal with that
16 wholesaler?

17 MR. McDONOUGH: Well, I think it's not at all
18 clear, because of the fact that Oklahoma is an open
19 wholesaling state, until we get a specific case in which
20 such a limitation is imposed and violated, the thing is
21 taken to court and there's been a discontinuance.

22 The second thing is that in the briefs of the
23 Respondents they have assured the Court that there are
24 sources of supply available to them from various sources
25 outside the state and that this is a situation in which

1 they can obtain the liquor and sell it. This is what I
2 understand their representation to the Court to be.

3 QUESTION: Is that a post-Oklahoma decision
4 representation?

5 MR. McDONOUGH: Yes, Your Honor, it is.

6 QUESTION: I see.

7 MR. McDONOUGH: Finally, Your Honor, I think
8 that California is entitled to have this statute on its
9 books in any event, because there have been at least two
10 situations in the recent past where there were open
11 wholesaling states, Minnesota first, now Oklahoma, in
12 which there was an opportunity to sell outside the
13 state. It's not clear whether and when some other state
14 may go to an open wholesaling law and permit sales
15 outside the state. So it would appear that California
16 would be entitled to have the statute on its books
17 against the possibility.

18 I think it is the case that at the moment we
19 can suppose the Oklahoma connection is not quite as
20 alive and well as it once was, but I don't think it's
21 disappeared, particularly in light of the
22 representations of the Respondents.

23 QUESTION: Would the volume of such sales have
24 any relevance? Assuming you're correct, that there
25 should not have been an invalidation on a more or less

1 per se basis, one of your arguments at least is that
2 maybe there should be sort of a rule of reason analysis.

3 If that approach were taken -- although I
4 understand you go beyond that in your argument -- if
5 that approach were taken, would the volume of this kind
6 of -- these sales be relevant?

7 MR. McDONOUGH: Yes, I would think it would,
8 Your Honor, in connection with any individualized case.
9 We have to suppose a particular case in which a
10 particular California wholesaler would seek an
11 opportunity to vend a particular brand, in which
12 opportunity was denied him, and then the question would
13 come up as to what effect this particular set of facts
14 had had upon competition in the sale of distilled
15 spirits in California.

16 The market share of the distiller would be
17 relevant, one would think. The amount of intrabrand
18 competition, the volume of sales; if it were a de
19 minimis volume, it probably wouldn't raise the
20 question.

21 But I think the question is still there,
22 because again one of the situations in which this kind
23 of statute and the kind of vertical arrangement that is
24 necessary or desirable, at least from the point of view
25 of the Petitioners and many commentators, is a situation

1 where someone is trying to introduce a new brand into
2 the state and wants to, in order to make that
3 introduction most effective, to have his wholesaling in
4 the hands of a relatively small number of people who
5 will have the incentive to promote it.

6 So again, in that situation it may be that the
7 volume involved is relatively small, but the
8 justification for the restraint on interbrand
9 competition would be at its maximum.

10 QUESTION: Could I ask, I take it your
11 position is, though, that even if on a rule of reason
12 analysis you would conclude that, absent this
13 designation law, there was a violation of the Sherman
14 Act, that even so the law would protect it from attack
15 under the Sherman Act?

16 MR. McDONOUGH: No, no, not at all, Your
17 Honor. Our view is exactly the --

18 QUESTION: Oh, really? So that if absent this
19 law this would be a violation of the Sherman Act you
20 would say that the law could not -- the California law
21 could not immunize it?

22 MR. McDONOUGH: Exactly, exactly. If the
23 situation were one, for example, where the Department of
24 Justice thought it appropriate to --

25 QUESTION: Well, do you think that's the

1 situation of the amicus brief filed by the Department
2 here?

3 MR. McDONOUGH: Yes, it's my understanding
4 that that indeed is the thrust, the precise thrust of
5 the amicus brief. The Department's brief argues for the
6 validity of the designation statute on the understanding
7 that it does not purport to immunize any conduct that
8 would otherwise violate the Sherman Act from being
9 adjudged in such violation. And it is indeed, that is
10 the basis upon which we think the statute clearly does
11 not offend the Sherman Act.

12 It is as though -- and every state statute
13 must be enacted as though it said, and this one
14 certainly does say that, subject to whatever
15 restrictions the Sherman Act may otherwise place on
16 interbrand competition or on restrictions of interbrand
17 competition, the statute undertakes to support.

18 QUESTION: So this conduct is not protected
19 under the Parker against Brown analysis for any reason?

20 MR. McDONOUGH: Well, Your Honor, that's not
21 the -- we have made a separate argument under Parker
22 against Brown. We have further made a separate argument
23 --

24 QUESTION: Well, if you've made a separate
25 argument under that, why wouldn't -- aren't you arguing,

1 then, that your conduct is just immune from Sherman Act
2 liability?

3 MR. McDONOUGH: All right, Your Honor, I
4 understand the point you're making. We have also made a
5 separate argument under the Twenty-First Amendment.

6 QUESTION: I understand that, too.

7 MR. McDONOUGH: All right. Now what I'm
8 addressing at this moment is, independently of whether
9 those arguments prevail or do not prevail, and assuming
10 that they do not and that this Court were then
11 nevertheless to reverse this particular case on the
12 ground that there is -- that the case has to be adjudged
13 under the rule of reason and we fail to prevail on our
14 other grounds, then in that event the statute would not
15 immunize the conduct from inquiry under --

16 QUESTION: My question, my first question, was
17 whether you weren't submitting that, however violative
18 of the Sherman Act your conduct might otherwise be, this
19 law protects you from Sherman Act liability on the
20 Parker v. Brown basis.

21 MR. McDONOUGH: We have made both of those
22 arguments.

23 QUESTION: Yes, yes.

24 MR. McDONOUGH: You're quite right, Your
25 Honor. But independently of those, we think the statute

1 -- if those arguments do not prevail with the Court and
2 if the situation is one where the Court says that the
3 statute is not valid under those provisions, then we say
4 it's still valid under the Sherman Act because it does
5 not seek to immunize the conduct of individuals that
6 otherwise would be in violation of the Sherman Act.

7 Your Honor, I believe I'll reserve the balance
8 of my time for rebuttal.

9 CHIEF JUSTICE BURGER: Very well. Mr. Roth.

10 ORAL ARGUMENT OF GEORGE J. ROTH, ESQ.

11 ON BEHALF OF PETITIONER BAXTER RICE

12 MR. ROTH: Mr. Chief Justice, may it please
13 the Court:

14 I'm here today on behalf of the states that
15 regulate the industry. My colleagues on the intervening
16 side and on the Respondent side represent the members of
17 the industry that are really fighting about how to
18 allocate markets. And we're here hoping to preserve our
19 right to regulate markets.

20 The states are very worried because of the
21 import of the Court of Appeals' decision that's before
22 us today. They're worried because if you read that it's
23 very easy to get the impression that if any state liquor
24 statute affects competition in some material way,
25 automatically you must say, let's start with the Sherman

1 Act.

2 We believe that the Court has told us for some
3 45 years, starting with the Young's Market case and
4 going through all of the cases -- Ziffirin, Seagram's,
5 McKittrick, and Midcal -- that where we have a pure
6 importation situation, or in Midcal they talk about the
7 structure of the distribution system, that then we look
8 to see first if the Twenty-First Amendment applies.

9 And I think it's important as to where you
10 start, because if you start with the Sherman Act you
11 possibly and very readily come to a different
12 conclusion. If you start with the Twenty-First
13 Amendment, then you say that the burden is on the people
14 attacking the statute, because they have to show that
15 the Twenty-First Amendment has not granted this power
16 over importation to the state. If you start with the
17 Sherman Act, the state has to come in, it's a negative
18 kind of a thing, and say, well, the Sherman Act doesn't
19 cover us because.

20 And so the states feel that we don't want you
21 to change the law, we don't want you to do anything
22 except tell us that what we think you've told us for 45
23 years is still the law, that we're in a pure importation
24 case, we have the right to regulate the industry.

25 Now, if you look at the Midcal case upon which

1 the present case was based by the Court of Appeals, you
2 can see a great difference. The Midcal case had no
3 concern whatever with importation. The Midcal case was
4 a retail price maintenance case and the goods were in
5 the retailer's store before you could have the impact of
6 the statute.

7 In California, the wholesaler in the very
8 statute we're talking about, or the importer, must bring
9 the goods to rest. It's the second sentence of that
10 particular section that the court said wasn't relevant.
11 But they have to bring the goods to rest in the state.

12 So that by the time in Midcal you get to the
13 price-fixing law you have nothing whatsoever to do with
14 importation at all.

15 And the other thing I would like to mention,
16 Your Honors, is that the briefs both of the Respondent
17 and the Solicitor seem to infer that there's very meager
18 evidence of any state purpose, and I must confess that
19 when I first got this case and looked at it, I looked at
20 this statute and I tried to find legislative history.
21 Your Honors well know that when you're dealing with
22 state legislative history it's a difficult problem to
23 find anything except most of the time mere supposition.

24 But then -- I guess it's serendipity of some
25 kind or another -- I started to read the statute again

1 and I started to read the other night the whole
2 Alcoholic Beverage Control Act, and it suddenly dawned
3 on me that there is a specific purpose. Now, one of the
4 purposes we've discussed is the preservation of the
5 three-tier structure of the distribution system, and I
6 want to go into that.

7 But Your Honors, the first section of the
8 Alcoholic Beverage Act is Section 23001, and it says:
9 "This division is an exercise of the police powers of
10 the state for the protection of the safety, welfare,
11 health, peace and morals of the state, to eliminate the
12 evils of unlicensed and unlawful manufacture, selling
13 and disposing of alcoholic beverages, and to promote
14 temperance in the use and consumption of alcoholic
15 beverages."

16 Then it goes on to say: "It is hereby
17 declared that the subject matter of this division
18 involves in the highest degree the economic, social and
19 moral well-being and safety of the state and all of its
20 people. All provisions of this division shall be
21 liberally construed for the accomplishment of these
22 purposes."

23 And that's why you can't find any legislative
24 intent for the particular statute that amends another
25 statute. The new statute puts the existence of the

1 factual situation right back where it was before the old
2 Rice case in California. And as a consequence the state
3 then comes up and has purpose.

4 The state has -- one of the purposes is the
5 regulation of people dealing with the liquor business,
6 and if we may look at that for a minute. We have in
7 Oklahoma or some other state a wholesaler or a jobber;
8 we have no control over him. Respondents tell us that
9 the brand owner has totally divested title and sold it
10 to this particular person in Oklahoma, to use that
11 example, and all he has is the shipping certificate. He
12 spends \$50 for it.

13 Now, he's not somebody we've investigated
14 thoroughly. He's not somebody who has a tremendous
15 investment in his business. And supposing, just for an
16 example, that Oklahoma wholesaler were to come into
17 California or some of the other states that have similar
18 laws and were to give free goods to the retailer. It's
19 the Oklahoma wholesaler.

20 Or suppose the Oklahoma wholesaler were to
21 come in and stock the shelves of the retailer. These
22 things are prohibited under California law and in the
23 law of many of the states. And yet, the state would
24 have no way to go and discipline that Oklahoma personage
25 or that Oklahoma business. So we have the right and

1 we're looking for the right to continue the regulation
2 in that aspect.

3 This Court I don't think -- I mean, the court
4 below said they couldn't find any reason for temperance,
5 and they assumed that was the only reason for a liquor
6 regulation statute. I can't find any. I don't think
7 this statute has anything to do with temperance. I
8 don't think it has to do with public welfare and
9 morals.

10 But it has to do with economic well-being of
11 the people of the state because of the fact that in some
12 way you can argue it helps the state control the revenue
13 that it gets from the liquor tax.

14 QUESTION: May I ask you, with respect to the
15 words "licensed importer" in the statute --

16 MR. ROTH: Yes, Your Honor.

17 QUESTION: -- do those words just refer to
18 wholesalers or do they include retailers?

19 MR. ROTH: No. Retailers -- you see, in
20 California there's this specific division. The
21 wholesaler cannot own a retail license. The brand owner
22 cannot own a retail outlet.

23 QUESTION: Well, does that mean a licensed
24 importer must be a wholesaler?

25 MR. ROTH: A licensed importer must be a

1 wholesaler in California, yes, Your Honor. And
2 supposing again that the Oklahoma connection man owned a
3 retail store in California. He'd be violating our law
4 very specifically, but we would have no way to go
5 against him, because he didn't have a license, all he
6 had was a shipping permit, that we could cancel, I
7 suppose.

8 QUESTION: Well, are these sales by the
9 Oklahoma wholesalers made to retailers or wholesalers?

10 MR. ROTH: No, they must be made to
11 wholesalers, Your Honor. The retailers have to buy from
12 California wholesalers.

13 QUESTION: No, I mean assume the statute --
14 what's happening today --

15 MR. ROTH: Yes.

16 QUESTION: -- without this, when the statute
17 is not in effect, to whom are the Oklahoma wholesalers
18 selling?

19 MR. ROTH: They're selling to California
20 wholesalers, Your Honor.

21 QUESTION: Well, aren't all the California
22 wholesalers regulated by the state?

23 MR. ROTH: Yes. But suppose --

24 QUESTION: So I don't understand -- you were
25 explaining the state purpose was to prevent sales by the

1 Oklahoma wholesalers to California retailers.

2 MR. ROTH: No, to California wholesalers, Your
3 Honor. But you see --

4 QUESTION: Well then, how does your free goods
5 example fit?

6 MR. ROTH: Let me go into it a little bit.
7 It's a little complex unless you're in the business, I
8 think. And that is this: that under our law the brand
9 owner or the wholesaler is not permitted to do anything
10 for the retailer, in effect.

11 And here we have an outside Oklahoma
12 wholesaler, who is outside the chain of existence of the
13 regular chain. There's nothing to prevent him from
14 coming in and doing those things for the retailer that
15 the California wholesaler is prohibited from doing or
16 that the brand owner is prohibited from doing, because
17 we can't reach him, we can't go after him. He's over
18 here.

19 QUESTION: When he comes into California you
20 can reach him.

21 MR. ROTH: He doesn't come, Your Honor. He
22 sells his goods in Oklahoma to a California wholesaler.
23 If he comes in and stocks the shelves, we can't stop
24 him. We can just possibly revoke his permit. But he is
25 not a licensee of the Department.

1 QUESTION: No, but you regulate all his
2 customers.

3 MR. ROTH: We regulate his customers, that's
4 true. But suppose we want to go against the person. I
5 mean, if the brand owner or the California wholesaler
6 were to come in and give free goods, for example, to a
7 retailer, we could go in and we could discipline him and
8 take his license away, and he's got a tremendous
9 investment in it.

10 QUESTION: Well, just so I understand your
11 argument, your point is that your discovery of the other
12 evening about the real purpose of this statute was it
13 was to prevent the Oklahoma wholesaler from giving free
14 goods to California retailers?

15 MR. ROTH: That's not the only thing.

16 QUESTION: That kind of thing.

17 MR. ROTH: Those types of things.

18 QUESTION: Is there any evidence that this has
19 ever happened?

20 MR. ROTH: I have none, Your Honor. I don't
21 know of any. But the point is that we're all in a
22 hypothetical situation, because these people are
23 attacking the Act on the face of the Act. There's no
24 evidence whatsoever. In the court below a motion was
25 made to strike a lot of this evidence and the court

1 said, we don't have to honor the motion or even discuss
2 it because we're not going to look at the evidence,
3 we're not going to consider it.

4 QUESTION: A California wholesaler is free, as
5 I understand it, to sell to any California retailer.

6 MR. ROTH: That is correct, Your Honor.

7 QUESTION: So there is full horizontal
8 competition among retailers?

9 MR. ROTH: Yes, Your Honor.

10 I have nothing -- Your Honor?

11 QUESTION: Do you think the California
12 wholesaler is free to -- I suppose he is as far as the
13 law is concerned, the statute is concerned -- to sell
14 outside the state.

15 MR. ROTH: We don't prevent him if some other
16 state doesn't prevent him, Your Honor. That's not a
17 California problem, and we have no way of preventing him
18 from selling outside the state.

19 QUESTION: And -- well, what do you mean, you
20 have no way?

21 MR. ROTH: Well, I mean we don't have any
22 grounds for disciplining him, let's put it that way. I
23 don't know of any prohibition.

24 QUESTION: Well, aren't you free to impose,
25 under more recent cases, aren't you free to impose some

1 territorial restraints on your wholesalers?

2 MR. ROTH: I think we can.

3 QUESTION: Reasonable ones.

4 MR. ROTH: I think we can.

5 QUESTION: You think you probably could impose
6 a restraint on your wholesalers not to sell outside of
7 California?

8 MR. ROTH: I have some question about that,
9 Your Honor. I don't know if we could. I really do not
10 know. I hadn't thought about it and I do not know the
11 answer. But I know this, that --

12 QUESTION: Well, what you're saying, then, is
13 that even aside from the Oklahoma law, even if there was
14 no Oklahoma law, you would have some doubt that you
15 could discipline your Oklahoma wholesalers for selling
16 to somebody in California.

17 MR. ROTH: I believe that's true --

18 QUESTION: Well, if you have doubt about that,
19 you'll certainly be getting an awful lot of help you
20 didn't have from this California law.

21 MR. ROTH: Well, the purpose of our law is to
22 make certain that the Oklahoma people don't come in.

23 QUESTION: Exactly. So that the California
24 law is giving you something you couldn't otherwise do to
25 an Oklahoma wholesaler; is that right or not?

1 MR. ROTH: No. It's something we do to our
2 own wholesalers, but all we can do is --

3 QUESTION: You just told me you had some doubt
4 that you could keep one of your wholesalers from selling
5 outside the state of --

6 MR. ROTH: One of our wholesalers from selling
7 in another state, yes.

8 QUESTION: Yes.

9 MR. ROTH: That's correct.

10 QUESTION: So you would have some doubt that
11 you could keep an Oklahoma -- or you have some doubt
12 that you could keep a wholesaler in Utah from selling to
13 a wholesaler in California.

14 MR. ROTH: No, no, I have no doubt. If our
15 statute says so and our statute is correct --

16 QUESTION: I don't -- well, never mind.
17 That's fine. Thank you.

18 MR. ROTH: Well, all right. I have nothing
19 further, Your Honors.

20 CHIEF JUSTICE BURGER: Mr. Weickhardt.

21 ORAL ARGUMENT OF GEORGE G. WEICKHARDT, ESQ.

22 ON BEHALF OF RESPONDENTS

23 MR. WEICKHARDT: Mr. Chief Justice and may it
24 please the Court:

25 What is fundamentally wrong with this statute

1 is that it authorizes private parties to prohibit
2 otherwise legal interstate commerce which would exist in
3 a free market. Under this private system of regulation,
4 a distiller may prevent interstate movement of goods
5 which he originally and voluntarily sold without any
6 restrictions on resale as to customer or territory.

7 Now, the Respondents are fully licensed by the
8 State of California to import liquor. They purchase
9 liquor in Oklahoma from Oklahoma jobbers who obtain this
10 liquor from the distillers without any restrictions on
11 resale. The liquor is resold by the jobbers to the
12 California wholesalers, also without restriction.

13 Now, both the California wholesalers, the
14 Respondents here, and the Oklahoma jobbers observe all
15 applicable state and federal regulations as to the
16 interstate movement of this liquor. In California, the
17 Respondent wholesalers compete with wholesalers who
18 purchase directly from the distiller -- these are the
19 so-called franchise wholesalers -- except the
20 Respondents sell to California retailers for less than
21 the franchise wholesalers because they charge a lower
22 markup.

23 Now, the designation procedure at issue here
24 works like this. If the distiller agrees to designate
25 his franchisees to import but nobody else, then all

1 non-designated importers are prohibited from importing
2 that brand. So to recapitulate, the distiller may
3 prohibit trade in goods which were not purchased
4 directly from the distiller, but were purchased from a
5 third party without any restriction on resale, goods
6 which have become the full legal property of the
7 Respondent and which in all previous sales, these goods
8 have been sold without restriction.

9 Now, this designation procedure is a violation
10 of the Sherman Act --

11 QUESTION: Well, what conduct of the distiller
12 really violates the Sherman Act? He designates a -- one
13 importer for his brand in California. Now, isn't that
14 -- so far there's nothing illegal about that, is there?
15 He designates one and he refuses to designate anybody
16 else. Suppose the state law authorizes him to do that.
17 There's nothing wrong with that, is there, if that's as
18 far as it goes?

19 MR. WEICKHARDT: The violation is the
20 exclusion of the Respondents. The conduct which he
21 does, the only conduct which the statute requires, is
22 for him to agree to designate a particular wholesaler.

23 QUESTION: All right, all he does is designate
24 one wholesaler. And everybody else applies to him; he
25 says, sorry, I only have one wholesaler in the whole

1 state. Now, does that violate the Sherman Act?

2 MR. WEICKHARDT: Yes, because this statute
3 gives that --

4 QUESTION: I'm not asking about this statute.
5 I'm just saying, in the first place, all the state
6 authorizes him to do is to designate licensees in the
7 state. So far isn't -- that doesn't violate the Sherman
8 Act, does it?

9 MR. WEICKHARDT: Just that agreement itself
10 would be innocuous if it were not that the statute --

11 QUESTION: He designates one and he refuses to
12 designate anybody else.

13 MR. WEICKHARDT: Yes. Now, that agreement
14 alone would be innocuous but --

15 QUESTION: Agreement? There's no agreement.
16 There's just that he designates one and refuses to
17 designate others. That's not an agreement.

18 MR. WEICKHARDT: Well, I assume that he's not
19 designating someone who is unwilling to serve as an
20 importer.

21 QUESTION: Oh, sure.

22 MR. WEICKHARDT: I think the Court --

23 QUESTION: He serves as an importer. But
24 there's no agreement between the two that he won't
25 designate anybody else. He just doesn't designate

1 anybody else.

2 MR. WEICKHARDT: Yes, but the statute here
3 gives the agreement to designate that effect. If he
4 agrees --

5 QUESTION: I know, but the state law just
6 comes along and says, anybody who isn't designated as an
7 importer by the distiller may not import that brand.
8 That's what it says. That's all it says. And the state
9 liquor control people suddenly find somebody who isn't
10 designated importing that brand, and they prosecute
11 him.

12 Now, is that a violation of the Sherman Act?

13 MR. WEICKHARDT: I believe the violation here
14 is the exclusion of someone --

15 QUESTION: The importer -- the distiller
16 doesn't do anything but designate one licensee in the
17 whole state. That's all he does.

18 MR. WEICKHARDT: Well, the result of that
19 conduct under the statute is that people who can get
20 these goods elsewhere free of restriction are thereby
21 prohibited.

22 QUESTION: That's the statute that does that.

23 MR. WEICKHARDT: Well, I don't think you can
24 say that the statute does the restriction, because the
25 statute is not self-actuating. Basically what happens

1 under the statute is that only those importers who are
2 authorized by the distiller may import. It's not
3 substantially different from a statute that would say
4 that he can agree to import some and prohibit others
5 from importing.

6 QUESTION: What if the distiller found that a
7 non-designated wholesaler was in fact getting a-hold of
8 some of the distiller's products from another wholesaler
9 out of state, and the distiller simply sued the
10 out-of-state wholesaler for a breach of a private
11 agreement between them that the out-of-state wholesaler
12 wouldn't sell to people in California. Would that be a
13 violation? Simply a state court action on contract;
14 would that be a violation of the antitrust laws?

15 MR. WEICKHARDT: Well, certainly the question
16 demonstrates that the distiller can -- does have a
17 remedy for that particular problem. If one of his
18 franchisees is selling to a non-designated wholesaler,
19 he's certainly free under the Sylvania case to refuse to
20 deal with that franchise wholesaler further. He has a
21 remedy there.

22 QUESTION: That wouldn't violate the antitrust
23 laws. Why does the state statute that simply really
24 authorizes that sort of a thing and says, you won't be
25 prosecuted under state law, it's no violation of state

1 law to do this, why is that any different?

2 MR. WEICKHARDT: The difference is that this
3 state statute essentially delegates the power to decide
4 who can import to private parties without supervision.

5 QUESTION: They could easily have -- they
6 probably did have that power without the statute, didn't
7 they?

8 MR. WEICKHARDT: Yes, but they did without --
9 they could not without this statute keep out goods that
10 they let out of their franchise system. You see, the
11 problem here is that the distillers are voluntarily
12 selling goods outside their franchise system without any
13 territorial restrictions. And what they're saying under
14 this statute is, I want a second bite at the apple to
15 stop these goods from coming into California.

16 Now, they don't need that because they can
17 impose those restrictions by private contractual means,
18 Sylvania restrictions, in the original deals that they
19 make with the wholesalers that they sell to throughout
20 the United States.

21 QUESTION: But they can't in Oklahoma.

22 MR. WEICKHARDT: They can in Oklahoma now,
23 because --

24 QUESTION: Well, now, but they couldn't --

25 MR. WEICKHARDT: -- since the Central Liquor

1 decision, which was decided after this case was taken,
2 it is legal for distillers to impose Sylvania
3 restrictions in Oklahoma. Now, since the Central Liquor
4 case was decided, most distillers have imposed those
5 restrictions. Some have not, even though they have the
6 right to do so under Oklahoma law.

7 But if they have not imposed those
8 restrictions, they are voluntarily and with full
9 knowledge and consent selling those goods to an Oklahoma
10 jobber with knowledge that they will be exported to
11 California.

12 QUESTION: You want to say that these
13 distillers -- the distiller by designating one importer
14 in California is violating the antitrust law because the
15 state has passed a statute.

16 MR. WEICKHARDT: Well, what I'm saying is that
17 what the statute does is it gives that designation the
18 effect, the legal effect of excluding everybody else,
19 including people who could operate in a free market.

20 QUESTION: Why do you hang that on the -- why
21 do you blame the distillers for that law? All they're
22 doing is what otherwise would be legal, designating one
23 importer.

24 MR. WEICKHARDT: It would otherwise --

25 QUESTION: The state comes along and says, no

1 one else may import.

2 MR. WEICKHARDT: It would otherwise be legal.
3 Without this statute, of course, people who existed in
4 the free market such as the Respondents could continue
5 to trade. But what the statute does is say, if you
6 agree to designate that one wholesaler, then everyone
7 else is excluded.

8 It gives -- the statute gives exclusionary
9 effect to that designation and thereby excludes people
10 who would be operating in a free market.

11 Now, the -- it's been argued here that there
12 is essentially only a unilateral act by the distiller,
13 that the designation process is not an agreement or
14 conspiracy. But the operation of the restraint requires
15 more than a unilateral action, because to make the
16 restrictive scheme work the distiller has to agree to
17 authorize his franchisees to import. So the designation
18 agreement is an essential part of the restrictive scheme
19 here.

20 QUESTION: How do we know that without any
21 record, when the statute's simply being challenged on
22 its face?

23 MR. WEICKHARDT: Well, I think, as I said
24 earlier, I think it's safe to presume that the distiller
25 is not going to designate people who are unwilling to

1 sell his product. He's certainly going to designate
2 people that he thinks are willing to promote the
3 product, willing to serve as his wholesalers in the
4 state.

5 Now, I think the argument that there is not a
6 per se violation here has largely hinged on the
7 contention that this statute somehow facilitates
8 Sylvania type restrictions and it therefore has
9 pro-competitive benefits. Now, there's no basis for
10 saying this as to the California-Oklahoma trade after
11 the Central Liquor case.

12 The Central Liquor case says that -- decided
13 by the Oklahoma Supreme Court in February of this year
14 -- says that the distiller may refuse to sell in
15 Oklahoma to a jobber if the goods are destined for out
16 of state. Now, most brand owners have imposed these
17 restrictions. Some have not.

18 But it's clear today that you don't need a
19 California statute to impose Sylvania restrictions in
20 Oklahoma. You can do that by private contractual
21 devices there. It's unnecessary, the statute is
22 unnecessary, to effectuate any vertical restrictions.

23 The argument that the statute somehow
24 facilitated Sylvania restrictions was only applicable in
25 the period prior to the Central Liquor case, when

1 Oklahoma law prohibited distillers from imposing
2 vertical restrictions on resale in that state.

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1 So after the Central Liquor case, the liquor
2 industry is like any other industry. Sylvania
3 restrictions may be imposed by private contractual
4 devices, and no statutory enabling act is necessary to
5 do that.

6 The issue here, therefore, is not whether the
7 statute is necessary to facilitate Sylvania, but it is
8 whether once having sold the good without restriction in
9 Oklahoma or elsewhere, the distiller may reassert
10 control over the goods in the hands of a subsequent
11 purchaser who purchased them without restriction. And
12 at this point the distiller has transferred all property
13 and contractual rights in the goods, and the subsequent
14 purchaser has full title to the goods and has obtained
15 them without restriction. And nonetheless, the
16 distiller, although he could have originally imposed
17 these restrictions in Oklahoma and didn't, wants a
18 second bite at the apple. And it's just not necessary
19 to effectuate any vertical restrictions on distribution.

20 Now, theoretically there is no difference,
21 because the Respondents purchased these goods without
22 restriction, there's no difference between these goods,
23 between the distiller restricting trade in these goods
24 and goods which were manufactured by some other
25 distiller. In fact, if this Court accepts a

1 restriction, a reassertion of control over goods that
2 were originally sold without restriction, there is
3 nothing to prevent the distiller from reasserting
4 control, even when the goods are in the hands of a
5 consumer.

6 Now, you might say that the Respondents here
7 are like the consumer in the Sylvania case. Sylvania
8 put restrictions on Continental T.V., and that was all
9 right, but when Continental T.V. sold the television to
10 the consumer, it sold the television -- it sells the
11 television without restriction, and there's nothing in
12 Sylvania that says, that keeps that consumer now from
13 taking that television to Nevada and selling it to
14 somebody else. If you get it without restriction,
15 there's no argument for the reassertion of such control
16 by the manufacturer.

17 QUESTION: I don't understand your argument.
18 How does the manufacturer reassert control? Say he
19 sells to the Oklahoma wholesaler and the Oklahoma
20 wholesaler sells it to somebody else? The manufacturer
21 doesn't know anything about it, does he?

22 MR. WEICKHARDT: He reasserts the --

23 QUESTION: He violates the -- he may violate
24 this statute or if the statute is bad -- I don't
25 understand your saying the manufacturer reasserts

1 control.

2 MR. WEICKHARDT: Yes.

3 QUESTION: It sounds like you are rearguing
4 the Schwinn case.

5 MR. WEICKHARDT: He reasserts control in this
6 sense, that he originally sold the goods without any
7 restrictions on resale --

8 QUESTION: Right.

9 MR. WEICKHARDT: He said he sold them under
10 conditions where the jobber to whom he sold could resell
11 in any territory --

12 QUESTION: Sell them in California, right.

13 MR. WEICKHARDT: -- and to any person, and yet
14 when a subsequent purchaser who has received the goods
15 without restriction tries to move them in interstate
16 commerce, the distiller comes back and says I'm sorry, I
17 want to renege on my original bargain.

18 QUESTION: No, the distiller hasn't done
19 anything. The California Liquor Authority has said you
20 have got to pay the statutory penalty.

21 MR. WEICKHARDT: Well, I don't see why it's
22 the California Liquor Authority. The California Liquor
23 Authority has confided that decision as to whether those
24 goods can move in interstate commerce totally to the
25 discretion of a private party, namely, to the distiller,

1 by action of designation agreements.

2 QUESTION: Well, they've said if you sell, if
3 Oklahoma wholesaler sells to an undesignated wholesaler
4 in California, it violates the California statute. But
5 how is that imposing a restriction by the -- how is the
6 distiller imposing a restriction?

7 MR. WEICKHARDT: Because the distiller is --

8 QUESTION: By failure to designate.

9 MR. WEICKHARDT: The distiller is the one
10 given the power under this statute to prevent that
11 interstate transaction.

12 QUESTION: Well, he doesn't have power to
13 prevent it. He has the power to authorize it. He can
14 decline to --

15 MR. WEICKHARDT: Yes, but the power to
16 authorize is the power to prevent. This statute is
17 really no different from a statute that says the
18 distiller may prohibit interstate transactions. If he
19 can authorize them, he also has the subsellenial power
20 to prohibit them.

21 QUESTION: Would it be unlawful for the
22 distiller to enter in an agreement with -- let's take
23 the one example that Justice White put -- one California
24 wholesaler, and say the designation is tantamount to an
25 agreement that says I won't sell to anybody else who

1 sells to any of your competitors? Would that violate
2 the Sherman Act?

3 MR. WEICKHARDT: As long as there were people
4 like the Respondents who had goods that they had
5 obtained without restriction in interstate commerce,
6 they were thereby --

7 QUESTION: Well but the term of the agreement
8 is that there won't be any such people. The distiller
9 says to the wholesaler, I will designate you as my
10 exclusive California wholesaler and I agree that I will
11 not sell to anyone who sells into California in
12 competition with you, and he does that voluntarily. He
13 stops selling in Oklahoma entirely if there are people
14 like that.

15 Would that be unlawful? That is my question.

16 MR. WEICKHARDT: Well, that restriction would
17 probably be judged under a rule of reason, but I don't
18 think that's what's happening here. If there is not an
19 agreement between the distiller and the authorized
20 wholesaler in that example --

21 QUESTION: Well, then who is your agreement
22 with?

23 MR. WEICKHARDT: -- that the distiller won't
24 sell to someone else, the issue here is not whether the
25 distiller will refuse to deal with someone else, the

1 issue is whether he can prevent trade and goods which
2 are moving in commerce and which were originally sold
3 without restriction. It is a restriction on a third
4 party that is not in privity with either --

5 QUESTION: Well, you don't contend, then, that
6 in effect what we have is an agreement between the
7 distiller and the designated wholesaler to interfere
8 with the trade of others.

9 MR. WEICKHARDT: That's right. We have --

10 QUESTION: You don't contend that. That's not
11 your theory.

12 MR. WEICKHARDT: We have two -- we have two
13 competing chains of distribution here.

14 QUESTION: I understand.

15 MR. WEICKHARDT: A distiller is selling to his
16 franchise wholesaler, and an Oklahoma jobber is selling
17 to the Respondents, and the restrictions are not running
18 vertically here. You are allowing one chain to reach
19 out across the chains of distribution and block trade
20 between the other chain.

21 QUESTION: May I respectfully suggest that you
22 don't have anything because you don't have a record. I
23 come back to Justice Rehnquist's point. You keep
24 telling us all of this, this law has never been
25 enforced, and there's no record.

1 MR. WEICKHARDT: Well, the fact is that --

2 QUESTION: The fact -- well, point to the fact
3 in the record.

4 MR. WEICKHARDT: The fact, there is the fact
5 in the record that each of the Respondents applied for
6 designation prior to the effective date of the statute,
7 and that was alleged in the original petition. They
8 were uniformly denied designation. So it was clear at
9 the time that the California Court of Appeal decided
10 this case --

11 QUESTION: Wasn't that stayed?

12 MR. WEICKHARDT: -- that all of the
13 Respondents would be excluded.

14 QUESTION: Wasn't that stayed?

15 MR. WEICKHARDT: Pardon?

16 That statute was stayed, yes.

17 QUESTION: So it has never been enforced.

18 MR. WEICKHARDT: Yes, but if it was enforced,
19 if it had been enforced at that time, it would have
20 been --

21 QUESTION: How do we get jurisdiction over
22 if?

23 MR. WEICKHARDT: Over whom?

24 QUESTION: If, i-f, if something is done. We
25 get jurisdiction after it's done, don't we?

1 MR. WEICKHARDT: Well, if you can decide, as I
2 contend, that the statutory -- that the designation
3 procedure inherently involves a per se violation of the
4 Sherman Act, you don't need a record, and I think that
5 that's obvious that that's what it does. It's obvious
6 that it excludes people who operate -- who can freely
7 operate in interstate commerce.

8 Now --

9 QUESTION: Are you going to get to the 21st
10 Amendment?

11 MR. WEICKHARDT: Yes. This is not a 21st
12 Amendment case. Under Midcal, the 21st Amendment will
13 not save a statute like this from preemption unless the
14 state has a valid regulatory purpose which outweighs the
15 interference with free competition guaranteed by the
16 Sherman Act. Now, here, the California State Court,
17 which is the legitimate arbiter of California's
18 regulatory interests, has decided that there is no valid
19 state interest which is served by this statute.

20 Now, in the Midcal case, this Court said that
21 it will give great weight to the findings of the state
22 court as to what the state's regulatory interest is, and
23 here the state courts have said that there is none.

24 Now, the Petitioners, however, would ask this
25 Court to foist upon the State of California some

1 regulatory purpose which its own courts could not
2 discern.

3 Now, we heard a new purpose of all the many
4 that were contrived to try to justify this statute, we
5 heard a new purpose here today that the state has no
6 control over the Oklahoma jobber, that if he violates
7 the law there is nothing you can do about it. Well,
8 there's another California statute that was passed at
9 the same time as this one that requires any out-of-state
10 shipper of alcoholic beverages, distillers, Oklahoma
11 jobbers, anyone who sends goods for importation into
12 California must obtain an out-of-state shipper's license
13 from California. He must submit his records to the
14 State of California for review and control.

15 And in fact, the state can, if he does not
16 follow the laws of the state, the state can revoke that
17 out-of-state shipper's license. And if it can be said
18 that the state has no control over the Oklahoma jobber,
19 as Mr. Roth argued, certainly the state has no control
20 over any of the distillers who sell to California
21 either, and there is no --

22 QUESTION: Do you think the California
23 legislature and the California Governor just passed and
24 signed this bill in a fit of absent-mindedness?

25 MR. WEICKHARDT: I don't understand your

1 question, Mr. Justice.

2 QUESTION: Well, what do you think their
3 purpose was?

4 MR. WEICKHARDT: I think that the purpose -- I
5 think it's special interest legislation that was
6 designed to eliminate the importers from --

7 QUESTION: But still, all legislation, all
8 legislation is special interest legislation. I mean,
9 some parties win in the legislature, some parties lose.

10 MR. WEICKHARDT: Yes, but there's no
11 regulatory purpose that's been identified for this
12 statute. I think all of them that have been advanced
13 were after-the-fact contrivances, and they were all
14 rejected by the state court. If anything, the -- and of
15 course, the Director of California Alcoholic Beverage
16 Control never sponsored or supported the passage of this
17 statute. It is a statute that simply doesn't serve any
18 valid regulatory purpose.

19 QUESTION: But Counsel, he did read the
20 statute itself. Is that true, what he read? The
21 statute said it was enacted pursuant to their police
22 power, and then spelled it out.

23 MR. WEICKHARDT: Yes, but what --

24 QUESTION: Didn't it?

25 MR. WEICKHARDT: It --

1 QUESTION: All I'm questioning here is because
2 you said there was nothing.

3 MR. WEICKHARDT: Yes. I think, Mr. Justice
4 Marshall --

5 QUESTION: You wouldn't call that nothing,
6 would you?

7 MR. WEICKHARDT: -- it's a meaningless
8 statement to say that something serves the police power
9 unless you can identify how.

10 QUESTION: They did in what he read, they did
11 identify it.

12 MR. WEICKHARDT: But I still don't understand
13 what regulatory interest is served. I think he
14 mentioned that somehow the statute helps to monitor
15 imports, audit taxes. That purpose was argued to the
16 state court and rejected. It's clear that this statute
17 does not speak to any such information. The statute
18 simply says that the distiller can prohibit someone from
19 importing. The statute doesn't require any reports, it
20 doesn't require any inspections. There's no way that
21 it's going to generate any information. And this
22 argument that the statute somehow promotes the
23 three-tier system is also clearly fallacious. The
24 three-tier system is essentially a requirement that the
25 distilling, wholesaling and retailing layers be

1 separately owned. And this statute, the state court
2 found in its opinion, is counterproductive to the
3 purposes of the three-tier system because it authorizes
4 the distillers to exert more control over the
5 wholesaling layer.

6 One other thing --

7 QUESTION: Well, that's the statutory purpose,
8 isn't it? The statutory purpose is to enable the
9 distiller to control the vertical line of distribution
10 of his own product more effectively than he could do by
11 private contract.

12 MR. WEICKHARDT: Well he doesn't need it, he
13 doesn't need it to control the distribution of his own
14 product because he can do that by private contractual
15 means under the Sylvania decision.

16 QUESTION: Well, I say he apparently can do it
17 more effectively with the state behind him than he can
18 do it by just private agreement.

19 Now the question is whether that is all right
20 or not.

21 MR. WEICKHARDT: Well, even if, even if --

22 QUESTION: And that's what you are complaining
23 about, is that he's able to control it more effectively
24 and your people can't get in.

25 MR. WEICKHARDT: Even if we concede that the

1 statute serves some of these grand promotion purposes
2 which the Petitioners argue, they say that the statute
3 will guarantee higher prices in California and thereby
4 allow the franchise wholesalers to advertise the brands
5 more, and that will strengthen interbrand
6 competition --

7 QUESTION: It serves precisely the same
8 purpose as a resale price maintenance scheme serves,
9 effectively, too. I think that's the purpose that the
10 distillers would attempt to serve with the statute.
11 They would attempt to eliminate the discountes. That's
12 probably why the statute was passed in the first place,
13 because it's clear that the Respondents were the
14 discounters in the market, and they sell this liquor --
15 the difference at the retail level is about a dollar a
16 bottle, and that liquor would stay out, and there
17 wouldn't be any price -- there would be much less price
18 competition if this statute were in force.

19 But I wanted to say, Mr. Justice Stevens, that
20 even if we concede that the statute has all of these
21 grand promotional purposes, that it will help the
22 distillers to finance more advertising in California,
23 the State of California has absolutely no regulatory
24 interest in that. The interest of the state, as found
25 by the court below, was the promotion of temperance.

1 The state does not have an interest in more advertising
2 of liquor that will increase consumption.

3 Now, if the Court does not agree with me that
4 the statute is inconsistent with the Sherman Act but
5 believes that the statute is unfair in its operation, I
6 would commend to the Court the other grounds on which
7 this statute was attacked below, first, that it violates
8 due process of law. This statute in essence sets up a
9 second tier of licensing over and above that of the
10 state. You must not only have a state's license to
11 import liquor; you must also get a license from private
12 parties. In effect, the statute gives private parties a
13 virtual veto over the state's licensing process.

14 Now, the statute does so with no due process.
15 There is obviously no due process in this statute. The
16 statute provides no standards or criteria for its own
17 administration. It provides for no review or appeal to
18 the state from an aggrieved importer who is refused
19 designation. It is quote obvious that the state will
20 totally unsupervise these designations that are made by
21 the distillers. And in this Court's 1973 decision in
22 Gibson v. Berryhill, it was also found to be a violation
23 of due process to confide the licensing procedure to
24 private members of the industry who were interested in
25 it.

1 This statute clearly interferes with property
2 rights of the Respondents. It prohibits them from
3 freely disposing of property to which they have full
4 legal title and which they purchased without
5 restrictions. So there is clearly a violation of due
6 process.

7 There's also a violation of equal protection
8 of the laws because this statute discriminates between
9 two groups, those who are designated and those who are
10 not. Both groups are fully licensed by the state to
11 import, so from the state's point of view, they are
12 functionally indistinguishable. Both groups meet all of
13 the minimum regulatory criteria for the importing of
14 liquor into the state, and yet one group can import and
15 the other can't by virtue of the discretion of a private
16 party.

17 Now, the state court below has already found
18 that there is no regulatory purpose to justify the
19 statute, none. So on that basis this court can find
20 that the statute fails to pass constitutional muster
21 even under the rational basis test for equal
22 protection.

23 Now, what we are saying here is that we would
24 like the free market to work in the liquor industry. We
25 want to let Adam Smith into the liquor industry. This

1 statute is in essence fair trade through the back door.
2 In the initial denial of designations to the Respondents
3 it was apparent that it would be used to eliminate
4 discounters from the market.

5 The Oklahoma-California trade is exactly the
6 way the free enterprise system is supposed to work.
7 Where one seller in a local market is overcharging and
8 someone else can bring in goods from another market and
9 distribute them more efficiently and at a lower cost, he
10 should be allowed to compete. The statute deprives the
11 California consumers of this benefit of the free
12 enterprise system, and moreover, the state court has
13 already found that the State of California has
14 absolutely no regulatory interest in this statute.

15 Thank you.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. McDonough?

18 MR. MC DONOUGH: If I may, just one moment,
19 Your Honor.

20 CHIEF JUSTICE BURGER: You have two minutes
21 remaining.

22 ORAL ARGUMENT OF JOHN R. MC DONOUGH, ESQ.

23 ON BEHALF OF PETITIONERS -- REBUTTAL

24 MR. MC DONOUGH: Thank you, sir.

25 The contention is made that the state court

1 found that this statute has no regulatory purpose. I
2 think that goes beyond what the Court of Appeal did say
3 in California. The Court did indicate we are not
4 persuaded, the Court said, that the asserted purposes
5 are necessarily accomplished by the statute.

6 The fact of the matter is that the statute
7 obviously serves the purpose of giving governmental
8 support to the vertical allocation of markets. It also
9 does protect California's three-tier system of liquor
10 importation and marketing. There is a tier of the
11 distiller who sells to the wholesaler, the wholesaler
12 who sells to the retailer. All of that is very
13 carefully regulated. The Oklahoma connection, or any
14 other out-of-state source, brings in a fourth tier.
15 California is entitled to preserve the three-tier
16 system.

17 We think the statute falls clearly within the
18 area indicated in Mr. Justice Powell's decision in
19 Midcal of a statute that regulates both importation and
20 the structure of the industry, and therefore, that you
21 don't get to a weighing test in a 21st Amendment
22 analysis of this statute.

23 But if you do, let me make the suggestion that
24 the court below did the weighing in this fashion. On
25 the one hand, on the federal side, the Court put the

1 entire weight of the majesty of the Sherman Act as a
2 charter of economic freedom, and on the other hand put a
3 modestly weighted amount of state interest. That
4 really, I think, is not what one does or ought to do and
5 what this Court ought to do in the weighing analysis if
6 you get to it.

7 What you have to do is compare the impairment
8 of the federal Sherman Act interest on the one hand with
9 whatever state values are served on the other. And in
10 this kind of a statute where we are dealing with a
11 statute that give some collateral support to vertical
12 allocation which has been held in GTE Sylvania not to
13 violate the Sherman Act, we are obviously not dealing
14 with a heavy impairment of any Sherman Act interest. If
15 there is an interest to be put on the federal side, it
16 is a relatively light one. And that is the analysis, it
17 seems to me, that must be made, not put the whole
18 Sherman Act on one side and state interest on the other,
19 but how much does it impair any Sherman Act values here,
20 and how many state interests are served there.

21 Both questions are federal questions. Both
22 questions are for this Court to resolve, and they should
23 be resolved, we think, by adjusting the balance in favor
24 of the statute if you get to the weighing analysis.

25 Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.

2 The case is submitted.

3 (Whereupon, at 11:08 a.m., the above-entitled
4 case was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCHOLIC BEVERAGE CONTROL OF CALIFORNIA
v. NORMAN WILLIAMS COMPANY, ET AL. # 80-1012

BOHEMIAN DISTRIBUTING COMPANY v. NORMAN WILLIAMS COMPANY ET AL
80-1030

WINE & SPIRITS WHOLESALERS OF CALIFORNIA v. NORMAN WILLIAMS COMPANY ET AL
#80-1052

and that these pages constitute the original transcript of the proceedings for the recors of the Court.

By Diene Hamman

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