REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-2022

TITLE 324 LIQUOR CORP., dba YORKSHIRE WINE & SPIRITS, Appellant V. THOMAS DUFFY, ET AL.

PLACE Washington, D. C.

DATE November 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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324 LIQUOR CORP., dba YORKSHIRE :
WINE & SPIRITS, :
Appellant, :
V. : No. 84-2022
THOMAS DUFFY, ET AL. :

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Washington, D.C.

Monday, November 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

BERTRAM K. KANTOR, ESQ., New York, New York; on behalf of the appellant.

W. STEPHEN CANNON, ESQ., Deputy Assistant Attorney General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae supporting appellant.

CHRISTOPHER KEITH HALL, ESQ., Assistant Attorney General of New York, New York, New York; on behalf of the appellees.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this afternoon in No. 84-2022, 324 Liquor Corporation doing business as Yorkshire Wine and Spirits versus Thomas Duffy.

Mr. Kantor, you may proceed when you are ready.

ORAL ARGUMENT OF BERTRAM K. KANTOR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. KANTOR: Mr. Chief Justice, and may it please the Court, this afternoon I would like to establish three points in my argument. The first is that the New York statutory scheme for resale -- for retail liquor pricing constitutes resale price maintenance, in violation of Section 1 of the Sherman Act.

The second point I would like to establish is that the New York statutory scheme is not saved by the state action exemption. And the third proposition is that the statutory scheme is not saved by the 21st Amendment.

Just some brief background to begin with. Appellant is a neighborhood liquor store located in Manhattan who was suspended by the state liquor authority for alleged violation of Section 101(b)(b) of

the New York Alcoholic Beverage Control law in that the appellant had made two retail sales of liquor below the minimum resale price for such items which had been set by the wholesaler for those items in the month in question.

It is noteworthy that the appellant was found to have violated a statute which ostensibly requires a 12 percent markup over what the statute calls "cost" when notwithstanding the fact that the appellant had actually received an 18 percent markup on the sales in question.

Now, the explanation for this curious phenomenon which I have described is that Section 101(b)(b) does not require a minimum markup over the retailer's actual cost, but rather over something called the bottle price, which is able to be set by the wholesaler freely without any state supervision or control.

However, the economic reality is that the bottle price is not a good proxy for the retailer's actual cost because retailers rarely purchase liquor from wholesalers by the bottle. They rather purchase by the case.

QUESTION: The bottle price is a real price. It is the real price at which the wholesaler would have

to sell it if he sold it by the bottle.

MR. KANTOR: Yes, Justice --

QUESTION: In which case he wouldn't be a wholesaler, I suppose.

MR. KANTOR: Well, yes, Justice Scalia.

QUESTION: Who do you charge the bottle price to, anyway? Who does the wholesaler charge the bottle price to?

MR. KANTOR: He would charge the bottle price to the retailer in the event that the retailer sought to acquire his liquor in less than case lots.

QUESTION: If he buys one and a half cases he gets half a case at the bottle price.

MR. KANTOR: Yes, I believe so. The example that comes to mind is the rare bottle of 40 or 50 year old Scotch that a retailer may purchase one bottle from a wholesaler or let's say a very exotic brandy or something like that. The products that were involved here were something called Chatham Gin in a 1.75 liter bottle, which is not an item you would acquire by the bottle.

QUESTION: But it is still not theoretically just a made up resale price that the wholesaler can impose without any real world consequences to himself. It is a real price, the price at which he will sell less

than case bottles.

MR. KANTOR: I would accept the first portion of your proposition. I will not accept the second. It is a real price in that it is available should the retailer want to buy by the bottle in the unlikely event. The second portion of the proposition is that the real world consequences of setting a high bottle price is that you lose very few sales because the bulk of your sales are made at retail. What we have here, and the record demonstrates this, is the ability of the wholesaler to control the bottle price and the case price and the relationship thereto and thereby to confer in some cases supercompetitive profits of over 30 percent on retailers.

The record further contains actual advertisements which are placed by wholesalers in liquor trade journals in which the wholesaler trumpets the fact to the retailer as a selling point that we are going to confer upon you markups of 20 percent, 28 percent, 30 percent. In fact, one ad says we have a whole line of liquor that can give you a 30 percent markup. So something is awry here. You do not have a normal situation. This clearly is not a statute that mandates a 12 percent markup on a real retailer cost.

Now, under the New York statutory scheme that

I am referring to, 101(b)(b), the New York Court of Appeals held below as a matter of state law that the statute does not mandate a correlation between the case and bottle prices filed by the wholesaler. The Court of Appeals also held below that the state does not actively supervise the wholesaler's price filings.

As a result, under the New York statutory scheme, as I said a moment ago, a wholesaler is free to set a high bottle price in relation to his case price, and thereby confer supercompetitive profits upon retailers. Now, why this is a violation of the Sherman Act is that the Sherman Act clearly condemns resale price maintenance.

Further, this is a combination in unreasonable restraint of Section 1 in that the wholesaler under the statute is given the power to set price with no state involvement, and the retailers are compelled by state enforcement of the statute to adhere to the retail price, minimum retail price fixed by the wholesaler. Thus you have the same kind of a combination that was struck down in Parke Davis or in Schwegmann, indeed in Midcal.

In fact, the state's opinion does not -- the opinion of the state court below does not even discuss whether this is a price maintenance scheme. It assumes

it. It states clearly this is a price maintenance scheme. Indeed, in the portion of the opinion below that deals with state action in determining that it was not state action holds that this price maintenance scheme is not actively supervised by the state.

The only reason that we are here is because the state court below found that the statute was consistent with the 21st Amendment. And I will perhaps address the temperance and 21st Amendment questions to save some time.

In justifying the statute under the 21st Amendment, again, the state court below was silent on the issue of temperance. This is because there is no legislative history which indicates that the statute was based on temperance.

QUESTION: Mr. Kantor, is it your position that the 21st Amendment will never justify a state interest in the protection of retailers?

MR. KANTOR: Justice O'Connor, it is not my position. It is my position that in this case the conflict between state law as represented by 101(b)(b) and the federal law as represented by the Sherman Act was needlessly created by the state. There are many ways in which the state presumably could properly address the question of protecting small retailers under

the 21st Amendment.

QUESTION: Under the 21st Amendment you would concede that a state could properly protect retailers?

MR. KANTOR: Yes, I would concede that if the state, for example, were to put in place a mechanism whereby the state determined the liquor prices, that would not cause my problem. I would further concede that if we had a statute here that sought to condemn loss leaders or predatory pricing of some sort, that that would not cause a problem.

I further concede that if you had a statute here which sought to prohibit sales below actual cost, that would not create a problem. What we have here is that the state has created a retail price maintenance scheme under the guise of protecting small retailers, and thus has needlessly offended the Sherman Act.

If the state sought to approach this some other way, that would be a different case than I believe the case we have here. I would submit that what we have here is Midcal. All that has changed is the means --

QUESTION: Well, there is much more of a record here than in Midcal of an effect of helping retailers. There just wasn't that kind of a record in Midcal, was there?

MR. KANTOR: I don't know that I would agree

that there is more of a record here about preservation of small retailers. In fact, the state's claim that this statute preserves small retailers is totally unsubstantiated. The record here is that in 1971, when 101(b)(b) was passed there were approximately 5,000 retailers in the state of New York. As of July, '86, there were approximately 3,000 retailers. Therefore it would be very hard to make an argument that this statute has protected small retailers.

In addition, even assuming arguendo that it had, and I think we have established it had not, it is the state that is needlessly creating the conflict here between state and federal law. It is our position that if the state could address the subject of protecting small retailers in a way that did not violate the Sherman Act that would be a different case than this case.

QUESTION: But if it didn't violate the Sherman Act you wouldn't have any trouble anyway, would you? I mean, the question is whether the state can do something that does violate the Sherman Act on the grounds of the 21st Amendment.

MR. KANTOR: Presumably the state might be able to do something that might otherwise violate the Sherman Act if it actively supervised what went on. The

Court below stated as a matter of fact, and I believe correctly, that there is no state supervision or control over the prices determined by the wholesalers. What we have here is the gauzy cloak that the Court talked about in Midcal.

In other words, the state statute creates a gauzy cloak of state involvement in a private price-fixing scheme without any state supervision or control of that.

QUESTION: But that may be a sufficient argument, and I gather the Court of Appeals agreed with you, to dispel the state action exemption, the Parker against Brown, but that still doesn't answer, by itself doesn't answer the 21st Amendment question, does it?

MR. KANTOR: No, but there are two parts to a 21st Amendment question, Your Honor. One is temperance and the other is protection of small retailers. The court below did not in any way seek to justify this statute on the basis of temperance. The state comes in here now in the Supreme Court and argues that somehow temperance is involved because by allowing wholesalers to fix prices and to set high minimum resale prices this somehow would encourage temperance.

The fact of the matter is that the legislature in passing this statute in 1971 said that the evidence

on the relationship between liquor prices and liquor consumption was very foggy, and we have no reason to believe that the price for liquor is elastic. Indeed, it appears, and we have lodged studies with the Court in this case, that the price for liquor is inelastic. That is one of the reasons why the wholesalers are content to set high bottle prices which result in high minimum resale prices, because they don't lose anything.

QUESTION: Surely they lose business to other brands. It isn't a system that prevents interbrand competition. You have to have brand loyalty or somebody else can take up the slack by having a lower bottle price, right?

MR. KANTOR: Well, they don't -- they clearly don't lose any business to other brands because apparently everybody engages in parallel behavior. In other words, we are not attacking the statute on the ground that it was a horizontal arrangement, but the record indicates that certainly this vertical price-fixing arrangement certainly has horizontal overtones.

For example, in the instance of Smirnoff Vodka, the product which is one of the two sales involved in our case here, there were three wholesalers, and all of them, while having somewhat different case

prices, had the same bottle price, so the fact of the matter is that there is plenty of --

QUESTION: On Smirnoff in particular?

MR. KANTOR: Because --

QUESTION: Yes, but what about other vodka? People don't have to buy Smirnoff. You know, Smirnoff is priced too high, people buy another vodka.

MR. KANTOR: Well, the answer to that, Your Honor, is that the wholesaler of let's say Gordon's Vodka when he sets his minimum resale price through setting the bottle price, obviously casts an eye over what his rivals are doing vis-a-vis Smirnoff Vodka.

QUESTION: There has to be some smart fellow who figures he will sell a lot more at a lower price. I thought that's the way the thing works.

MR. KANTOR: Well, Your Honor, many of these dealers don't have one brand of vodka, they have numerous brands of vodka, so there is an element of horizontality here. In other words, the wholesaler when he is setting the bottle price of a panoply of vodkas that he is selling is in effect determining the minimum resale price for, let's say, Gordon's, Fleischman's, and Smirnoff, because he is the wholesaler of all three of those.

QUESTION: Anyway, I gather resale price

maintenance is per se invalid, whether or not it in fact restricts trade. Is that right?

MR. KANTOR: That is what this Court has said, and that is what I understand to be the law. I would like to reserve the balance of my time for rebuttal if I could.

CHIEF JUSTICE REHNQUIST: We will hear now from you, Mr. Cannon.

ORAL ARGUMENT OF W. STEPHEN CANNON, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

MR. CANNON: Mr. Chief Justice, and may it please the Court, in Midcal this Court confronted a state statutory scheme it found to be a per se violation of the Sherman Act. The statute could not be saved by either the state action doctrine or the 21st Amendment. The United States submits today that the faults this Court found with the California wine pricing statute in Midcal are equally present in the New York statute before you.

As in Midcal, the New York statute creates a resale price maintenance scheme. Liquor wholesalers control the retail price of liquor. Both the Court of Appeals and the New York legislature specifically recognized that the state sanctions resale price

maintenance.

As in Midcal, the real question posed by this case is whether such resale price maintenance is protected from invalidation by the state action doctrine or alternatively the 21st Amendment, rather. We believe it is saved by neither.

As for the state action doctrine, clearly the first prong of Midcal is met. Just as clearly, the second prong is not. We think the New York Court of Appeals was absolutely correct in finding that the State of New York does not actively supervise the setting of retail prices. To the contrary, the state has abdicated that function to private wholesalers.

To respond to Justice Scalia's question on this point, in fact, the bottle price is not an actual price. It bears no relationship to the actual price that the wholesaler purchased the liquor from the manufacturer and in fact bears no relationship to what the wholesaler is actually going to sell to the retailer. So, to --

QUESTION: Are you denying that if the wholesaler sells to the retailer in less than a case he has to charge the bottle price? Is that what you mean?

MR. CANNON: Justice Scalia, no. The statute surely says that the wholesaler --

QUESTION: Okay. You are just saying he doesn't sell in less than cases?

MR. CANNON: Pardon me?

QUESTION: You are just saying he doesn't in fact sell in less than case lots.

MR. CANNON: Well, it is certainly possible, as Mr. Kantor said, in rare situations to sell in less than cases. Certainly in this case the purchases in question were on cases.

QUESTION: The only purpose of my question was distinguishing this case from the normal resale price maintenance, where the price established is simply a price at which the retailer will sell to the customer, and it has no other independent validation whatever, whereas here the bottle price is really in theory, at least, the price at which the bottle will be sold by the wholesaler to the retailer.

MR. CANNON: But only in theory, Your Honor, and the problem with the statute here is by allowing the wholesaler to independently set the bottle price as opposed to the case price, there is no necessary correlation. You have to think of the bottle price as merely the mechanism by which this statute allows the wholesaler to engage in resale price maintenance, and that is the crux of the case.

Your Honor, this Court has recognized on many occasions the importance of our strong federal policy of promoting competition. New York's stated interest in protecting retailers from competition is directly contradictory to and cannot be reconciled with the Sherman Act. New York's resale price maintenance statute is not protected by the 21st Amendment for several reasons.

First, the state's interest in protecting small retailers from competition is not within the core of 21st Amendment interests this Court described in its Crisp decision. The time, place, or manner of the importation or use of liquor is not directly implicated here.

Secondly, even the tenuous connection with the 21st Amendment that this statute is supposed to have has not been substantiated. The Court of Appeals made no finding that the statute has actually protected small liquor retailers. Third --

QUESTION: Is that essential, Mr. Cannon, for us to conclude that there may be at least some connection between protecting small retailers and the New York statute. Is it essential that the Court of -- New York Court of Appeals had made such a finding?

MR. CANNON: Well, Your Honor, I assume it is

not absolutely essential. However, the problem here, as this Court stated in Midcal, when one is balancing or trying to reconcile the strong federal interest in competition against a state's stated interest in protecting retailers, and in this case in protecting them from all competition, then as the Court said in Midcal the state interest must surely be substantiated before you can even attempt to reconcile the two.

In this case there is absolutely no indication, no evidence that in fact this particular statute has preserved small retailers.

QUESTION: The legislature -- supposing this appeal were brought a month after the statute was passed, regardless of anything conceivable you would surely make the same statement. The statute hasn't preserved small retailers because it hasn't yet been in operation long enough to tell.

MR. CANNON: Your Honor, it is important to recognize here that the interest of the state is effectuating a private price-fixing scheme. No more and no less. While it may say that it is doing this to protect private retailers, we must know that this in fact flies directly in the face of the Sherman Act.

That being the case, the state has a very heavy burden in order to reconcile the statute, and it

cannot do that.

QUESTION: Why is it that the state has a heavy burden, because the statute, as you put it, flies directly in the face of the Sherman Act? If it flew more laterally would the state have a lighter burden?

MR. CANNON: Well, Your Honor, if in fact the state chose to protect small retailers in another manner such as the law in New York which prohibits any retail liquor store owner from having more than one outlet. That doesn't -- that is not a Sherman Act violation, at least that this Court recognizes, and we wouldn't be here today.

QUESTION: The state needn't worry about the situations where it doesn't have a Sherman Act violation. But is it your position that no matter what the state interest under either Parker against Brown or under the 21st Amendment, if there is a Sherman Act violation the state interest can't prevail?

MR. CANNON: Well, Your Honor, again, it depends on the type of statute or the type of manner in which the state is trying to advance the interest in protecting small retailers. Again, here we have a per se violation of the Sherman Act. Now, as I say, there may be other types of protection that the state may offer such as are in this statute of prohibiting

discriminatory discounts or gift allowances or loss leader prohibitions. But that is not the case here. We are addressing or looking at a per se violation of the Sherman Act.

And given the federal interest, the strong federal interest in promoting competition we have a state statute that achieves the very opposite, which is to eliminate competition on the retail level.

QUESTION: I take it you say this is really no different than if the state didn't have a statute and the wholesalers just made agreements with retailers.

MR. CANNON: Your Honor, yes. The problem with this case, of course, or the statute is that the state has abdicated the responsibility of pricing at the retail level for the wholesalers.

QUESTION: Yes, and it would be no different -- this case is no different than if the state had merely authorized the -- but not required the wholesalers to set the retailers' price.

MR. CANNON: Authorized but not required? Well, Your Honor, of course, if in fact the state itself had attempted to set prices --

QUESTION: I understand, yes.

MR. CANNON: That would be quite a different thing. The problem we have here is this abdication of

the state's ability -- setting prices.

QUESTION: So a law that permits the wholesaler to set the retailer's price establishes a --

MR. CANNON: Oh, yes, Your Honor. I mean, this quote in Parker and in succeeding cases, this clearly said the state does not have the ability to authorize private price-fixing agreements among private parties.

QUESTION: What would you say to a state statute that simply provided a minimum markup of 12 percent over what the retailer paid the wholesaler?

MR. CANNON: Justice Stevens, that is quite a different matter in that the discretion afforded to the private parties would be far less, and in fact the parties would have no --

QUESTION: I understand it is different. I am just curious to know whether you think it would be valid or invalid.

MR. CANNON: I think it certainly comes much closer to being protected under the state action doctrine, much closer.

QUESTION: I understand it comes closer. I just wonder whether you think it is valid or invalid.

(General laughter.)

QUESTION: If you don't know you can say so.

MR. CANNON: I don't know, Your Honor, but I would simply say that it would come much closer to state action.

QUESTION: (Inaudible.)

MR. CANNON: Because, Your Honor, in a minimum markup statute a private party would not have the discretion as it has in this case to set prices, and a minimum markup statute such as the statute, the Connecticut statute that the Second Circuit upheld in the Morgan case recently --

QUESTION: In a minimum markup statute all that means is that you must mark your resale price up a certain amount over what you bought it for.

MR. CANNON: That is exactly right, Your Honor.

QUESTION: Well, I know, but then the wholesaler always sets a -- always determines what price he is selling it to the retailer.

MR. CANNON: In this statute, Your Honor, in this statutory scheme the State of New York has not required the wholesaler to set its price to the retailer based on what the wholesaler bought the liquor for. There is absolutely no requirement of any relation --

QUESTION: You mean based on what the retailer bought it for.

MR. CANNON: No, sir, what the wholesaler bought it for. When the wholesaler buys from the manufacturer --

QUESTION: Yes?

MR. CANNON: -- that is when the state supervision breaks down. The wholesaler then is not required to determine its price to the retailer on any basis of cost. It can make it up literally out of thin air. On the other hand, in a minimum markup statute then usually --

QUESTION: Why would it be any different there?

MR. CANNON: In a minimum markup statute?

QUESTION: Yes.

MR. CANNON: Well, in that --

QUESTION: The wholesaler can set his price as high as he wants, as he can sell it for.

MR. CANNON: Your Honor, in the Connecticut case, the Connecticut statute, the Morgan case, for instance, there, once the liquor crossed the Connecticut state line, the state then said Mr. wholesaler, before you are able to -- the price that you must sell your liquor to the retailer is a certain amount based over your cost, and that is the key difference here, is the state action controls the price. In this case the

wholesaler is allowed to make up its own price.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cannon.

We will hear now from you, Mr. Hall.

ORAL ARGUMENT OF CHRISTOPHER KEITH HALL, ESQ.,
ON BEHALF OF THE APPELLEES

MR. HALL: Mr. Chief Justice, and may it please the Court, the question before the Court is whether New York may impose a statutory minimum markup on retail liquor prices when that statute which prohibits below cost pricing operates entirely within the state and involves no concerted action between independent entities.

There are three separate reasons why this Court should reject appellant's facial attack on the below cost statute and its as applied attack on that statute which is limited to the anticompetitive effects of the Bulletin.

First, there is no contract combination or conspiracy. Second, the state's direct imposition of the price restraint is ipso facto immune under Hoover v. Ronwin. And third, the state was acting pursuant to its core constitutional power under the 21st Amendment to structure its liquor distribution system to address

perceived flaws in its local market.

Last term in Fisher this Court reiterated that when a statute is challenged on its face under the antitrust laws this Court will strike it on preemption grounds only if it mandates or authorizes conduct which necessarily constitutes a violation of the antitrust laws in all cases or if it places irresistible pressure on private parties to violate the antitrust laws.

As the Chief Justice explained in Norman Williams, such facial condemnation follows only if the conduct contemplated by the statute is in all cases a per se violation. If it is not, this Court will analyze it under the rule of reason and will not condemn it in the abstract.

In Fisher this Court faced an identical facial challenge to a rent control ordinance in the City of Berkeley under which the landlords claimed that the ordinance formed a combination between the city and its officials on the one hand and landlords on the other, or a horizontal combination among landlords.

As Justice Marshall explained, even though the economic effect of that ordinance was exactly the same as a horizontal combination among landlords, a restraint imposed unilaterally does not become concerted action simply because it has a coercive effect on parties who

must obey the law.

New York's statute here operates exactly the same way. It directly imposes the 12 percent markup on retailers.

QUESTION: But does it depose the 12 percent -- does it decide what the 12 percent markup shall be imposed on?

MR. HALL: Under the statute, yes, it provides a --

QUESTION: It fixes the bottle price? The state fixes the bottle price?

MR. HALL: The state set forth a detailed statutory scheme for establishing the bottle price in which the wholesaler has very limited ability to change and can only change in accordance with those statutory commands.

QUESTION: That mainly governs the time when he makes the change or the announcement. He can raise his bottle price 50 cents one month after another, can't he?

MR. HALL: Under the statute he can only raise his price if the manufacturer's price to the wholesaler changes or if its labor costs or other operating costs go up and it secures the permission of the state enforcement agency, the SLA, to make that change, but

the wholesaler has no freedom under the statute to change --

QUESTION: What about setting it initially?

MR. HALL: Well, for the bulk of the prices under the statute those prices were set by the state in 1967 when it froze the percentage markup over manufacturers' prices. It is true that with new items or a new wholesaler coming onto the market it has freedom to set that initial price. At that moment, however, that ceases to be a free market price, and that price is controlled from then on under the statute under rigid statutory controls.

QUESTION: You say he can't change it after that except?

MR. HALL: Except in accordance with the provisions of the statute, for example --

QUESTION: Which is what, that he is charged a higher price by the manufacturer?

MR. HALL: If the manufacturer raises its price to the wholesale --

QUESTION: Right.

MR. HALL: -- then the wholesaler can raise its price by an equivalent percentage. That is one instance under the statute. Another instance, with the SLA's permission, it can raise in response to increased

labor operating costs, but only with the permission --

QUESTION: Well, how did the promotional situations that are at issue in this case arise?

MR. HALL: Two years after the statute was enacted, the state enforcement agency, the SLA, promulgated a bulletin which permitted the wholesaler to conduct temporary sales as an exception from the normal operation of the statute as construed by the SLA and Rule 16, which mandates that the case and the bottle price under the statute be linked lockstep with only that breakage charge differentiating.

QUESTION: What prices have we just been talking about that can't be altered, the case price or the bottle price or both?

MR. HALL: Both, under the statute, as opposed to the bulletin.

QUESTION: Yes, but you can't say the bulletin doesn't interpret the statute, do you? Should we disregard the bulletin or assume it is a correct interpretation of the statute?

MR. HALL: Well, we are faced here with a facial attack on the statute.

QUESTION: I understand. Would you answer my question?

MR. HALL: Under the --

QUESTION: Would you answer my question?

MR. HALL: Yes.

QUESTION: Should we assume that the bulletin is a correct construction of the statute or an incorrect construction of the statute?

MR. HALL: It is a correct application of the SLA's power to make exceptions in the statute, and that is -- from the normal operation, and that is exactly how the court below construed it. It is simply an exception from -- it construed -- it construed the statute in Rule 16 as linking the two prices. That is --

QUESTION: Well, you can say that a statute that allows such exceptions is facially invalid. I mean, you know, if you insist that we do it on the face. I assume that the ability to make exceptions is part of the face.

MR. HALL: It is true that the SLA on the face of the statute has the power to make exceptions, yes, from the statute. That is true.

QUESTION: Including an exception of this sort that would allow you to fix whatever price you want for bottles.

MR. HALL: That's correct, but in construing a facial attack on the statute on the antitrust laws this Court has made clear that it will strike it on

preemption grounds only if that statute mandates or authorizes conduct which is going to be a per se violation in all cases, and the statute doesn't permit violation of the antitrust laws.

QUESTION: In your view what was it that violated the antitrust laws in Midcal?

MR. HALL: In Midcal, in Midcal the Court focused on California's statutory requirement that parties enter into fair trade contracts. That was the first --

QUESTION: They didn't need to do that. All the -- they could either do that or they could post their wholesale prices. They didn't need to enter into fair trade contracts.

MR. HALL: That is correct, but the --

QUESTION: And all the retailers did was post their prices, and that became the wholesale price. And why was there a retail price maintenance scheme there that was illegal and not here?

MR. HALL: The aspect of the resale price maintenance scheme in Midcal that was a per se violation was the fair trade contract.

QUESTION: I just suggest to you that the wholesalers didn't need to enter into fair trade contracts. They could just post their prices.

MR. HALL: That's correct. But if this Court were to face the issue squarely, which it did not in Midcal, of whether a unilaterally imposed price schedule violated the antitrust laws because it formed a meeting of the minds between the manufacturer and the wholesaler in that case, it would decide it differently in light of its reaffirmation of the Colgate doctrine in Monsanto, in Copperweld, and in Fisher.

If the government were not involved a wholesaler under the Colgate doctrine would be perfectly free to announce that it was going to establish a retail -- a resale price, and the retailer is free to acquiesce in that price, and the wholesaler is free to terminate that --

QUESTION: What you are suggesting is that Midcal was just wrong.

MR. HALL: To the extent that Midcal is read to apply as well to the price schedules this Court would decide it differently today.

QUESTION: Well, that is what -- isn't that exactly what the fact was in Midcal?

MR. HALL: In Midcal there was, according to the state court --

QUESTION: The wholesaler could either bring in these contracts or post a schedule of resale prices.

MR. HALL: That's correct. However, a holding that a filing of a price schedule constitutes a meeting of the minds between the manufacturer and the wholesaler in that case would not be squared with this Court's reaffirmation of the Colgate --

QUESTION: So you are suggesting that we just went off the deep end in Midcal. Is that it?

MR. HALL: I would suggest that that, if it is read, Midcal is read that broadly, this Court would, squarely faced with the issue, would decide it differently, and that is exactly what this Court has made clear in Monsanto and Copperweld and in Fisher itself, that in order to establish a violation of the Section 1 you must have a meeting of the minds. You must have concerted action. You must have combination. You must have a conspiracy, and the Solicitor General has expressly stated in his brief that under New York's --

QUESTION: Mr. Hall, do you think we have also overruled the Schwegmann case?

MR. HALL: No, Your Honor, because --

QUESTION: There is no meeting of the mind there. It was all done by state power on the nonsigners.

MR. HALL: Well, as Justice Douglas's opinion

makes clear, there was concerted action by the distributors together using their fair trade contract which had been exempted under the Miller-Tidings law as a club to coerce the retailer. There was concerted action in Schwegmann. There was concerted action among the distributors. There was concerted action among the distributors and --

QUESTION: All you needed in Schwegmann was one resale contract that bound the whole trade, and that was the coercive power of government was part of what was at stake, just as it was in Midcal. But you say we should ignore the governmental power and just look for a private agreement. That is your understanding.

MR. HALL: But in Schwegmann the entire -- well, the entire enforcement was by private parties. It was not -- it was not enforced by the government. But even assuming that this Court were to interpret Schwegmann as not involving any concerted action between the distributors or between the distributors together with the signers, it cannot be squared with the Colgate doctrine.

QUESTION: Well, Mr. Hall, do you think, for instance, a state could pass a law telling all steel producers that they had to charge the price as set by U.S. Steel and just conduct a complete end run around

the Sherman Antitrust Act?

MR. HALL: There would be --

QUESTION: That seems to be the thrust of your argument, and I am not sure that an agreement by private parties is necessary. How can a state enact a law that tells everybody else they have to charge the price fixed by one individual out in the marketplace.

MR. HALL: Section 1, according to its plain language, as this Court found in Copperweld, addresses only concerted action, action which involves a meeting of the minds between -- where the state there is unilaterally imposing that price requirement on private parties, even though that may be a gap in the Section 1's coverage of restraints of trade, nothing in Section 1 reaches out to cover that.

QUESTION: In order to find that a state law is preempted by the Sherman Act and is incompatible with the Sherman Act, do we have to find that the state law violates the Sherman Act? Isn't it enough to find that the scheme that it sets up so frustrates the purposes of the Sherman Act, as Justice O'Connor just described, that it is invalid. We don't have to find that it violates the Sherman Act in and of itself, do we?

MR. HALL: Yes, you do, Justice Scalia. That is exactly what this Court said in Fisher. That was the

argument raised by Mr. Smock in the oral argument in Fisher, and as Justice White pressed him on that point, is a conflict with the policy sufficient, because he was not arguing a violation. This Court squarely rejected it and said in its central language in Fisher there must be a violation of Section 1.

QUESTION: The conduct that it authorizes or requires must be.

MR. HALL: That's correct.

QUESTION: Not the law violates the Sherman Act.

MR. HALL: The conduct -- here there is no -- under the statute --

QUESTION: But the statute ends up being unenforceable because the conduct violates the Sherman Act.

MR. HALL: But there is no such conduct here. There is, as the Solicitor General recognized --

QUESTION: If we disregard Midcal, you are right.

MR. HALL: To the extent that Midcal was read to apply to the price schedules, but if you look at the language in Midcal, Page 102, this Court was addressing the effect of the repeal of Miller Tidings Act on fair trade contracts, and that is exactly the language it was

using in --

QUESTION: On Midcal all you needed was one fair trade contract, too, wasn't it? Just one, and that bound everybody.

MR. HALL: That's correct, but there was at least some concerted action under that aspect of the statute which would --

QUESTION: By one -- at most by one retailer, even if they went the fair trade contract route.

MR. HALL: That's correct, but looking at the New York statute here there simply is no agreement between wholesaler and retailer.

QUESTION: No, but the difference between this case and your Berkeley rent case is, there a public decisionmaker made a decision that affected the entire market. There was no enforcement -- marketwide enforcement of a private decision. Here you have got private decisions on what the bottle price shall be to which the statute gives marketwide enforcement effect. You have got a mixture of the private and public decisionmaking power which you did not have in the Berkeley case.

MR. HALL: Well, the entire --

QUESTION: And you had that in Midcal, and you had that in Schwegmann.

MR. HALL: But in Berkeley the entire ordinance was based on privately set prices which the ordinance --

QUESTION: Has been for themselves. One landlord didn't fix another landlord's rent. The only marketwide effect of any decision was a public decision by the municipality, but you don't have that here.

MR. HALL: Under the statute we do. We have the state unilaterally requiring retailers to impose a 12 percent markup. There is simply no concerted action between any parties, and indeed throughout the argument by both appellant and by the solicitor general they have pointed to no agreement, to no concerted actions, to no combinations between the private parties.

The second independent ground to affirm is that the state legislature's direct imposition of the price restraint is ipso facto immune under Hoover, and a third ground to affirm is that the state acted pursuant to its core constitutional power under the 21st Amendment to structure a liquor distribution system to meet its perceived local needs. Liquor --

QUESTION: Do you think that Midcal decided that the conduct authorized in the California statute violated the Sherman Act?

MR. HALL: In Midcal the Court did assume a

violation when it was discussing the Sherman --

QUESTION: Assumed, assumed, but did it decide it?

MR. HALL: -- discussing the 21st Amendment.

QUESTION: Did it decide it or it just assumed it?

MR. HALL: No, it reached a decision that there was a violation of the Sherman Act. When it was discussing the 21st Amendment it was discussing it in the context of a violation.

Liquor is different. Liquor is different from any other commodity, because it is the only commodity singled out by the Constitution for special treatment. It is a specific, express grant of constitutional power to states to regulate liquor. There is one basic theme that runs through every -- has run through every 21st Amendment case since adoption, which is, the state has wide latitude, indeed, virtually complete control over how to structure its liquor distribution system within its borders.

There is no need in this case to balance the state's exercise of its core constitutional power against any other federal interest, because there is no conflict with any other part of the constitution. There is no violation of the antitrust laws, and --

QUESTION: What if we think there is a violation?

MR. HALL: If this Court does consider that there is a violation then it would engage in balancing under the method set forth in Justice Brennan's unanimous opinion in Capital Cities where the state's interests are closely related to its 21st Amendment power. The state's regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy, and that is exactly what we have here. We have an exercise of the state's core power under the 21st Amendment, as this Court has reiterated --

QUESTION: Well, Midcal didn't seem to treat it as part of the core power in its discussion, did it?

MR. HALL: In Midcal this Court gave great weight to the state court's conclusions about state law and the state interest as well as great deference to the factual findings of the California court because that is what it does in the absence of exceptional circumstances. Here the state, contrary to the situation in California, New York State's highest court, has found that the minimum markup statute advances an important public policy. It pointed to legislative findings.

The state acted in response to 21st Amendment concerns to structure its liquor distribution system, and the state balanced that important public policy being served by the statute against the federal interest under the antitrust laws and came to the directly contrary conclusion, and applying the same method of analysis that this Court did in Midcal this Court would come to the same conclusion that the state court was correct in its interpretation of its state interest.

It is quite different from Midcal, where the California court came to a completely different view about the importance of its statutory scheme, because there it found that the statute was contrary to public policy. It found that there were alternative means such as below cost statutes. That is exactly what we have here to achieve the same goal. It found that it would not -- that the method that California chose would not advance its purposes, but here it is a completely different situation. And the Court --

QUESTION: Could the state have met its goal of helping retailers by having simply a minimum markup statute in place?

MR. HALL: The state can meet its statutory goals under a simple minimum markup. It could choose a variety of means, but it doesn't --

QUESTION: Is there anything in the record then to justify the additional provision in New York for the price maintenance scheme as opposed to a minimum markup?

MR. HALL: There is nothing directly in the record on the necessity for the bulletin. The bulletin introduced a -- perhaps a needed element of flexibility at the wholesale level in what would be otherwise a rigid pricing system, but that is well within the state's core powers under the 21st Amendment to structure a liquor distribution as it sees fit. It can choose a monopoly. It can choose to sell liquor by the drink. It can sell it in package stores. It can choose the places and the times. It can limit the number of locations or provide unlimited, or it can choose a system, as New York did here, of small retailers coexisting with large ones.

QUESTION: Mr. Hall, why don't you argue that this is just a minimum markup law? What else is it?

MR. HALL: That is exactly what the statute is, and that is exactly what we did argue in our brief, that this is exactly like minimum markup laws in other states, which have never been held to be per se violations.

QUESTION: It requires a minimum markup on the

bottle price but it is still just a minimum -- is still just a requirement for a markup on whatever price the wholesaler sets.

MR. HALL: Exactly, and that is exactly the argument we --

QUESTION: Yes, but a markup usually means a markup on what he pays, not on what he says. I mean, the problem here is, it is not a markup on what he pays. He pays the case price and charges the markup on the bottle price, which is not the price he pays. That is not a markup. I mean, you can call it a markup, but it is not.

MR. HALL: Under the statute it is directly related to the price that he pays with the only difference the $1.92 per case breakage charge, but that is a statutory formula that New York used under its markup law, just as each state with a minimum markup law has chosen its own statutory formula for defining cost and which factors go into it.

All are equally artificial. There is nothing --

QUESTION: No, they are not equally artificial. This bears no relationship to what he paid for this bottle that he sold. He bought the bottle at a case price. He has to charge the markup over the bottle

price, even though he didn't buy it at the bottle price. That is just no relationship. It is not a markup.

MR. HALL: Under the statute it bears a direct relationship as distinct from the bulletin. It prepares an --

QUESTION: The statute as distinct from the bulletin?

MR. HALL: Under the statute the bottle price and the case price are the same except for the imposition of a breakage charge.

QUESTION: Fine.

MR. HALL: Which is a charge for opening a case to sell by --

QUESTION: Why aren't we dealing with the bulletin?

MR. HALL: Well, the bulletin and the statute should be considered distinctly because we have a facial attack on the statute and we have an as applied attack. The as applied attack is simply based on the anticompetitive effects of the bulletin, which is an entirely separate issue. It is true that under the bulletin the wholesaler does have some ability to effect the component of the price. It is different from the statute, which is a simple minimum markup.

QUESTION: I take it your argument, you would make the same kind of an argument if the wholesaler -- if there wasn't any state imposed minimum markup but the state just permitted wholesalers to set the resale price that retailers had to sell at.

MR. HALL: That is exactly what this Court did in Colgate.

QUESTION: Yes. Yes, so that is -- and that is what you are arguing.

MR. HALL: That's correct.

QUESTION: And there is no difference between that situation and this minimum markup situation.

MR. HALL: None at all.

QUESTION: And so again we get back to Midcal and Schwegmann.

MR. HALL: The result below was correct for three reasons. The result below was correct because there was no meeting of the minds under the statute or the bulletin. The result below is correct because the state directly imposed its price restraint as an act of the sovereign, and the result below is correct because the state acted pursuant to its core constitutional powers over which -- to structure a liquor distribution system to address what it perceived as flaws in the market and correcting its failures and aiding its

victims.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hall.

Mr. Kantor, do you have something more? You have five minutes remaining.

MR. KANTOR: Unless the Court has further questions, I have no further argument.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 1:54 o'clock p.m., the case in the above-entitled matter was submitted.)

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#84-2022 - 324 LIQUOR CORP., dba YORKSHIRE WINE & SPIRITS, Appellants

V. THOMAS DUFFY, ET AL.

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BY Paul A. Richardson

(REPORTER)