SUPPOSTON D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

JOHN F. HEALY, ET AL., Appellants v. THE BEER INSTITUTE, INC., ET AL.;

and

CAPTION: WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,

Appellant v. THE BEER INSTITUTE, INC., ET AL.

CASE NO: 88-449; 88-513

PLACE: WASHINGTON, D.C.

DATE: March 28, 1989

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1	IN THE SUPREME COURT OF THE UNITED STATES
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3	JOHN F. HEALY, et al.,
4	Appellants :
5	v. : No. 88-449
6	THE BEER INSTITUTE, INC., et al.; :
7	and :
8	х
9	WINE AND SPIRITS WHOLESALERS OF :
10	CONNECTICUT, INC.,
11	Appel lant :
12	v. : No. 88-513
13	THE BEER INSTITUTE, INC., et al. :
14	х
15	Washington, D.C.
16	Tuesday, March 28, 1989
17	The above-entitled matter came on for oral
18	argument before the Supreme Court of the United States
19	at 12:59 o'clock p.m.
20	APPEARANCES:
21	ROBERT F. VACCHELLI, ESQ., Assistant Attorney General of
22	Connecticut, Hartford, Connecticut; on behalf of the
23	Appellants.
24	JEFFREY IVES GLEKEL, ESQ., New York, New York; on
25	behalf of the Appellees.

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CHIEF JUSTICE REHNQUIST: We'll hear argument ncw in No. 88-449, John Healy v. The Beer Institute; No. 88-513, Wine and Spirits Wholesalers of Connecticut v. The Beer Institute.

Mr. Vaccheili?

DRAL ARGUMENT OF ROBERT F. VACCHELLI ON BEHALF OF THE APPELLANTS

MR. VACCHELLI: Mr. Chief Justice, and may it please the Court.

This case is an action for declaratory judgment and injunction challenging the constitutionality of Connecticut's beer affirmation law.

Under Connecticut law brewers must post their prices once a month on the sixth day of the month, and at that time affirm or swear under oath that that price is no higher than the lowest then being offered in the surrounding states of Massachusetts, New York or Rhode Island. The law -- the price becomes effective on the first day of the next month and is effective all throughout that next month.

Also, under another provision of Connecticut law, brewers are free to change or lower their prices at any time elsewhere, and such a change or decrease in

price does not constitute a violation of Connecticut law.

The law is challenged under the Commerce

Clause, and three Issues emerge: one, whether it

contains an Impermissible extraterritorial thrust and

thus directly regulates commerce in other states;

second, whether it constitutes protectionist legislation

by neutralizing the competitive advantages in other

states; and third, whether it is an indirect burden on

Interstate commerce.

We submit that the law passes muster under all three Commerce Clause tests and to whatever effect it has on interstate commerce, it is sanctioned by the Twenty-first Amendment to the United States Constitution.

Considering extraterritorial effect, the case of Brown-Forman is on point. In that case, this Court struck down New York's affirmation law because it prevented brewers from lowering their prices in other states lower than that which was in effect in New York at the time. The Court noted that that constituted an impermissible extraterritorial effect because it, in effect, regulated prices in other states in violation of the Commerce Clause.

Connecticut's law was struck down in 1982 for this same reason. And it was amended in 1984 with

law, brewers are free to change their prices in other states at any time, and that price change does not constitute a violation of Connecticut law.

Brewers, however, contend that they do not have the pricing flexibility that the Connecticut statute purports to extend. New York, they argue, has a 180-day price hold on price reductions, and Massachusetts has a 30-day price hold on all prices. The Second Circuit agreed and found that there — since there was no difference between what, in effect, occurred prior to the amendment, that even with the amendment, the law still contains an impermissible extraterritorial thrust.

We respectfully submit that it should be clear that Connecticut has no control over the pricing laws in New York or Massachusetts. Connecticut allows brewers to change their prices at any time and it does not constitute a violation of Connecticut law. Connecticut has done all that it can to satisfy the statements in Brown-Forman and the prohibitions discouraged there.

QUESTION: Counsel, you have no brewery in the State of Connecticut.

MR. VACCHELLI: That's correct, Your Honor.

There is still no brewery in Connecticut.

It?

QUESTION: How does that ever happen?

The -- the record indicates -- or I think -- that beer prices in Connecticut have always been a little blt high.

MR. VACCHELLI: Yes.

QUESTION: Why is this?

MR. VACCHELLI: Well, the — that is because we submit in Connecticut prior to 1981, the Connecticut laws were congested with regulatory provisions that protected the local industry. And as a result, liquor prices were high and consumers found it worthwhile to cross the state borders in large numbers.

In 1982, the -- the -- in -- the general assembly made a policy change. They decided they were no longer going to be supporting the profits of its local industry members. It would attempt to bring beer prices down which would facilitate consumers purchasing beer in Connecticut more and thereby facilitate the collection of taxes.

QUESTION: It's kind of hard on Yale, isn't

MR. VACCHELLI: Pardon me?

QUESTION: I say it's a little hard on Yale, isn't it?

MR. VACCHELLI: The brewers contend that this is protectionist, and the Second Circuit agreed. And we submit it's completely ironic to view a law which attempts to bring prices down in a state, which attempts to make a local industry more competitive, to call that protectionist.

QUESTION: Well, but you do allow for quantity discounts in Connecticut?

MR. VACCHELLI: Quantity discounts are not allowed in Connecticut.

QUESTION: But they are in New York, aren't they?

MR. VACCHELLI: They are. Quantity discounts are allowed in New York. Whether or not they actually --

CUESTION: How do you explain that as consistent with your policy in trying to make the market real competitive?

MR. VACCHELLI: Well, it's — the net effect is that the price of beer is lower in Connecticut now, that it has worked. And I think the statements of Representative Zajac in the joint appendix at page 65A shows that beer prices are now lower, and we don't have the problem that we had in Connecticut prior to 1981.

QUESTION: Of -- of course, if that's true and quantity discounts are irrelevant, you wouldn't -- you wouldn't need this statute.

MR. VACCHELLI: Well --

QUESTION: But the problem is that with quantity discounts in -- in New York, a New York price per se just has really no relation to the Connecticut market structure.

MR. VACCHELLI: Well, you're -- I think you're making some assumptions about the marketplace in New York and -- and in Connecticut. It's true that New York does allow volume discounts, but there are other provisions in New York law that are more restrictive too, such as the 180-day price hold. If brewers lower their prices in New York, they must keep that for six months. That is certainly a deterrent to their ability to target prices throughout the State of New York.

And I think this is --

Justice Stevens' question illustrates, you say, well,

Connecticut is really eliminated — a rigidly controlled market, but it still abolishes — or it still prohibits quantity discounts. And that's one of the whole problems in this case.

MR. VACCHELLI: Well, I -- I'm not sure that

Is all you're saying.

MR. VACCHELLI: Yes, right.

QUESTION: They're still higher than New York, but -- but lower than they used to be.

MR. VACCHELLI: Well, the actual prices are

--are not a matter of record, but they may very well be

still a little bit higher than they are in New York.

But the -- the difference between the prices in

Connecticut and the prices in New York, Massachusetts

and Rhode Island are not as significant as they used to

be. And I think that's what Representative Zajac was

referring to in the testimony that appears in the joint

appendix.

QUESTION: Well, what -- is it your submission that Connecticut's posting law has no effect at all on the prices in New York, for example?

MR. VACCHELLI: That's exactly what we're saying, Your Honor. I think --

QUESTION: And -- and so, what was the purpose of your posting law?

MR. VACCHELLI: Well, the -- the essential purpose of the posting law is so that regulators know what price is In effect In Connecticut. And so, if prices are -- are sold at a lower level, they -- they know who is violating the law. It's -- it's an

certainly thought it did.

MR. VACCHELLI: I don't think any of the trial courts agreed with that. In the first case, Healy I, Justice — the trial court judge there said there was no impact, no effect on interstate commerce by this law.

QUESTION: What did the court of appeals say?

MR. VACCHELLI: The court of appeals didn't

address that issue at all.

QUESTION: What --

MR. VACCHELLI: It -- it let that stand.

What the court of appeals did in the Healy I case is focus on the mechanics of the law.

QUESTION: Uh-hum.

MR. VACCHELLI: They found that this -- the

--the law at the time prevented brewers from lowering

their prices in other states because if they did that --

QUESTION: Well, that -- that -- that means that it has an effect on pricing in other states.

MR. VACCHELLI: It does, but I don't think -QUESTION: Well, that's what -- that's what I
asked. You said no.

MR. VACCHELLI: I'm trying to make the distinction now. It certainly did prevent them from changing their prices in other states, and that was extraterritorial. But we don't read either the Healy I

case or this Court's decision in Brown-Forman as finding that all laws — all affirmation laws have a burden on interstate commerce, that they are protectionist. I think both those cases focused on the mechanics of the law and — and how they worked because, as in the Seagram's case, there's no evidence in this case of whether or not there's a burden on interstate commerce, but what exactly affirmation does to the markets in beer. It's quite clear that beer flows freely across state borders into Connecticut. And the brewers have failed to put on any evidence in this case of the market and what the effect of this law has on the market.

They did put on evidence like that in the Healy I case. They put on affidavits from various officers and companies. They put on an affidavit from their economist saying the adverse effects to interstate commerce. In Healy I, the state put on its —— its affidavits, and it put on its expert witness, its economist. And there was a battle of the —— of the experts in that case. And the net result was the trial court found that there was no burden on interstate commerce.

In this case it's devoid of any evidence of what adverse impact this law may have on the market.

And so, we moved for summary judgment in that -- on that

But, again, also In the Second Circuit, the court didn't focus on what Interference Is being worked in the market. It didn't focus — it didn't even address whether or not there was a burden on interstate commerce. The — the Second Circuit didn't discuss the protectionism issue. Again, it focused on the mechanics of the law and whether it has an extraterritorial effect.

QUESTION: But It did say that the effect of your affirmation law — posting an affirmation — was that the companies couldn't change their prices in other states.

MR. VACCHELLI: Well, I think it -QUESTION: For all practical purposes, they
couldn't because of the laws of the other states.

MR. VACCHELLI: Yes. In effect, they --

QUESTION: And so, you were really achieving by your -- by your new -- by your new law or the present law what you -- you had the same effect as under the old law, didn't you?

MR. VACCHELLI: That's exactly what the court felt, and I think that's how they ruled.

QUESTION: And do you think it -- do you disagree that It had the same effect?

MR. VACCHELLI: No, I don't think I disagree with that in that they're not --

QUESTION: And -- and don't you think the legislature wanted it to have the same effect?

MR. VACCHELLI: No. That's absolutely not

--what the legislature manted to do was to make

Connecticut marketplace more competitive, to bring

prices down. Its purpose wasn't to prevent brewers from

changing their prices in other states. And that's

exactly why they wrote this specific provision of the

law to free them to do that. That's the defect they had

in mind. They addressed it as plainly and as squarely

as they possibly could.

If brewers are not free to change their prices in New York or Massachusetts as freely as they wish, that is because of the laws in New York, not because of the laws of Connecticut. And this is not —

QUESTION: Mr. — go on. Finish that thought and I'll —

MR. VACCHELLI: And we submit that this is not a constitutional deficiency because of this. All companies engage --

QUESTION: Can -- can I ask about -- about
the discrimination against interstate commerce aspect
you've just been talking about the affecting the laws of

other states. Why -- why doesn't this discriminate against interstate commerce because it's plain that on the face of this statute if -- if you are a brewer that -- that manufacturers and markets only in Connecticut --4 there's no limit on what price you could set. You can 5 piece out the market throughout Connecticut any way you 6 want. You can charge low here, high there. You're entirely free to -- to price any way you want. 8 But if you're a brewer that sells in 9 Connecticut and elsewhere, you suddenly have a price 10 constraint. You cannot go lower in Connecticut than you can go elsewhere. Why isn't that a -- and that only applies If you're selling outside of Connecticut. You -- you have no restriction if you're selling in Connecticut. 15 MR. VACCHELLI: Well, are you saying that it 16

MR. VACCHELLI: Well, are you saying that it discriminates against Connecticut brewers?

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freer. They can -- they can price their -- their product at whatever they want inside Connecticut.

MR. VACCHELLI: And there's -- there are no brewers, and they are also --

QUESTION: Well, there may --

MR. VACCHELLI: They must sell to wholesaler in New York,

they must sell in Connecticut at that same low price.

QUESTION: Yes, but therefore --

MR. VACCHELLI: (Inaudible).

QUESTION: Therefore, if you're smart, don't sell in New York. If you're smart, just sell in Connecticut. Then you can price throughout Connecticut at whatever level you want. But as soon as you sell in New York, then your prices in Connecticut have to be constricted.

Now, I don't see any response to that except that you happen right now to have no -- to have no brewers in -- in -- in Connecticut, but I don't know that we adjudge the --

MR. VACCHELLI: Well --

QUESTION: -- the facial discriminatory nature of a -- of a particular law on the basis of whether there currently are any -- any people being benefited by it.

MR. VACCHELLI: Well, I don't think that constitutes a discrimination, Your Honor. As long as all — if all brewers are free to sell only in Connecticut or if they're free only to sell in New York, then the law affects them all the same. Every brewer is eligible to — under that same kind of a scenario.

QUESTION: Gee, well -- then there's no such

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thing as discriminating against interstate commerce. long as you're -- you're free to engage in just intrastate commerce, you're not being discriminated against.

MR. VACCHELLI: Well --

QUESTION: That can't be right.

MR. VACCHELLI: The -- the -- there are no brewers in Connecticut, so that is a hypothetical --

QUESTION: Well, there might --

QUESTION: Maybe you're trying to develop them. Maybe you're trying to develop them. certainly -- If you want to sell in Connecticut, the best way to do It now is to -- Is to manufacture and sell only there. Then -- then you can price at whatever you Whereas, as soon as you start selling outside of Connecticut, then -- then -- then you have a price constraint.

MR. VACCHELLI: Well, how does It interfere with interstate commerce?

QUESTION: You're discouraging me from selling outside of Connecticut because once I do, then -- then -- then I have a price constraint when I sell within Connecticut. Whereas, If I just limit myself to selling inside Connecticut, I can price at whatever level I want.

MR. VACCHELLI: Well, I -- I'm failing to see the discrimination because you're -- you're -- I think 2 it's talking about apples and oranges. In one case, 3 you're talking about one company that only sells within 4 the State of Connecticut. In another case, you're 5 talking about people that sell in all different states. 6 If you're talking about discriminating against 7 interstate commerce, it would be discriminatory for 8 Connecticut to say that Connecticut brewers who engage 9 in interstate commerce are free to sell lower In 10 Connecticut as opposed to Interstate brewers --11

QUESTION: No, his point is they're free to -
MR. VACCHELLI: -- who are not located in

Connecticut can sell elsewhere.

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QUESTION: His point is they're free to sell higher in Connecticut. But the problem with that is I suppose it's pretty hard to sell beer at a much higher price than the competitive level. That's the — that's —

MR. VACCHELLI: Well, I'm just not following.

I don't think it's -- you're talking about different

classes. If they -- if all are in the same class and if
they're being discriminated against, that constitutes a
discrimination against interstate commerce. You're
talking about different classes altogether. One class,

only interstate -- only within the state of Connecticut -- if they don't engage in interstate commerce, and another class that engages in interstate commerce. 3 can't treat companies engaged in interstate commerce any differently than we treat local companies. But that's not the case here. 6 QUESTION: Oh, I -- I don't think that's 7 right. 8 MR. VACCHELLI: There are two different 9 categories and two different classifications in --10 QUESTION: You -- you're telling me that you 17 don't violate the Commerce Clause so long as you treat 12 people who do business only in Connecticut differently 13 from people who are interstate business people. MR. VACCHELLI: I think so, and that's 15 especially true under the Twenty-first Amendment to the 16 United States Constitution where each state -- if I'm --if I'm not giving an acceptable answer to you on that, 18 at least under the Twenty-first Amendment --QUESTION: Well --20 MR. VACCHELLI: -- It's certainly valid for 21 them to do that --QUESTION: That's --23 MR. VACCHELLI: -- because there they're just 24

regulating commerce within the state. If it's not going

out the -- out the state, they can discriminate all they want.

But I think the point I'm trying to bring out is that you're talking about two different classes and where there are differences, discrimination is permitted as long as there are differences in factual situations.

And you have completely different factual situations here.

QUESTION: Mr. Vacchelli, if this case involved a product other than alcoholic beverages, would you think that a posting statute would violate the Commerce Clause?

MR. VACCHELLI: That's difficult to answer.

The yes — the answer to that would probably be, yes, probably. The answer would be this would be a valid provision provided it's not protectionist in purpose and provided it doesn't interfere with interstate commerce. But without testing those other two issues, I don't think I can answer that — that question.

QUESTION: Well, why isn't it a protectionist purpose for the -- the state to try to obtain a competitive advantage for its own consumers?

MR. VACCHELLI: Connecticut isn't trying to contain to give a competitive advantage to Connecticut over New York, Massachusetts or Rhode Island. It's

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trying to make its own Ilquor Industry more competitive. It's not trying to treat New York customers differently, and there's no evidence in this case that it does. Just as in the Seagram's case, the —— it's just as likely that this law will give Connecticut lower prices rather than New York or Massachusetts higher prices, and there's no evidence to the contrary.

But I think when you're -- when you're getting at the -- the -- the heart of the protectionism issue, the -- you have to look at whether or not you're protecting a local industry from competition outside, protecting a local industry from interstate competition. Connecticut is not trying to protect its local industry from competition. We're not trying to make --

QUESTION: You're trying to protect your local consumers.

MR. VACCHELLI: We're trying to get the best prices for beer for our consumers that we can.

QUESTION: You're trying to protect your retail dealers, aren't you?

MR. VACCHELLI: That, as I -- that is also -- it's -- we're not trying to make them in a better position than anyone else. It's -- it is trying to put them in a more competitive position.

QUESTION: Could I ask you just -- New York

has -- permits volume discounts. 1 MR. VACCHELLI: They permit quantity 2 discounts. 3 QUESTION: I mean, quantity discounts. 4 MR. VACCHELLI: There is -- there is a 5 difference. 6 QUESTION: And in Connecticut you cannot give 7 tnem. 8 MR. VACCHELLI: That's correct. 9 QUESTION: Now, what if the -- what if the 10 --do the -- do the brewers selling in New York have to 11 --when they post under the New York law, they have to 12 post their quantity discounts? 13 MR. VACCHELLI: I'm not sure about that. 14 QUESTION: Well, let's assume there is a 15 quantity discount in effect in New York. 16 MR. VACCHELLI: Yes. 17 QUESTION: Now, at what price do they have to 18 sell in Connecticut? Do they have to give every small wholesaler a -- a -- the advantage of a quantity 20 discount even though he doesn't -- even though he 21 doesn't buy in such quantities? 22 MR. VACCHELLI: Well, the -- the -- it's yes, 23 but that's -- I don't think that situation exists. QUESTION: Why? 25

QUESTION: Well, I know, but -- but --

MR. VACCHELLI: We do get the lowest price that's offered. And if one wholesaler is getting a quantity discount that brings the price down to a particular level per case, then that is the price that Connecticut gets.

QUESTION: Well, but they can't be giving your -- your people quantity discounts.

MR. VACCHELLI: That's right. Connecticut doesn't get the quantity discount. But If you take their price, subtract the quantity discount, determine what the case price is, that's the case --

CUESTION: Don't you think that has some consequence on -- on their pricing and -- their quantity discount pricing in New York?

MR. VACCHELLI: There's no evidence of that,
Your Honor. And that's -- that's the whole heart of
this case. I think you're assuming that -- that this -this will cause -- what -- what will happen if that's
the case? Is that causing them to raise their prices in
New York? There's no evidence of that. Does that cause
a disturbance in the market in beer? There's no

evidence in that. Beer flows freely across the borders in Connecticut, and that is the focus of the Commerce Clause, looking at what is the disturbance in the market ——

QUESTION: But you do —— but —— but if they want to give quantity discounts in New York, they're going to have to sell beer at that quantity discount price in Connecticut.

MR. VACCHELLI: Yes.

QUESTION: Even though —— even though none of the buyers happen to —— happen to be buying in quantities big enough to justify a discount.

MR. VACCHELLI: That's —— well, that's

MR. VACCHELLI: That's -- well, that's correct. But In -- in Connecticut we don't permit quantity discounts --

QUESTION: I know.

MR. VACCHELLI: -- or volume discounts because all wholesalers --

QUESTION: I know. I know.

MR. VACCHELLI: -- must be treated the same.

QUESTION: But you force the companies to sell at that lower price even though if they had a quantity discount system, none of these people would qualify for the quantity discount.

MR. VACCHELLI: Well, it's possible. But

that.

what effect does that have on the market? That's -that is -- if that is the case, assuming you -- there is
evidence of that, and assuming you could read that from
the face of the law, what is the effect of that on the
market?

QUESTION: Well --

MR. VACCHELLI: There is no evidence of -- of

QUESTION: Pennsylvania comes in here and says the effect it has on -- on the market is that the brewers won't give us quantity discounts anymore.

MR. VACCHELLI: Well, Pennsylvania is — Is trying to get prices lower than anyone else in the country, and that's exactly why affirmation laws came into effect in the first place. If it does cause a disturbance in the market, it certainly would have been apparent by now. Affirmation —

QUESTION: What is the -- what is the basic purpose of an affirmation law? Is it to get lower prices for the retailers or for the consumers or for both? Or is it some other purpose?

MR. VACCHELLI: Well, I think generally they
were enacted for both purposes: one, to prevent
discrimination, geographic price discrimination which is
the same kind of theory as under the Robinson Patman

Act, and secondly, to -- to get better prices for their consumers vis-a-vis other states.

And if you can see how it works in

Connecticut, it has worked to solve a particular social problem that Connecticut was having with consumers leaving the states in large numbers, buying liquor themselves, bring it into Connecticut completely beyond the control of Connecticut authorities.

And this is — this is where the Twenty-first Amendment issue comes in. Under that Amendment, states have broad powers to regulate liquor within their borders according to their own philosophies. And this Court has consistently held that the Twenty-first Amendment works an exception to the normal operations of the Commerce Clause; that is, if the law is not extraterritorial —and to this point, extraterritorial means preventing brewers from changing prices in other states and making it illegal for them to do that. If it's not extraterritorial and if it's an exercise of a core power of the Twenty-first Amendment, then the law will outwelgh whatever impact — adverse impacts it may have on interstate commerce.

QUESTION: Mr. Vacchelli, would the following law be -- be constitutional in your view? Connecticut says anyone who sells beer only within Connecticut may

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MR. VACCHELLI: Yes.

QUESTION: What happens to beer that might be

Imported from Tennessee or Canada or something like
that? Is that free of all restriction, or does it have
to come through a wholesaler that's regulated?

MR. VACCHELLI: The system is every product has to have a shipper. The shipper has to be licensed in Connecticut. That shipper sells to the wholesaler. The wholesaler sells to the retailer. So, whether the origin is — is Canada or Germany or anywhere in the world — the origin of the product — it still goes through the same system.

QUESTION: But then is -- I'm still not quite clear. Is it subject to this restraint then that if the Canadian beer is sold through a shipper that's licensed, does -- oh, then they -- they still have to represent that it's not sold at any lower or any higher price than in New York or -- or -- I see.

MR. VACCHELLI: That's right.

QUESTION: Yes.

MR. VACCHELLI: And considering the hypotheticals, Your Honor, the real world is that there are no brewers in Connecticut. And I don't think the law -- the law -- you have to test the -- the actual effects of the law on the market. There is no adverse effect on the market in this case.

CUESTION: Counsel --

MR. VACCHELLI: And a core power that it's being exercised --

QUESTION: Do -- do -- do we have any case in which we say that market behavior of a regulated entity in some other state can be the premise for legislation in the home state?

MR. VACCHELLI: Well, Seagram's is the only one that comes to mind immediately in that we can regulate with reference to prices --

QUESTION: And you read -- you read -- you read -- you read that for the proposition that outside market behavior is a valid regulatory premise under the Commerce Clause.

MR. VACCHELLI: Well, it's not exactly the same thing, but it's very similar in that states are free to -- to put on price controls on the sale of liquor within their states with reference to what's happening in other states.

And I think the very evil that it's being protected here is obvious in Connecticut, that if consumers are able to leave the state in large numbers and purpose — and purchase their liquor elsewhere, it completely short-circuits Connecticut's regulatory system. If we can't — if Connecticut has pervasive regulations regulating what industry members can sell,

when they can sell it, who they can sell it to, how much they can sell it for, and if consumers can leave the state and short-circuit that, then their powers -- state power is completely short-circuited.

Connecticut's interest in this case is plain.

It's trying to make the Connecticut industry more

competitive. It's not trying to discriminate against

industries that regulate — that operate in interstate

commerce. And unlike the Midcal case and 324 Liquor

case, it's substantiated. The brewers' state

affirmation works in their brief. The legislative debates show that it works, and we wouldn't be here if

that wasn't so.

Unless there are any further questions, I'll reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Vacchelli.
Mr. Glekel?

ORAL ARGUMENT OF JEFFREY IVES GLEKEL

ON BEHALF OF THE APPELLEES

MR. GLEKEL: Thank you, Mr. Chief Justice, and may It please the Court.

As the Appellants concede, Connecticut's beer affirmation provisions were enacted by the Connecticut legislature in order to halt the practice of Connecticut consumers who live near the border areas crossing state

lines to buy beer in the bordering states at the lower prices which prevailed in those states.

It is our position that the Connecticut law violates the Commerce Clause on two different though somewhat related grounds. First, the statute is extraterritorial. It's extraterritorial because it purposefully regulates transactions occurring in other states. Second, in our view —

QUESTION: When you say purposefully regulates, Mr. Glekel, you put to one side, I take it, cases in which a local law will have an effect, although it's not designed to have that effect in another state.

MR. GLEKEL: That's right. I put aside the cases where a state law designed to promote some valid objective does have some ramifications on commerce in other states.

It is our view that the law is also protectionist because it operates much in the manner of a tariff or a tax to deprive out-of-state consumers and wholesalers of the competitive advantages which they presently enjoy in the actions of such legislation.

I should also add that It is our view that affirmation statutes in general -- that is, state laws that the in-state prices to out-of-state prices -- are generally extraterritorial and protection ist.

we believe there is some factors that attend — attending the operation of the Connecticut statute that make it particularly objectionable on Commerce Clause grounds. But it is our broader submission that the logic of this Court's Commerce Clause decisions compel the conclusion that affirmation statutes are generally unconstitutional.

I would like to first briefly address the extraterritorial operation of the Connecticut statute.

This, of course, was the basis for the Second Circuit's decision invalidating the law.

I think it is useful to focus for just a moment on the manner in which the statute came into existence. In 1983, this Court summarily affirmed the Second Circuit's decision which invalidated Connecticut's predecessor statute on the grounds that it prohibited brewers from selling beer in a neighboring state at a price lower than the posted Connecticut price during the month covered by the posting.

The Connecticut legislature then amended the affirmation requirement to require that at the time of the posting the prices at which beer was sold in the bordering states was no higher than the posted Connecticut price. It was still illegal, however, under the statutory language for the brewers to lower prices

In the bordering states subsequent to their Connecticut posting.

Now, when the brewers brought suit again seeking declaratory and Injunctive relief, Connecticut apparently recognized that this statute was just as unconstitutional as the one invalidated in the previous Healy decision. The Connecticut liquor commissioners attempted to step into the breach, and they issued a declaratory ruling which basically states that despite the statutory language, under Connecticut law it is not illegal for a brewer to lower its price in the bordering states following its posting an affirmation in Connecticut.

Now, as I understand it, Connecticut's argument seems to be that the brewers really have nothing to complain about because under Connecticut law all they have to do is to adjust their prices to neighboring state prices — that is, to adjust their Connecticut price to neighboring state price levels — for the single day of the posting.

I think the problem is, as Mr. Vacchelli acknowledged -- Is that the brewers cannot, in fact, lower it at lower bordering state prices subsequent to their posting an affirmation in the bordering states because Connecticut law interacts with the statutes of

the bordering states in a way which makes this impossible.

QUESTION: Mr. Glekel, supposing that

Connecticut passed the converse of this sort of a

statute in the interest of a — a mild form of

prohibition requiring that the brewers affirm that the

prices in the neighboring states were no lower. Would

that have the same Commerce Clause consequences?

MR. GLEKEL: If they were to affirm that the prices — If they had to affirm that the prices in the bordering states were no lower, it would have Commerce Clause consequences somewhat — somewhat in reverse since it would tend to — It would have the effect of preventing or at least strongly discouraging higher prices in the bordering states if the brewers intended or wanted to charge higher prices —

QUESTION: Or keeping prices in Connecticut high.

MR. GLEKEL: Or keeping prices in Connecticut high.

I think It's Important --

QUESTION: Would that -- would that be good or bad under the Commerce Clause and under the Twenty-first Amendment?

MR. GLEKEL: Well, we would take the position

that it would still be exporting Connecticut price regulations beyond Connecticut's borders and influencing prices in other states.

QUESTION: Even though it's a perfectly permissible purpose, I take it, for Connecticut under the Twenty-first Amendment to say we want to — we don't want to prohibit beer consumption outright, but we want to keep the price high so that not many people drink very much.

MR. GLEKEL: That's a permissible purpose under the — assuming that was the purpose. That is a permissible purpose under the Twenty-first Amendment, but I think that this Court's precedents establish that even if the purpose is permissible, a state cannot attempt to achieve that purpose by protectionist or extraterritorial means. And our objection would be to the means. It would be somewhat similar to this — to the Bacchus Imports case where the Court ruled that a tax which Hawaii — a tax exemption which Hawaii granted just to home-grown liquor and not to other liquor was unconstitutional.

I think the -- the problem with that is that there are plenty of things that Connecticut can do in order to promote temperance. Obviously, they could prohibit the sale of beer altogether. They can

they can do as they do, make it lilegal to promote beer or to discount the prices of beer. But they — under this Court's decisions in Bacchus Imports and Brown-Forman and Midcal, they cannot undertake measures which essentially export the problem and make other states bear the burden.

QUESTION: Well, Mr. -- Mr. Glekel, if -- if

-- if New York aidn't have a -- some kind of a posting

law, if the -- if the -- if a company -- if a distiller

could lower his prices there anytime he wanted to, would

the Connecticut law be valid then?

MR. GLEKEL: Assuming that all — that prices could be lowered in any of the bordering states anytime the brewer wanted to, our view is that the law would still be unconstitutional. First of all, obviously for the moment in time of the Connecticut affirmation, it does — It would compel brewers to adjust their prices in Connecticut and in the adjoining states to an equal level. So, there would be some cost involved. And I think all that would effect would be the degree of the extraterritorial impact.

If the -- your question is directed at the type of statute --

QUESTION: Of course, I doubt -- probably

Connecticut wouldn't have this statute then if --

MR. GLEKEL: Well, I just --

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QUESTION: -- if it were so easy to change the prices in other states.

MR. GLEKEL: I was just going to add that

Connecticut's statute would scarcely achieve the purpose

It was designed to achieve, which Mr. Vacchelil believes

that it was achieving, if in fact consumers had an

Incentive to travel from Connecticut across state lines

QUESTION: Just wait a day.

MR. GLEKEL: -- every day but one.

QUESTION: Just wait a day, yes.

QUESTION: Well, Mr. Glekel, does the record tell us anything about the frequency of price changes in this industry?

MR. GLEKEL: What the -- what the record --

QUESTION: Do we -- do we know, for example,

that they ever reduce the price in New York?

MR. GLEKEL: Yes. Yes, Your Honor. The record presented in the context of the summary judgment motions — the undisputed facts — I'm referring particularly to page 154A of the joint appendix — states among other things that "New York and Rhode Island brewers and importers, unfettered by extensive

regulation, can and do offer a range of price discounts to wholesalers for a variety of reasons. Discounts are offered for quantity sales, sales to special customers (the so-called home distributors in New York), to encourage advertising by wholesalers for purposes of test marketing new products, and for promotional purposes."

about price changes. It says there are a lot of discounts, but they may be permanent discounts that are frozen and have been the same for the last 30 years.

MR. GLEKEL: Well, I think there are also statements in the record that there is a — that the New York markets are significantly more competitive — New York and Massachusetts, Rhode Island markets. There's extensive competition, more than in the Connecticut market, and that the New York market is characterized by substantial price flexibility and variability.

I think you have to keep in mind that in New York, unlike Connecticut, prices are not uniform.

There's no requirement that prices be uniform throughout the state. In Connecticut, a brewer has to have one statewide price. In New York, a brewer can charge different prices to different wholesalers in different areas, and they do that. So, it's a very different,

certainly a far more competitive market than you find in Connecticut that has chosen a very different system of -- of regulation.

QUESTION: Well, does that -- that material in the record indicate then that there have -- there have been continuing price changes from time to time in New York despite the Connecticut statute?

MR. GLEKEL: Well, the record --

QUESTION: Let me put it a different way. Is there anything in the record to indicate that the Connecticut statute has ever prevented any brewer from making any price change that it wanted to make?

MR. GLEKEL: The present -- the -- the present statute.

QUESTION: Yes.

MR. GLEKEL: No, there's nothing in the record as to what has occurred since the actual enactment of the -- of the Connecticut affirmation statute. Our --

QUESTION: You started to explain earlier

--and I was kind of curious, and I don't think you ever

completed it -- how the Connecticut statute might

prevent price changes in New York. I really don't

understand how it could do that.

MR. GLEKEL: Well, under the New York -- New

York does not have an affirmation requirement --

Right.

QUESTION:

MR. GLEKEL: -- unlike Connecticut. But New York does have a requirement that if a brewer lowered prices in New York, which is referred to as a price promotion --

QUESTION: He has got to hold it for six months.

MR. GLEKEL: -- that price promotion has to stay in effect for a -- six months or a hundred -- or 180 days.

QUESTION: Right.

MR. GLEKEL: It can be offered to a particular wholesaler or a particular region, but It has to remain in effect. So, when a brewer makes the decision whether to undertake a price promotion in New York, the brewer, one, has to keep in mind that that special promotion price that may be offered to one wholesaler because wholesale is a very competitive market, has to be offered throughout Connecticut for the six months — I guess the six months plus an additional month.

QUESTION: Right.

MR. GLEKEL: Plus the fact that brewer, after posting the price required by the Connecticut

affirmation statute following the beginning of the promotion, can't just reassess the situation and say, gee, this doesn't make any economic sense. If we have to offer the same low price in Connecticut, lat's halt the promotion and raise our prices in New York the day after.

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QUESTION: But that's a consequence of the New York statute. That's because New York says you got to keep it low for six months.

MR. GLEKEL: I don't believe so because it is really only the Connecticut statute, not the statutes of New York or Massachusetts or Rhode Island, that deliberately crosses state lines by referencing in-state prices and practices to out-of-state practices and prices. If Connecticut had nothing more but the type of regulations found in Rhode Island, Massachusetts and -- and New York, there would be no extraterritorial problem. The regulations of the neighboring states don't cross borders. The Connecticut -- the Connecticut regulations do.

QUESTION: Well, does that mean that every state is limited to the least restrictive form of regulation of the liquor business because If it adopts 24 anything more restrictive like Connecticut does, it's going to interfere with neighboring states which have a more relaxed regime?

MR. GLEKEL: No, it doesn't mean that, but I think It does mean if a state undertakes or enacts a statute that is designed to give a benefit to in-state businesses at the expense of out-of-state businesses and does this with the intent and effect of imposing a burden on out-of-state businesses, that violates the Commerce Clause despite the Twenty-first Amendment. The Twenty-first Amendment, as the Court concluded in Brown-Forman, does not authorize extraterritorial legislation and does not authorize protectionist legislation.

We're not, again, talking about a statute that promotes some objective related to the Twenty-first Amendment such as temperance, but --

question: You -- you answered earlier in response to my hypothetical that it wouldn't make any difference if we were. If it has an extraterritorial effect even if it promotes temperance, it falls under the Commerce Clause.

MR. GLEKEL: Not any extraterritorial -QUESTION: Well, but my -- my hypothesis.

MR. GLEKEL: Yes, yes. We would take the position that that -- that that would still be

unconstitutional.

QUESTION: Even though it -- It has a perfectly legitimate motive to promote temperance.

MR. GLEKEL: Yes, because it was promoting the temperance through — through protectionist means and, in effect, was attempting to pose a burden on the brewers and consumers and businesses in the bordering states in order to achieve the goals that it was seeking on behalf of the affirmation state. One of the —

QUESTION: How would it impose a burden on consumers and border states?

MR. GLEKEL: Because it might well interfere with the policies of the border states under the Twenty-first Amendment who may take a very different view of what is desirable. Maybe the bordering states desire lower prices. Maybe they desire a great deal of competition, believe in flexible pricing and want different brewers to charge different prices in different areas.

QUESTION: But why -- why should that view prevail over the more restrictive view? Why shouldn't each state be entitled to have its own view?

MR. GLEKEL: Because at some point if a state enacts legislation to further its view that references out-of-state practices as the measure of what's permitted in state, it's going to interfere with what

other states want to do.

In effect, Connecticut under the present statute is interfering with what New York, Massachusetts and Rhode Island would like to do in effect. New York is telling Massachusetts and New York that if they want to minimize the impact of the Connecticut statute, they have to abandon their regulatory practices such as insisting that discounts remain in effect for 180 days or Massachusetts' 30-day rule that prices have to remain in effect for 30 days, but they have to abandon these practices or significantly modify them even though what New York and Massachusetts do does not reach across state lines and is not in any way objectionable.

So, our view is that what Connecticut has done is interfere with the Twenty-first Amendment prerogatives of other states rather than furthering its own Twenty-first Amendment policies.

I would say also there's something a little bit, I think, Ironic in Connecticut Invoking the Twenty-first Amendment on behalf of legislation which is not designed to promote temperance or combat any evil attendant to the distribution or consumption of alcoholic beverages, but rather is designed, as Connecticut has in effect conceded, to divert business from the bordering states to Connecticut. Indeed, what

Connecticut states is that the purpose of this law is to promote the sales of beer in Connecticut.

QUESTION: Well, isn't that a permissible purpose under the Twenty-first Amendment? The state has complete authority to regulate -- what is it -- the sale and consumption.

MR. GLEKEL: It may be a permissible purpose, but it's not a purpose that under the Twenty-first

Amendment would enable a state to adopt extraterritorial or — or protectionist legislation. I —

QUESTION: But your position is that no -- no -- even temperance purposes under the Twenty-first Amendment wouldn't -- would not allow the state to adopt extraterritorial.

MR. GLEKEL: That — that is our position, and I — I think Brown-Forman supports that position.

I'm just pointing out that there's certainly a plus factor as far as this Connecticut statute is concerned.

I -- I think the way Bacchus Imports put it is really appropriate to this Connecticut statute as far as the Twenty-first Amendment Issue is concerned, and what the Court concluded there is that the Amendment simply does not empower states to favor local industries by erecting barriers to competition, which is -- was really precisely what Connecticut has -- has done here.

Connecticut affirmation provisions also constitute a classical example of an explicitly protectionist statute. And what the law really does on its very face is to strip New York, Massachusetts and Rhode Island brewers, consumers, retailers of all the competitive advantages they would otherwise enjoy. I mean, one thing is certain. This legislation will remove the incentive for Connecticut residents to purchase out—of—state beer and eliminate the widespread shopping of Connecticut residents for beer in the neighboring states. It's going to operate very much like a tariff.

And I'd like to respond here to one point that Mr. Vacchelli made in response to a question. Mr. Vacchelli said that actually the price disparity between Connecticut and the bordering states is not as great as it used to be, and he referred to the remarks of a Connecticut legislator.

actually the Connecticut legislator he was quoting -- his remarks are reproduced at page 65A of the appendix -- was speaking concerning Connecticut's -- when Connecticut's current affirmation law was proposed following this Court's invalidation of the predecessor statute. And he was speaking in support of the statute pointing out that Connecticut ought to pass a new

and Connecticut residents were not traveling across
state borders like they used to to purchase beer.

So, I think what Mr. Vacchelll is referring to really supports the obvious protectionist nature of the Connecticut -- of the Connecticut affirmation provisions.

QUESTION: I really must confess I'm puzzled about another aspect that this example points up. This traveling back and forth across the state line suggests that the same economic market includes both sides of the state line. And I would think under the Robinson Patman Act, you probably have to sell to your customers on both sides of the state line at the same price anyway.

MR. GLEKEL: The -- I think what you're suggesting is that under the supremacy --

QUESTION: Well, there's a federal statute that says you can't discriminate between competing purchasers who are similarly situated. And if they're in the same economic market and you're suggesting these people go across the state line to buy beer in New York instead of buying it in Connecticut, presumably you're saying it's cheaper in New York. If it's cheaper in New York, you must be discriminating between the New York customers and the Connecticut customers.

MR. GLEKEL: No. There's --

QUESTION: And the statute is designed to prevent that.

MR. GLEKEL: I — I think as the record below indicates, the Connecticut brewers — the brewers basically sell beer in the New York and Connecticut markets based upon competitive provisions. They're very different regulations in New York, Connecticut and Massachusetts and Rhode Island, very different degrees of competition.

Of course, New York brewers, wherever they may be, sell to New York wholesalers, and they sell to Connecticut wholesalers. The wholesalers, in turn — a New York wholesaler cannot sell to a Connecticut retailer. It can only sell to a New York retailer.

QUESTION: Right.

MR. GLEKEL: A Connecticut wholesaler to a Connecticut retaller.

QUESTION: You're saying the problem is that the markup is higher in Connecticut.

MR. GLEKEL: Well, what we are suggesting, part of the problem is undoubtedly that the markup is higher in -- in Connecticut. Part of the problem is that there's less competition in Connecticut because of its increased regulations. So, in some cases, beer

prices are higher to Connecticut wholesalers just as in some cases prices are lower to Connecticut wholesalers.

what the record indicates — the stipulated facts — is that on the wholesale level, from brewer to wholesaler, prices in Connecticut are neither the highest nor the lowest in the four-state area. And this is something that constantly changes particularly because of a lack of restrictions in the New York market where different wholesalers receive different prices at different times.

QUESTION: Mr. Glekel, what if Connecticut adopted a state liquor store policy of simply saying that the only people that can sell liquor in Connecticut or beer are liquor — are the state liquor stores. And it's a state—owned company, and the state—owned company says to all the distributors we're not going to pay you any more for your liquor than you — than you're offering for in New York. There would be nothing wrong with that, would it?

MR. GLEKEL: There may very well be. There is no state that has adopted that policy as far as liquor — as far as beer is concerned.

QUESTION: Well, certainly lots of states have adopted it so far as Ilquor is concerned.

MR. GLEKEL: They certainly have, and I

recognize that some of this Court -- this Court's decisions have held that when a state acts in a proprietary capacity of this sort, Commerce Clause restraints don't necessarily apply.

However, I don't think those precedents would necessarily support a state basically selling — taking over the Ilquor business inside a state and, in effect, doing the same thing that Connecticut presently compels under affirmation. I don't think we're required to take any ultimate position on this, but I don't think this Court's precedents necessarily support a state doing this. And I think it's open to serious question as to whether a state can — can do that. I think that takes the state propriety doctrine one step further than —

QUESTION: Then how is the state liquor business supposed go about purchasing from brewers? To say, you know, you just charge me whatever you want?

MR. GLEKEL: Well, what Pennsylvania suggested in its amicus brief, that brewers should probably — that the state should bargain with the brewers or distillers, whatever, just like any other customer would.

QUESTION: And might you not bargain to say I won't pay you a bit more than you charge New York wholesalers?

MR. GLEKEL: I suppose there's always the question of fact. At some point — whether by bargaining in this nature at some point you're doing the exact, same thing as you're doing in affirmation. I think if a state had a hard and fast policy that, in fact, made a brewer sign an affirmation that it would never offer prices any — to a state any higher than those sold anywhere else, there would be substantial question whether that would be immunized from Commerce Clause challenge because it was the state doing it itself rather than compelling private parties — private parties to do it.

I would like to turn briefly to our contention that affirmation statutes are generally unconstitutional and that Seagram should be overruled or at least substantially qualified.

we do not believe that there is any principal distinction between prospective, contemporaneous and retrospective affirmation statutes. In our view, all type of affirmation laws are protectionist and exercise impermissible extraterritorial control because what they do is to force brewers to consider the affirmation state's market conditions when they are setting prices in other states on the basis of market conditions in those states.

In short, any law that compils brewers to sell their product in an affirmation state at prices no higher than those offered in other states, inevitably is going to deprive brewers and consumers and retailers of the relative advantages that they would enjoy without such legislation.

Now, I want to make it clear that we are not contesting the right of a state, Connecticut or any other state, to set maximum prices for liquor, beer or any other commodity if it feels that's a wise sort of policy. What we believe a state may not do, however, is in order to achieve lower prices within its border, to impose burdens on businesses and consumers in other states. And this is what affirmation statutes of any kind really do because under affirmation, a brewer is no longer free to set prices in out-of-state markets on the basis of conditions prevailing in those markets in order to maximize their profits.

what the brewer is compelled to do is to consider that the lowest price it charges in out-of-state markets must be offered throughout the affirmation state. And I think the inevitable result will be that a brewer or distiller will to some extent modify their out-of-state prices that they would otherwise charge in order to satisfy the requirements of

affirmation.

QUESTION: Mr. Glekel, supposing Connecticut passed a statute saying we will appoint a price control commission and we'll hire investigators to find out what the prices are in New York. And they'll periodically report to the commission every month, and they'll set a new maximum price. It will happen to be triggered by what the investigators find over in New York. Would that be constitutional?

MR. GLEKEL: I think there's -- there always can be a question of fact whether a state is doing indirectly what's -- what is -- what is directly prohibited. I suppose if it considered New York prices as one factor and took into account a lot of other factors --

QUESTION: Well, the other factors it takes into account are the prices in Rhode Island and New Jersey.

MR. GLEKEL: That sounds like it's unconstitutional to me.

QUESTION: I see.

(Laughter.)

QUESTION: You can have price fixing as long as you don't do too much studying before you fix the prices.

(Laughter.)

MR. GLEKEL: As long as they're really not designed to deprive consumers and brewers in other states of -- of their competitive advantages.

I'd just like to close by — by noting that the problem really with affirmation is that the affirmation state is projecting itself into other states and regulating prices in those states. And I think the —the way this Court put it in Baldwin v. Selig is perfectly appropriate to affirmation statutes. What the Court stated is that the Commerce Clause does not permit a state to establish a scale of prices for use in other states. I think this is the problem with affirmation, and it's the primary reason why affirmation is unconstitutional.

If there are any other questions, I would be glad to answer them. Otherwise I'd like to thank the Court for its attention.

QUESTION: Thank you, Mr. Glekel.

Mr. Vacchelli, you have one minute remaining.

REBUTTAL ARGUMENT OF ROBERT F. VACCHELLI

MR. VACCHELLI: Just one point, Your Honor,

and that's on the matter of the Seagram's case.

Approximately 30 years ago the Court stated in Seagram

that it's permissible for states to regulate prices with

reference to prices in other states, and that It would wait to see what effect It would have on the market and take the matter up at another time. We've been waiting almost 30 years and we still haven't seen what adverse material impact affirmation laws have on — on the beer markets. And to — and this case adds nothing to that.

And also, with respect to the Louislana Law Review article cited by some of the amici and the -- and the brewers, we urge the Court to reject consideration of that because this is economic testimony and it's impermissible to enter something like that in -- at the Supreme Court.

And it's also incorrect in footnote 47 of that article the authors note that they will be -
CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Vacchelli.

The case is submitted.

(Whereupon, at 1:59 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 88-449 - JOHN F. HEALY, ET AL., Appellants V. THE BEER INSTITUE, INC., ET AL.; and

No. 88-513 - WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., Appellant V. THE BEER INSTITUTE, INC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

(REPORTER)

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