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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: STATE OIL COMPANY, Petitioner v. BARKAT U. KHAN
AND KHAN & ASSOCIATES, INC.

CASE NO: 96-871

PLACE: Washington, D.C.

DATE: Tuesday, October 7, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE OIL COMPANY, :

4 Petitioner :

5 v. : No. 96-871

6 BARKAT U. KHAN AND KHAN & :

7 ASSOCIATES, INC. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, October 7, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:04 a.m.

14 APPEARANCES:

15 JOHN BAUMGARTNER, ESQ., Grayslake, IL; on behalf of the
16 Petitioner.

17 JOEL I. KLEIN, ESQ., Assistant Attorney General,
18 Department of Justice, Washington, D.C.; for United
19 States, as amicus curiae, supporting Petitioner.

20 ANTHONY S. DiVINCENZO, ESQ., Chicago, IL; on behalf of the
21 Respondents.

22 PAMELA J. HARBOUR, ESQ., Deputy Attorney General of New
23 York, New York, NY; for State amici curiae, supporting
24 Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 96-871, State Oil Company v.
5 Barkat U. Khan and Khan & Associates.

6 Mr. Baumgartner.

7 ORAL ARGUMENT OF JOHN BAUMGARTNER

8 ON BEHALF OF THE PETITIONER

9 MR. BAUMGARTNER: Mr. Chief Justice, and may it
10 please the Court:

11 The Petitioner in this cause would like to
12 accent three questions in this case this morning, if
13 possible. First, that manufacturers and suppliers have a
14 legitimate and competitive interest in the maximum prices
15 which are charged by the people who carry their products.
16 Second, that the rule in Albrecht actually hinders, rather
17 than enhances, economic efficiency and competition. And,
18 third, that the foundations of Albrecht were destroyed by
19 the decisions in Sylvania and Arco.

20 Unless a manufacturer or a supplier operates his
21 own retail outlets, the only means he has for reaching
22 consumers is through retailers. And the activities of
23 those retailers vitally affect the degree to which his
24 products are sold.

25 For instance, in this particular case, Khan

1 sales were also State Oil sales. And State Oil had a
2 legitimate business interest in seeing to it that those
3 sales were handled in the most effective manner possible.
4 Any action by Mr. Khan which reduced those sales also
5 reduced State Oil's sales, income and profits.

6 We believe that this is the incentive which a
7 manufacturer or a wholesaler has when he attempts to
8 introduce a maximum retail price. We also believe that
9 the rule in Albrecht hinders, rather than supports,
10 competition, and maximum economic efficiency, because it
11 prevents manufacturers from ensuring that economic
12 incentives offered at the wholesale level are passed on to
13 the targeted consumers, who actually determine the
14 competitive outcome.

15 For example, a dealer who wishes a price
16 reduction, or a manufacturer who wishes to establish a
17 price reduction, are unable to agree, at least to the
18 degree of an enforceable arrangement, that this price
19 reduction will be passed on to the consumer. And the
20 supplier or the manufacturer is therefore discouraged from
21 utilizing price reductions as a man -- as a means of
22 enhancing sales of his products.

23 A dealer who wishes an exclusive territory, or a
24 manufacturer who wishes to establish exclusive
25 territories, are again discouraged from utilizing that

1 means, because the manufacturer and the supplier are
2 unable to obtain enforceable assurances that the dealer,
3 or that some dealers, will not ultimately use that
4 exclusive territory to be able to increase the price of
5 the product which they're selling.

6 In this case, when the price ceiling was
7 ignored, the consumer who purchased premium gasoline paid
8 a higher price for that gasoline, and the additional
9 effect of an inability of the manufacturer, or the
10 wholesaler, to limit the maximum price is that an
11 increased price can be passed on to the consumer. The
12 only thing which the rule in Albrecht really encourages is
13 vertical integration on the part of manufacturers and
14 suppliers.

15 We further believe that the foundations of
16 Albrecht were destroyed by the decisions in Sylvania and
17 Arco. The -- Arco -- Albrecht appears to be based on four
18 concepts. Number one, an objection to restraints on
19 alienation; a concern about the freedom of dealers; an
20 objection to vertical restraints; and an objection to
21 price restraints in any form.

22 Sylvania rejected the distinction between sales
23 and non-sales transactions and, therefore, also rejected
24 the concept of restraints on alienation. In determining
25 that some forms of vertical restraints were permissible

1 and were not anti-competitive, Sylvania also rejected the
2 concept of freedom of dealers as an antitrust concept.
3 This leaves as the only real foundation for Albrecht an
4 objection to price restraints as such.

5 QUESTION: Are there some markets where freedom
6 for the dealers is -- is important? Are there some
7 circumstances in which it's advantageous -- and I won't
8 say whether it's pro-competitive, but advantageous -- to
9 have dealers with substantial strength and substantial
10 freedom?

11 MR. BAUMGARTNER: Oh, yes, there are, Your
12 Honor.

13 QUESTION: Is -- is one of those instances so
14 that dealers have the ability to switch to different
15 manufacturers, different suppliers?

16 MR. BAUMGARTNER: Well, the dealer, until he's
17 committed to a particular supplier or manufacturer, always
18 has the ability to switch suppliers.

19 QUESTION: And -- and is that -- is that ability
20 helpful to competition, do you think?

21 MR. BAUMGARTNER: Oh, yes, I think it is. It
22 induces a competition between wholesalers or
23 manufacturers.

24 QUESTION: Do you suggest that that case,
25 Sylvania, totally rejected any interest in the

1 independence of the dealer, such as, for example, fixing
2 minimum prices? Do you think that's at stake in this
3 case?

4 MR. BAUMGARTNER: I don't believe that minimum
5 price fixing is at stake in this case, Your Honor. As I
6 understand Sylvania, Sylvania represents a switch from
7 Albrecht in the sense of looking not at -- in Albrecht the
8 Court, I believe, looked at possible misuses of the
9 activity in question. And in Sylvania, the Court, rather
10 than looking at possible misuses, looked to see whether
11 the activity had potential pro-competitive effects.

12 My problem with the question of minimum
13 price-fixing is that I'm not really in a -- a position to
14 express a worthwhile opinion on the pro-competitive
15 aspects of minimum price-fixing. And, therefore, I'm not
16 really expressing any opinion on it at all.

17 QUESTION: It doesn't really apply in this case?

18 MR. BAUMGARTNER: It does not apply. Our
19 argument is limited strictly to vertical maximum
20 price-fixing.

21 If the primary concern that remains from
22 Albrecht is the question of price agreements as such, it's
23 a recognized fact today that price agreements cannot be
24 realistically lumped into one sole category. There's an
25 excepted difference between vertical price arrangements

1 and horizontal price arrangements. There's a recognized
2 difference between maximum prices and minimum prices.

3 And we believe that the --

4 QUESTION: But recognized by whom? Not by our
5 current antitrust jurisprudence.

6 MR. BAUMGARTNER: Even in the decision in
7 Albrecht, Your Honor, the Court appears to recognize that
8 there is a difference between maximum prices and minimum
9 prices. And that's really all I was expressing as an
10 opinion.

11 QUESTION: I think we can all stipulate that
12 there's a difference between maximum prices and minimum
13 prices. But I thought you were saying that there was a
14 legal difference that's -- that's been established in --
15 in some of our cases.

16 MR. BAUMGARTNER: I know of no legal --

17 QUESTION: That's not what you're saying,
18 though?

19 MR. BAUMGARTNER: No. I know of no legal
20 difference between the effect of maximum prices and the
21 effect of minimum prices. I'm just saying there's a
22 realistic economic difference between the two.

23 And maximum prices established in a vertical
24 sense, as I indicated before, can be used in a
25 pro-competitive manner and should, therefore, not be found

1 to be, per se, as a matter of law, unreasonable and
2 forbidden.

3 QUESTION: Pro -- pro-competitive because it
4 precludes exploitation of -- of exclusive territories. Is
5 there any other particular reason that it's
6 pro-competitive?

7 MR. BAUMGARTNER: Yes. I believe that the --
8 the most significant position in which it's
9 pro-competitive is the situation -- and we believe that
10 situation existed in this case -- in which a supplier, in
11 this particular case, to assist the dealers' competitive
12 position, provides a reduced wholesale price -- not in one
13 specific instance, such as a -- a price war or anything
14 like that, but, generally speaking -- prices the dealer
15 below what the dealer would normally be charged as a
16 wholesale price. And we believe that the supplier is
17 discouraged from doing that because he's unable to obtain
18 any sort of binding assurance that the dealer won't pass
19 that reduction -- or will pass that reduction on and won't
20 simply regard it as money on the table which he can then
21 use.

22 And I think that's probably a more important and
23 more significant instance than the situation in which the
24 dealer has a monopoly position.

25 QUESTION: That's really your burden. I mean,

1 it's surely not enough for you to say that there's -- you
2 can conceive of circumstances in which vertical maximum
3 price restraints are -- are healthy. I -- I suppose I
4 could conceive of instances in which -- in which vertical
5 minimum prices are -- are healthy as well. I -- I think
6 our per se rule is directed at situations in which it is
7 most unlikely to be helpful. It might be helpful in some
8 circumstances, but the chances are -- are so small that
9 it's not worth -- it's not worth taking the risk. And you
10 should put the burden on the other side, to show that
11 there's some exceptional situation.

12 MR. BAUMGARTNER: I --

13 QUESTION: So you -- can you persuade us that
14 that's the case, that it's more -- it's more likely to be
15 good than bad?

16 MR. BAUMGARTNER: I believe I can, Your Honor.
17 I've given two instances, counting the -- the one that was
18 given, three instances, in which it's a good situation.

19 On the other hand, I personally -- and it may be
20 a defect in my imagination -- but I personally am unable
21 to come up with any situation in which a vertical maximum
22 price arrangement can be used in a manner which will
23 reduce competition.

24 QUESTION: Well, your opponent here -- your
25 opponent here claims that one situation is where -- where

1 the -- the maximum price on -- on one line, high octane
2 gas, prevents him from charging a lower price on another
3 line. Why isn't that a situation? I mean, as -- as I
4 gather it, what -- what Khan wanted to do was to use --
5 use the low octane as a -- as a loss leader, and make up
6 for the difference by charging a lot on high octane.
7 Why -- conceivably, that could benefit consumers. I guess
8 there are more consumers that buy low octane than high
9 octane.

10 MR. BAUMGARTNER: Well, it benefits the
11 consumers who buy low octane and hurts the consumers who
12 buy high octane. Actually, there was no evidence of that
13 ever introduced in this case. It's simply a claim at this
14 point.

15 But I would alter that situation, if I could,
16 Your Honor, to the situation in which we are merely
17 selling high octane gasoline, and he wishes to use our
18 product to subsidize a loss leader of some other type. In
19 Mr. Khan's operation, he carried a lot of different
20 products -- bread, milk -- a number of things. And I
21 think we would have a very legitimate objection, and
22 should have a right to protect ourselves, if Mr. Khan had
23 increased the price of all gasoline, for instance, to
24 subsidize a price reduction for beer.

25 QUESTION: Mr. Baumgartner, are you right when

1 you say there's no evidence? At least it was alleged that
2 that was what the receiver did, wasn't it?

3 MR. BAUMGARTNER: It was alleged that the
4 receiver increased the price of premium gasoline and
5 reduced the price of regular gasoline, yes. There was no
6 allegation that Mr. Khan ever attempted or wished to do
7 that. And there was no allegation or evidence that the
8 increase in premium gasoline actually in fact subsidized
9 the reduction of price in regular gasoline. It may very
10 well have been that the reduction of price in regular
11 gasoline increased sales by enough to more than make up
12 the difference of the lost margin. There's not really any
13 evidence, one way or the other, at this point in the case.

14 QUESTION: Although you said you can't think of
15 any example in which a -- a supplier's control over the
16 maximum price the -- the retailer could sell would ever be
17 anti-competitive, you don't really have to go that far to
18 win. Because you can surely conceive of a case in which
19 the -- a -- a seller with monopoly power, who wanted to
20 drive out competitors from the market, and, in order to do
21 it, had to control the prices of his customers as well as
22 his own price. I mean, it's at least theoretically
23 possible.

24 MR. BAUMGARTNER: I agree. And I should have
25 accepted the situation in -- that predatory pricing was --

1 QUESTION: But -- but your view is that it
2 happens so rarely that you shouldn't have a per se rule --
3 you should have a rule of reasoned approach, rather than
4 per se?

5 MR. BAUMGARTNER: There are other situations,
6 but they are illegal under other rules. And I'm just
7 simply saying that the rule of reason will cover any
8 situation that could come up in vertical maximum
9 price-fixing.

10 If the Court has no other questions, I'd like to
11 reserve any time I have remaining.

12 QUESTION: Very well, Mr. Baumgartner.

13 MR. BAUMGARTNER: Thank you.

14 QUESTION: Mr. Klein, we'll hear from you.

15 ORAL ARGUMENT OF JOEL I. KLEIN

16 FOR UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

18 MR. KLEIN: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 Albrecht should be overruled because its
21 doctrinal underpinnings have been eroded, and also because
22 its perpetuation is likely to do considerably more
23 competitive harm than good.

24 Per se rules are reserved for business practices
25 that are manifestly, self-evidently, if not always, at

1 least almost always, anti-competitive, whereas maximum
2 resale price agreements are rarely in that category. If
3 anything, we submit, they are more likely to be
4 pro-competitive.

5 For example, as the Court express -- expressly
6 recognized in Arco, a maximum can constrain dealer market
7 power, which is something that, in varying degrees, can
8 exist from time to time. These maximums also serve other
9 important purposes relating to price, advertising and
10 discounting, which is undermined by a per se rule.

11 I should add, as precedent, Albrecht has had an
12 especially difficult time of it. Its dealer autonomy and
13 dealer multiplicity rationales were undermined in
14 Sylvania. And I do think that that doesn't mean that a
15 minimum falls. The difference is that minimum resale
16 price-fixing has entirely different effects and -- both
17 pro-competitive and anti-competitive.

18 But it's not the abstract notion of dealer
19 autonomy, Justice Stevens, that's critical here. And I
20 would dare say that Albrecht got a remarkably chilly
21 reception in the Arco case. The lower Federal courts have
22 whittled away at it. The commentators have been
23 extraordinarily critical of it.

24 QUESTION: Mr. Klein, we have a brief here from
25 33 States and the Territory of Guam, saying don't get rid

1 of Albrecht. That's going to hurt our antitrust
2 enforcement. Now, would you like to comment on the
3 position of the States?

4 MR. KLEIN: I'd be -- I'd be delighted to. I --
5 I think there are two things I'd like to say about it.
6 First of all, what's significant is that the States
7 themselves don't cite a single instance, and we in the
8 Federal Government could find no instances, where an
9 enforcement agency brought a maximum case. And that seems
10 to me to be very, very telling. That is, in the 30 years
11 since Albrecht, none of them appear to have brought such a
12 case.

13 Second, their concern -- if you read their
14 briefs -- their concern is, somehow, if you breach the
15 wall in this pricing area, that you won't be able to stop
16 at minimum. Now, I think minimum presents very different
17 effects. And in fact, their key argument is that maximum
18 could be a minimum.

19 But my answer to that is, if it is a minimum, it
20 will be treated by a minimum. And, frankly, I don't see
21 any problem in detection. The notion that somehow you
22 could disguise this -- after all, the first person who is
23 likely to object is going to be the dealer. And if the
24 dealer thinks that its price wants -- he wants to drive
25 his price down, he's entirely free to do so. And if he

1 gets punished for that, then we know that it's a minimum.

2 So this notion that it's undetectable seems to
3 me to be a very hard one to sustain.

4 Now, in addition, the only other arguments of
5 maximum and minimum, which I think is the most telling
6 thing about the States' brief, Justice O'Connor, is they
7 really are fighting for another day. And if that day
8 should come, entirely different competitive considerations
9 will be at play.

10 But the other thing that's very telling about
11 it, the only other argument you see in the briefs is that
12 a maximum price could affect dealer service. Now, that --
13 that -- that's a reasonable concern, but I would say
14 several things about it.

15 One, there's no reason to think that the
16 manufacturer is not interested in dealer service that has
17 a pro-competitive benefit. This Court recognized, in GTE,
18 it recognized in Sharp, that manufacturers have an
19 interest in order to maximize their profit in an efficient
20 distribution system. Second, and it seems to me crucial,
21 is that under the law now, after GTE/Sylvania, you can
22 actually impose specific service limitations in your
23 contract.

24 For example, McDonald's can say to all of its
25 dealers: You can't have waiters. It destroys the

1 ambience.

2 QUESTION: You can't have what?

3 MR. KLEIN: Waiters.

4 QUESTION: Waiters?

5 MR. KLEIN: In a fast-food restaurant.

6 They can condition a McDonald's franchise on
7 that limitation on service.

8 The -- the -- the manufacturer here, the gas
9 State -- gas company here could say: You can't wash
10 windows. You can't do tires. They can put that in there.
11 Now, that may be anti-competitive ultimately, but it would
12 be tested by a rule of reason.

13 So the notion that we would have a per se rule,
14 basically because it might impact service -- a price
15 restriction might impact service, seems to me to have the
16 cart way before the horse in terms of what would go on, on
17 a direct restriction.

18 And, beyond that, those are the two generic
19 circumstances: maximum/minimum and effect on service.
20 Beyond that, the only other notion that comes up is a
21 possibility of predation. And if there is predation, of
22 course, that would be a violation. But the Court, in
23 Brook and many other cases, has realized that that's quite
24 rare.

25 So the key point here is that this is not the

1 stuff of which per se rules are made. Whether you could
2 imagine a case is not the question. If there is such a
3 case and there's competitive effects, the rule of reason
4 is there, as it is for virtually all business practices.

5 What the per se rule is reserved for, what it
6 has its real currency in is practices that one ought to
7 look at and say, this is really bad stuff; you don't need
8 to do an in-depth examination.

9 Now, what's on the other side of the equation?

10 First of all, you asked about exclusives. But
11 it's not just exclusives. Look at the facts in Albrecht.
12 You can have, if you will, de facto market power. If
13 you're a newspaper dealer, it's -- it's really the case
14 that you're going to have an area which you -- you deliver
15 these newspapers to. And unlike the newspaper company,
16 the dealer might well say, look, I have some market power;
17 people in Washington, D.C. want to wake up on a Saturday
18 morning and see their newspaper there. I can charge more
19 than a quarter for that, before they're going to go out to
20 a machine or downtown or something like that. And then
21 the dealer can extract real monopoly profits in that
22 situation.

23 QUESTION: Is -- is one of the States' concerns
24 that if you change the per se rule, then price, for
25 maximum prices, becomes a legitimate subject of a

1 day-to-day discussion between the manufacturer and his
2 dealers, and that this will create a climate in which
3 minimum pricing and price-fixing of the anti-competitive
4 sort might go on, and that it's more difficult, then, for
5 the States to enforce?

6 As it is now, it's just -- this is just beyond
7 the subject of discussion, which is one reason why there
8 have been so few cases on it. People know that you don't
9 do this. And if we say that you can, does this, then,
10 cause a -- a danger of -- that price will be a subject
11 of -- of legitimate discussion in some instances and that
12 this will lead to abuses? Is that, do you think, the
13 States' concern?

14 MR. KLEIN: I don't -- I -- I don't think
15 it's -- it may be the States' concern. I don't think it's
16 a realistic concern, Justice Kennedy, for sev -- several
17 reasons. To begin with, there is a lot of discussion
18 about price, as this Court has recognized, time and again.
19 You can have a suggested manufacturers' retail price, as
20 long as there's no agreement. But they discuss it all the
21 time.

22 Second, it seems to me, this notion that somehow
23 talking about this issue will lead to unlawful agreements,
24 I think, if there is such an unlawful agreement that
25 results, then we can address that problem in that

1 particular case.

2 But I don't see any reason to somehow say that
3 we need to eliminate from the air discussions of price.
4 Manufacturers and their retailers discuss price all the
5 time.

6 QUESTION: Mr. Klein, what about the principle
7 of stare decisis here? We're dealing with a statutory
8 question, not a constitutional question. And,
9 customarily, it takes a fairly strong case to get us to
10 overrule a previous decision.

11 MR. KLEIN: I think that that's right, Mr. Chief
12 Justice. I would say two things. One, I think, as this
13 Court has recognized, the standard under the antitrust law
14 is a little different from many statutes, because it is a
15 common law statute, in which this Court has revised and
16 changed over the years. GTE/Sylvania said that, and the
17 Court did as well in Copperweld. And I think it has
18 recognized that principle.

19 But I think, whatever standard you apply, it can
20 be met here. I think if you look at GTE/Sylvania, you
21 will see that the basic notions that animated the decision
22 in -- in Albrecht are no longer viable. There was a view
23 in the mid-eighties that actually animated Schwinn -- in
24 the mid-sixties, it animated Schwinn and animated
25 Albrecht -- that said there ought to be dealer autonomy;

1 we ought to have lots and lots of dealers; that's better
2 than a few dealers.

3 The Court's opinion, quite clearly, eroded that
4 thinking. Not only that, it created the very right to --
5 to establish exclusives that Albrecht said was no good.
6 Albrecht said, well, if you have market power because you
7 have an exclusive territorial arrangement, then, under
8 Schwinn, the territory falls. But now, post-GTE, the
9 territory remains.

10 Then I think the next problem you have is the
11 Court says in Arco -- it -- it -- it's really an
12 interesting opinion -- it starts out by saying: We
13 assume, arguendo, that Albrecht is still good law. It
14 then has a footnote saying: Albrecht was the only case
15 ever that dealt with a pure maximum.

16 And then it goes on, in footnote 13, and says:
17 The pro-competitive benefits are now, quote, clearer than
18 they were at the time of Albrecht. And they cite a list
19 of maybe 10 different academic articles, all of which are
20 harshly critical of Albrecht for essentially
21 mis-perceiving its competitive impact.

22 Then you look at what the lower courts have
23 done. They have constantly read the opinion narrowly,
24 chipping away at it. No antitrust injury, no injury in
25 fact, no damages, no agreement. Cases involving discounts

1 get distinguished in some sort of ways.

2 So this is anything but robust. This is, in --
3 in Judge -- Chief Judge Posner's words, a rather moth
4 eaten foundation.

5 And then the point which I would not discount --
6 Justice Kennedy said there haven't been many such cases in
7 minimum resale price maintenance. The States cite a lot
8 of cases they have brought. The Antitrust Division has
9 brought such cases. The Federal Trade Commission has
10 brought such -- such cases. These are real enforcement
11 actions. In the maximum area, there are no such cases.
12 It's not because the practice doesn't occur; it's because
13 government agencies don't find this to be a desirable
14 enforcement vehicle.

15 And then I would just say the last point, to the
16 extent congressional intent here is relevant. Of course,
17 in 1991, Congress actually attempted to pass -- it
18 ultimately failed, but a different statute passed both
19 houses, trying to reverse this Court's decisions in Sharp
20 and Monsanto. And while the ultimate statute never
21 passed, Mr. Chief Justice, both statutes would have
22 ensured -- both -- both bills -- would have ensured that
23 minimum resale price maintenance stayed a per se rule.
24 And they had exceptions for maximum.

25 So, to the extent one can glint -- glim -- take

1 anything from that congressional reaction, Congress, too,
2 realized that Albrecht was no good.

3 QUESTION: Well, but of -- of what use is
4 congressional reaction if it doesn't become a law?

5 MR. KLEIN: It -- it -- it -- I only point to
6 it. I -- I put it last on the last. I only point to it
7 to say to the extent heard anything from them, we've heard
8 that -- what little guidance there is, is minimal, I
9 agree.

10 But the key point is not what Congress did.
11 This is, in the end, a common law statute. This Court, I
12 believe, has the obligation to revise and change in this
13 circumstance. And the reason you should do it, most
14 importantly, is I don't think you should strip
15 manufacturers of a mechanism that is pro-competitive. If
16 we leave it on the books, that is going to increase market
17 injury. And I think that is a bad result.

18 Thank you very much, Mr. Chief Justice.

19 QUESTION: Thank you, Mr. Klein.

20 Mr. DiVincenzo.

21 ORAL ARGUMENT OF ANTHONY S. DIVINCENZO

22 ON BEHALF OF THE RESPONDENTS

23 MR. DIVINCENZO: Mr. Chief Justice, may it
24 please the Court:

25 Current antitrust jurisprudence relies upon

1 interbrand competition to guarantee the fundamental
2 purpose of the antitrust laws: the protection and
3 preservation of competition.

4 What I find interesting in this case is that
5 although cloaking themselves as champions of competition,
6 their position -- the Government and State Oil's
7 position -- really expresses a deep-seated distrust of
8 interbrand competition. Look at what they tell you.

9 They tell you that we need to have the
10 manufacturers and suppliers, the upstream suppliers, have
11 power to set prices, because interbrand competition, which
12 affects and controls retailers' actions as well, isn't
13 going to work. We have to be afraid of the possibility of
14 retailers having market power. What happened to the
15 concept of interbrand competition, which they espouse? If
16 interbrand competition exists in a marketplace, why not
17 trust interbrand competition to keep the prices of the
18 retailers at the level the competition would in fact
19 dictate?

20 QUESTION: I guess their answer is that,
21 basically, the only time that a manufacturer would want to
22 do such a thing -- not -- not 100 percent, but the vast --
23 would be in an instance where interbrand competition was
24 not working perfectly. Otherwise, there wouldn't be power
25 in the dealer to raise price above the competitive level.

1 That's why he wants to keep it down. There isn't enough
2 interbrand competition. I think that's basically the
3 argument.

4 MR. DiVINCENZO: In 30 years, since Albrecht was
5 adopted, what I'm looking for and I don't see in this
6 record or in the literature is any breakdown of interbrand
7 competition controlling retailers. As this Court itself
8 pointed out in the -- the Sharp case, it is rare, indeed,
9 that you're going to find a retailer that has market power
10 to be able to dictate price. And, indeed, the concept of
11 GTE/Sylvania was that you don't have to really worry about
12 exclusive territories, because they protect intrabrand
13 competition, because you still have the specter of
14 interbrand competition out there to control these
15 retailers, even though they now have exclusive
16 territories.

17 Under those circumstances, I think the best way
18 to approach the potential problem of a market power in a
19 retailer is under the current jur -- jurisprudence. And
20 that has two very distinct elements. The first is
21 Albrecht, which is the per se application. It says that a
22 violation of Section 1 occurs when there is a vertical
23 maximum resale price maintenance agreement -- price-fixing
24 at that level.

25 But there's a second element. And that is the

1 Arco case. And the Arco case says that in order for a
2 private plaintiff to have an antitrust cause of action,
3 that private plaintiff has to establish an antitrust
4 injury. And it is an injury which flows from the core of
5 the antitrust laws.

6 And what is the core of the antitrust laws, as
7 this Court has come to define it? Interbrand competition.

8 So, thus, you have the per se rule in its
9 maximum, strident position, indeed --

10 QUESTION: Sorry, I thought you were talking
11 about intrabrand. You mean interbrand?

12 MR. DiVINCENZO: Interbrand.

13 QUESTION: Oh, well, the reason that they
14 worried is that they have some market power in there, in
15 their product. And since they have some market power, the
16 price isn't perfectly competitive, the dealer gets more
17 market power because of his position; that's why they want
18 to keep the price down.

19 MR. DiVINCENZO: Again --

20 QUESTION: And that's the basic argument, which
21 I guess you have to deal with in this.

22 MR. DiVINCENZO: No, I understand that, Your
23 Honor.

24 QUESTION: I'm sorry I misunderstood inter for
25 intra.

1 MR. DiVINCENZO: No, what -- what I'm saying is
2 that in a situation -- the best way of dealing with that
3 market power is to use the -- the per se rule, coupled
4 with antitrust injury. It would require a plaintiff to
5 demonstrate that there was an injury flowing to itself
6 from the interference within interbrand competition. And
7 that's what occurred in this case.

8 Here, Mr. Khan ran his gas station -- and he was
9 constrained as to his pricing ability. He had to deal
10 with a margin restraint, which is a -- a slightly
11 different animal than a pure maximum price-fixing price.
12 It says: Mr. Khan, you cannot make more than 3 and a
13 quarter cents per gallon of gasoline. Now, we don't care
14 if you charge more than the suggested pump price. And --
15 except -- and even to monopoly levels -- but we get those
16 monopoly profits. And that's State Oil's position here.

17 It's clear that State Oil wasn't trying to
18 restrain Mr. Khan's ability to charge monopoly prices.
19 All they wanted to do was shift the profits from that
20 monopoly pricing, if it could occur, from Mr. Khan, and
21 put some --

22 QUESTION: But surely -- surely the effect was
23 precisely the same. If you tell a dealer that you can
24 charge whatever you want, but everything over a certain
25 amount that you take in goes to me, he's not going to do

1 that?

2 QUESTION: You don't really think they thought
3 Mr. Khan was that stupid?

4 MR. DiVINCENZO: No, I --

5 (Laughter.)

6 MR. DiVINCENZO: No, I -- I -- I cert -- I
7 certainly agree. But I think, Your Honors, what that puts
8 an end to is the argument which State Oil makes, that what
9 they were trying to do was constrain, in reality,
10 Mr. Khan's pricing. I don't think that that was what was
11 involved in this case at all. The intention here may have
12 been to allocate the profit margins, but it certainly
13 wasn't any concern over Mr. Khan's ability to manipulate
14 or charge more for gasoline than interbrand competition,
15 which existed in this marketplace, would allow him to
16 charge.

17 QUESTION: What -- what's -- what's the
18 antitrust injury? What -- how -- how is the consumer
19 harmed?

20 MR. DiVINCENZO: The consumer was harmed here
21 because the price which was in fact set, the mechanism --
22 the restraining mechanism -- the margin restraint,
23 affected both a maximum price on some products as well as
24 the minimum price on other products. Indeed, what you
25 ended up here is the manufacturer set a single price, and

1 that became the market price. Because it not only
2 eliminated the ability of the supp -- of the dealer,
3 Mr. Khan, to increase price -- he -- well, it removed any
4 incentive, as this Court has quite -- pointed -- has just
5 pointed out to me -- it also eliminated his incentive to
6 decrease prices.

7 Because, at this point, a 3-and-a-quarter-cent
8 margin, his margins were so close to cost that he had no
9 incentive or ability to lower the price.

10 QUESTION: Why does he ever -- why does he ever
11 have an incentive to lower the price? I mean, once again,
12 this -- does -- doesn't this posit a -- a good deal of
13 stupidity on his part? That, oh, if I could only raise
14 this price more, I would give all this money back to the
15 consumers by lowering my price on the -- on the regular
16 gas. Why, I mean, nobody behaves that way.

17 MR. DIVINCENZO: Your Honor, with all due
18 respect, the receiver behaved exactly that way after
19 Mr. Khan was out. When Mr. Khan left the station, the
20 receiver did exactly what we say State Oil constrained
21 them, or stopped them, from doing. It lowered the price
22 on regular grades of gasoline. And, as the expert points
23 out, that resulted in a shift of the volumes from premium
24 to more sales of regular gasoline, thereby increasing the
25 volume of sales. And the same token, there was an --

1 QUESTION: Excuse me. By that, do you mean that
2 some people who used to buy premium bought regular or --

3 MR. DiVINCENZO: No. I --

4 QUESTION: -- or more regular were -- more
5 people came to buy regular?

6 MR. DiVINCENZO: Your Honor, with all -- with --
7 based on the record we have, all we know is that there was
8 more regular gasoline sold.

9 QUESTION: Okay. Well, that -- that, in itself,
10 is a justification for lowering the price of regular gas.
11 And as far as I can tell, it's the only justification that
12 someone who's selling gas will ever use. If I lower the
13 price, I'll sell more and I'll make more money. I can't
14 imagine anybody thinking, oh, you know, if I could raise
15 the price on premium, I'll be able to lower the price on
16 regular, even though it won't get me any more customers.

17 I mean, that's silly. Why does he want to do
18 that? This man is full of love for -- for gasoline
19 buyers?

20 MR. DiVINCENZO: No, Your Honor. What --

21 (Laughter.)

22 MR. DiVINCENZO: -- what this man is trying to
23 do is run a business where he has margins constrained at 3
24 and a quarter cents per gallon, which is simply, as
25 experience proved to him, not enough to sustain his

1 business. So what he attempts to do at that point is, by
2 using his market ability to read the market, to get to a
3 level which brings him more volume and therefore some
4 additional gross revenue --

5 QUESTION: Right.

6 MR. DiVINCENZO: -- but, at the same token, add
7 to his profit by charging a -- what the market allows him
8 to charge as a competitive price on another grade of
9 gasoline.

10 QUESTION: But he ought to lower the price of
11 his regular no matter what the price of his premium is if
12 lowering the price of the regular will -- will increase
13 his profits. He ought to do that whether or not he's --
14 he can fiddle with the -- with the maximum on -- on the
15 premium. I can't understand why that gives him any more
16 of an incentive to lower the price of his regular.

17 MR. DiVINCENZO: The incentive that any dealer
18 has is to stay in business, Your Honor.

19 QUESTION: No; it's to make as much money as he
20 can.

21 MR. DiVINCENZO: And if he -- if, by lowering
22 price, he cannot make enough money to stay in business --

23 QUESTION: No. If by lowering price he can't
24 make more money than by keeping the price higher, he's not
25 going to lower it. He's not going to say, I'm going to

1 lower it; I'll lose a little more -- you know, I'll make
2 it up -- I'll make it up by -- by increasing my premium
3 price. That is -- that is senseless behavior.

4 MR. DiVINCENZO: Your Honor, no, I don't believe
5 it is. And -- and for this reason. As a businessman
6 sitting there, he must decide whether in fact the lowering
7 of the price in the competitive conditions that he faces
8 will -- will result in an increase in volume to him, and
9 bring in sufficient additional revenue to offset the
10 decrease in price that he has in fact imposed.

11 QUESTION: This is intelligent behavior only for
12 somebody whose whole objective in running a gas station is
13 barely to stay in business. Then -- then it makes sense.
14 If -- if I'm going -- opening this gas station in order
15 barely to stay in business, then I -- I might want to
16 raise my premium price so that I could give away money by
17 lowering my -- my -- my regular price, even though it's
18 not going to increase sales.

19 MR. DiVINCENZO: And it is also the --

20 QUESTION: But I don't know anybody who has that
21 objective. He wants to make money.

22 MR. DiVINCENZO: Your Honor, he must make money.
23 But it would also be the case of someone who is in trouble
24 of going out of business to adopt that marketing strategy
25 and that pricing strategy. Because if that person is then

1 faced with a business where he is about to lose his
2 \$100,000 investment in his gas station, he has got to do
3 something to increase his profitability. He's got to make
4 more money.

5 So at that point he says, I can get more volume
6 and thereby increase my ancillary sales, drawing in
7 additional revenue. But, at the same token, that is a
8 tremendous gamble, and one which he may say, given the
9 current market conditions, he could not achieve. If he
10 lowers the price and doesn't increase volume, what he's
11 done is signed his own death warrant. But in the
12 circumstances that existed here because of the pricing
13 decisions imposed upon him by State Oil, the market for
14 premium gasoline, the interbrand competition on premium
15 gasoline, would allow him to make more money.

16 And so, as a result, he was able -- would be
17 able to shift his pricing, to lower the price in one
18 place, to increase his overall volumes and, the same
19 token, to increase the price on premium gasolines, overall
20 increasing his margins. And --

21 QUESTION: The 3.25 limit did not apply to
22 premium?

23 MR. DiVINCENZO: The 3.25 limit applied to all
24 grades of gasoline.

25 QUESTION: All grades -- all grades of gas?

1 MR. DiVINCENZO: All grades of gasoline.

2 QUESTION: I see.

3 MR. DiVINCENZO: He was restricted with that
4 margin. He could not charge another price. If he did, it
5 went to State Oil. If he dropped below, he lost money.

6 QUESTION: If -- if I understand your response
7 to Justice Scalia, it would be that lowering the price of
8 the cheap grade will make him more money, but not for a
9 year or two. So we have to stay in business until it pays
10 off. And so, what we'll do is raise the high price even
11 more, and that gives us the money necessary to stay in
12 business until the low price pays off.

13 MR. DiVINCENZO: That would certainly be
14 rational thinking on their part.

15 QUESTION: Is that your argument?

16 MR. DiVINCENZO: Yes. That would be rational
17 thinking on his part.

18 QUESTION: All right. And the problem with that
19 argument, I guess, John D. Rockefeller could make it, too:
20 Let me -- any monopolist -- let me charge the earth,
21 because, you see, what I do when I charge the earth, is I
22 take all this money -- John D. Rockefeller and others --
23 and I give it back to the public. I charge a lower price
24 eventually for my heating oil or for some other product.
25 And the difficulty is not that that's always wrong; I

1 guess the difficulty is, if that argument were allowed as
2 a response, it would always be made and we'd never know
3 when it was wrong.

4 I mean, that's -- that's what I think -- you
5 gave a sophisticated argument -- and so I -- I think it's
6 an interesting one, and I -- I want to get you to respond
7 to what I'd call is a -- a real administrative objection
8 to your sophisticated argument.

9 MR. DIVINCENZO: The argument can always be made
10 by a monopolist with market power that they're -- what
11 they're trying to do is shift pricing around so that, at
12 one point, they in fact lower price. I don't think that
13 makes a monopolist -- you know, going back to United Shoe
14 Machinery, this Court was faced with the benevolent
15 monopolist. You can always posit a benevolent monopolist,
16 but that still was -- was considered illegal.

17 What I think the administrative answer, Your
18 Honor, is that the rest of the antitrust laws aren't
19 abrogated as to dealers. The antitrust laws would apply
20 to dealers who attempt to use or abuse monopoly power that
21 they have acquired in a definable marketplace. And
22 that -- that's the other end of this scenario.

23 You have on one end, in trying to judge whether
24 you should change the per se rule and allow vertical
25 maximum price-fixing, the question is: Is it really

1 necessary? And I suggest that it's not. Because
2 interbrand competition should do, in all cases where
3 interbrand competition exists and is not distorted, it
4 should keep the prices at competitive levels. So you
5 don't need to have this artificial restraint or power
6 given to manufacturers where interbrand competition can
7 work.

8 QUESTION: But it apparently doesn't work here.
9 Because you say your client feels free to kick the premium
10 up as high as he likes -- with -- without being -- why
11 isn't he constrained by -- by other gas stations from
12 charging this additional money for his premium?

13 MR. DiVINCENZO: The answer, Your Honor, is that
14 in the given conditions, the price that was prevailing in
15 the marketplace must have allowed him to make additional
16 margins.

17 QUESTION: That is to say there was no
18 interbrand competition.

19 MR. DiVINCENZO: No, I -- I disagree with that,
20 Your Honor, with all due respect. Interbrand competition
21 doesn't always drive the price to the lowest possible
22 level. Otherwise, you'd have no profitability.
23 Competition sets a price -- and I think this Court has
24 recognized --

25 QUESTION: Well, is it your position that the

1 market for the premium gas allow -- generally allowed for
2 a margin of more than 3.25 cents, where it's just 3.25 on
3 the regular?

4 MR. DiVINCENZO: Or -- or --

5 QUESTION: And that -- in other words, the
6 difference in product was -- should have dictated a
7 difference in margin, and that's what he was trying to
8 take advantage of?

9 MR. DiVINCENZO: That is correct, Your Honor.
10 The -- the difference in the products -- there are --
11 without using the -- the term "market" in the technical
12 sense -- but the difference in the competitive market for
13 premium gasoline would allow a higher margin. And a --
14 competition within that market would have allowed the
15 dealers to make more than 3 and a quarter cents per
16 gallon. The receiver experience, at least 3 and 8/10ths
17 cents a gallon over all his entire product margin.

18 On the other hand, because of the difference in
19 the nature of competition, it may be that premium gasoline
20 buyers don't price shop as much as regular gasoline
21 purchasers, but that the general circumstance concerning
22 regular gasoline is that the margins -- the competitive
23 market allows less margin and requires lower prices. And
24 what State Oil did was it ignored the competitive
25 circumstances, ignored these differences between these

1 products, and set a single price. And that put him --

2 QUESTION: Well, of course, the consequence of
3 that normally would be that you would get a larger share
4 of the premium sales, if your margin is less, and you --
5 you'd be un -- underpricing your competitors on -- on
6 premium.

7 MR. DIVINCENZO: You -- you might receive some
8 additional --

9 QUESTION: Unless, as you say, all premium
10 buyers are stupid.

11 MR. DIVINCENZO: Well, not necessarily stupid;
12 less price elastic.

13 QUESTION: They don't -- they don't -- yeah.

14 MR. DIVINCENZO: Demand being, in that market, a
15 little different, the elasticities of demand being
16 different.

17 But under those circumstances, what you end up
18 happening is -- what ends up happening is that you have
19 State Oil saying to this Court: Give us the power to
20 give -- put our judgment in place of free market forces.
21 And -- and that is a very serious threat to competition,
22 which is the purpose of the antitrust laws.

23 QUESTION: Well, free market forces are
24 ordinarily reflected in contracts, which your client
25 signed with State Oil.

1 MR. DiVINCENZO: There was a contract that
2 was -- was signed with State Oil, in which he agreed --
3 that's how we actually get in -- under Section 1 here,
4 Your Honor. There was an agreement which constrained his
5 ability to price, to 3 and a quarter cents. There is --
6 the flip side of that, however, is that what is not set is
7 the pump price. There is no contractual requirement that
8 a particular pump price be set.

9 So State Oil had the right to set a pump price,
10 and that pump price may or may not reflect conditions in
11 competition in that particular marketplace. And if State
12 Oil guessed wrong, then you have the threat of
13 anti-competitive effects. And if State Oil, as it did,
14 guessed wrong as to the price that should prevail for
15 regular grades of gasoline, you have the consumers being
16 hurt.

17 And State Oil guessed wrong, on the high side on
18 the -- on the premium grades, in setting the maximum, then
19 Mr. Khan was squeezed at that end as well. This was a
20 squeeze that came from both ends, and ultimately resulted
21 in his failure to run the business.

22 Now, the receiver, which refused to agree with
23 the restraints set forth in the contract and was free to
24 do what it wanted, and adopted a marketing strategy which
25 increased volume, which increased profitability and

1 margin, and therefore benefitted some consumers,
2 benefitted State Oil, as well as benefitting itself and
3 the operation. And that's what competition is supposed to
4 do. Competition allows for the businessmen to make a
5 reasonable profit so they can stay in business, so they
6 can invest in their business, to recoup their investment,
7 and that return of investment is -- is --

8 QUESTION: Well, I don't see that any of that
9 argument means you couldn't reach the right result under
10 the rule of reason. I mean, I -- I just don't understand
11 why it requires a per se rule.

12 MR. DiVINCENZO: The rule of reason analysis
13 requires proofs of market power, quite honestly, which
14 would exclude almost every single petroleum market case
15 that you're faced with, as well as others. Absent proof
16 of market power and impacts on competition in a definable
17 market, you would have situations like Mr. Khan not being
18 able -- you could not address his situation, where he
19 suffers an antitrust injury.

20 But, moreover, when the --

21 QUESTION: Excuse me. He suffers an antitrust
22 injury? I mean, I -- I thought it's the consumer that
23 suffers the antitrust injury?

24 MR. DiVINCENZO: No. In this case, he suffers
25 an antitrust injury in the sense that he cannot price and

1 increase his volumes on the low end and make a competitive
2 price on the high end.

3 QUESTION: Well, that's a -- that's a com --
4 I -- I think we've said that -- that the antitrust law is
5 not there to protect merchants; it's there to protect
6 consumers.

7 MR. DIVINCENZO: In every ca --

8 QUESTION: And that's why I keep looking for
9 some consumer who has been hurt by this. Now, you -- you
10 -- you say that -- that -- that when -- when the -- the
11 trustee took over, he lowered the price of -- of regular.
12 Is it clear that it would not have paid him to lower the
13 price of regular unless he had -- unless he had increased
14 the price of premium? Did -- did he not make more money,
15 in volume, by lowering the price of regular?

16 MR. DIVINCENZO: He made some additional
17 volume -- he made volume. There's nothing in the record
18 which indicates he made enough from that to be able to
19 sustain or improve the profitability.

20 QUESTION: Is there any -- anything in the
21 record to the contrary, that -- that he did not increase
22 his profitability by selling more of the regular at a
23 lower price?

24 MR. DIVINCENZO: The --

25 QUESTION: Do -- do we know that he -- he lost

1 money on it?

2 MR. DiVINCENZO: No. The -- the only -- the
3 only -- in -- the only evidence in the record is the
4 expert's report, which, as I pointed out, indicates an
5 increase in overall volume, lumping both -- all grades
6 together.

7 QUESTION: Thank you, Mr. DiVincenzo. I think
8 you've answered the question.

9 Ms. Harbour, we'll hear from you.

10 ORAL ARGUMENT OF PAMELA J. HARBOUR

11 FOR STATE AMICI CURIAE,

12 SUPPORTING THE RESPONDENTS

13 MS. HARBOUR: Mr. Chief Justice, and may it
14 please the Court:

15 For several decades, the 35 State attorneys
16 general before this Court today have been the primary
17 enforcers of the law in the area of vertical price-fixing.
18 Our experience, and the realities of the marketplace, have
19 shown us that the labels placed on these agreements --
20 that is to say, maximum vertical price-fixing, on one
21 hand, and minimum vertical price-fixing on the other --
22 are, in most cases, a meaningless distinction.

23 As the agencies most familiar with these cases,
24 the States have considerable experience with price-raising
25 schemes being characterized as price-lowering schemes.

1 And --

2 QUESTION: Ms. Harbour, how -- how extensive is
3 that experience? Is it -- is it correct that there's not
4 a single case that's been brought?

5 MS. HARBOUR: Your Honor, there are -- there was
6 a characterization game that was going on here. The
7 targets of our investigation came in and said to us, we
8 are actually fixing price ceilings, intending to lower
9 prices. But, in fact, after we investigated, we found
10 that those were not price ceilings. In fact, they were
11 intended to raise prices rather than lower them.

12 QUESTION: So were there prosecutions brought?
13 What I'm asking is, is it correct, as the -- as the -- as
14 the United States Government has contended, that
15 they're -- they're unaware of a single case, where --
16 where you or any other State has moved against maximum
17 prices?

18 MS. HARBOUR: As I said, there are elements of
19 maximum price-fixing in the cases that we brought. The
20 States claim that they're price-fixing --

21 QUESTION: What cases are they?

22 MS. HARBOUR: The Minolta case. It was a
23 \$640,000 settlement that was returned to consumers.
24 Panasonic involved a \$16 million settlement. And in these
25 two cases, as well as Mitsubishi, Your Honor, the

1 defendants contended that they were actually trying to
2 lower prices for consumers. But, in fact, when we
3 investigated, we found that they were in fact raising
4 those prices. There was a characterization they were
5 appealing to our prosecutory --

6 QUESTION: You found that they were minimum
7 pricing cases, not maximum pricing cases. And I suppose
8 the question is, a genuine maximum -- which is not in
9 question in this case -- no one is asserting that this was
10 a minimum price in disguise -- do you have any case where
11 there was a maximum price, not a disguised minimum price,
12 where the States have prosecuted?

13 MS. HARBOUR: Understood, Your Honor. No, Your
14 Honor. But retailer market power is very rare in these
15 cases --

16 QUESTION: The -- the reason that I think that's
17 awfully important is because what you're basically doing
18 is you're taking the position that consumers should have
19 to pay more money for gasoline. Now, if you're requiring
20 consumers to pay more money for gasoline, there ought to
21 be -- which is what's going on, if you don't let them set
22 a real high price -- then I'd like to know why. And your
23 argument is, because, really, maybe it's a minimum price.
24 All right, I understand that argument. It's logically
25 sound.

1 But what is the evidence that you have to make
2 consumers pay more money for gasoline in order to stop
3 people from, you know, charging a minimum price? And --
4 and -- and that's why I think this evidentiary question,
5 why you know that, why you're saying this, the facts of
6 the case, are pretty important. So -- so I'm urging you
7 to -- you know, why do you think that?

8 MS. HARBOUR: Your Honor, basically, the
9 argument being advanced today by the Petitioners is that
10 manufacturers, like State Oil, should be free to restrain
11 the exercise of monopoly power by their dealers who have
12 been granted exclusive territories. Well, first of all,
13 Khan had no exclusive territory. There is nothing in this
14 record that points to that.

15 And, second of all, nothing in this record
16 suggests that Khan had monopoly power whatsoever.

17 QUESTION: That's quite a good point. And --
18 and do you think, then, it would be possible, under a rule
19 of reason, for a firm to come and complain on the basis
20 that they're a failing dealer, and so a failing dealer
21 couldn't possibly be in a situation of trying to raise
22 prices above the competitive level unless there was no
23 need for this kind of thing to constrain his price? I
24 mean, that's what I think would be quite interesting,
25 whether there would be categories of things where it would

1 be a good defense -- or it would be a good -- a good
2 price-fixing claim.

3 MS. HARBOUR: The rule of reason is not the rule
4 for a price-fixing case or any agreement on price. In
5 fact, as this Court has held in Maricopa, the
6 anti-competitive potential inherent in all price-fixing
7 cases justify their facial invalidation even when
8 pro-competitive justifications are offered for some. But,
9 in this case, Your Honor, it is the States' position that
10 the argument posited by the Petitioners is illogical. And
11 allow me to illustrate.

12 The Petitioners have hypothesized a dealer with
13 market power in an exclusive territory. When a dealer has
14 monopoly power, by definition, there is no effective
15 interbrand competition; and, therefore, there is no
16 justification for granting the exclusive territory. Under
17 the Sylvania decision, Sylvania held that restraints on
18 intrabrand competition -- namely, the exclusive
19 territory -- will only be tolerated when they stimulate
20 interbrand competition.

21 But here, this -- this dealer, this hypothetical
22 monopoly power that this dealer has, there is no effective
23 interbrand competition. Therefore, there is no
24 justification for granting the exclusive territory; and
25 further, there is no justification for imposing the price

1 ceiling to restrain the monopoly power that was
2 unreasonably granted to the dealer in the first place.

3 QUESTION: Gee, is that our law? I wasn't aware
4 it was. That you -- you cannot exclusive territories,
5 even those exclusive territories, overall, will -- will --
6 will stimulate interbrand competition. If in any single
7 territory there is no interbrand competition, you cannot
8 restrict that dealer to -- to a territory?

9 MS. HARBOUR: As -- as the holding --

10 QUESTION: Just one territory?

11 MS. HARBOUR: Intrabrand competition --
12 restraints on intrabrand competition will only be
13 tolerated when they stimulated interbrand competition.

14 QUESTION: Within the particular territory or
15 overall? I mean, I'm -- I'm -- I'm a manufacturer, and
16 nationwide, there's plenty of interbrand competition. But
17 you're saying if there is one -- one territory in the
18 country where there's no effective interbrand competition,
19 you cannot have an exclusive territory there?

20 MS. HARBOUR: When -- I'm talking about a -- a
21 monopolist. And when there is a monopolist there, that
22 means there is no inter- or intrabrand competition.

23 QUESTION: I wasn't aware we -- we had held
24 that, but you think that's the law?

25 MS. HARBOUR: Your Honor, if -- if I have

1 mischaracterized that, forgive me. But I -- I do know
2 that, in Sylvania, this Court said that in order to -- to
3 restrain intrabrand competition, there must be effective
4 interbrand competition. And the States do not feel that
5 that has been posited here.

6 But we do believe that a great deal is at stake
7 in this case, Your Honor -- more than the 29-year-old rule
8 in the Albrecht decision. The clear and straightforward
9 per se rule against maximum price-fixing, which has served
10 this Nation well for most of this century, is at risk.
11 Albrecht was merely a reaffirmation of Dr. Miles,
12 Sucony-Vacuum Oil, Parke Davis and many other precedents
13 in a consistent line of cases, which all stand for the
14 same proposition -- that price-fixing is price-fixing,
15 whether it is vertical or horizontal --

16 QUESTION: Then why was it -- Dr. Miles was 1911
17 and Albrecht wasn't until the sixties. So if it was so
18 evident that minimum and maximum are the same and they're
19 all equally bad, why did it take from 1911, till what,
20 1968 for that light to go on?

21 MS. HARBOUR: Actually, it didn't, Your Honor.
22 In 1911, Dr. Miles equated horizontal and -- and vertical
23 price-fixing. And -- and, basically, they said that it
24 produced market effects that were functionally the same.
25 But, then, in the Sucony-Vacuum Oil decision, in 1940,

1 this Court formulated the classic definition of a
2 price-fixing agreement -- any agreement that fixes,
3 raises, lowers, maintains, or stabilizes prices. In that
4 agreement, maximum and minimum price-fixing was equated.

5 QUESTION: Well, that may be, but they're
6 arguing for a very basic distinction. In the vertical
7 context, the one, means the consumer pays low prices; in
8 the other, high prices. Where the consumer pays high
9 prices, that's likely to be bad. Where it means the
10 consumer pays lower prices, that's likely to be good.

11 I mean, that's a crude distinction, and it
12 requires lots of -- but, I mean, I think that's the basic
13 idea, isn't it, for making the distinction between the
14 high and the low, under the antitrust laws?

15 MS. HARBOUR: Yes. In the States' opinion,
16 price ceilings almost always harm consumers. And they
17 almost always harm consumers because they can disguise a
18 minimum price, as this Court pointed out in Albrecht and
19 late in Maricopa, or they could be a de facto minimum.
20 And also they can fa -- facilitate collusion. And as this
21 Court pointed out in --

22 QUESTION: Can't you use suggested retail prices
23 for that purpose just as effectively?

24 MS. HARBOUR: I'm sorry, Your Honor?

25 QUESTION: Why can't you use suggested retail

1 prices for that purpose just as effectively?

2 MS. HARBOUR: Well, in fact, that is --

3 QUESTION: I mean, if -- if you're trying to get
4 a de facto minimum.

5 MS. HARBOUR: I believe that that suggestion by
6 Your Honor is an alternative that can be used instead of
7 the price ceiling. Price ceilings are almost always
8 anti-competitive. And there are alternatives that are
9 less pernicious to competition, such as suggested retail
10 pricing.

11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Ms. Harbour. Your time has expired.

13 MS. HARBOUR: You're welcome.

14 CHIEF JUSTICE REHNQUIST: Mr. Baumgartner, you
15 have 1 minute remaining.

16 MR. BAUMGARTNER: We have nothing further,
17 Mr. Chief Justice.

18 CHIEF JUSTICE REHNQUIST: Very well, the case is
19 submitted.

20 (Whereupon, at 11:02 a.m., the case in the
21 above-entitled matter was submitted.)

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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:

STATE OIL COMPANY, Petitioner v. BARKAT U. KHAN AND KHAN & ASSOCIATES, INC.

CASE NO: 96-871

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

BY Donna M. Fedrico-----

(REPORTER)