17-2003

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Connecticut Fine Wine and Spirits, LLC, DBA Total Wine & More,
Plaintiff - Appellant,

v.

Commissioner Michelle H. Seagull, Department of Consumer Protection,
John Suchy, Director, Division of Liquor Control,
Defendants - Appellees,

Wine & Spirits Wholesalers of Connecticut, Inc., Connecticut Beer Wholesalers Association, Inc., Connecticut Restaurant Association, Connecticut Package Stores Association, Inc., Brescome Barton, Inc.,
Intervenors - Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

BRIEF OF INTERVENORS-DEFENDANTS-APPELLEES WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT ASSOCIATION, CONNECTICUT PACKAGE STORES ASSOCIATION, INC.

David S. Hardy
Damian K. Gunningsmith
CARMODY TORRANCE
SANDAK & HENNESSEY LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509

Robert M. Langer
Benjamin H. Diessel
WIGGIN AND DANA LLP
20 Church Street
Hartford, CT 06103
860-297-3700
(counsel continued on back cover)

203-777-5501
Attorneys for Defendant-Appellee Connecticut Beer Wholesalers Association, Inc.

Meredith G. Diette
SIEGEL, O'CONNOR,
O'DONNELL & BECK, P.C.
150 Trumbull Street
Hartford, CT 06103
860-727-8900

Attorneys for Defendant-Appellee Connecticut Restaurant Association

Patrick A. Klingman
KLINGMAN LAW, LLC
280 Trumbull Street, 21st Floor
Hartford, CT 06103
860-256-6120

Attorneys for Defendant-Appellee Connecticut Package Stores Association, Inc.

-and-
Deborah Skakel
Craig M. Flanders
BLANK ROME LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174
212-885-5000

Attorneys for Defendant-Appellee Wine and Spirits Wholesalers of Connecticut

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Intervenor Defendant Appellee, Wine & Spirits Wholesalers of Connecticut, Inc., hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Intervenor Defendant Appellee, Connecticut Beer Wholesalers Association, Inc., hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Intervenor Defendant Appellee, Connecticut Restaurant Association, hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Intervenor Defendant Appellee, Connecticut Package Stores Association, Inc., hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Page purposely left blank.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES vi

INTRODUCTION 1

ISSUES PRESENTED..2

STATEMENT OF THE CASE..3

A. The Challenged Provisions 3

1. How the Challenged Provisions Work 3

a. Price Discrimination Prohibition Provisions..4

b. Minimum Retail Price Provisions 4

c. Post and Hold Price Provisions 5

2. The Challenged Provisions' Anti-Discrimination Purpose 6

B. Procedural Background and the District Court's Decision 8

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. Legal Framework For Assessing Sherman Act Preemption Challenge 13

A. Prong One: Only Statutes That Mandate or Authorize *Per Se* Sherman Act Violations In All Cases Can Be Preempted......................................15

B. Prong Two: Only Hybrid Restraints May Be Preempted........................17

II. The District Court Correctly Concluded that the Challenged Provisions Are Not Preempted...18

A. The District Court Correctly Concluded that the Price Discrimination Prohibition Provisions Are Unilateral Restraints 18

B. The District Court Correctly Concluded that the Minimum Retail Price Provisions Are Not Preempted 20

C. The District Court Correctly Concluded that the Post and Hold Provisions Are Not Preempted 25

1. *Battipaglia* is controlling 25

2. Total Wine's attacks on *Battipaglia* lack merit 28

a. *Battipaglia* was not overruled by *324* Liquor 28

b. *Battipaglia* is not distinguishable based on its procedural posture 30

c. *Battipaglia* was correctly decided and remains good law 31

d. Sherman Act Preemption requires mandating or authorizing an actual agreement 34

3. Out-of-Circuit Decisions Provide No Basis To Depart From *Battipaglia* 38

III. The Challenged Provisions Are Not Preempted For Additional Reasons That Support Affirmance 40

A. The Price Discrimination Prohibition Provisions Do Not Mandate or Authorize *Per Se* Antitrust Violations 40

B. The Post and Hold and Minimum Retail Price Provisions Are Unilateral Restraints 41

1. The Post and Hold Provisions are unilateral restraints 41

2. The Minimum Retail Price Provisions are unilateral restraints 45

3. The District Court erred in holding that these provisions are "hybrid" restraints 45

a. The District Court erred in failing to consider relevant pre-*Fisher* authority....................46

b. The District Court erred in relying on *324 Liquor* 47

IV. Total Wine's Attempt To "Lump" Analysis of Separate Statutes Is Improper....................49

V. Total Wine's Allegations That Go Beyond the Scope of Its Facial Challenge Should Not Be Considered....................53

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

Cases

324 Liquor Corp. v. Duffy,
479 U.S. 335 (1987)..*passim*

324 Liquor Corp. v. McLaughlin,
102 A.D.2d 607 (1st Dep't 1984) 48

Battipaglia v. N.Y. State Liquor Auth.,
583 F. Supp. 8 (S.D.N.Y. 1982), *aff'd* 745 F.2d 166 (2d Cir. 1984) ....*passim*

Battipaglia v. N.Y. State Liquor Auth.,
745 F.2d 166 (2d Cir. 1984) ....*passim*

Benihana, Inc. v. Benihana of Tokyo, LLC,
784 F.3d 887 (2d Cir. 2015) 16

Booker v. BWIA W. Indies Airways Ltd.,
No. 06–CV–2146, 2007 WL 1351927 (E.D.N.Y. 2007)...................................31

Business Elecs. Corp. v. Sharp Elecs. Corp.,
485 U.S. 717 (1988)..16

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980)..*passim*

Catalano, Inc. v. Target Sales, Inc.,
446 U.S. 643 (1980)..32

Cent. Valley Chrysler-Jeep v. Witherspoon,
456 F. Supp. 2d 1160 (E.D. Cal. 2006) 54, 55, 57

Concerned Home Care Providers, Inc. v. Cuomo,
783 F. 3d 77 (2d Cir. 2015) 50

Costco Wholesale Corp. v. Maleng,
522 F.3d 874 (9th Cir. 2008) ....*passim*

Dr. Miles Medical Co. v. John D. Park & Sons Co.,
220 U.S. 373 (1911)..21, 22, 48

E.I. du Pont de Nemours & Co. v. F.T.C.,
729 F.2d 128 (2d Cir. 1984) 33, 34

Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc.,
275 Conn. 363 (2005) 6, 21, 24

English v. General Elec. Co.,
496 U.S. 72 (1990)..50

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978)..30, 41

Figueroa v. Foster,
864 F.3d 222 (2d Cir. 2017) 52

Fisher v. City of Berkeley, Cal.,
475 U.S. 260 (1986)...*passim*

Freedom Holdings, Inc. v. Cuomo,
624 F.3d 38 (2d Cir. 2010) ....*passim*

Freedom Holdings, Inc. v. Spitzer,
357 F.3d 205 (2d Cir. 2004) 37, 38

Gade v. National Solid Wastes Management Ass'n,
505 U.S. 88 (1992)..52, 56

Grand River Enterprises Six Nations, Ltd. v. Beebe,
574 F.3d 929 (8th Cir. 2009) 15, 55

Grand River, *Enterprises Six Nations, Ltd. v. King*,
No. 02 CIV.5068 JFK, 2008 WL 4615838
(S.D.N.Y. Oct. 14, 2008) 54

Granholm v. Heald,
544 U.S. 460 (2005)..13

I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.,
936 F.2d 759 (2d Cir.1991) 40

Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of New York,
852 F.3d 178 (2d Cir. 2017) 13

L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors,
Civ. No. 07-002 JJF, 2008 WL 2937253 (D. Del. July 29, 2008)....................36

Leavitt v. Jane L.,
518 U.S. 137 (1996)....................50

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007)....................*passim*

Mass. Food Ass'n v. Mass. Alcoholic Bevs. Control Comm'n,
197 F.3d 560 (1st Cir. 1999)....................30, 36

In the Matter of McWane, Inc.,
No. 9351, 2012 WL 4101793 (FTC Sept. 14, 2012)....................32

Mhany Mgmt. v. Cnty. of Nassau,
819 F.3d 581 (2d Cir. 2016)....................40

Miller Brewing Co. v. Liquor Control Commission,
Civ. No. 124086, 4 (Conn. Ct. of Common Pleas, Hartford Cty., April 26, 1977)....................6, 28

Miller v. Hedlund,
813 F.2d 1344 (9th Cir. 1987)....................38, 39, 48

Modern Home Institute, Inc. v. Hartford Acci. & Indem. Co.,
513 F.2d 102 (2d Cir. 1975)....................35

Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981)....................*passim*

Nat'l Org. for Marriage, Inc. v. Walsh,
714 F.3d 682 (2d Cir. 2013)....................15

National Advertising Co. v. Niagara,
942 F.2d 145 (2d Cir. 1991)....................50

Payne v. Fairfield Hills Hosp.,
215 Conn. 675 (1990)....................50

Rice v. Norman Williams,
458 U.S. 654 (1982)..*passim*

Richmond Boro Gun Club, Inc. v. City of New York,
97 F.3d 681 (2d Cir. 1996) 13

Sanders v. Brown,
504 F.3d 903 (9th Cir. 2007) 55

Sawyer v. Whitley,
505 U.S. 333 (1992)...48

Schwartz v. Kelly,
140 Conn. 176,184 (1953) ....*passim*

Schwegmann Bros. v. Calvert Distillers Corp.,
341 U.S. 384 (1951)..*passim*

Serlin Wine and Spirit Merchants, Inc. v. Healy,
512 F. Supp. 936 (D. Conn. 1981)..*passim*

Slimp v. Dep't of Liquor Control,
239 Conn. 599 (1996) ....*passim*

State v. Menillo,
171 Conn. 141 (1976) 49, 51

Sugar Institute v. U.S.,
297 U.S. 553 (1936)..*passim*

Tag Mfrs. Institute v. Federal Trade Commission,
174 F.2d 452 (1st Cir. 1949)...32

TFWS, Inc. v. Schaefer,
242 F.3d 198 (4th Cir. 2001) ....*passim*

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001) 31

Toys "R" Us, Inc. v. Federal Trade Comm'n,
221 F.2d 928 (7th Cir. 2000) 24, 25, 52

Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n,
No. 89-1825, 1990 WL 36746 (6th Cir. Apr. 2, 1990)....................................55

In re Tribune Co. Fraudulent Conveyance Litig.,
818 F.3d 98 (2d Cir. 2016) 13, 49

Tritent Intern. Corp. v. Kentucky,
467 F.3d 547 (6th Cir. 2006) 55

U.S. v. Am. Express Co.,
838 F.3d 179 (2d Cir. 2016) 24

U.S. Brewers Ass'n, Inc. v. Healy,
532 F. Supp. 1312 (D. Conn. 1982)...*passim*

U.S. v. Moore,
949 F.2d 68 (2d Cir. 1991) 28

Whitman v. United States,
135 S. Ct. 352 (2014)..47

Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health,
654 F.3d 919 (9th Cir. 2011) 54

Statutes and Regulations

15 U.S.C. § 1 ....*passim*

15 U.S.C. § 13 ....4, 41

Conn. Gen. Stat. § 1-3 50

Conn. Gen. Stat. § 30-1 ....*passim*

Conn. Gen. Stat. § 30-6..4, 5, 51

Conn. Gen. Stat. § 35-45 ....7, 27, 28

Conn. Gen. Stat. § 30-63 ....*passim*

Conn. Gen. Stat. § 30-68...5, 51

Conn. Gen. Stat. § 30-68i..5, 51

Conn. Gen. Stat. § 30-68k 4, 51

Conn. Gen. Stat. § 30-68l 5, 51

Conn. Gen. Stat. § 30-68m .... *passim*

Conn. Gen. Stat. § 30-74 3

Conn. Gen. Stat. § 30-94 .... 4, 48, 51

Conn. Gen. Stat. § 35-45 .... 4, 7, 28

Regs. Conn. State Agencies § 30-6-A29 4

Regs. Conn. State Agencies § 30-6-B12 .... 5, 51

Other Authorities

2 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 33

Black's Law Dictionary (10th ed. 2014) 18

Roundtable on Resale Price Maintenance – United States Submission to OECD (October 2008) 24

INTRODUCTION

Connecticut Fine Wine & Spirits, LLC, d/b/a Total Wine & More ("Total Wine") and its affiliated companies operate a huge complex of wine and liquor chain stores throughout the country. (JA 17 at ¶ 7.) Though Total Wine is a Maryland-based company (JA 16 at ¶ 1), it already operates four large retail stores in Connecticut. Total Wine touts that its massive size and purchasing power allow it to achieve "economies of scale" that confer an "advantage" over smaller, less efficient stores in Connecticut. (Br. at 9-11.) Total Wine seeks to press this advantage by slashing prices to the point that the small mom-and-pop stores that it tars as "inefficient" retailers would be unable to compete, thereby eliminating Total Wine's competitors at the retail level. (Br. at 13; JA 21 at ¶ 22.)

But there is a barrier to Total Wine's objective of pricing smaller stores out of existence across the state of Connecticut: Connecticut's legislature determined that smaller retail stores are a public good worthy of protection and thus enacted laws to protect against what has become known as the "Walmartization" of alcohol retail sales. Precisely ***because*** massive operations like Total Wine's have inherent economic advantages, the Connecticut legislature introduced the challenged provisions of the Liquor Control Act to level the playing field by prohibiting discriminatory pricing and below-cost sales.

Total Wine brings a Sherman Act preemption challenge to these laws because its business model depends on these same prohibited tactics. Total Wine attempts to spin the pursuit of its individual commercial interests as a defense of competition. But that is a mere facade.[1] The prerogatives of the Connecticut Legislature are entitled to substantial deference, and the bar for Sherman Act preemption is high. Total Wine's tour through the judiciary to attempt to further its agenda under the auspices of a facial Sherman Act challenge does not meet this high burden. The District Court correctly dismissed Total Wine's preemption case because none of the challenged provisions poses an irreconcilable conflict with, and thus cannot be preempted by, the Sherman Act. (JA 133, *et seq.*) This Court should affirm that judgment.

ISSUES PRESENTED

1. Should the District Court's judgment that the challenged provisions are not preempted by the Sherman Act be affirmed because, as the District Court concluded: (a) the price discrimination prohibition provisions are unilateral restraints; (b) the minimum retail price provisions must be analyzed under the rule of reason; and (c) the post and hold provisions must be analyzed under the rule of reason?

[1] A cornerstone of this facade is Total Wine's misleading statement that Intervenors purportedly "conceded" below that the purpose of the challenged statutes is to "prevent . . . competition." (*E.g.*, Br. at 3.) That "concession" is made up. (*See* Dist. Ct. Dkt. 66-1, at 14 (actual quote describes a statutory regime to "prevent ***unfair*** competition" (emphasis added).) Total Wine's egregious use of ellipsis is telling.

2. Should the District Court's judgment that the challenged provisions are not preempted by the Sherman Act be affirmed on the alternative grounds that: (a) the price discrimination prohibition provisions must be analyzed under the rule of reason; (b) the minimum retail price provisions are unilateral restraints; and (c) the post and hold provisions are unilateral restraints?

STATEMENT OF THE CASE

A. The Challenged Provisions

The sale of alcoholic beverages in Connecticut is prohibited except as expressly authorized under the State's Liquor Control Act. Conn. Gen. Stat. §§ 30-1, *et seq.*; Conn. Gen. Stat. § 30-74. First passed in 1933 following the repeal of Prohibition, the Liquor Control Act creates a three-tier system for the sale and distribution of alcohol consisting of manufacturer/suppliers, wholesalers, and retailers (both on-premise restaurants and bars and off-premise package stores). *See Serlin Wine and Spirit Merchants, Inc. v. Healy*, 512 F. Supp. 936, 937-38 (D. Conn. 1981) ("*Serlin*") (describing three tiers), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) ("*Morgan*").

1. How the Challenged Provisions Work

Although the Liquor Control Act contains over 100 separate statutory provisions, Total Wine attacks only the three challenged provisions described below.

a. Price Discrimination Prohibition Provisions

Each wholesaler must sell a specific product (*i.e.,* brand and bottle/case size) at the same price to all retail customers in the state, and thus cannot discriminate on price among different purchasers. Conn. Gen. Stat. §§ 30-68k, 30-94(a). These anti-discrimination provisions include a prohibition on volume or quantity discounts of any kind. Conn. Gen. Stat. § 30-63(b); Regs. Conn. State Agencies § 30-6-A29(a) (collectively, with Conn. Gen. Stat. §§ 30-68k, 30-94(a), and 30-63(b), the "Price Discrimination Prohibition Provisions"). Manufacturers are likewise prohibited from discriminating in price among wholesalers. Conn. Gen. Stat. § 30-63(b). These prohibitions mirror similar price discrimination provisions found in federal antitrust law under 15 U.S.C. § 13 (the "Robinson-Patman Act") and Conn. Gen. Stat. § 35-45(a), Connecticut's state law equivalent.

b. Minimum Retail Price Provisions

Retailers cannot sell to consumers below their "cost." Conn. Gen. Stat. § 30-68m(b). For wine and spirits, the retailer's "cost" is defined as the "posted bottle price from the wholesaler plus any charge for shipping or delivery to the retailer permittee's place of business." Conn. Gen. Stat. § 30-68m(a)(1)(A). "Bottle price" is likewise statutorily defined. Conn. Gen. Stat. § 30-68m(a)(3). For beer, the retailer's "cost" is defined as "the lowest posted price" during the month in which the retailer is selling "plus any charge for shipping or delivery to

the retailer permittee's place of business." Conn. Gen. Stat. § 30-68m(a)(1)(B) (collectively, with Conn. Gen. Stat. §§ 30-68m(a) and (b), the "Minimum Retail Price Provisions"). Manufacturers and wholesalers, like retailers, also may not sell products below cost. Conn. Gen. Stat. §§ 30-68, 30-68i, 30-68l. Retailers have complete control over pricing above that statutorily defined cost. Conn. Gen. Stat. § 30-68m. Even that "floor" is subject to a statutory exception that allows the retailer to sell a designated product each month below the "minimum." Conn. Gen. Stat. §§ 30-68m(c).

c. Post and Hold Price Provisions

Every month, each wholesaler is required to file a detailed pricing schedule with the Connecticut Department of Consumer Protection stating the bottle, can, and case price that the wholesaler has set for every item offered for sale. Conn. Gen. Stat. § 30-63(c); Regs. Conn. State Agencies § 30-6-B12(a) (Conn. Gen. Stat. § 30-63(c), together with Regs. Conn. State Agencies § 30-6-B12, the "Post and Hold Provisions," and together with the Price Discrimination Prohibition and Minimum Retail Price Provisions, the "Challenged Provisions"). The wholesaler must sell only at its posted prices during the following month. Conn. Gen. Stat. § 30-63(c).[2]

---

[2] Manufacturers are similarly regulated by post and hold and other pricing controls. *See* Conn. Gen. Stat. § 30-63. Although the Complaint references manufacturers

2. The Challenged Provisions' Anti-Discrimination Purpose

The prohibition on price discrimination is a cornerstone of Connecticut's regulation of pricing practices within the liquor industry, a primary purpose of which is to prevent unfair competition and the potential harm to the public that can result from such unfair competition. *Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 377 (2005). As courts have observed, "the economic regulation of the liquor industry promotes the financial solvency and the financial stability of the members of the industry" and thereby "assures an orderly conduct of the industry." *Miller Brewing Co. v. Liquor Control Commission,* Civ. No. 124086, 4 (Conn. Ct. of Common Pleas, Hartford Cty., April 26, 1977), attached hereto as Supplemental Appendix Ex. 2.

The objective of precluding wholesalers from discriminating in prices among retailers is self-evident in Connecticut's Price Discrimination Prohibition Provisions. *Slimp v. Dep't of Liquor Control*, 239 Conn. 599, 611 (1996) (explaining that the pricing statutes evidence that "the legislature was concerned that there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut"); *accord* Conn. Gen. Assembly, Joint Standing Committee Hearings,

---

in conclusory allegations about price fixing (JA 19-21 at ¶¶ 14, 16, 20, 21), its gravamen concerns alleged abuses of wholesalers and purported market distortion of wholesale and retail prices as the basis of the claims (JA 18-21 at ¶¶ 11, 16-17, 19, 20).

95-96 (April 16, 1947) ("1947 Joint Comm. Hrgs.") (as noted during hearing on price filing bill amending the Liquor Control Act, "[i]t does not take the element of free enterprise out of business as it allows each manufacturer, out-of-state shipper and wholesaler to fix his own prices on his commodities but it prevents him . . . from discrimination as to prices among the various buyers."), attached hereto as Supplemental Appendix Ex. 3; *see also Battipaglia v. N.Y. State Liquor Auth.*, 583 F. Supp. 8, 9 (S.D.N.Y. 1982) ("The purpose of the regulatory structure [of New York's substantively identical post and hold statute] is to prevent unfair and unreasonable price discrimination to the benefit of favored buyers resulting in a disorderly market."), *aff'd* 745 F.2d 166 (2d Cir. 1984). By analogy, and as noted by the 1947 Connecticut legislature, price discrimination prohibitions have also been embraced in Connecticut and at the federal level in other statutory contexts to protect competition. Conn. Gen. Stat. § 35-45(a) (the "Connecticut Antitrust Act") ("[n]o person engaged in commerce . . . shall discriminate in price between different purchasers of commodities of like grade and quality"); Robinson-Patman Act (federal counterpart of the Connecticut Antitrust Act); 1947 Joint Comm. Hrgs. at 96 (price posting bill prevents wholesaler discrimination, "as does the [Robinson-Patman] Act in Federal Government, from discrimination as to prices among the various buyers").

Likewise, the Minimum Retail Price Provisions' mandate of uniform minimum resale pricing (which thereby prohibits predatory and below-cost pricing) eliminates discriminatory pricing favoring larger retailers. Finally, the Post and Hold Provisions' price-filing requirement serves as an essential means of tracking and maintaining compliance with the anti-discrimination statutes by requiring pricing data to be published. Report of the Liquor Price Fixing Investigation Commission to the 1978 Session of the Connecticut General Assembly of the State of Connecticut at 22 (February 15, 1978), attached hereto as Supplemental Appendix Ex. 1 (page 95 missing in Intervenors' copy of report).

B. Procedural Background and the District Court's Decision

In August 2017, Total Wine filed its Sherman Act preemption complaint with respect to the Challenged Provisions.[3] The State and Intervenors filed separate motions to dismiss. During argument, Total Wine confirmed that its case involves solely a "facial challenge to the statute." (JA 96.) Total Wine also conceded that the Court was not required to analyze the three statutes collectively. (JA 87-88 (agreeing that lumping was not "essential" and merely a suggested

---

[3] *See* JA 22-23 at ¶ 28 (count one alleging preemption by section one of the Sherman Act on the basis that the challenged provisions purportedly "facilitate and impel" horizontal price-fixing), and ¶ 33 (count two alleging preemption by section one of the Sherman Act on the basis that the challenged provisions purportedly "facilitate and impel" vertical price-fixing and resale price maintenance).

framework that was "preferred," but not required).)[4]

Following argument, the District Court held that none of the Challenged Provisions is preempted by the Sherman Act and dismissed all claims on that basis. (JA 133-71.) To reach that conclusion, the court analyzed each of the Challenged Provisions individually, based on principles of federalism, Connecticut's severability mandate, and controlling precedent. (JA 145-47.) The Court held as follows:

1. The Price Discrimination Prohibition Provisions are lawful, unilateral restraints that merely "prohibit[] liquor wholesalers from charging different prices to different retailers," and thus not preempted. (JA 169-70.)

2. The Minimum Retail Price Provisions are vertical restraints, and thus not preempted. (JA 162-63.)

3. The Post and Hold Provisions do not irreconcilably conflict with the Sherman Act, consistent with this Circuit's ruling in *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166 (2d Cir. 1984) (hereinafter, "*Battipaglia*"), in which the Court upheld New York's substantively identical post and hold provisions. (JA 153-55.)

---

[4] Total Wine also confirmed that it is not pursuing Sherman Act preemption under the "irresistible pressure" standard outlined in *Rice v. Norman Williams*, 458 U.S. 654 (1982). (JA 99-100.)

In reaching these conclusions, the District Court appropriately rejected Total Wine's attempts to inject allegations about the industry and purported consumer harm into the analysis, as such considerations are outside the scope of a facial preemption challenge. (JA 138 n.6; JA 140.) Although these conclusions standing alone were sufficient to dismiss Total Wine's preemption claims, the District Court unnecessarily and incorrectly concluded that the Post and Hold Provisions and Minimum Retail Price Provisions are "hybrid" restraints. (JA 147-51 (post and hold); 159-61 (minimum retail price).)

SUMMARY OF ARGUMENT

This appeal turns on a single issue: Do the Challenged Provisions on their face irreconcilably conflict with the Sherman Act under *Rice v. Norman Williams*, 458 U.S. 654 (1982)? If they do not, as the District Court concluded, the judgment must be affirmed.

Assessing irreconcilable conflict involves a two-pronged test: (1) does the statute on its face mandate or authorize a *per se* violation of the Sherman Act in all cases, *id.* at 659; and (2) does the statute impose a "hybrid" restraint by conferring regulatory power on private parties, *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 260 (1986). Unless the answer to *both* questions is "yes," the challenged provisions are not preempted. (Point I.)

The District Court held that none of the Challenged Provisions is preempted because none irreconcilably conflicts with the Sherman Act under this test. The District Court was right. As to the Price Discrimination Prohibition Provisions, the court correctly held that they are unilateral restraints under *Fisher* in that they simply ban price discrimination. (Point II.A.) As to the Minimum Retail Price Provisions, the court correctly held that they are vertical restraints, and thus not preempted. (Point II.B.) As to the Post and Hold Provisions, the court correctly held that they do not mandate or authorize *per se* violations of the Sherman Act in all cases, as outlined in this Circuit's controlling and dispositive decision in *Battipaglia*, and are thus not preempted. (Point II.C.)

This Court should also affirm the District Court's judgment on alternative grounds. The Price Discrimination Prohibition Provisions are not preempted for the separate reason that they do not mandate or compel a *per se* violation of the antitrust laws in all cases; Total Wine does not even attempt to articulate that this standard is satisfied. Indeed, these provisions are similar to other well-established non-discrimination provisions, such as the Robinson-Patman Act and its Connecticut counterpart. (Point III.A.) The Post and Hold and Minimum Retail Price Provisions are not preempted for the separate reason that each is a unilateral restraint. A long line of Connecticut authority has consistently treated Connecticut's post and hold provisions as requiring wholesalers simply to

unilaterally post and hold their own prices. A straightforward application of *Fisher* confirms those courts were right. (Point III.A.1.) And the Minimum Retail Resale Provisions merely set a floor on entirely independent pricing decisions. Connecticut authority and *Fisher* hold that such restraints must also be treated as unilateral. (Point III.A.2.) In concluding otherwise, the District Court erred by inappropriately disregarding on-point Connecticut and federal jurisprudence treating such provisions as unilateral restraints. (Point III.A.3.)

Because the Challenged Provisions fall far short of the *Norman Williams* preemption standard, Total Wine urges this Court to analytically "lump" all of the Challenged Provisions together in a Frankenstein-like effort to create what it hopes would be a more "preemptable" target. But Total Wine already conceded that this mode of analysis is not required. Moreover, such a mode of analysis, as the District Court held, would be improper because it would fail to give the required deference to federalism concerns and Connecticut's statutory severability requirements. (Point IV.)

Finally, Total Wine complains that the District Court ignored its wide-ranging and irrelevant allegations about the purported conduct of industry participants and anticompetitive effects and erred in denying Total Wine an opportunity for discovery on those subjects. Total Wine has no basis to complain. It brought solely a facial preemption challenge, not an antitrust case. As such,

Norman Williams mandates that the Court conduct its preemption analysis "in the abstract," based on the face of the challenged statutes. (Point V.)

For these reasons, the judgment of the District Court should be affirmed.

ARGUMENT

I. Legal Framework For Assessing Sherman Act Preemption Challenge.

"[T]here is a strong presumption against federal preemption of state and local legislation." *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 687 (2d Cir. 1996) (*citing California v. ARC America Corp.*, 490 U.S. 93, 101 (1989)). "The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone," such as alcohol beverage regulation. *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 110 (2d Cir. 2016); *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (since the end of Prohibition states have "virtually complete control" over regulation of liquor distribution). "[A] facial challenge to a legislative enactment," such as Total Wine's challenge, "is the most difficult challenge to mount successfully." *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of New York*, 852 F.3d 178, 184 (2d Cir. 2017) (internal citations omitted).

In *Norman Williams*, the Supreme Court set forth the authoritative "irreconcilable conflict" framework for analyzing facial preemption claims under

the Sherman Act:

> In determining whether the Sherman Act pre-empts a state statute . . . the inquiry is whether there exists an *irreconcilable conflict* between the federal and state regulatory schemes . . . A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

458 U.S. at 659 (emphasis added). Under the *Norman Williams* standard, only a statute that "*on its face* irreconcilably conflicts" with antitrust law can be preempted. *Id.* (emphasis added). And, as stated in *Fisher*, only *hybrid* restraints—those that confer "a degree of private regulatory power" on private actors—can be preempted. 475 U.S. at 268. A "restraint imposed unilaterally by government," on the other hand, cannot. *Id.* at 267.

Thus, the test for determining "irreconcilable conflict" imposes a burden on a preemption claimant to demonstrate that the challenged statute:

1) on its face mandates or authorizes a *per se* violation of the Sherman Act in all cases, *Norman Williams*, 458 U.S. at 659; *and*

2) imposes a "hybrid" restraint, *Fisher*, 475 U.S. at 267-68.

Failure to satisfy either of these prongs is fatal to a preemption claim, requiring dismissal. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 50-53 (2d Cir. 2010) ("*Freedom Holdings IV*") (irreconcilable conflict a threshold issue); *see*, *e.g.*,

Grand River Enterprises Six Nations, Ltd. v. Beebe, 574 F.3d 929, 938-39 (8th Cir. 2009) ("*Grand River v. Beebe*") (affirming dismissal of Sherman Act preemption claim).[5]

A. Prong One: Only Statutes That Mandate Or Authorize *Per Se* Sherman Act Violations In All Cases Can Be Preempted.

As to the first prong, *Norman Williams* announced the following standard:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it *mandates or authorizes* conduct that necessarily constitutes a violation of the antitrust law in *all cases*. . . . Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in *all cases a per se violation*.

458 U.S. at 661 (emphasis added).[6] If a statute does not facially involve a *per se* violation of the Sherman Act in all cases, it cannot be preempted. *Id.*

---

[5] The District Court devoted significant attention to the relative order of analysis of these two prongs. Had the court followed the order of the prongs set forth herein, the path to dismissal would have been shorter. In any event, on appeal, because the judgment of dismissal must be affirmed if ***either*** prong is not met, if the Court concludes that one of the prongs supports affirmance, it need not reach the other. *E.g.*, *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.").

[6] *Norman Williams* discusses an alternative preemption theory where a statute creates "irresistible pressure" to violate the antitrust laws; a formulation rarely (if ever) applied since *Norman Williams* to invalidate a statute. *Id.* Although Total Wine uses the phrase "irresistible pressure" in its brief, the Complaint is devoid of any allegations articulating this theory and Total Wine conceded at oral argument that the claims in this case are not based on the "irresistible pressure" theory. (JA

In the landmark case *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Supreme Court held that *per se* treatment is confined to only those restraints "that would always or almost always tend to restrict competition" and "lack . . . any redeeming virtue" such that "courts can predict with confidence that [they] would be invalidated in all or almost all instances." *Id.* at 886-87. The Court announced a sweeping rule that vertical restraints (*i.e.*, those operating between different levels of the supply chain[7]) are not *per se* unlawful and must ***all*** be analyzed under the rule of reason, precluding preemption. *Id.* at 885-86, 899. The Court classified the challenged restraint—a resale price maintenance restraint between a manufacturer/distributor of leather goods and retailers—as "vertical," and upheld the restraint. *Id.* at 882.[8]

99-100; *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 897 (2d Cir. 2015) (theory not raised below at oral argument is waived on appeal).)

[7] *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 745 n.10 (1988) (describing vertical restraints).

[8] Although *Leegin* removed vertical restraints from the purview of Sherman Act preemption, it does not follow that horizontal restraints (those operating between competitors at the same level) are subject to *per se* treatment. A party mounting a facial challenge to a non-vertical restraint under the Sherman Act must show "irreconcilable conflict" by establishing, in the abstract, that the statute necessarily mandates or authorizes a Sherman Act violation "in all cases." *Battipaglia*, 745 F.2d at 175 (holding that post and hold provisions were subject to rule of reason analysis and did not mandate or authorize a Sherman Act violation in all cases).

B. Prong Two: Only Hybrid Restraints May Be Preempted.

In *Fisher*, the Supreme Court held that "[a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law" as "[t]he ordinary relationship between the government and those who must obey its regulatory commands . . . is not enough to establish a conspiracy." 475 U.S. at 267; *see also Freedom Holdings IV*, 624 F.3d at 56 (holding that a restraint that amounts merely to "state directives that by themselves limit or reduce competition" is a unilateral restraint).

The *Fisher* Court distinguished hybrid restraints as those that confer on private parties "a degree of private regulatory power." 475 U.S. at 268; *see also Freedom Holdings IV*, 624 F.3d at 50 (a "statute may be preempted as hybrid" only where it "grants private actors a degree of regulatory control over competition"). Prior Supreme Court cases finding a hybrid restraint, such as *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), involved statutory authorization of private trade agreements, which had a regulatory effect of setting prices for third parties. *Fisher*, 475 U.S. at 267-69 (describing these cases as examples of "nonmarket mechanisms [that] merely enforce private marketing

decisions"). In contrast to *Schwegmann* and *Midcal*, the rent control regulations upheld in *Fisher* lacked any private agreement as to price. *Id.* at 269-70.

II. The District Court Correctly Concluded that the Challenged Provisions Are Not Preempted.

The District Court correctly held that none of the three statutes is preempted by the Sherman Act. The Price Discrimination Prohibition Provisions are unilateral restraints, precluding preemption. (Point II.A.) The Minimum Retail Price Provisions are subject to rule of reason review under *Leegin* and thus cannot be preempted. (Point II.B.) And the Post and Hold Provisions are subject to rule of reason review based on *Battipaglia*, which is dispositive. (Point II.C.)

A. The District Court Correctly Concluded that the Price Discrimination Prohibition Provisions Are Unilateral Restraints.

The District Court correctly held that the Price Discrimination Prohibition Provisions are unilateral restraints. (JA 171.) Those provisions, as Total Wine pleads, operate as a "ban" on volume discounts and other forms of discriminatory pricing. (JA-19 at ¶ 14.) "Ban" is just another word for an official "regulatory command[]," *Fisher*, 475 U.S. at 267, against discriminating on the basis of price. *See* Black's Law Dictionary (10th ed. 2014) (defining "ban" as "a legal or otherwise official prohibition against something"). The legislature's determination to put small retailers on equal footing with big chain stores by prohibiting price discrimination, *see Slimp*, 239 Conn at 611; 1947 Joint Comm. Hrgs at 95-96,

involves no private agreement to regulate and thus is not a hybrid restraint. *Fisher*, 475 U.S. at 267-78; *accord Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 898 (9th Cir. 2008) (holding that a similar price discrimination ban was unilateral, explaining, "[t]he State of Washington commands that no discounts be given . . . ; that the wholesalers comply with these commands is not enough to deem the restraints hybrid"). The fact that private parties set the non-discriminatory prices does not make the provision a hybrid restraint, as Total Wine agrees. (Br. at 34.)

On appeal, Total Wine argues that the District Court erred by declining to lump the Price Discrimination Prohibition Provisions with the other Challenged Statutes. (Br. at 35-36.) Not only is this "lumping" an improper mode of analysis (*see infra* Point IV), but the sole case upon which Total Wine relies, *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208 (4th Cir. 2001), *reconsideration denied sub nom. TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), is inapposite. As the District Court explained, that case did not involve an analysis of severability of Maryland's volume discount ban because the parties waived that issue. (JA 170; *accord Costco*, 522 F.3d at 897 (concluding that "TFWS provides little guidance on this issue" and rejecting the *TFWS* lumping approach).) Nothing in *TFWS* warrants lumping in this case. While Total Wine tries to link the Price Discrimination Prohibition Provisions to the other Challenged Provisions, "the fact

that the challenged provisions govern related aspects of the liquor market does not render them analytically inseparable." (JA 171.)

B. The District Court Correctly Concluded that the Minimum Retail Price Provisions Are Not Preempted.

As the District Court held, Total Wine did not plausibly plead that the Minimum Retail Price Provisions are horizontal restraints, as they "clearly do not mandate or authorize any horizontal activity by wholesalers." (JA 162-63; *see also* Br. at 48 (relying solely on purported horizontal impact of separate post and hold requirements in arguing that the "three statutes," collectively, have horizontal impact).) As the District Court recognized, the Minimum Retail Price Provisions operate vertically, "dictat[ing] the relationship between the prices set by wholesalers and retailers." (JA 162-63; *see also Schwartz v. Kelly*, 140 Conn. 176,184 (1953) (The Connecticut Liquor Control Act "does not come into operation by virtue of any agreement or combination among individuals. It is the act of each individual wholesaler acting independently which determines the minimum price to be charged by the retailers for his brand of liquor."), *appeal dismissed*, 346 U.S. 891 (1953).)

Because the Minimum Retail Price Provisions are vertical restraints, *Leegin* mandates that the rule of reason applies, precluding preemption.[9] In *Leegin*, the Supreme Court overruled the nearly century old *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had mandated that resale price maintenance agreements were *per se* illegal. *Leegin*, 551 U.S. at 882. In overturning *Dr. Miles*, the Supreme Court explained that "[t]he Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach . . . [and] from the opinion's rationales," *id.* at 900, such that "[v]ertical price restraints are to be judged according to the rule of reason," *id.* at 907; *accord Serlin*, 512 F. Supp. 936 (upholding prior version of Connecticut minimum resale provision against Sherman Act preemption challenge). Consistent with *Leegin*'s observation that resale price maintenance is potentially procompetitive, 551 U.S. at 900, 907, the provisions' mandate of minimum resale pricing furthers competition by eliminating discriminatory pricing favoring larger retailers and promoting smaller retailers' ability to compete with large chain stores. *See Eder Bros.*, 275 Conn. at 375, 377. Despite *Leegin*'s unequivocal and on-point holding, Total Wine asserts

[9] Even if the Minimum Retail Price Provisions were viewed as horizontal restraints (and they should not be), they would still be subject to rule of reason analysis, as *Leegin* makes clear that minimum resale price provisions do not warrant *per se* treatment. 551 U.S. at 886-87.

that *Leegin* should not apply for several reasons. Total Wine's assertions are without merit.

First, Total Wine asserts that *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) remains good law because *Leegin* did not specifically mention it. (*See* Br. at 50.) The District Court rightly rejected this assertion below. (JA 164-65.) *Leegin* repeatedly made clear that it overruled *Dr. Miles*. 551 U.S. at 882, 900, 902, 907. *Dr. Miles*, in turn, was the premise for *324 Liquor*'s conclusion that "[r]esale price maintenance [had] been a per se violation of § 1 of the Sherman Act 'since the early years of national antitrust enforcement.'" *324 Liquor*, 479 U.S. at 341 (quoting *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752, 761 (1984) (citing *Dr. Miles*, 220 U.S. at 404-09)). And this now-overruled premise was essential to the *324 Liquor* Court's conclusion that the New York statute at issue was *per se* illegal. *See id.* at 342-43. *324 Liquor* was thus plainly overruled; that *Leegin* did not reference *324 Liquor* is of no moment.[10]

Second, Total Wine asserts that *Leegin* does not apply to industry-wide resale price fixing. (Br. at 50.) As an initial matter, this argument is entirely

---

[10] In the 96 years between the *Dr. Miles* and *Leegin* decisions, *Dr. Miles* was cited in over 40 Supreme Court decisions and 140 Circuit Court decisions. It cannot be the law that the Supreme Court was required to sift through the almost 200 Supreme Court and Circuit Court cases referencing *Dr. Miles* spanning a century of jurisprudence and expressly overrule each one that relied on *Dr. Miles*.

academic, as the Minimum Retail Price Provisions do not mandate or compel unlawful industry-wide price fixing or formation of any "cartel," as Total Wine mischaracterizes it.[11] But even if the Minimum Resale Price Provisions could be viewed as involving industry-wide resale price maintenance, the District Court correctly held that a carve out for such restraints has no basis in *Leegin*. (JA 165-66.) Indeed, *Leegin* discussed industry-wide resale price maintenance and its potential "anticompetitive effects" before holding that resale price maintenance is nevertheless subject to rule of reason analysis on a category-wide basis. 551 U.S. at 892-94.[12]

Total Wine similarly contends that the potential procompetitive benefits of resale price maintenance referenced in *Leegin* "break[] down" with industry-wide resale price maintenance. (Br. at 52.) As the District Court held, even if one were

---

[11] This is so even if these provisions would be considered in combination with the separate Post and Hold Provisions, because, as the District Court held (JA 152-57) and as discussed below (Point II.C), those provisions are also subject to rule of reason analysis.

[12] In arguing that *Leegin* did not create a categorical rule, Total Wine asserts that the Court "took pains to identify several facts that were not present in that case." (Br. at 53 (citing 551 U.S. at 897-98).) The District Court correctly rejected this argument. (JA 167.) *Leegin* unequivocally mandated applying the rule of reason to all vertical restraints. In the portion of *Leegin* upon which Total Wine relies, the Court was simply specifying factors for lower courts to consider when applying the mandatory rule of reason analysis. *Leegin*, 551 U.S. at 897 ("If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry.").

to hypothetically credit Total Wine's economic assertion, *Leegin* compels that such economic considerations would be reviewed as part of a rule of reason analysis. (JA 165-66.) Moreover, Total Wine's unsupported economic argument falls flat. *See* Roundtable on Resale Price Maintenance – United States Submission to OECD (October 2008), *available at* https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/resalepricemaintenance.pdf, ¶ 27 ("[w]idespread use of RPM is . . . consistent with a hypothesis that its efficiencies are widespread"); *see also Eder Bros.*, 275 Conn. at 375, 377 (procompetitive benefits of eliminating discriminatory pricing favoring large retailers).

Total Wine also asserts that *Toys "R" Us, Inc. v. Federal Trade Comm'n,* 221 F.2d 928 (7th Cir. 2000) requires the Court to carve out from *Leegin* restraints which have both vertical and horizontal components. (Br. at 53-54.) This argument lacks merit. *Leegin* considered and expressly rejected the idea that the restraints in *Toys "R" Us*, or those like them, warranted *per se* treatment. 551 U.S. at 893-94 (citing *Toys "R" Us* and holding that rule of reason analysis is appropriate for such restraints "[n]otwithstanding the risks of unlawful conduct"). Moreover, the Second Circuit has rejected efforts to characterize similar vertical restraints as *per se* unlawful. *United States v. Am. Express Co.*, 838 F.3d 179, 195 (2d Cir. 2016) (holding industry-wide vertical agreements could not "recast the

vertical restraints as horizontal" because "we have never drawn this type of distinction between any varieties of vertical restraints"). *Toys "R" Us* in any event is not a preemption case and, as the District Court held, does not support Total Wine's proffered distinction. (JA 166-67.)

In short, straightforward application of *Leegin* confirms that the Minimum Retail Price Provisions must be analyzed pursuant to the rule of reason, and thus cannot be preempted.

C. The District Court Correctly Concluded that the Post and Hold Provisions Are Not Preempted.

The Post and Hold Provisions do not mandate or authorize conduct that would in all cases constitute a *per se* violation of the Sherman Act. *Norman Williams*, 458 U.S. at 659-61. This Circuit's decision in *Battipaglia*, as the District Court correctly recognized, is "directly on point" and dispositive of this issue. (JA 152.)

1. *Battipaglia* is controlling.

In *Battipaglia*, this Circuit held that New York's post and hold provisions are not preempted under *Norman Williams*. 745 F.2d at 174-75. The Court held that the provisions do not require any private agreement or put pressure on private parties to conspire:

> New York wholesalers can fulfill all of their obligations under the statute without either conspiring to fix prices or engaging in "conscious parallel" pricing. So, even more clearly, the New

> York law does not place irresistible pressure on a private party to violate the antitrust laws in order to comply with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month.

Id. at 175 (quotation marks omitted). The Court further held that even if the "exchange of price information and price adherence compelled by the state" were treated as "voluntary," the provisions would not mandate or authorize antitrust violations. *Id.* at 174 ("The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams*, 'necessarily constitutes a violation of the antitrust laws in all cases.'" (quoting 458 U.S. at 661)). As this Court noted in *Battipaglia*, the Post and Hold Provisions are in relevant part substantively identical to the New York statute upheld in that case. *Id.* at 172. Thus, *Battipaglia* is controlling.

Battipaglia is also consistent with prior Connecticut decisions upholding its post and hold provisions, including *Serlin*, 512 F. Supp. 936, and *U.S. Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983). *Serlin* involved a Sherman Act preemption challenge to, among other things, Connecticut's post and hold provisions. 512 F. Supp. at 938 & n.3. The court found no "facial antitrust violation in the [Connecticut] Liquor Control Act itself, or in its enforcement by the Liquor Control Commission," *id.* at 943, and held that use of posted prices for calculating minimum resale price did not "constitute any contract,

combination, or conspiracy which the Sherman Act was intended to address," *id.* at 939. The Second Circuit affirmed, ruling that "the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of § 1 of the Sherman Act." *Morgan*, 664 F.2d at 355. As noted in *Battipaglia*, this Circuit in *U.S. Brewers* upheld a prior version of Connecticut's post and hold provisions applicable to beer distribution on the basis that the Sherman Act "is directed only at joint action." *Battipaglia*, 745 F.2d at 172 (quoting *U.S. Brewers*, 532 F. Supp. at 1330).

Likewise, the Post and Hold Provisions fall far short of *Leegin*'s articulation of the stringent criteria for *per se* restraints—that they "lack any redeeming virtue" and "always or almost always tend to restrict competition." 551 U.S. at 886. These provisions are the means for achieving compliance with the core non-discrimination principles of the Liquor Control Act. This, in turn, promotes healthy competition at the retail level by protecting the ability of small retailers to compete, *see Slimp*, 239 Conn. at 611; 1947 Joint Comm. Hrgs., and is consistent with federal and Connecticut competition laws prohibiting price discrimination in other contexts, *see* Connecticut Antitrust Act; Robinson-Patman Act. Moreover, Connecticut's implementation of post-and-hold permits the wholesaler to amend its price to a *lower* price—and *only* to a lower price—to match the price of an identical product (*i.e.*, the same brand and size). Conn. Gen. Stat. § 30-63(c).

Meeting a competitor's lower price is expressly permitted under the Robinson-Patman Act and its analogue under the Connecticut Antitrust Act, Conn. Gen. Stat. § 35-45(a). These procompetitive justifications for the Post and Hold Provisions provide another reason for concluding that they are not a *per se* violation of the Sherman Act. *See Leegin*, 551 U.S. at 889.

2. Total Wine's attacks on *Battipaglia* lack merit.

Total Wine nevertheless urges this Court not to follow *Battipaglia*. (Br. at 42-44.) This suggestion is ill-conceived. "[P]rior opinions of a panel of [the Second Circuit] are binding upon [future panels] in the absence of a change in the law by higher authority or . . . in banc proceedings (or its equivalent). . . ." *U.S. v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991). *Battipaglia* was correctly decided and remains good law. Total Wine's arguments to the contrary are without merit.

a. *Battipaglia* was not overruled by *324 Liquor*.

Total Wine asserts that *Battipaglia* was overruled by *324 Liquor*. (Br. at 42.) That assertion is baseless as *324 Liquor* is simply inapposite. The Supreme Court did not analyze the issue of "irreconcilable conflict." *324 Liquor* also did not involve a post and hold statute. (JA 107 (Total Wine counsel conceded that "*324* [*Liquor*] did not involve a post and hold statute.").) Rather, the Supreme Court analyzed "a regime of resale price maintenance" as a purely vertical restraint, 479 U.S. at 341-42, now subject to the rule of reason. *324 Liquor*'s

references to "[m]andatory industrywide resale price fixing," *id.* at 342, are in that context, describing wholesaler-retailer relationships. The language had nothing to do with New York's separate post and hold provisions, which were not addressed in the decision's preemption analysis. *See id.* at 341-45;[13] *accord* JA 155-56 ("This language has little, if any, relevance to the question of whether Connecticut's post and hold provisions, when viewed as horizontal restraints, are *per se* violations of the Sherman Act.").

In asserting that *324 Liquor* analyzed horizontal "price fixing among competitors" (Br. at 41), Total Wine simply reads into *324 Liquor* that which is not there. The only time *324 Liquor* even referenced a "horizontal" restraint was in casting *Midcal* as a case about "vertical"—*not* "horizontal"—restraints. *Id.* at 342 (although "*Midcal* . . . involved horizontal as well as vertical price fixing . . . our decision . . . rested on the 'vertical control' of wine producers . . . ." (quoting *Midcal*, 445 U.S. at 103)).[14]

---

[13] The Court discussed post and hold only in the context of the separate *Parker* immunity and 21st Amendment analyses that are not at issue in this appeal. *Id.* at 343-45 (*Parker* immunity); 346-52 (21st Amendment).

[14] Total Wine also misconstrues *324 Liquor* in asserting that a statute is subject to *per se* scrutiny whenever it authorizes or compels mere "anticompetitive behavior." (Br. at 17, 24, 29, 31, 42 n.17 (citing 479 U.S. at 345 n.8).) As courts have noted while interpreting this language, "one must be careful in parsing general statements to the effect that states may not compel 'private parties to engage in anticompetitive behavior.'. . . What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not

b. *Battipaglia* is not distinguishable based on its procedural posture.

Total Wine next claims that *Battipaglia* is distinguishable because it was a summary judgment case where "even after discovery the plaintiffs did not have any evidence that the challenged statute 'had an anticompetitive effect.'" (Br. at 44 (citing *Battipaglia*, 745 F.2d at 172 & n.10).) This is a gross mischaracterization. Not only did *Battipaglia* never assess any anticompetitive effects of the post and hold provisions, it expressly stated that to do so would be incompatible with *Norman Williams*. *Id.* at 175 (stating that *Norman Williams* requires "facial" analysis of the statute, which precludes analysis of "the statute['s] . . . actual operation" and "the factual material" referenced elsewhere in the opinion). As discussed below, and as the *Battipaglia* Court also recognized, discovery is simply not relevant to a facial preemption challenge.[15] (*See infra* Point V.)

---

state directives that *by themselves* limit or reduce competition." *Mass. Food Ass'n v. Mass. Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 565 (1st Cir. 1999) (cited approvingly in *Freedom Holdings IV*, 624 F.3d at 50); *accord Costco*, 522 F.3d at 889 ("[C]ourts must be careful not to rely upon the presence of anti-competitive effect alone . . . ."); *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.").

[15] Total Wine also asserts that *Battipaglia* is distinguishable because the New York statutory regime in effect at the time did not include a minimum retail price provision. (Br. at 43.) This is a distinction without a difference. *Battipaglia* is

c. *Battipaglia* was correctly decided and remains good law.

Total Wine next suggests that this Court should ignore *Battipaglia* because it was purportedly "rendered by a divided panel" and "wrongly decided." (Br. at 43-44.) Total Wine may prefer the result in the *Battipaglia* dissent, but it has no precedential value. *E.g.*, *Booker v. BWIA W. Indies Airways Ltd.*, No. 06–CV–2146, 2007 WL 1351927, at *3 (E.D.N.Y. 2007) ("A dissent . . . is not binding and has absolutely no precedential value."). Judge Friendly's opinion for the panel, on the other hand, is, and continues to be cited as, the binding law of this Circuit. *E.g.*, *Freedom Holdings IV*, 624 F.3d at 62 (citing *Battipaglia* in the same paragraph in which it referenced *324 Liquor*); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (approvingly citing *Battipaglia*).

Total Wine's assertion that *Battipaglia* was "wrongly decided" is also incorrect. Total Wine points to Judge Winter's dissent in which he relies on *Sugar Institute v. U.S.*, 297 U.S. 553, 601 (1936), to posit that the "hold" aspect of post and hold warrants *per se* treatment. (Br. at 45 (citing 745 F.2d at 179 (Winter, J., dissenting).) Judge Winter was wrong, and misapplied language from *Sugar*

---

directly on point and dispositive, having reviewed New York's substantively identical provisions and held that they are not preempted. The Minimum Retail Price Provisions, addressed above, are on their face not preempted based on a straightforward application of *Leegin*. *Battipaglia* does not enter that analysis at all.

Institute that "steps . . . to secure adherence, without deviation, to prices and terms . . . announced" are illegal. 297 U.S. at 601. *Sugar Institute* was a concerted action case—not a preemption case—that involved competitors' private ***agreement*** to exchange prices and other commercial terms and adhere to those terms. By contrast, the Post and Hold Provisions lack any mandate or authorization for an agreement and thus do not violate the Sherman Act. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50 (1980) ("As the *Sugar Institute* case demonstrates . . . , there is a plain distinction between the lawful right to publish prices and terms of sale, on the one hand, and an ***agreement*** among competitors limiting action with respect to the published prices, on the other." (emphasis added)); *Tag Mfrs. Institute v. Federal Trade Commission*, 174 F.2d 452, 465 (1st Cir. 1949) (distinguishing *Sugar Institute* due to the lack of an "agreement to adhere to . . . filed list prices"); *In the Matter of McWane, Inc.*, No. 9351, 2012 WL 4101793, *26 (FTC Sept. 14, 2012) (distinguishing *Sugar Institute* on the basis of a lack of "agreement to adhere to posted prices"); *see also TFWS*, 242 F.3d at 214 (Luttig, J., concurring) (characterizing Maryland post and hold scheme as unilateral "because there is no voluntary agreement, independently reached,

between private parties that is either authorized or enforced by the state.”).[16] *Sugar Institute* therefore is inapposite, as Judge Friendly correctly assessed. 745 F.2d at 172 (rejecting application of *Sugar Institute*).

More illustrative of how to view post and hold statutes which, as here, do not mandate or authorize agreement, is *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128 (2d Cir. 1984). There, this Circuit held that price disclosure and adherence by competitors in the absence of an agreement does not violate the antitrust laws. *Id.* at 133-41. *Du Pont* involved competitors in the concentrated industry of manufacture and sale of gasoline additives. The FTC alleged that the competitors had each adopted practices of publicly disclosing price increases; providing 30 days advance notice of any price changes; and agreeing to “most favored nation” clauses in customer contracts. *Id.* at 133. Rejecting the FTC’s position that these practices violated the law by facilitating “uniform price levels” and eliminating price competition, *id.*, the Court held that this conduct did not violate the Sherman Act, *id.* at 136. In reaching this conclusion, the Court emphasized that there was no “agreement” among competitors, who “acted independently and unilaterally.” *Id.* at 140. The Court also emphasized that the

---

[16] The discussion of *Battipaglia* in 2 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW that Total Wine cites (Br. at 45), falls into the same trap by taking issue with “***agreements*** to post and adhere.” ¶ 217b2 (emphasis added).

challenged conduct was an effort to "guarantee against price discrimination," which "assured the smaller refiners that they would not be placed at a competitive disadvantage on account of price discounts to giants such as Standard Oil, Texaco and Gulf." *Id.* at 134. The Court dismissed evidence of price uniformity on the basis that it is "as consistent with competitive as with anticompetitive behavior." *Id.* at 141.

Du Pont is instructive. The Post and Hold Provisions, like the conduct at issue in *du Pont*, provide for public disclosure of pricing terms and adherence to disclosed pricing terms for 30-day periods. Critically, as in *du Pont*, the price posting and adherence does not depend on any agreement among competitors. And like in *du Pont*, the purpose of the Post and Hold Provisions is to "guarantee against price discrimination," which "assured the smaller [retailers] that they would not be placed at a competitive disadvantage on account of price discounts to giants such as [Total Wine]." *Du Pont*, 729 F.2d at 134; *see also Battipaglia*, 745 F.2d at 172 (describing non-discrimination purpose of Connecticut's Act).

d. Sherman Act Preemption requires mandating or authorizing an actual agreement.

Unable to steer around the lack of private agreement, Total Wine falls back to an argument that an actual agreement is unnecessary for a restraint to be preempted by the Sherman Act. (Br. at 42.) Total Wine is incorrect. The law is clear: "[e]ven where a single firm's restraints directly affect prices and have the

same economic effect as concerted action might have, *there can be no liability under § 1 in the absence of agreement*." *Fisher*, 475 U.S. at 266 (emphasis added); *Modern Home Institute, Inc. v. Hartford Acci. & Indem. Co.*, 513 F.2d 102, 108 (2d Cir. 1975) ("Section 1 of the Sherman Act . . . is directed only at joint action. . . . It does not prohibit independent business actions and decisions.").

As purported support for its contrary argument, Total Wine cites a single footnote of *324 Liquor* and incorrectly states that "*324 Liquor* held that there need not be a 'contract, combination . . . , or conspiracy' (*i.e.*, an actual private agreement)" for a restraint to be preempted by the Sherman Act. (Br. at 42.) Total Wine contorts the footnote beyond recognition. In the footnote, *324 Liquor* "reject[ed] appellees' contention that there is no 'contract, combination . . . , or conspiracy, in restraint of trade.'" 479 U.S. at 345 n.8 (quoting 15 U.S.C. § 1)).[17] Total Wine is likewise incorrect in asserting that *Midcal* supports that no agreement is required. (Br. at 42 n.17.) *See Battipaglia*, 745 F.2d at 172 (distinguishing *Midcal* as "involving an implicit agreement"); *U.S. Brewers*, 532 F. Supp. at 1329 ("*Midcal* did not remove the requirement of an agreement . . . .");

[17] The Court also recited the standard for hybrid restraints from *Fisher*, but did not hold or suggest that a hybrid restraint can be condemned in absence of a contract, combination or conspiracy. *Id.*; *see also infra* pp. 47-48 & n.25.

see also Morgan, 664 F.2d at 355 (distinguishing *Midcal* as authorizing or compelling private parties to fix prices).[18]

Total Wine similarly asserts that Sherman Act preemption can be established if conduct contemplated by a statutory scheme would be a *per se* Sherman Act violation "if done by private agreement." (Br. at 37.) This "done by private agreement" concept has never been accepted by the Supreme Court as sufficient to warrant preemption. *Norman Williams*, 458 U.S. at 659 (preemption not warranted "simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws"); *Fisher*, 475 U.S. at 266 (denying preemption even though, "[h]ad the owners . . . voluntarily banded together," that conduct "would not be saved from antitrust attack"); *see also Mass. Food Ass'n.*, 197 F.3d at 565 (same); *U.S. Brewers*, 532 F. Supp. at 1329-30 (holding that the Connecticut Liquor Control Act did not violate the Sherman Act

---

[18] Moreover, *324 Liquor* and *Midcal* both involved challenges to vertical resale price maintenance statutes. *324 Liquor*, 479 U.S. at 342; *Midcal*, 445 U.S. at 103. To the extent that those decisions could have been construed as suggesting that vertical resale price maintenance could be a *per se* violation of the Sherman Act absent proof of an agreement, those cases cannot plausibly support that proposition post-*Leegin*. *See L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors*, Civ. No. 07-002 JJF, 2008 WL 2937253, at *3 (D. Del. July 29, 2008) ("In view of *Leegin*, the Court does not read either *Midcal* or *324 Liquor* as indicating that *per se* violations of the Sherman Act, such as horizontal price fixing, can be found absent proof that conspiracy among competitors exists.").

simply because it compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation).

The *Freedom Holdings* opinions, which Total Wine relies on as the source of the supposed "done by private agreement" standard (Br. at 37), lend no support. In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004) ("*Freedom Holdings I*"), this Court pre-*Leegin* held that the Master Settlement Agreement ("MSA") between certain states and cigarette companies to settle tobacco litigation was preempted by the Sherman Act because it enforced a market-sharing and price-fixing cartel that would have been a *per se* violation "if done by private agreement." *Id.* at 208, 225. But the Court did not hold, and could not have held consistent with *Norman Williams*, 458 U.S. at 659, that any statute that contemplates conduct that would be a *per se* violation if done by a private agreement necessarily mandates or authorizes a *per se* antitrust violation in all cases. Further, any confusion that could have been introduced by the "done by private agreement" language was clarified in this Circuit's post-*Leegin* opinion in *Freedom Holdings IV*. There, the Court reversed course and upheld the MSA provisions previously found preempted in *Freedom Holdings I*. Rather than endorsing a "done by private agreement" standard, this Court emphasized that, post-*Leegin*, *per se* violations are limited to only "manifestly anticompetitive restraints" such as "competitors privately agree[ing] among themselves to fix

prices or to divide markets." 624 F.3d at 50 (internal quotations marks omitted).[19] The decision left no doubt that "irreconcilable conflict" remains the controlling doctrine in this Circuit. *Norman Williams*, 458 U.S. at 659.[20]

3. Out-of-Circuit Decisions Provide No Basis To Depart From *Battipaglia*.

Also misguided is Total Wine's invitation to follow decisions in the Fourth and Ninth Circuits holding that post and hold statutes in other states are preempted by the Sherman Act. *See Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987)

---

[19] For similar reasons, the pre-*Leegin* in-passing statement in a footnote of *Freedom Holdings I*, 357 F.3d at 223 n.17, citing *324 Liquor* for the proposition that a "contract, combination or conspiracy need not be shown for a statute to be preempted," is not a correct summary of the law today, if it ever was before. In view of *Leegin*, *324 Liquor* is not correctly interpreted as permitting the finding of *per se* violations without proof of a conspiracy. (*See supra* n.17.) Moreover, *Freedom Holdings IV* clarified that a challenged restraint can be preempted only if it mandates or authorizes a private contract, combination or conspiracy. *See* 624 F.3d at 50 (preemption requires that a challenged statute "mandate or authorize private antitrust violations" (brackets and quotation marks omitted)); 52-53 ("section 1 of the Sherman Act proscribes only private party contracts, combinations or conspiracies in restraint of trade" (brackets, quotation marks and ellipses omitted)); 56 (no *per se* violation where conduct did not "manifest an agreement proscribed by the Sherman Act").

[20] Even if "done by private agreement" was the standard—and it is not—*Battipaglia* makes clear that the Post and Hold Provisions would not meet that standard. Judge Friendly assumed, without deciding, "that an exchange of price information and price adherence compelled by the state are to be treated, for the purpose of antitrust preemption analysis, as if they were voluntary," *i.e.* by private agreement. 745 F.2d at 174; *accord* JA 156-57 (reaching same conclusion).

(Oregon); *Costco*, 522 F.3d 874 (9th Cir. 2008) (Washington); *TFWS,* 242 F.3d 198 (4th Cir. 2001) (Maryland).

As an initial matter, as discussed above, this Circuit's decision in *Battipaglia* is controlling and must be followed as the law of this Circuit. Moreover, these contrary decisions are not instructive because they were incorrectly decided. Although acknowledging that post and hold provisions do not require any concerted action among wholesalers, these cases nonetheless found that the mere exchange of price information and required adherence to (unilaterally) publicly posted prices amounted to a *per se* violation of section one of the Sherman Act.[21] That is not the law. (*See supra* pp. 34-38.) In reaching this erroneous result, these cases misread *Sugar Institute*[22] and misapplied binding Supreme Court authority in *Fisher* and *Norman Williams*. These cases also cannot be squared with binding precedent in the Second Circuit, including *Battipaglia*, and should not be followed.

---

[21] *Miller v. Hedlund*, 813 F.2d at 1349 ("it is true that there is no agreement or concerted activity among the wholesalers"); *Costco*, 522 F.3d at 893 (same); *TFWS*, 242 F.3d 198 (discussion of post and hold mechanism without reference to agreement).

[22] *Miller v. Hedlund*, 813 F.2d at 1349 (citing *Sugar Institute*); *Costco*, 522 F.3d at 896 (citing *Sugar Institute*); *TFWS*, 242 F.3d at 209 (quoting *Sugar Institute*).

III. The Challenged Provisions Are Not Preempted For Additional Reasons That Support Affirmance.

Alternative grounds also support affirmance of the District Court's judgment.[23] The Price Discrimination Prohibition Provisions are not preempted for the separate reason that they do not mandate or compel any *per se* violation of the antitrust laws. (Point III.A.) The Post and Hold and Minimum Retail Price Provisions are not preempted for the separate reason that they are unilateral restraints. (Point III.B.)

A. The Price Discrimination Prohibition Provisions Do Not Mandate or Authorize *Per Se* Antitrust Violations.

Although the District Court did not reach the issue, its holding of no preemption can also be affirmed on the alternative ground that the Price Discrimination Prohibition Provisions do not mandate or authorize a *per se* violation of the Sherman Act in all cases. *Norman Williams*, 458 U.S. at 661. Total Wine fails to even argue that these provisions meet this standard.[24]

---

[23] This Court "may affirm [a district court's] decision on any ground which is supported by the record." *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 761 (2d Cir.1991); *see Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 605 (2d Cir. 2016) ("[A] notice of appeal from a final judgment brings up for review all reviewable rulings which produced the judgment.").

[24] Total Wine only offers the irrelevant assertion that the Price Discrimination Prohibition Provisions "extend and reinforce" post and hold. (Br. at 48.)

Total Wine's failure to dispute this point is understandable. Far from irreconcilably conflicting with the antitrust laws, the Price Discrimination Prohibition promotes healthy competition at the retail level by protecting the ability of small retailers to compete free from predatory practices of larger retailers. *See Slimp*, 239 Conn. at 611; 1947 Joint Comm. Hrgs at 95-96. For these pro-competition reasons, Congress enacted very similar price discrimination prohibitions, as part of the federal antitrust law through the Robinson-Patman Act, which mirror the challenged Connecticut Price Discrimination Prohibitions. *See* 15 U.S.C. §§ 13, 13a. The Supreme Court has specifically rejected Sherman Act preemption claims where "the basic purposes of the state statute and the Robinson-Patman Act are similar." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). These provisions therefore are not preempted.

B. The Post and Hold and Minimum Retail Price Provisions Are Unilateral Restraints.

The District Court's holding that the Post and Hold and Minimum Retail Price Provisions are not preempted can also be affirmed on the alternative ground that they are unilateral restraints.

1. The Post and Hold Provisions are unilateral restraints.

Under the analytical framework articulated in *Fisher* and *Freedom Holdings IV*, the Post and Hold Provisions are unilateral restraints. *Fisher*, 475 U.S. at 267 (a "restraint imposed unilaterally by government" is not subject to preemption).;

Freedom Holdings IV, 624 F.3d at 53 ("[U]nilateral acts of a state fall[] outside federal antitrust law."). The requirements to post and hold prices are "regulatory commands," *Fisher*, 475 U.S. at 267, that each wholesaler must follow. The Post and Hold Provisions do not give any wholesaler "regulatory power" over any other wholesalers or over retailers, *id.* at 268, as a wholesaler's sole prerogative under the provisions is to post *its own* prices and hold *its own* prices. (*Accord* Br. at 11 ("Every aspect of the statutory scheme is mandatory.").) No wholesaler can dictate the price that any other wholesaler charges to any retailer. The mere prospect that "certain citizens benefit from" state directives, or that the directives "limit or reduce competition," is entirely irrelevant. *Freedom Holdings IV*, 624 F.3d at 53, 56.

The conclusion that the Post and Hold Provisions are unilateral restraints is consistent with decades of Connecticut and federal jurisprudence construing post and hold provisions as unilateral restraints, culminating in this Circuit's decision in *Battipaglia*. In 1953, the Connecticut Supreme Court in *Schwartz v. Kelly* upheld a prior version of the Connecticut Liquor Control Act, reasoning that "[i]n filing the schedule of minimum retail prices to be charged for their liquor, [wholesalers] . . . are merely complying with the law enacted by the General Assembly," "not legislating" as "[t]here has been no delegation of legislative powers to the wholesalers." 140 Conn. at 183; *accord Fisher*, 475 U.S. at 266-68 (contrasting

unilateral restraints that coerce the conduct of "parties who must obey the law" with hybrid restraints that grant private actors "a degree of private regulatory power"). The Court in *Schwartz v. Kelly* distinguished the hybrid restraint in *Schwegmann*, 341 U.S. 384, on the basis that the Connecticut Liquor Control Act involves "individual wholesaler[s] acting independently." 140 Conn. at 184; *accord Fisher*, 475 U.S. at 266 (distinguishing unlawful conduct from "independent activity by a single entity").

Almost thirty years later, the District of Connecticut revisited the Connecticut post and hold provisions in two decisions, *U.S. Brewers* and *Serlin*. In *U.S. Brewers*, the court upheld Connecticut's post and hold provisions applicable to beer wholesalers on the basis that they required only "unilateral action" and they did "not exert irresistible economic pressure on the plaintiffs to violate the Sherman Act." 532 F. Supp. at 1330 (quotation marks omitted); *accord Fisher*, 475 U.S. at 265, 266 (upholding restraint that required only "unilateral action" and did not "place[] irresistible pressure on a private party to violate the antitrust laws"). In *Serlin*, the court upheld the Connecticut Liquor Control Act to a preemption challenge, holding that "the most liberal application of the Sherman Act to State related conduct itself[] does not apply to Connecticut's pervasively state controlled liquor pricing law." 512 F. Supp. at 940 (citations omitted). The court concluded that the Act is "facially valid" despite a limited role of private

industry participants because "complete monopolization of the industry by the State" was not required. *Id.* at 939; *accord Fisher*, 475 U.S. at 270, 269 (restraint not "facially inconsistent with the federal antitrust laws" even where "private parties" given "some power to trigger the enforcement of its provisions"). This Circuit affirmed *Serlin* in *Morgan*, calling the *Serlin* decision "well reasoned" and affirming "essentially on the grounds" set forth in the opinion. 664 F.2d at 354-55.

Shortly thereafter, the *Battipaglia* trial court reviewed the New York post and hold regime. 583 F. Supp. 8. The court positively distinguished the New York post and hold requirements from the hybrid restraints at issue in *Midcal* because they "obviously operate in the Connecticut mold rather than the California mold [as in *Midcal*]." *Id.* at 10. On appeal, this Circuit described a substantively identical post and hold statute as "state compulsion of individual action," an analysis which is consistent with unilateral treatment of post and hold here. *Battipaglia*, 745 F.2d 166, 173; *accord Fisher*, 475 U.S. at 266; *see infra* Point III.B.3.a (describing how "unilateral" concept pre-dated *Fisher* and *Battipaglia*).

Fisher, *Freedom Holdings IV*, *Battipaglia*, and prior decisions from this Court and the Connecticut Supreme Court provide a uniform message: the Post and Hold Provisions are unilateral restraints, and therefore cannot be preempted by the Sherman Act.

2. The Minimum Retail Price Provisions are unilateral restraints.

The Minimum Retail Price Provisions likewise are unilateral restraints under the standard articulated in *Fisher* and *Freedom Holdings IV*. Those provisions prohibit retailers from selling below statutorily defined cost, protecting even-handed competition among retailers. Conn. Gen. Stat. § 30-68m(b). Such minimum retail pricing provisions are unilateral "regulatory commands," *Fisher*, 475 U.S. at 267, that merely set a floor on certain independent pricing decisions. That the statutory formula for the minimum retail resale price is based, in part, on a wholesaler's unilaterally determined bottle price does not amount to State "enforce[ment of] private marketing decisions," *id.* at 268, that would convert the provisions to hybrid restraints, *Serlin*, 512 F. Supp. at 939 ("The mere fact that the manufacturer's price constitutes part of the wholesaler's and retailer's statutorily defined 'cost' does not constitute any contract, combination, or conspiracy which the Sherman Act was intended to address."). Consistent with the foregoing authority, the Minimum Retail Price Provisions are unilateral restraints that cannot be preempted by the Sherman Act.

3. The District Court erred in holding that these provisions are "hybrid" restraints.

In holding that the Post and Hold and Minimum Retail Price Provisions are hybrid restraints, the District Court erred in two fundamental ways: *First*, it

inappropriately discounted or failed to address the long line of Connecticut and Second Circuit authority treating such provisions as unilateral restraints. *Second*, in place of this relevant authority, the District Court erroneously relied on *324 Liquor*, which is inapposite.

a. The District Court erred in failing to consider relevant pre-*Fisher* authority.

In holding that the Post and Hold and Minimum Retail Price Provisions are "hybrid" restraints, the District Court disregarded a long line of authority treating the Connecticut Liquor Control Act's relevant provisions as unilateral restraints. (JA 151, 160.) This was error.

As demonstrated above, the pre-*Fisher* decisions—*Schwartz v. Kelly*, *U.S. Brewers*, *Serlin* and *Morgan*, and *Battipaglia*—discussed the unilateral nature of the Connecticut Liquor Control Act using concepts that very closely mirrored the unilateral restraint analysis set forth in *Fisher*. (*See supra* pp. 41-44.) *Fisher* synthesized prior decisions and clarified the Supreme Court's understanding of hybrid restraints, but did not create the concept of unilateral and hybrid restraints, as the District Court appears to have mistakenly understood. (JA at 151, 160.) Rather, as the Supreme Court has repeatedly recognized, the concepts of unilateral and hybrid restraints had already existed in preemption jurisprudence for decades. *Norman Williams*, 458 U.S. at 665 (Stevens, J., concurring in judgment) (stating that the restraints in *Schwegmann*, (1951) and *Midcal* (1980) were "hybrid

restraints"); *Fisher*, 475 U.S. at 268 (same). The pre-*Fisher* decisions treating relevant provisions of the Act as unilateral restraints are thus on point, and the District Court erred in disregarding them.

b. The District Court erred in relying on *324 Liquor*.

The District Court compounded its error by relying on *324 Liquor*. (JA 149-151, 159-161.) *324 Liquor* is inapposite for several reasons.

First, as discussed above, *324 Liquor* did not involve and has no application to post and hold restraints. (*See supra* pp. 28-29 & n.13.) Accordingly, *324 Liquor* does not support, much less compel, a conclusion that the Post and Hold Provisions are hybrid restraints.

Second, *324 Liquor* focused on state-action immunity doctrines not asserted by any movant below in seeking dismissal, and did not analyze the issue of unilateral versus hybrid restraints. The Court's only reference to hybrid restraints was in a footnote, where the Court quoted the standard from *Fisher* for hybrid restraints. 479 U.S. at 345 n.8. That footnote did not clearly hold that the New York statute is a hybrid restraint, much less articulate bases for such a conclusion. Even if the footnote included a clear holding that New York's resale price maintenance statute was a hybrid restraint (and it did not), a mere footnote would be shaky ground upon which to conclude that resale price maintenance is hybrid. *E.g.*, *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) ("little weight" given to

a "drive-by ruling" "in a footnote"); *Sawyer v. Whitley*, 505 U.S. 333, 354 (1992) (questioning reliance on "a cryptic discussion relegated to a footnote at the end of its opinion").[25]

Third, *324 Liquor* involved a resale price maintenance regime that, although now assessed under the rule of reason in view of *Leegin*, is in any event entirely distinct from the challenged provisions.[26] *324 Liquor* thus has no application here.[27]

---

[25] That footnote is even shakier given that *324 Liquor* was decided prior to *Leegin* at a time when resale price maintenance was still deemed *per se* unlawful under the Sherman Act in accord with *Dr. Miles*. The District Court nevertheless erroneously concluded that, even though *324 Liquor* was overruled by *Leegin*, *324 Liquor*'s footnote statement purportedly classifying the New York minimum retail price statute as hybrid may still be good law. (JA 160.) This is a non sequitur. The footnoted reference to hybrid restraints was in the context of the *Parker* immunity doctrine—an analysis invoked only after a threshold showing that a statute is otherwise preempted. *Id.* at 343. Thus, because *Leegin* vitiated the *324 Liquor* determination of preemption, the *Parker* immunity discussion was also overturned.

[26] Although the Connecticut and New York post and hold provisions are substantively identical, there are meaningful distinctions between the Liquor Control Act and the New York statutes examined in *324 Liquor*. For instance, the New York resale price maintenance statutes did not require wholesalers to sell above costs, as required in Connecticut. *Compare 324 Liquor Corp. v. McLaughlin*, 102 A.D.2d 607, 610 (1st Dep't 1984) (a "wholesaler is free even to sell a brand below cost"), *to* CGSA § 30-94(b).

[27] As discussed above (*see supra* Point II.C.3), certain appeals court decisions in the Fourth and Ninth Circuits have held that post and hold statutes in other states are hybrid restraints preempted by the Sherman Act. *Miller*, 813 F.2d 1344; *Costco*, 522 F.3d 874; and *TFWS*, 242 F.3d 198. These cases were wrongly decided for the reasons discussed above and should not be followed.

For these reasons, to the extent that the Court needs to reach this issue, it should affirm that these provisions are unilateral restraints and thus not preempted.

IV. Total Wine's Attempt To "Lump" Analysis of Separate Statutes Is Improper.

Recognizing that the Challenged Provisions fall far short of the *Norman Williams* preemption standard, Total Wine urges this Court to analytically "lump" all of the Challenged Provisions together, borrowing components from each in a spurious effort to sink them all. (Br. at 21-26.) The District Court properly rejected this approach. (JA 145-47.)

As an initial matter, Total Wine fails to offer a single case holding that the "lumping" approach is mandated. Indeed, as Total Wine conceded at oral argument, it is not. (JA 87-88.) Total Wine cannot now claim that the District Court erred by not adopting a mode of analysis that is not required. Moreover, Total Wine's concession that its "lumping" analysis is not the law was correct.

Courts must approach preemption of state regulation mindful of the limits of federal power and the presumption of validity. *In re Tribune Co.*, 818 F.3d at 110 (describing presumption against federal preemption "premised on federalism concerns"); *State v. Menillo*, 171 Conn. 141, 145 (1976) (noting the "maxim that this court will strive to interpret a statute so as to sustain its validity"). Indeed, this Court has aptly warned that, "[a]s a general rule, a court should refrain from invalidating an entire statute when only portions of it are objectionable . . . . The

preference for severance is particularly strong when the law contains a severability clause." *National Advertising Co. v. Niagara*, 942 F.2d 145, 148 (2d Cir. 1991). "Severability is of course a matter of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996), and in Connecticut, "[i]f any provision of any act passed by the General Assembly is held invalid . . . , such invalidity shall not affect other provisions or applications of such act." Conn. Gen. Stat. § 1-3. "The [Connecticut] legislature has expressed its intention, by General Statutes § 1-3, that courts should presume the severability of the provisions and the applications of statutes." *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 685 (1990). This Court and others have approved a similar provision-by-provision preemption analysis deployed by the District Court here. *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F. 3d 77, 88 (2d Cir. 2015) (upholding lower court ruling finding ERISA preempted only one section of New York Wage Parity Law); *Costco*, 522 F.3d at 883-84 (analyzing each challenged provision of alcohol beverage statutes separately for Sherman Act preemption challenge).

Although Total Wine urges that federalism principles do not govern the "separate question" of "lumping," it is plain that lumping statutes together to allow a preemption challenger to essentially cherry-pick those allegedly pernicious pieces from various different regulations improperly lowers the preemption bar in direct contravention of Supreme Court admonitions. *English v. General Elec. Co.*,

496 U.S. 72, 88 (1990) ("The teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists") (internal citations omitted).[28] Moreover, the fact that the Challenged Provisions are contained in separate statutes passed into law separately over several decades further confirms that the legislature adopted each Challenged Provision independently, and they must be analyzed as such. *Menillo*, 171 Conn. at 145.[29]

Contrary to Total Wine's suggestion, the *Midcal* and *324 Liquor* Courts—which dealt with resale price maintenance restraints at a time when such restraints were still categorically treated as *per se* illegal pre-*Leegin*—simply did not address the issues of bundling or severability, let alone set forth a required framework that

---

[28] The District Court's description that the legal framework for determining if one of the provisions is "hybrid" would "inform [its] efforts" as to another, was not, contrary to Total Wine's suggestion (Br. at 23), an admission the statutes should be "lumped." The same preemption framework (outlined above) applies to all statutes, and has no bearing on Total Wine's "lumping" theory. (JA 147.)

[29] For example, antecedents of the Post and Hold Provisions (Conn. Gen. Stat. § 30-63(c) and Regs. Conn. State Agencies § 30-6-B12), the Price Discrimination Prohibition Provisions (Conn. Gen. Stat. §§ 30-68k and 30-94(a)), and the Minimum Retail Price Provisions (Conn. Gen. Stat. §§ 30-68, 30-68i, 30-68l and 30-68m), were passed separately beginning in 1949, 1955, and 1957, respectively, with separate amendment processes spanning several decades. Total Wine's conclusory assertion that the Challenged Provisions must be lumped because they are "inextricably intertwined" (Br. at 23; *see* Br. at 13) is undermined by this chronology as well as by Total Wine's survey showing that states throughout the country often have enacted only a subset of the components found in the Challenged Provisions (Br. at n.11).

governs in all cases.[30] Total Wine's reliance on *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), is similarly misplaced. *Gade* dealt with statutory preemption of an entire "field" of regulation. *Id.* at 88 n.2; *see also Figueroa v. Foster*, 864 F.3d 222 (2d Cir. 2017) (explaining difference between field and conflict preemption). Because the relevant inquiry in field preemption, unlike Sherman Act preemption, is whether the federal act occupies the entire field by *categorically* preempting state law in that field, it was unremarkable that the *Gade* court did not consider the challenged statutes separately. *Id.* Nor does *Toys "R" Us*, 221 F.3d at 930, support Total Wine's assertion that restraints with both horizontal and vertical components must be analyzed collectively (Br. at 25), as it is inapposite for the reasons discussed above. (*See supra* pp. 24-25.)[31]

For these reasons, the District Court correctly analyzed the Challenged Provisions individually.[32]

---

[30] Contrary to Total Wine's assertion, *324 Liquor* did not "invalidate[] substantively identical statutes." (Br. at 24.) The Court considered and struck down only the distinguishable resale price maintenance statute (a single statute, not a "complex" of "statutes"), without considering (let alone striking) post and hold. 479 U.S. at 342. *See supra* pp. 28-29 & n.13, n.25.

[31] Total Wine's unsupported assertion that the Challenged Provisions should be considered together based on their purported effects in the industry (Br. at 23-24) is equally meritless. As discussed below in Point V *infra*, consideration of such effects is improper in a facial Sherman Act preemption challenge.

[32] Even under Total Wine's invented lumping theory, the Challenged Provisions would not be preempted because none of them, as discussed in Points II-III, *supra*,

V. Total Wine's Allegations That Go Beyond the Scope of Its Facial Challenge Should Not Be Considered.

Total Wine injects wide-ranging and irrelevant allegations concerning purported conduct of industry participants and anticompetitive effects into its facial preemption case.[33] This is entirely inappropriate in a facial challenge, as the District Court properly held. (JA 140.)

There is no dispute that Total Wine brings solely a ***facial*** challenge to the Challenged Provisions. (JA 96.) As such, whether the Challenged Provisions are facially preempted by the Sherman Act is assessed "in the abstract," based solely on the face of the statutes. *Norman Williams*, 458 U.S. at 661. Because *Norman Williams* calls for facial analysis of a challenged statute, allegations that go beyond the face of the statute are irrelevant and must be disregarded. *Id.*; *see Fisher*, 475 U.S. at 270 n.2 (city's purported conduct in attempting to monopolize not cognizable in facial preemption challenge because it "goes beyond the scope of the

---

mandates or authorizes *per se* violations of the Sherman Act and all are unilateral restraints.

[33] For example, Total Wine claims that manufacturers and wholesalers "have used the challenged provisions of Connecticut law to fix and maintain prices at levels substantially above what fair and ordinary market forces would dictate" (JA 19 at ¶ 16), that wholesalers "typically lower their monthly case prices periodically throughout the year during regular 'off-post' months but without lowering the corresponding minimum bottle price in proportion to the lowered case price" (JA 19-20 at ¶ 17), and that "[c]ompeting wholesalers for the same brands routinely set the same bottle and case prices down to the penny" (JA 20 at ¶ 19).

facial challenge presented here"); *Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 654 F.3d 919, 930 n.12 (9th Cir. 2011) (state's purported conduct in attempting to monopolize not cognizable); *Grand River*, *Enterprises Six Nations, Ltd. v. King*, No. 02 CIV.5068 JFK, 2008 WL 4615838, at *5 (S.D.N.Y. Oct. 14, 2008) (intent of private actors not cognizable).

Sherman Act preemption claims that are premised on anticompetitive effects of a challenged statute—rather than a facial challenge—are therefore subject to dismissal. For example, in *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006), automobile dealers brought a claim that certain emissions regulations were preempted by the Sherman Act. The plaintiff had premised its preemption challenge not on facial invalidity but on "specific anticompetitive effects" of the regulations. *Id.* at 1186. The court found no authority "suggesting that anticompetitive effects short of 'irreconcilable conflict' are grounds for preemption of a state statute." *Id.* at 1187. The court distinguished between "challenges [to] the facial validity of a statute" that could give rise to preemption, and "alleg[ations] that action taken pursuant to legislation constitute an antitrust violation," which cannot. *Id.* Because the plaintiff failed to present a facial challenge, and instead alleged only that actions taken pursuant to legislation constituted a violation of antitrust law, the court dismissed the complaint. *Id.*

Applying this framework, dismissal of deficient facial preemption challenges at the pleading stage (*i.e.*, before discovery) is routine. *See, e.g.*, *Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n*, No. 89-1825, 1990 WL 36746, *3 (6th Cir. Apr. 2, 1990) (affirming the dismissal of a Sherman Act challenge to Michigan's Liquor Control Act, which created a three-tier system of suppliers, wholesalers, and retailers with numerous restrictions, finding that under the *Norman Williams* standard, "[i]t is highly doubtful that the three-tier arrangement is a per se violation of the Sherman Act"); *Grand River v. Beebe*, 574 F.3d at 938-39 (affirming dismissal of Sherman Act preemption challenge to state statutes implementing MSA on the basis that the restraint did not mandate or authorize unlawful conduct in all cases and that the restraint was not "hybrid"); *Sanders v. Brown*, 504 F.3d 903, 911, 917-18 (9th Cir. 2007) (affirming dismissal of Sherman Act preemption challenge to state statutes implementing MSA where the plaintiff failed to "adequately allege that the implementing statutes mandate or authorize conduct that 'in all cases' violates federal antitrust law," and concluding that the challenged statutes were not "hybrid" restraints); *Tritent Intern. Corp. v. Kentucky*, 467 F.3d 547, 554 (6th Cir. 2006); *Cent. Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1187.

In the face of this authority, Total Wine cites nothing that could support consideration of its proffered alleged facts as part of a facial challenge and instead

misleadingly states that *324 Liquor*'s preemption holding was based on "evidence" about the effect of the statute. (Br. at 29.) It was not. Consistent with the *Norman Williams* standard for facial analysis, *324 Liquor*'s preemption discussion included no reference to industry effects at all. 479 U.S. at 341-45.[34] Total Wine also cites *Costco*, 522 F.3d 890, as supporting consideration of extra-statutory facts for unilateral-restraint analysis. (Br. at 30 n.13.) It does not. *Costco* merely "hypothesize[d]" potential anticompetitive effects from a retailer-to-retailer sales ban based on the operation of the statute. *Id.*[35]

Total Wine's insistence that courts "must consider" facts far beyond the scope of the statutes (Br. at 27) is not only unsupportable, but also gives the lie to its preemption challenge. *Per se* restraints, by definition, can be identified without any "need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886. Total Wine's reliance on these extra-statutory allegations only further confirms that the challenged provisions cannot be condemned on the basis of *per se* review, and thus are not preempted.

---

[34] The Court discussed industry effects only in the context of the separate *Parker* immunity and 21st Amendment analyses that are not at issue in this appeal. *Id.* at 343-45 (*Parker* immunity); 346-52 (21st Amendment).

[35] Total Wine quotes *Gade*, 505 U.S. at 107, for the proposition that "'[P]re-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field.'" (Br. at 29.) But as discussed above, *Gade* was an inapposite field-preemption case. (*See supra* p. 52.)

Norman Williams, 458 U.S. at 661 (facts concerning "circumstances underlying a particular economic practice" cognizable only through rule of reason analysis).[36]

In pressing consideration of these extraneous matters, Total Wine either does not appreciate or is intentionally disregarding the critical difference between "challenges [to] the facial validity of a statute" that could give rise to preemption, and "alleg[ations] that action taken pursuant to legislation constitute an antitrust violation," which cannot. *Cent. Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1187; *see also Freedom Holdings IV*, 624 F. 3d at 57-58 (distinguishing potentially cognizable antitrust claim from facial preemption challenge). Similarly misdirected is Total Wine's self-interested attempt to use its suit to promote its business model and undercut the legislature's decision to put smaller retailers on equal footing with big chain stores. As to the claims before this Court, the Challenged Provisions—judged, as they must be, on the basis of an abstract, facial analysis—are not preempted for the reasons discussed above.

CONCLUSION

For the foregoing reasons, the District Court's judgment dismissing Total Wine's Complaint should be affirmed.

---

[36] The same considerations rebut Total Wine's misplaced assertion that it was entitled to discovery on its facial preemption claims. (Br. at 30.)

Respectfully submitted,

/s/ Robert M. Langer
Robert M. Langer
Benjamin H. Diessel
WIGGIN AND DANA LLP
20 Church Street
Hartford, CT 06103
860-297-3700
rlanger@wiggin.com
bdiessel@wiggin.com

-and-

Deborah Skakel
Craig M. Flanders
BLANK ROME LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174
212-885-5000
DSkakel@BlankRome.com
CFlanders@BlankRome.com

Attorneys for Defendant-Appellee Wine and Spirits Wholesalers of Connecticut

David S. Hardy
Damian K. Gunningsmith
CARMODY TORRANCE SANDAK
& HENNESSEY LLP
195 Church Street
P.O. Box 1950
New Haven, CT 06509
203-777-5501
dhardy@carmodylaw.com
dgunningsmith@carmodylaw.com

Attorneys for Defendant-Appellee
Connecticut Beer Wholesalers
Association, Inc.

Meredith G. Diette
SIEGEL, O'CONNOR, O'DONNELL
& BECK, P.C.
150 Trumbull Street
Hartford, CT 06103
860-727-8900

Attorneys for Defendant-Appellee
Connecticut Restaurant Association

Patrick A. Klingman
KLINGMAN LAW, LLC
280 Trumbull Street, 21st Floor
Hartford, CT 06103
(860) 256-6120

Attorneys for Defendant-Appellee
Connecticut Package Stores
Association, Inc.

Dated: October 3, 2017

Federal Rules of Appellate Procedure Form 6.
Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ This brief contains 13,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), **or**

☐ This brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point type Times New Roman type style, **or**

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: October 3, 2017

/s/ Robert M. Langer
Robert M. Langer