17-2003-CV

To Be Argued By:
Gary M. Becker
Assistant Attorney General

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CONNECTICUT FINE WINES 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

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

BRIEF OF DEFENDANTS-APPELLEES

GEORGE JEPSEN
ATTORNEY GENERAL

Gary M. Becker
Robert Deichert
Assistant Attorneys General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5040

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Connecticut State Statutes

New York State Statutes

Regulations

JURISDICTIONAL STATEMENT

This is a facial challenge to three separate provisions of the State of Connecticut's liquor control laws. Plaintiff alleged preemption by the Sherman Act, 15 U.S.C. § 1, and the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. The complaint was dismissed on June 6, 2017, representing a final judgment on all parties' claims, JA 173, and a timely appeal was filed. JA 174. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that principles of federalism and controlling Supreme Court cases regarding the analytical methodology to be employed require the court to analyze each challenged statute individually?

2. Did the District Court correctly conclude that a facial preemption challenge must look to the language of the challenged statute itself to determine whether what is required or authorized therein is a violation of the Sherman Act?

3. Did the District Court correctly conclude that the "price discrimination" law is a unilateral restraint?

4. Did the District Court err in concluding that the "post and hold" law and the "minimum retail price" law are hybrid restraints?

5. Did the District Court correctly conclude that the Sherman Act does not preempt any of the three challenged State of Connecticut laws?

STATEMENT OF THE CASE

A. The Challenged Laws

Alcohol distribution and sales in the State of Connecticut are subject to the provisions of the Liquor Control Act, Conn. Gen. Stat. § 30-1 et seq. and related regulations.[1] The specific sections of the Act challenged by Plaintiff include § 30-63(b), § 30-68k and § 30-94(b), (the "price discrimination" provisions); § 30-63(c), (the "post and hold" provision); and § 30-68m, (the "minimum retail price" provision). *See* Compl., ¶ 14 (defining the "challenged provisions") JA 19. Each of the

[1] The challenged regulations are Conn. Agencies Regs. § 30-6-B12, which implements the post and hold requirement of Conn. Gen. Stat. § 30-63(c), and Conn. Agencies Regs. § 30-6-A29(a), which implements the price discrimination prohibition of Conn. Gen Stat. §§ 30-63(b), 68k and 94(b).

challenged laws operates independently and constrains different levels of market participants. The prohibition against price discrimination applies to manufacturers and wholesalers, and is effectuated by Conn. Gen. Stat. §§ 30-63(b), 30-68k, and 30-94(b). As the Connecticut Supreme Court noted in *Slimp v. Department of Liquor Control*, 239 Conn. 599, 611 (Conn. 1996),

> The legislature was concerned that there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut. Section 30-63(b) serves this purpose because it prohibits discrimination in "any manner in price discounts between one permittee and another."

Id.[2] Sections 30-68k and 30-94(b) further reinforce this basic prohibition–a single manufacturer must sell at the same price to every wholesaler and a single wholesaler must sell at the same price to every retailer, without discounts for volume purchases. Thus, in Connecticut, small retailers receive their supplies from a wholesaler at the same price as large retailers. The price discrimination provisions are a flat

---

[2] A federal court should accord "respectful consideration and great weight to the views of the state's highest court" with respect to questions regarding the meaning, intent and operation of state law. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, Inc., 445 U.S. 97, 111 (1980))(citing *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938)); *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 177 (2d Cir. 1984).

prohibition on manufacturer and wholesaler behavior by the State. They do not require or permit any choice, agreement or conspiracy by the manufacturers, wholesalers or retailers; all must equally abide by the law.

The post and hold provision applies only to wholesalers and is effectuated by § 30-63(c). As the court in *Slimp* noted, the post and hold provision does not compel any particular wholesaler to post any particular price (although wholesalers are subject to their own below cost sales prohibition, Conn. Gen. Stat. § 30-68l). It requires only that a wholesaler post the price to retailers and hold it for thirty days. The post and hold provision does not require or authorize any communication or agreement among or between the wholesalers or between a wholesaler and a retailer or a wholesaler and a manufacturer. Wholesalers may, but are not required to, price-follow down, but they may not amend to a higher price if their competitor has posted a higher price.

The minimum retail price provision applies to retailers and is effectuated by Conn. Gen. Stat. § 30-68m. It is a similarly mechanistic exercise of government power that does not admit of exception and does

not require or permit any choice, agreement or conspiracy among or between wholesalers and retailers. It is, rather, a simple mathematical exercise. The bottle price of the alcohol is posted by each wholesaler for the liquor it sells to retailers and the shipping charges are a known quantity for each particular retailer. A retailer may not sell at a price below that cost (with the one item per month exception to allow loss-leading), but it can sell for any price above that cost that the consumer market will bear. The law requires no communication or agreement between a wholesaler and a retailer or between and among retailers as to either the bottle price that is posted by a wholesaler or the ultimate retail price at which a consumer buys that product.

B. Plaintiff's Claims

The Complaint alleges that there is conspiracy among and between wholesalers and retailers, JA 19-21, although it does so on information and belief and without any plausible allegations of an actual agreement that would satisfy the standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiff again makes such allegations to this Court in its brief. However, when questioned

repeatedly and pointedly by the District Court at oral argument, counsel for Plaintiff acknowledged that this was solely a facial challenge to the statute. JA 96-97; *see also* JA 138.

C. The Ruling Below

In granting Defendants' motion to dismiss, the District Court first determined that principles of federalism, the analytical structure compelled by Supreme Court precedent, and principles of severability require that each of the three specific challenged laws be analyzed separately to determine whether, on its face, the law is a hybrid, *per se* violation of the Sherman Act. JA 144-47.

Second, the District Court determined that the post and hold provision and the minimum retail price provision were both hybrid restraints. JA 147-51 (post and hold); JA 159-61 (minimum retail price provision).

Third, the District Court determined that, in accordance with this Court's holding in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 175 (2d Cir. 1984), any restraint arising from the post and hold provision would be subject to a rule of reason analysis. JA 151-57.

Similarly, the District Court determined the minimum retail price provision was a vertical restraint that, pursuant to *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), must also be analyzed under the rule of reason. JA 161-67. Accordingly, the District Court held that, under the standard set down in *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982), it must dismiss claims as to both these two statutes. JA 171.

Fourth, the District Court determined that the price discrimination provision was a unilateral exercise of state power which admitted of neither discretion nor exception and therefore, pursuant to *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986), that the statute was not preempted. JA 168-71.

Additionally, the District Court determined that the requirement of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007), to allege facts that plausibly support the existence of an actual agreement was inapplicable to this facial challenge. JA 156-57.

SUMMARY OF ARGUMENT

As Plaintiff repeatedly acknowledged at oral argument, this is a facial preemption case. JA 96-97, 123-25. To be preempted, the Connecticut state laws challenged by Plaintiff must, on their face, in all cases and under all circumstances, be in irreconcilable conflict with the Sherman Act. *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986)(" a state statute should be struck down on pre-emption grounds only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.")(citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)).

They are not. The laws do not mandate or authorize any coordination, collusion, agreement, or conspiracy in violation of the Sherman Act among or between competitors – a fact Plaintiff admitted below JA 7 (Docket #82)(Plaintiff's Opposition to Motion to Dismiss at 5, n. 2)(the alleged "coordination and matching of prices by wholesalers is not required by Connecticut law") – and it is quite possible for all parties involved to meet their obligations under the challenged Connecticut laws without running afoul of the Sherman Act. Indeed, if

the parties in fact violate the law—whether by entering into prohibited agreements, or otherwise—they will expose themselves to a risk of enforcement by private entities, the Connecticut Attorney General's Office, or both.

Here, the District Court correctly concluded that, in the context of this facial preemption challenge, the three challenged laws should be analyzed separately. For, while they are all part of the larger Liquor Control Act, which implements the goals of the Connecticut General Assembly, they each have separate requirements and impose separate obligations on separate parties. To the extent they constitute market restraints at all, each is of different character. The minimum retail price provision describes a vertical restraint, the post and hold provisions a horizontal one and the price discrimination provision is not a market restraint at all. As the District Court correctly noted, in order to conduct the analyses required by *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986), and *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) – that is, to determine whether the challenged statute is a unilateral or a hybrid restraint and, then, whether it is subject to *per se*

or rule of reason analysis – a court necessarily must analyze each statute separately.

Plaintiff attempted below and continues its attempts now to muddy the waters of its admittedly facial challenge with threadbare factual allegations of an interlocking horizontal and vertical conspiracy between wholesalers and retailers. The District Court was correct to reject this obvious end run around the *Fisher* and *Norman Williams* preemption standards. In the first instance, Plaintiff's allegations are irrelevant. In the context of a facial challenge, the statute requires what it requires. It is either preempted by virtue of what it requires or it is not. Whether individual market participants are participating in alleged conspiracies is irrelevant to making that determination and such allegations are therefore appropriately disregarded.

If the District Court's determination that an actual agreement need not even be alleged to sustain a facial challenge is correct, then Plaintiff's allegations are even more irrelevant. However, to the extent that Plaintiff claims that some actual agreement between and among wholesalers and retailers is evidence as to the purpose and effect of the challenged statute, then for the courts to consider that as part of their

analysis, Plaintiff bears the burden of alleging facts plausibly suggesting the existence of actual agreement, not broad allegations on information and belief coupled with evidence suggesting nothing more than conscious parallelism. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). Plaintiff has not met that burden here.

With the analytical framework established, the question becomes whether the challenged statutes—analyzed individually—are unilateral or hybrid restraints and, if hybrid, whether the conduct the statutes require would be a *per se* violation or receive rule of reason scrutiny if performed outside the ambit of the statute. If it would be a *per se* violation, the statute is preempted. If it would be subject to rule of reason analysis, it is not (regardless of whether it would ultimately survive rule of reason scrutiny).

As to the unilateral versus hybrid analysis, the District Court got some things right and others wrong. Specifically, the District Court correctly concluded that the price discrimination provision is a unilateral restraint under the *Fisher* standard, as it is a flat prohibition on seller behavior by the State. It does not require or permit any choice, agreement or conspiracy by the manufacturers, wholesalers or

retailers; all must equally abide by the law or risk an enforcement action. Nor does it give private parties regulatory power.

However, the district court erred in holding that the post and hold and minimum retail price provisions were not also unilateral. Like the prohibition on price discrimination, they are State mandates that operate mechanistically and force all market participants to comply. They do not compel any particular wholesaler to post any particular price nor compel any wholesalers or retailers to agree with each other as to the posted wholesale prices. Neither do they compel the retailers to set the ultimate consumer price beyond establishing the minimum according to a mechanical formula. They certainly do not require or permit the retailers to agree with each other or with any wholesaler as to what the ultimate consumer price will be.

Although the District Court erred in finding that the post and hold and minimum retail price provisions are hybrid rather than unilateral, it correctly followed this Court's mandate in that post and hold provision would be analyzed under the rule of reason and therefore correctly held that the post and hold provision is not preempted. Judge Friendly's decision for this Court in *Battipaglia v. New York State*

Liquor Authority, 745 F.2d 166 (2d Cir. 1984), mandates as much and remains good law to this day. Similarly, the District Court was correct in following *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), to conclude that the vertical restraint imposed by the minimum retail price provision was to be analyzed under the rule of reason. Given these two conclusions, the District Court was correct to dismiss the preemption complaint under the standards established by *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

ARGUMENT

1. The District Court correctly concluded that each challenged statute must be evaluated on an individual basis.

a. Principles of federalism require individual analysis.

A facial federal preemption claim represents nothing less than an attempt to impose federal power to undo the decision of the people of Connecticut, who chose through their duly elected representatives in the General Assembly to institute certain laws to govern the sale and distribution of liquor in this State. *Cf. Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008)("facial challenges threaten to short circuit the democratic process by

preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.")

In our constitutional system of limited and enumerated federal powers, federal courts should and do tread lightly when considering whether state law should be preempted under the Supremacy Clause. *See, e.g., Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014)("Congress does not cavalierly preempt state law"); *Richmond Boro Gun Club Inc. v. City of New York*, 97 F.3d 681, 687 (2d Cir. 1996)("there is a strong presumption against federal preemption of state and local legislation. This presumption is especially strong in areas traditionally occupied by the states, such as health and safety measures"). The test for preemption of any law, let alone liquor control laws, is accordingly strict.

To overcome the strong presumption against preemption, a Plaintiff must show that the state law actually irreconcilably conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime*

& Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The burden of establishing obstacle preemption, like that of impossibility preemption, is heavy: "[t]he mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir.2006). Indeed, federal law does not preempt state law under obstacle preemption analysis unless "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Madeira*, 469 F.3d at 241. (internal quotes and cites omitted). *See also*, *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 101–02 (2d Cir. 2013)("A showing that the federal and state laws serve different purposes cuts against a finding of obstacle preemption").

Similar principles apply in the context of this Sherman Act challenge. As *Fisher* dictates, "a state statute should be struck down on pre-emption grounds only if it mandates or authorizes conduct that

necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Fisher v. City of Berkeley*, 475 U.S. 260, 264–65 (1986).

Simply put, a due respect for federalism and the rights of the states requires that, while a federal court may invalidate state laws if they are in actual conflict with federal laws, it should do so **only** to the extent of that conflict and no further. *Cf. United States v. Book*er, 543 U.S. 220, 258–59 (2005)("[W]e must refrain from invalidating more of the statute than is necessary. Indeed, we must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute."). Expanding federal power by striking down state law to any extent greater than the absolute minimum necessary to clear the conflict would be a usurpation of the State's powers. *Cf. Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992)(in light of its intrusion on state power, preemption should be construed narrowly).

Accordingly, in this facial challenge, each separate statute should be examined on its face and the questions asked – Is there an actual

conflict on the face of this statute? Does this statute on its face mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases? Does this statute on its face place irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute? Indeed, this is exactly the approach taken by the Ninth Circuit in *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008), which upheld the State of Washington's price discrimination and minimum retail price laws even while it (incorrectly) struck down the post and hold law. *See id.* at 897-900.

b. Proper application of the *Fisher* and *Norman Williams* standards requires individual analysis.

Further, as the District Court correctly noted, the particular analytical framework established for antitrust cases by the Supreme Court also dictates this approach. To make the determination under *Fisher* as to whether a particular statute is the unilateral command of the state and therefore not subject to antitrust preemption requires a court to look at the precise language of each challenged statute, for it is that language and only that language, that is the subject of a facial challenge.

Similarly, *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982), with its requirement that a court look to the type of restriction required or authorized by the statute, and reject any challenges that do not state a *per se* case, counsels that the Court look at each statute separately. As the Supreme Court stated, "[a]nalysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws." *Id.* Conflating three separate statutes does nothing to aid this Court in making those required determinations.

c. Nothing about the operation or purpose of the challenged statutes requires that they be analyzed collectively.

Plaintiff's contention that the challenged laws are so inextricably tied together that they must be analyzed collectively is simply wrong. As discussed above, each of the challenged Connecticut laws commands different parties to do different things, and they address different concerns of the General Assembly. As the Connecticut Supreme Court noted *in Slimp v. Dep't of Liquor Control*, 239 Conn. 599, 611 (Conn.

1996), [t]he statutes and regulations in question evidence two fundamental concerns of the legislature. First, the legislature was concerned that there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut . . . . The second fundamental concern . . . is the legislature's concern that artificial inducements to purchase liquor will result in increased consumption." *Id.* The price discrimination provision quite obviously addresses the first of these concerns. Although the post and hold provision does facilitate the State's monitoring of the price discrimination provision, either of the two statutes could exist entirely independently.

The minimum retail price provision primarily addresses the second of the concerns noted in *Slimp* – eliminating inducements to alcohol consumption by eliminating retailer price wars. As the Connecticut Supreme Court noted in *Eder Bros. v. Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 377 (Conn. 2005),

> [i]t may reasonably be presumed that, without the establishment of a minimum retail price for branded liquor, price wars among retail dealers are apt to occur. The cutting of prices which occurs during such wars may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained. Moreover, the cutthroat competition which ensues is apt to induce the retailers to commit such infractions of the law as selling to

> minors and keeping open after hours in order to withstand the economic pressure. To prevent the occurrence of such conditions promotes public health, safety and welfare.

Id. (citing *Schwartz v. Kelly*, 140 Conn. 176, 180 (Conn. 1953), *appeal dismissed*, 346 U.S. 891 (1953)).

"Severability is of course a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). As the District Court correctly noted, JA 146-47, Connecticut law presumes severability. *See* Conn. Gen. Stat. § 1-3 ("If any provision of any act passed by the General Assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act."). "To overcome this presumption of severability, a party must show that the portion declared invalid is so mutually connected and dependent on the remainder of the statute as to indicate an intent that they should stand or fall together and that the interdependence is such that the legislature would not have adopted the statute without the invalid portion". *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675 (Conn. 1990). A court should also consider that a statute may be valid as applied to some classes of persons even if invalid as applied to others. *See State v. Menillo*, 171 Conn. 141, 146 (Conn. 1976).

Given the different purposes intended by the General Assembly, the fact that they can and do act independently and the fact that the provisions address the conduct of different parties, the only way to consider the validity of these three different provisions consonant with state law severability principles is on a stand-alone basis. That is certainly the approach employed by the Ninth Circuit in *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008), which upheld the State of Washington's price discrimination and minimum retail price laws even while it (incorrectly) struck down the post and hold law. *See id.* at 897-900; *cf. Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 87–88 (2d Cir. 2015)(ERISA preemption).

d. Nothing in *Midcal* or *324 Liquor* requires collective analysis.

There is nothing in *Midcal* or *324 Liquor* that would compel a different approach. In *Midcal* the challenged California law required that a producer and a wholesaler enter a "fair trade contract" which set the price for a particular product to be sold by the wholesaler to retailers. The Supreme Court held that this was resale price maintenance condemned as a *per se* violation by *Dr. Miles Med. Co. v.*

John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and that it was not protected by the *Parker v. Brown*, 317 U.S. 341 (1943), immunity doctrine. *See Midcal*, 445 U.S. at 103. *324 Liquor* observed that there had been an element of horizontal restraint in the *Midcal* situation that "may have provided an additional reason for invalidating the statute", because the free trade contract, once posted, bound other wholesalers. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987). However, the Court specifically noted that the decision in *Midcal* "rested on the vertical control." *Id.* And *324 Liquor* itself did nothing more than hold the specific New York minimum retail price provision at issue, N.Y. Alco. Bev. Cont. Law § 101-bb, to be a *per se* violation not saved by *Parker* immunity. It did **not** address the New York wholesaler price posting statute N.Y. Alco. Bev. Cont. Law § 101-b. *See 324 Liquor*, 479 U.S. at 337-39; *see also 324 Liquor v. McLaughlin*, 102 A.D. 2d 607, 617 (N.Y. App. Div. 1984). Accordingly, both *Midcal* and *324 Liquor* addressed a specific statute that mandated a vertical restraint, and no reasonable reading of these cases can conclude that they require the three challenged Connecticut statutes to be analyzed collectively.

The District Court correctly recognized that the courts should analyze each challenged provision independently. JA 144-47. Plaintiff's challenges to the District Court's analysis lack any merit.

2. Whether wholesalers are actually conspiring, contrary to the requirements and authorizations of the statute, is irrelevant to this facial preemption challenge.

To reiterate, Plaintiff has made clear that this is a facial preemption challenge. JA 96-97, 123-25 (counsel acknowledging at oral argument that this is a facial challenge); JA 138 (District Court relying on those acknowledgements). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Comm. of Dental Amalgam Mfrs. & Distributors v. Stratton*, 92 F.3d 807, 810 (9th Cir. 1996)(principle applied to conflict preemption case).

As *Norman Williams* reminded, in the context of a preemption challenge specifically to a liquor control law, "[a] state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. A party may successfully enjoin the enforcement of a state statute only if the statute *on its face* irreconcilably conflicts with federal antitrust policy." *Norman Williams*, 458 U.S. at 659 (emphasis added). *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), does nothing to disturb this one simple principle – in a facial challenge, the court looks to the face of the statute. In *324 Liquor*, the Court concluded that the New York minimum bottle price statute on its face mandated resale price maintenance, which was a *per se* antitrust violation at that time. *Id.* at 343-43. ("As we explained in *Rice v. Norman Williams,* . . . the California statute was invalidated because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act.")(emphasis in original).

Even if it were not immune to challenge as a unilateral state act (it is), Connecticut's minimum retail price provision mandates on its face only a vertical restraint – resale price maintenance – which, since

Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), has been subject to the rule of reason test. Under the *Norman Williams* standard, only restraints that would constitute a per se violation can be challenged. Those evaluated under a rule of reason standard are exempt. There is no going beyond the language of that statute. It is condemned or not by the words it uses.

Similarly, the post and hold provision, and the price discrimination provisions are properly judged only by what they actually command or authorize. Here, the post and hold provision requires only that wholesalers post their prices once per month and maintain them for that month. The price posted by any wholesaler for any particular product is entirely within the wholesaler's unilateral discretion. On the face of the statute, wholesalers are not required or permitted to agree among themselves or with the retailers in advance as to the prices they will post. While a wholesaler may price follow down, it is not required to do so, and it may not price follow up. The price discrimination provision is a simple unilateral state mandate to sell at the same price to large or small retailers. It requires no collusion, agreement or even communication among any of wholesalers

or retailers. And any such collusion or agreement would be punishable under federal and/or state law.

In this case, it is possible for the market participants to adhere to their obligations under each of the statutes without colluding. Consider the following scenario: A wholesaler posts a price for a product. A second wholesaler elects not to price follow for that product, perhaps because it wants to maintain a higher margin and believes it will not suffer a loss of sales thereby (or for any other reason). The two wholesalers do not communicate or agree with each other. The wholesalers then sell their product to the retailers, large and small alike, at their respective posted prices. The retailers, without any agreement among themselves or with any of the wholesalers, then apply the mechanical formula to determine the state required minimum bottle price. The retailers then sell the product to consumers at two different prices above the calculated minimum. One sells to consumers at a higher price because she is in an isolated market without competing retailers nearby, while the other, in a crowded retail market, sells at lower price. In that scenario, every market participant has obeyed state law and has not colluded or fixed prices in violation of the Sherman Act.

The mere existence of this possibility necessarily defeats Plaintiff's facial challenge. Simply put, Plaintiff cannot "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987)(standard for facial challenges to the constitutionality of a statute). Accordingly, the District Court correctly concluded that the allegations regarding purported conspiracies are irrelevant.

Plaintiff apparently wants to have its cake and eat it too by pleading actual conspiracy to purportedly show that the statute irresistibly compels[3] it under *Rice*, while at the same time utterly failing to meet the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiff's Br., pp. 27-30. The District Court, relying on *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223 n.17 (2d Cir. 2004), concluded that since no actual agreement needed to be pleaded to mount a preemption challenge, *Twombly* compliance was not required. JA 156, n.11. Regardless of whether an agreement is required to mount a preemption challenge, there is no logical reason

[3] Although Plaintiff appeared to have abandoned any challenge based on "irresistible pressure" when questioned at oral argument by the District Court. JA 99-100.

why, if the existence of a conspiracy is relied upon by Plaintiff to support its claim that the statute on its face mandates or authorizes a violation of the Sherman Act, those allegations should be subject to a less stringent pleading standard. Here, the complaint simply alleges that there are horizontal and vertical conspiracies without more. The price charts attached to the Complaint establish nothing more than parallel conduct and Plaintiff's allegations suggest a common economic incentive. Neither of these allegations is adequate. *Twombly*, 550 U.S. at 556 ("an allegation of parallel conduct and a bare assertion of conspiracy will not suffice").[4]

3. All three challenged statutes are unilateral restraints.

The District Court correctly concluded that the price discrimination provision was a unilateral act exempt from challenge, because the Sherman Act simply does not apply to acts of the State. *See*

[4] The District Court noted that *Twombly* was a private action rather than a preemption case. JA 156 n. 11. That is true, but there is no logical reason why factual allegations in a preemption case do not need to satisfy the same standard, to the extent—if any—they are relevant. *See, e.g.*, *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 51 n.13 (2d Cir. 2010)("Freedom Holdings IV") (discussing *Twombly* in connection with preemption case).

Parker v. Brown, 317 U.S. 341, 351-52 (1943); *Fisher v. City of Berkeley*, 475 U.S. 260, 264–65 (1986). But the District Court incorrectly failed to recognize that the post and hold and minimum retail price provisions are also unilateral acts immune from Sherman Act preemption.

A unilateral restraint is a government command to an entity or a group of entities individuals to do or refrain from doing something. "[T]here can be no liability under [15 U.S.C.] §1 in the absence of agreement," *Fisher*, 475 U.S. at 266, and the fact that the government commands a group of entities to do or not something does not thereby create an agreement for purposes of the Sherman Act. *See Fisher*, 475 U.S. at 267. ("The mere fact that all competing property owners must comply with the provisions of the Ordinance is not enough to establish a conspiracy among the landlords"). Hybrid restraints are "nonmarket mechanisms [that] merely enforce private marketing decisions," such as those at issue in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and such hybrid restraints can be preempted only if they constitute *per se* violations of the Sherman Act. *Fisher*, 475 U.S. at 268. In essence, the unilateral versus hybrid dichotomy

established in *Fisher* is merely a recognition of the basic principle, first laid down in *Parker v. Brown*, 317 U.S. 341, 351 (1943), that the State can command actions that would violate the Sherman Act if done by private individuals. What the State cannot do is authorize private individuals to violate the Sherman Act or declare that their private action is lawful. *Id.* That is, the State could command action that results in fixed prices and allocated markets. It could not ex post facto ratify otherwise private agreements to fix prices and allocate markets.

Connecticut's price discrimination provision is **not** a "non-market mechanism that merely enforces private marketing decisions." *Fisher*, 475 U.S. at 268. It is, rather, a flat command to wholesalers that they must sell to all retailers at the same price. Crucially, it is not necessary under *Fisher* that the State set that price. The rent stabilization ordinance at issue in *Fisher* took the prices in 1980 – prices that had been established by each private landlord – and used them as a cap. Landlords could not raise rents unless or until there was a city mandated general percentage adjustment of rents or upon individual petition to the Rent Stabilization Board to reflect individual property

factors. *Fisher*, 47 U.S. at 262; *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 688 and n.44-45 (1984).

Unlike the statutes at issue in *Schwegmann* and *Midcal*, which bound other parties to sell at the same price established in private agreements reached between a producer and a distributor or wholesaler, the rent stabilization ordinance in Berkeley only bound each individual landlord to charge the privately determined price she had in place for her individual property in 1980, unless and until the government permitted a change. Accordingly, the court found it to be a unilateral restraint immune to preemption attack. *Fisher*, 475 U.S. at 270. Connecticut's price discrimination provision functions almost exactly the same way. Each wholesaler sets its own price for its own product at the beginning of the month. The State then commands that sales be made at that price without any distinction between retailers large and small until the wholesaler is permitted by the State to change its price for all retailers across the board.

As Plaintiff admits "a state statute can be a unilateral restraint even if private parties are the ones setting prices." (Plaintiff-Appellant's Brief at 34). Thus, it was not necessary under *Fisher* that the City of

Berkeley set the rent charged by a particular landlord for a particular property, nor is it necessary here that the State of Connecticut set the liquor price posted by a wholesaler for a particular product for the month ahead. It was only necessary that the Berkeley rent stabilization ordinance commanded all landlords to maintain their rent until an across the board adjustment allowed an increase. And it is only necessary that Connecticut price discrimination provision commands that all wholesalers sell to large and small retailers at the same price. That is what makes both situations unilateral restraints. The District Court was correct in its conclusion.

The District Court erred, however, when it concluded that the post and hold provision and the minimum retail price provision were hybrid restraints under the *Fisher* formulation. As noted above, both these provisions are mechanistic commands to all market participants alike; they are not "nonmarket mechanisms [that] merely enforce private marketing decisions." *Fisher*, 475 U.S. at 268. The post and hold provision requires only that the wholesalers post their case and bottle prices to retailers and not change them until the State permits. Unlike the statutes in *Schwegmann* and *Midcal*, the post and hold provision

does not permit any wholesaler to agree with another wholesaler or with a retailer as to that price and then impose it on others. The posted price binds only the wholesaler that posts it.

In holding that the post and hold provision is a hybrid restraint, the District Court relied on *324 Liquor v. Duffy*, 479 U.S. 335 (1987). JA 150 ("The post and hold provisions at issue here are remarkably similar to the statutes that the Supreme Court concluded constituted a hybrid restraint in *324 Liquor*"). However, *324 Liquor* dealt **only** with the New York minimum retail price law, holding that the law established a system of resale price maintenance, which was a *per se* violation of the Sherman Act at the time the case was decided, and that *Parker* immunity did not apply because the state was not involved in setting the minimum retail prices. Nowhere did *324 Liquor* actually hold that the New York wholesaler post and hold law, or any wholesaler post and hold law, is a hybrid restraint under the *Fisher* test. Indeed, it did not even consider the question. The District Court was therefore wrong to rely on any similarities between the two states' post and hold laws as a basis for its decision.

Connecticut's minimum retail price provision may be at first glance similar to the New York law that actually was at issue in *324 Liquor*, but there is one crucial difference that should be dispositive. Specifically, the New York minimum retail price provision in *324 Liquor* allowed wholesalers complete discretion to set the minimum bottle price. In Connecticut, by contrast, that bottle price is derived from the case price by the pricing algorithm set forth in the statute, which the wholesaler must obey.

Connecticut's minimum retail price provision acts in a purely mechanistic manner. A posted bottle price is strictly derived from the posted case price divided by the number of bottles per case, then adding a per bottle markup amount of 2, 4 or 8 cents depending on bottle size. In New York, a wholesaler was required to post a case price and the accompanying bottle price derived from the statutory formula. The New York wholesaler could then, at its discretion, "post off" the case price. That is, sell the case to retailers at less than the posted price. Critically, however, and unlike Connecticut, the New York wholesaler was then permitted to also "post off" the bottle price as well. Wholesalers could set the bottle price as the one posted with the state,

set the bottle price to match the "post off" case price, or set the bottle price at any level in between. Whatever "post off" bottle price the New York wholesaler chose to set was then the minimum price for a retailer. Accordingly, the New York wholesaler was in complete control of the minimum price. *See 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 339 n.4 (1987); *324 Liquor Corp. v. McLaughlin*, 102 A.D.2d 607, 610 (N.Y. App. Div. 1984). In Connecticut, by contrast, while a wholesaler may "post off" the case price to a retailer, it may **not** "post off" the bottle price once that price has been posted. Accordingly, the minimum retail price is set solely by the statutory algorithm, not by the whim of the wholesaler, and the Connecticut minimum retail price provision must be viewed as a unilateral restraint.

4. None of the challenged provisions can be preempted by the Sherman Act.

The standard is clear. To be preempted, the Connecticut State laws challenged by Plaintiff must, on their face, in all cases and under all circumstances, be in irreconcilable conflict with the Sherman Act. *Fisher v. City of Berkeley*, 475 U.S. 260, 264–65 (1986)("a state statute should be struck down on pre-emption grounds only if it mandates or

authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute"). As *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) explained, the conduct mandated or authorized on the face of the statute must be a *per se* violation. Conduct evaluated under a rule of reason standard cannot support a preemption claim. Moreover, "[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." *Fisher*, 475 U.S. at 267 (1986). This Court clearly defined the issue in *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 56 (2d Cir. 2010)("*Freedom Holdings IV*"), noting that "what is centrally forbidden is state licensing of arrangements between private parties that suppress competition, not state directives that by themselves limit or reduce competition." *Id.* (quoting *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 565 (1st Cir. 1999)).

As noted above, the three challenged provisions here are all unilateral commands of the State, which are immune to antitrust

preemption under *Fisher*. But even if they were not unilateral, they are either evaluated under a rule of reason standard and immune under *Norman Williams* (the post and hold provision and the minimum retail price provision) or do not direct or authorize conduct that would be a violation of the Sherman Act in any event (the price discrimination provision).

a. Pursuant to *Battipaglia*, the post and hold provision cannot be preempted.

In *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), this court considered a challenge to a New York post and hold law almost identical to the Connecticut provision at issue here and held that, because it did not compel or authorize a violation of the Sherman Act in all cases, the law could not be preempted under the *Norman Williams* standard. Writing for the majority, Judge Friendly properly distinguished cases such as *Sugar Institute v. United States*, 297 U.S. 553 (1936), where private parties agreed among themselves to post, match and hold sugar prices. Among other things, in *Sugar Institute*, once one sugar refiner announced a new price, it went into effect **only** if all the other refiners matched it. If they did not, the new

price did not go into effect. *Sugar Institute*, 297 U.S. at 580. As Judge Friendly noted, the liquor wholesalers in New York could "fulfill all their obligations under the [post and hold] statute without either conspiring to fix prices or engaging in conscious parallel pricing." *Battipaglia*, 745 F.2d at 175.

This is also precisely the case in Connecticut. Wholesalers are not required or authorized to agree on a posting price. They may, but are not required to, price match down but may not price match up. And if they do not price match, the original posting wholesaler is still bound by its own posted price until the end of the month, unlike the private agreement at issue in *Sugar Institute*.

Plaintiff's reliance on *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), is unfounded. *324 Liquor* did not overrule *Battipaglia* with respect to a post and hold provision, either explicitly or by necessary implication. Indeed, nowhere in the Supreme Court opinion is *Battipaglia* even mentioned, a fact that is not surprising given that *324*

Liquor dealt only with New York's minimum resale price law, not the post and hold provision.[5]

Contrary to Plaintiff's contention, *324 Liquor* did **not** condemn the vertical restraint at issue as a horizontal restraint. It merely noted that vertical restraints can facilitate horizontal cartels, 479 U.S. at 342, an observation the Supreme Court later made in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 892-93 (2007), in determining that vertical price restraints are now to be analyzed under the rule of reason. In fact, *324 Liquor* specifically distinguished the New York minimum resale price law from the restraint at issue in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), noting that

> The antitrust violation in this case is essentially similar to the violation in *Midcal*. It is true that the wholesalers in *Midcal* were required to adhere to a single fair trade contract or price schedule for each geographical area. *Midcal* therefore involved horizontal as well as vertical price fixing. Although the horizontal restraint in *Midcal* may have provided an additional reason for invalidating the statute, our decision in *Midcal* rested on the "vertical control" of wine producers, who held "the power to prevent price competition

[5] And it is questionable that *324 Liquor* remains good law even within the narrow confines of its own facts, given that it was decided in the pre-*Leegin* era, when vertical price restraints were considered *per se* violations.

> by dictating the prices charged by wholesalers." As we explained in *Rice v. Norman Williams Co.,* the California statute was invalidated because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act

324 Liquor, 479 U.S. at 342-43 (internal cites and quotes omitted). What can be concluded from this intentional distinction is that the *324 Liquor* court viewed the New York minimum resale law as purely a vertical restraint and condemned it as a *per se* violation under the then controlling precedent of *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) *overruled by Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Plaintiff also claims the *324 Liquor* overruled *Battipaglia* because "a central premise of *Battipaglia* was that a state statute is preempted only where it compels an agreement, [b]ut *324 Liquor* held that there need not be . . . an actual private agreement." (Plaintiff-Appellant's Brief at 42). This contention completely misstates the holding of *Battipaglia.* As the District Court correctly noted, *Battipaglia* was not decided based on the existence *vel non* of an agreement. JA 156-57. Rather, Judge Friendly merely noted that "even if we were to accept arguendo" that conduct compelled by the government was the same as

voluntary action, the New York post and hold law would still survive under the *Norman Williams* standard. *Battipaglia,* 745 F.2d at 174. Judge Friendly expressly noted that the Court was not resolving the issue of whether an agreement was necessary. *Id.* at 173 ("We do not need to resolve that difficult question"). This Court certainly recognized that distinction in *Freedom Holdings, Inc. v. Cuomo*, 357 F.3d 205, 223 n.17 (2004)(*Freedom Holdings I*).

Finally, Plaintiff misstates *Battipaglia* with respect to the Twenty-First Amendment discussion therein. Judge Friendly merely stated that even if the Court had not determined that the New York post and hold statute could not be preempted under the *Norman Williams* standard, the Court would still find that New York would prevail in the Twenty-First Amendment "balancing test" required under the applicable case law. *See Battipaglia*, 745 F.2d at 177. Although *324 Liquor* held that New York would not prevail under that balancing test when construing New York's minimum resale price statute, it cannot be said that the Court would have made the same decision regarding the post and hold statute if it had been presented with that law instead. More importantly, even if *324 Liquor* casts a shadow on

Battipaglia's Twenty-First Amendment alternative holding, it does not speak at all to *Battipaglia*'s preemption holding. And it is only the threshold preemption standard that is at issue in this appeal.

Under long-established precedent, unless and until *Battipaglia* is overruled by the Supreme Court or this Court *en banc* (or equivalent), it remains the law in the Second Circuit. *See United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991), *cert denied sub nom. Salami v. United States*, 503 U.S. 588 (1992)("prior opinions of a panel of this court are binding upon us in the absence of a change in the law by higher authority or our own in banc proceeding (or its equivalent)"); *Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003). A Supreme Court decision that was not on certiorari from *Battipaglia*, did not mention *Battipaglia*, did not address the same statute or issues as *Battipaglia* and did not establish a rule of general application, does not overrule *Battipaglia* expressly or by necessary implication.

Moreover, *Battipaglia* was correctly decided in the first instance and remains vibrant today. Plaintiff points to *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001), and *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008), for the proposition that if

"wholesalers entered into private agreements to accomplish what is required and allowed," *TFWS*, 242 F3d at 209, then it would be a *per se* violation. (Plaintiff-Appelant's Brief at 46-47) In the first instance, that formulation begs the question (in the true sense of that phrase) in that it first assumes a private agreement. As this Court noted in *Battipaglia*, there is a world of difference between a government mandate and private agreement. *Battipaglia*, 745 F.2d at 173. ("state compulsion of an individual action is the very antithesis of an agreement"). Here, no agreement is required or allowed by the challenged statute. Again, as Judge Friendly observed, it is possible for all parties to comply with Connecticut law without violating the Sherman Act. *See Battipaglia*, 745 F.2d at 175 ("New York wholesalers can fulfill all of their obligations under the statute without either conspiring to fix prices or engaging in conscious parallel pricing").

More importantly, this formulation would totally eviscerate the *Norman Williams* standard that if it is possible **at all** to comply with both the challenged state law and the Sherman Act, there can be no preemption. Finally, the rent stabilization ordinance in *Fisher* involved price fixing conduct that "if done by private agreement" would violate

the Sherman Act and yet it was not preempted. Extending the law in the direction Plaintiffs ask this Court to follow completely ignores the Supreme Court's recognition in *Parker v. Brown*, 317 U.S. 341 (1943), that a state has many competing interests to consider and that it may prioritize other interests ahead of a completely unrestricted market.

b. Pursuant to *Leegin*, the minimum retail price provision cannot be preempted.

Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007), held that **all** "[v]ertical price restraints are to be judged according to the rule of reason." This holding is by no means limited to resale price maintenance involving a single wholesaler and retailer. In fact, in reaching its holding the *Leegin* Court specifically considered the arguments that "resale price maintenance may … facilitate a manufacturer cartel" and "might be used to organize cartels at the retail level." *Id.* at 892-93. However, the Court concluded that "to the extent that a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it too would need to be held unlawful under the rule of reason." *Id.* at 893. Accordingly, even in light of Plaintiff's allegation of industry wide cartelization, the

minimum resale price provision is to be evaluated under the rule of reason. And, for that reason, it cannot be preempted under the *Norman Williams* standard.

c. The price discrimination provision does not mandate or authorize conduct that would violate the Sherman Act.

Connecticut's price discrimination provision mandates only one thing – that any wholesaler must sell to each retailer at the same price. There is nothing in the Sherman Act that prohibits a manufacturer from selling its product at a uniform price to all buyers. In fact, under some circumstances, it is actually required. *See* 15 U.S.C. § 13 *et seq*. (Robinson-Patman Price Discrimination Act). Accordingly, even if the price discrimination provision were not exempt as a unilateral State mandate, it is not an antitrust violation.

CONCLUSION

In this facial preemption challenge, Plaintiff must show that each of the three challenged State statutes on its face: 1) is not a unilateral restraint by the State; ***and*** 2) is, in all cases and under all

circumstances, in irreconcilable conflict with the Sherman Act. Plaintiff cannot show either. The Complaint was properly dismissed.

Dated: September 26, 2017

Respectfully submitted,

GEORGE JEPSEN
ATTORNEY GENERAL

By: /s/ Gary M. Becker
Gary M. Becker
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5040
Fax: (860) 808-5391

Attorneys for Defendants-Appellees

CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

In accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Local Rule 32.1(a)(4)(A), in that this brief contains 9051 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6), because it has been prepared in a monospaced typeface (Century Schoolbook) with 10.5 or fewer characters per inch.

/s/ Gary M. Becker
Gary M. Becker
Assistant Attorney General

CERTIFICATION OF SERVICE

In conformance with Rule 25(d) of the Federal Rules of Appellate Procedure and Local Rule 25.1(h)(2), I hereby certify that on this 26th day of September 2017, I caused the foregoing Brief of Defendants-Appellees Commissioner Michelle H. Seagull, Department of Consumer Protection, and John Suchy, Director, Division of Liquor Control to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit, and through that filing caused service to be made on all counsel of record.

/s/ Gary M. Becker
Gary M. Becker
Assistant Attorney General

Attorney for Defendants/Appellees