

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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PETER FRANCHOT, COMPTROLLER OF THE TREASURY OF MARYLAND, ET AL., PETITIONERS,

v.

TFWS, INC., T/A BELTWAY FINE WINE & SPIRITS, RESPONDENTS.

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

**APPLICATION OF PETITIONER PETER FRANCHOT  
FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 13.5, Petitioners, Peter Franchot, Comptroller of the Treasury of Maryland, *et al.*, request a 30-day extension of time, to and including December 9, 2009, to file a petition for a writ of certiorari in this Court. In support of this application, Petitioners state:

1. The United States Court of Appeals for the Fourth Circuit issued its decision on July 15, 2009, and, following its denial of a petition for rehearing, entered judgment on August 11, 2009. *See TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009). By operation of Rule 13.1, Petitioners' certiorari petition is currently due on or before November 9, 2009.

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

3. A copy of the opinion of the United States Court of Appeals for the Fourth Circuit and a copy of the court's order denying rehearing are attached.

4. This case presents important questions about the types of state economic regulation that are subject to preemption by federal antitrust laws and the scope of the states' authority, under Section 2 of the Twenty-first Amendment, to regulate the sale and distribution of alcoholic beverages. The lower courts in this case invalidated two Maryland laws that had been in place for more than half a century and that regulated the sale and distribution of wine and spirits through the State's three-tier system. Maryland's alcoholic beverage distribution laws seek to ensure orderly market conditions and to promote temperance by forbidding price discrimination by manufacturers and wholesalers. The laws at issue here supplement this general prohibition on price discrimination by (1) disallowing discounts based on volume and (2) creating an administrative enforcement mechanism that requires wholesalers to file with the regulatory authority each month the prices for each product offered and to adhere to those prices for that month. In the first of four appeals in this case,\* the Fourth Circuit held that the private conduct compelled by these laws constitutes a per se violation of the Sherman Act, and that the State's laws were "hybrid," not unilateral, restraints that are therefore subject to preemption by the Sherman Act. Acknowledging that the laws were enacted in furtherance of the State's legitimate Twenty-

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\* See *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001); *TFWS, Inc. v. Schaefer*, 325 F.3d 234 (4th Cir. 2003); *TFWS, Inc. v. Schaefer*, 147 Fed. Appx. 330 (4th Cir. 2005) (unpublished); *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009).

first Amendment interests, the Fourth Circuit held that the State’s authority to enforce the volume discount ban and the post-and-hold requirement would depend on an analysis that required the district court to engage in an inquiry with a “large factual component” to assess whether “the scheme [is] effective,” and then to “balance the state’s interest” against “the federal interest in competition.” *TFWS*, 242 F.3d at 213. The Fourth Circuit believed, in conflict with two other circuits, that this Court’s precedent compelled the conclusion that the challenged laws, which do not direct any concerted action by private entities in their price-setting, are nonetheless “hybrid” restraints; the Fourth Circuit also believed that the heightened means-end judicial assessment of the “efficacy” of the challenged laws was necessitated by this Court’s decisions evaluating state powers under the Twenty-first Amendment. This Court’s review is necessary to resolve the split among the circuits and to provide guidance to the lower courts on these important issues.

5. This request for an extension is necessary because the legal issues at stake are unusually complex; the proceedings over the ten-year history of the case have been extensive, and have generated a large record; and the decisions under review have potentially far-reaching implications for state regulation in the economic sphere and for the manner in which federal courts will review state laws, particularly with respect to commerce in alcoholic beverages, the special domain of the Twenty-first Amendment. Petitioners believe that a 30-day extension will be sufficient time to prepare and finalize a petition for filing in this Court.

6. Undersigned counsel contacted counsel for respondent to obtain consent for this request. At the time of filing, respondent has not stated whether it consents to this Application.

Petitioners therefore respectfully request that the time to file their petition for a writ of certiorari be extended by 30 days, from November 9, 2009 to and including December 9, 2009.

October 26, 2009

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

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STEVEN M. SULLIVAN\*  
Solicitor General

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WILLIAM F. BROCKMAN  
Deputy Solicitor General  
Office of the Attorney General  
200 St. Paul Place, 20th Floor  
Baltimore, Maryland 21202  
(410) 576-6324

Counsel for Petitioners

\* *Counsel of Record*

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**CERTIFICATE OF FILING AND SERVICE**

The undersigned certify that, in compliance with Rules 13.5, 22.2, 29.3, and 29.5, they caused to be filed an original and two copies of the APPLICATION OF PETITIONER PETER FRANCHOT FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI, and that they also caused to be served one copy of the same by depositing the same with the United States Postal Service from 200 St. Paul Place, Baltimore, Maryland, 21202 on this 26<sup>th</sup> day of October 2009, properly stamped and addressed to:

William J. Murphy, Esq.  
John J. Connolly, Esq.  
Murphy & Shaffer, LLC  
36 South Charles Street, Suite 1400  
Baltimore, Maryland 21201  
(410) 752-9700  
*Counsel for Respondent*

and by having the same sent by e-mail to:

All parties required to be served have been served

wmurphy@murphyshaffer.com  
jconnolly@murphyshaffer.com

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

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STEVEN M. SULLIVAN  
Solicitor General

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WILLIAM F. BROCKMAN  
Deputy Solicitor General  
Office of the Attorney General  
200 St. Paul Place, 20th Floor  
Baltimore, Maryland 21202  
(410) 576-6324

Counsel for Petitioners